SC96276

IN THE SUPREME COURT OF MISSOURI

CITY OF AURORA, MISSOURI, et al.
Plaintiffs/Respondents/Cross-Appellants

v.

SPECTRA COMMUNICATIONS GROUP, LLC d/b/a CENTURYLINK, et al.,
Defendants/Appellants/Cross-Respondents

Appeal from the Twenty-First Judicial Circuit, St. Louis County, Missouri Hon. David L. Vincent III and Hon. Tom W. DePriest Jr.

BRIEF OF AMICUS CURIAE MISSOURI MUNICIPAL LEAGUE

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INTRODUCTION AND STATEMENT OF INTEREST

The defendants in this lawsuit ("CenturyLink") provide telephone service in Missouri municipalities. The Plaintiff-cities have business license ordinances that require phone-service providers to pay a gross-receipts tax on revenue derived from doing business within the cities. The parties dispute whether the tax applies to certain CenturyLink receipts, so the Plaintiff-cities filed this action for declaratory judgment and related relief to resolve that dispute.

The Plaintiff-cities are not the only Missouri municipalities to have such ordinances; hundreds of municipalities have enacted them. And CenturyLink is of course not the only provider of phone service in the State. Indeed, it is not even the only phone-service provider disputing the reach of Missouri cities' gross-receipts taxes. The phone-service-providing subsidiaries of Charter Communications have followed the same path, and so they too have faced a declaratory judgment action seeking to demarcate the reach of Missouri cities' ordinances.

The Missouri Municipal League ("MML") is a Missouri benevolent corporation representing the interests of over 670 municipalities throughout the State of Missouri. MML fosters cooperation of Missouri cities, towns and villages, and promotes common interests, welfare, and cooperative relations among them, to improve municipal government and its administration throughout Missouri. MML formulates and promotes municipal policy to enhance the interests, welfare and relations among Missouri municipalities and citizens throughout the State. MML files this amicus brief in support of the Plaintiff-cities' positions regarding municipal taxation. MML also has a direct

interest in responding to the issues raised by Amici, because Charter's positions would negatively affect MML's members' ability to assert their rights.

Charter's case is currently pending in circuit court. *Collector of Winchester, Missouri v. Charter Commc'ns, Inc.*, No. 10SL-CC02719 (St. Louis County Cir. Ct.). Charter recently suffered a loss on summary judgment on issues of liability. A trial date looms. But rather than wait until after trial to appeal, Charter has instead attempted to raise issues it lost in its own case within an amici brief in this case. Not only are the arguments without merit, but CenturyLink itself did not even raise Charter's issues on appeal. Charter's end-run is improper as amici curiae cannot inject new issues into a case. *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 882 (Mo. banc 1999).

Charter argues that any action regarding an ordinance violation must be brought in municipal court. In five years of litigation in circuit court, CenturyLink never made this argument because it lacks merit; in six years of litigation in its own case, Charter never made this argument until faced with a motion for summary judgment. These actions seek equitable remedies such as declaratory and injunctive relief – they are not quasi-criminal prosecutions for ordinance violations. It has long been the law that circuit courts indeed possess exclusive, original jurisdiction over actions in equity. In fact, Missouri's Declaratory Judgment Act explicitly allows cities to petition a circuit court for a declaratory judgment (and related relief) regarding a dispute over a city ordinance. The Act has led this Court to declare that an action for a declaratory judgment "furnishes a particularly appropriate method for the determination of controversies relative to the construction and validity of statutes and ordinances." *City of Camdenton v. Sho-Me*

Power Corp., 237 S.W.2d 94, 96 (Mo. 1951).

Charter also argues that the cities have an adequate remedy at law through Missouri's statutory scheme for collecting taxes. But these statutes are inapplicable. Moreover, the cities cannot obtain equitable relief in a municipal court action, meaning they would be deprived of prospective relief. They would be forced to bring a scatterplot of retrospective actions in municipal courts across the State, which would then likely be challenged in circuit courts across the State. And they would be forced to do so every month or quarter that a service provider refused to pay contested taxes. This is far from an adequate remedy at law, and the enormous waste of judicial and municipal resources should be avoided.

Finally, Charter argues that the trial court failed to consider ordinance differences, but this is belied by the court's own actions. The judgments and orders reflect that the court carefully considered their terms, including an interstate exclusion. That the court refused to narrow the tax bases to Charter's liking is not evidence of an absence of due care.

If adopted, Charter's positions would deprive MML's members of the ability to seek equitable relief for any matter concerning a city ordinance. It would inhibit them from seeking prospective relief such as a declaratory judgment or injunction. It also would prevent them from pursuing relief collectively, even though Charter uniformly refuses to comply with any city's ordinance. These positions run counter to MML's goals of promoting the interests of Missouri municipalities and of fostering cooperation between them. They also run counter to settled interests that seek to promote efficiency

and uniformity in our courts. Charter's arguments should be rejected.

CONSENT OF PARTIES

Pursuant to Missouri Supreme Court Rule 84.05(f), MML sought consent of all parties to file this brief, but CenturyLink declined to consent. A motion for leave to file has been filed alongside this brief.

STATEMENT OF JURISDICTION

By law, circuit courts possess jurisdiction over all cases and matters, civil and criminal, and exclusive jurisdiction in equity. MO. CONST. art. V, sec. 14 (circuit courts "have original jurisdiction over all cases and matters, civil and criminal"); *First Nat. Bank of Kansas City v. Mercantile Bank & Trust Co.*, 376 S.W.2d 164, 168 (Mo. banc 1964) ("it is the rule in this state that the circuit courts inherently, traditionally and historically have had exclusive, original jurisdiction in what has been termed 'purely equitable matters'"); *State of Missouri ex rel. R-1 School Dist. of Putnam Cty. v. Ewing*, 404 S.W.2d 433, 440 (Mo. App. 1966) ("exclusive original jurisdiction of suits for a declaratory judgment is vested in the circuit courts"). Accordingly, the trial court possessed jurisdiction to resolve these ordinance disputes. The February 23, 2017 Final Order and Judgment disposed of all claims and was timely appealed. Appellate jurisdiction exists over the final judgment in this case. Section 512.020(5), RSMo.

MML defers to the Plaintiff-cities' Jurisdictional Statement on whether CenturyLink's challenge to the constitutionality of a statute is sufficient to invoke this Court's jurisdiction.

STATEMENT OF FACTS

The Plaintiff-cities provided a thorough statement of facts in their opening brief, which MML adopts. *See* Respondents'/Cross-Appellants' Initial Brief at 21-44. Only short portions of those facts will be repeated here.

Municipalities across Missouri impose a gross-receipts tax on telephone companies doing business within them. The Plaintiff-cities in this case are four such municipalities, and CenturyLink is a provider of telephone service that operates within the Plaintiff-cities. CenturyLink refused to pay taxes on all its revenue derived from doing business in the cities because it believed that the gross-receipts taxes did not apply to certain receipts. *See* Respondents'/Cross-Appellants' Initial Brief at 23 (citing LF1411-16, 11024-27, 10815-16). The Plaintiff-cities filed suit in 2012 to resolve the dispute. The first ten counts of the petition all sought equitable remedies. Counts I-V in the second amended petition sought declaratory and injunctive relief to remedy the refusal to pay the taxes, and Counts VI-X sought an accounting for the full amounts due. *Id.* at 28 (citing LF203-46).

In April 2014, the circuit court granted the Plaintiff-cities' first motion for partial summary judgment, finding that CenturyLink failed to pay taxes on certain receipts in contravention of the cities' ordinances. Two years later, the court granted the cities' second partial summary judgment motion, holding that "Defendants are liable for license taxes to each City for all revenue they receive in that respective City." After a bench trial, the court entered a final judgment on February 23, 2017. This appeal followed. *Id.* at 28-36.

In support of CenturyLink's appeal, another provider of telephone service, Charter Fiberlink-Missouri, LLC and Charter Advanced Services (MO), LLC ("Charter"), filed an amici brief. Charter shares an important characteristic with CenturyLink: it too is a landline provider that refuses to pay taxes on all receipts derived from doing business in Missouri municipalities.

Given that Charter acts in a way that is common across all cities that have enacted ordinances, the City of Winchester, MO brought an action on behalf of a class of other Missouri municipalities seeking to compel Charter to comply with the ordinances. *Collector of Winchester, Missouri v. Charter Commc'ns, Inc.*, No. 10SL-CC02719 (St. Louis County Cir. Ct., filed July 9, 2010). The petition contains two counts: one seeking a declaratory judgment, injunctive relief, and an equitable accounting, and a second seeking back taxes (if any) resulting from the court's declarations.

In an unsuccessful summary judgment motion, Charter argued that Winchester and the cities' claims were for "ordinance violations," and the circuit court lacked subject-matter jurisdiction to hear them because only municipal courts have jurisdiction. Order Denying Motion for Summary Judgment (Rule 37), *Winchester*, No. 10SL-CC02719 (St. Louis County Cir. Ct., Sep. 29, 2017) (attached as MML Appendix, at A1). It also argued that Winchester and the cities had an adequate remedy at law, so Winchester and the cities could not seek equitable relief. *Id.*

The circuit court held two days of hearings, and in a September 29, 2017 order, it found Charter's arguments were "without merit." *Id.*, at A1. The court concluded that it is "well-settled that Circuit Courts possess 'exclusive' original jurisdiction over equitable

claims such as these." *Id.*, at A2 (citing *First Nat. Bank of Kansas City v. Mercantile Bank & Trust Co.*, 376 S.W.2d 264, 168 (Mo. Banc 1964)). "Missouri's Declaratory Judgment Act expressly authorizes this Court to declare rights and other legal relations under municipal tax ordinances." Further, Winchester and the cities did not have an adequate remedy at law because "a damage award would not fully and finally settle this dispute and eliminate the need for future litigation," and "[a]bsent equitable relief, municipalities will be required to file debt actions each month (or quarter) as the taxes become due." *Id.*, at A4. The parties await a trial date.

DISCUSSION

Charter injects three issues into this case by way of an amici brief. First, it relabels the Plaintiff-cities' claims as prosecutions for "violations of city ordinances" and argues that they must be brought in municipal courts. Second, it argues that the Plaintiff-cities cannot seek a declaratory judgment because they have an adequate remedy at law, in that they can repeatedly prosecute these "ordinance violations" in municipal courts across the state every time a "violation" occurs. Third, it claims that any relief must be grounded in the specific language of each ordinance, even though the ordinances are functionally identical.

None of these arguments can be found in the issues raised by the parties to this appeal, which is improper. The fact that Charter had to include a "Points Relied On" section in its amici brief demonstrates this. *See DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 731 (3rd Cir. 1995) ("amicus may not frame the issues for appeal"); *Crutchfield v. New Mexico Dept. of Taxation,* 106 P.3d 1273, 1278 (New. Mex. App.

2004) (amicus "must accept the case before the reviewing court as it stands on appeal, with the issues as framed by the parties"). Regardless, all three arguments lack merit. The Plaintiff-cities properly brought their claims for declaratory and related relief in circuit court, and Charter's arguments should be rejected.

I. Charter has improperly injected new issues into this appeal via an amici brief.

This Court adheres to the widely-recognized principle that an "[a]micus cannot inject issues into a case not presented by the pleadings and the parties." *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 882 (Mo. banc 1999); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2776 (2014) (the U.S. Supreme Court does "not generally entertain arguments that were not raised below and are not advanced in this Court by any party"). As one hornbook puts it, an "amicus curiae cannot expand the scope of an appeal to implicate issues not presented by the parties or seek relief beyond that sought by the parties." 3B C.J.S. Amicus Curiae § 17 (collecting cases). Instead, "an amicus curiae must take the case as he finds it, with the issues made by the parties." *Brainchild Holdings, LLC v. Cameron*, 534 S.W.3d 243, 246 n.7 (Mo. banc 2017) (internal quotations and citations omitted).

All three of Charter's "Points Relied On" violate these principles. Charter Amic. Br. at 13-14. Charter first claims that the trial court "lacked jurisdiction to determine these claims" because Missouri law "vests exclusive jurisdiction to determine violations of municipal ordinances in Municipal Judges rather than Circuit Judges." *Id.* In its opening brief, CenturyLink (the defendant in this case) raised nine issues in this appeal.

Not a single one raises the argument that the case belongs in municipal courts rather than circuit courts. Nor can a reference to this issue be found in any of the Plaintiff-cities' eight issues raised in their own cross-appeal.

Charter next claims that the trial court lacked jurisdiction because there are adequate remedies at law in "existing statutes that provide for the enforcement of delinquent tax obligations." *Id.* Again, in the 17 issues raised by the parties on appeal, not one relates to this issue.

Finally, Charter claims that an enforcement action must be "grounded in the specific language of the Cities' ordinances." Yet again, nowhere can this issue be found in any of the 17 issues the parties raised.

This Court consistently has refused to entertain arguments "urged by an amicus curiae but not presented by the parties." *Gem Stores, Inc. v. O'Brien*, 374 S.W.2d 109, 118 (Mo. 1963); *see also Brainchild Holdings*, 534 S.W.3d at 246 n.7 (refusing to consider an argument newly-raised by an amicus curiae); *Hemeyer*, 6 S.W.3d at 882 (refusing to entertain an amicus curiae's new argument); *Robert Williams & Co. v. State Tax Comm'n of Missouri*, 498 S.W.2d 527, 530 (Mo. 1973) (new tax argument was "not presented by the parties" and thus was "not considered in this opinion"). Having lost at summary judgment in its own case, Charter is seeking to circumvent normal procedural rules by piggybacking on this appeal. The appeal rules exist for good reason, and Charter should be required to abide by them just like any other litigant. It should not be permitted to inject its own, new issues into this appeal.

II. The Circuit Court had exclusive jurisdiction to hear the Plaintiff-cities' equitable and related claims.

The fact that during five years of litigation, CenturyLink never attempted to raise these arguments shows that they are not just newly injected; they also are wrong. Charter first argues (at 16) that the lower court "lacked jurisdiction" because the "Missouri Constitution vests exclusive jurisdiction to determine violations of municipal ordinances in Municipal Judges rather than Circuit Judges." The error in this argument begins with the re-labeling of the Plaintiff-cities' claims as prosecutions for "violations of municipal ordinances." This ignores the cities' chosen path, as the first ten counts in their petition raise equitable claims. They seek a declaration regarding the applicability of the cities' gross-receipts taxes to certain CenturyLink receipts and a corresponding injunction requiring CenturyLink to fully comply with the ordinances in the future. And they seek an equitable accounting to ascertain the scope of harm caused by CenturyLink.

It has long been the rule that Missouri's circuit courts possess "exclusive," original jurisdiction over these types of equitable claims. *See First Nat. Bank of Kansas City v. Mercantile Bank & Trust Co.*, 376 S.W.2d 164, 168 (Mo. banc 1964) ("it is the rule in this state that the circuit courts inherently, traditionally and historically have had exclusive, original jurisdiction in what has been termed 'purely equitable matters'"); *State of Missouri ex rel. R-1 School Dist. of Putnam Cty. v. Ewing*, 404 S.W.2d 433, 440 (Mo. App. 1966) ("exclusive original jurisdiction of suits for a declaratory judgment is vested in the circuit courts"). Since circuit courts possess "exclusive" jurisdiction for matters in equity, it follows that municipal courts do not possess such jurisdiction.

Accord 9A McQuillin Mun. Corp. § 27:2 (3rd ed.) ("generally municipal courts have no jurisdiction in equity cases").

Indeed, caselaw abounds with examples of Missouri courts exercising equitable jurisdiction to construe the validity and application of ordinances.[1] Charter cannot sidestep this long-recognized power by recasting the petition as one for "ordinance violations" rather than for equitable relief and trying to shoe-horn it into municipal courts across the state. To paraphrase Justice Oliver Wendell Holmes, the party who brings a suit is its master, so it is for the plaintiff to decide what type of action to pursue – not the defendant. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

Thus, while Charter cites (at 16-17) to the Missouri Constitution and statutes for the principle that "violations of municipal ordinances" must be heard in municipal court, those citations are meaningless because this case is not a prosecution for ordinance violations. It is a classic equity suit: the Plaintiff-cities invoked the court's power to determine rights and obligations under their tax ordinances. Charter claims (at 17) that the case of *Yellow Freight* is "directly on point" but far from it. *Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights of City of Springfield*, 791 S.W.2d 382, 384 (Mo.

[1] *See, e.g.*, *City of Camdenton*, 237 S.W.2d at 96 (Camdenton, under Declaratory Judgment Act, could seek to adjudicate the rights of electric company to own and operate an electric distribution system in the city; the Act "furnishes a particularly appropriate method for the determination of controversies relative to the construction and validity of statutes and ordinances."); *Building Owners & Managers Ass'n v. City of Kan. City*, 231 S.W.3d 208, 210–11 (Mo. App. W.D. 2007); *Northgate Apartments, L.P. v. City of N. Kansas City*, 45 S.W.3d 475, 479 (Mo. App. W.D. 2001); *Mager v. City of St. Louis*, 699 S.W.2d 68, 70 (Mo. App. E.D. 1985); *see also Barker v. City of Springfield*, 2010 WL 6940301 (Mo. Cir. Ct. 2010), *aff'd*, 403 S.W.3d 600 (Mo. App. S.D. 2011).

1990). In that case, the issue was whether Springfield's "Commission on Human Rights" had "the authority to find plaintiff violated a city ordinance in connection with a complaint filed by an employee alleging unlawful discrimination in the termination of her employment." *Id.* at 383. Springfield had created its own administrative agency to hear violations of a discrimination ordinance. *Id.* at 383-84. It was within *that* context that the Court determined that Springfield's municipal courts – not a city-created administrative agency – must hear ordinance violations. *Id.* at 385.

That situation is far different from the cities bringing equitable actions in circuit courts seeking declarations construing the validity and application of their ordinances. In fact, the plaintiff in *Yellow Freight* took that approach when challenging Springfield's Commission on Human Rights, seeking and receiving a declaration in circuit court regarding the validity of the Commission's powers and the ordinance that created it. *Id.* at 383. This Court affirmed the circuit court's declaratory judgment, showing that the plaintiff properly sought equitable relief in circuit court concerning the validity of the ordinance. *Id.* at 387.

Charter fares no better when it cites (at 19) to certain cities' municipal ordinances for the proposition that the cities themselves require ordinance violations to be heard in municipal court. When the cities refer to ordinance violations, they refer to actions that are quasi-criminal in nature, such as traffic tickets, as opposed to equitable. *City of Webster Groves v. Erickson*, 789 S.W.2d 824, 826 (Mo. App. E.D. 1990) (citation omitted). "In legal effect, this means a prosecution for the violation of a municipal ordinance… [resembles] …a criminal action in its effects and consequences.'" *Id.* ("The

action is criminal 'in the sense that its primary object is to punish ...'.") As a result, in a prosecution for an ordinance violation, the rules of criminal procedure apply, including the criminal standard of proof beyond a reasonable doubt. *Id.* The ordinances therefore do not speak to whether the Plaintiff-cities can seek equitable relief in circuit court to construe them.

Charter further points to (at 19) one of the Plaintiff-cities' issue headings in their opening brief, which states that CenturyLink's behavior should be "declared unlawful and a violation of the Cities' ordinances," but that does not change the nature of the Plaintiff-cities' action. Even assuming *arguendo* that the suit is "predicated" on an ordinance violation, as Charter contends, that does not convert a straightforward declaratory judgment action into a "quasi-criminal" prosecution requiring an Information, a Violation Notice, proof beyond a reasonable doubt, and other requirements of criminal procedure. Further, that the Plaintiff-cities seek relief beyond a declaration and an injunction, such as back taxes owed, does not deprive the circuit court of its power to hear this case. In fact, Missouri law expressly provides that the "circuit courts of this state, within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Section 527.010, RSMo. Moreover, "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." Section 527.080, RSMo (Supplemental Relief).

As noted above, Charter made these same arguments in its own case, only to have them rejected. The circuit court found it "well-settled that Circuit Courts possess

'exclusive' original jurisdiction over equitable claims such as these." MML App. at A2. It also found that circuit courts routinely issue declaratory judgments to construe the validity and scope of city ordinances, and that Charter was attempting "to recast Plaintiffs' petition as one for ordinance violations, rather than for equitable relief." *Id.*, at A3.

As the circuit court concluded in Charter's case, this "is not a 'quasi-criminal' prosecution" like that for a moving violation. *Id.* Instead, the Plaintiff-cities bring classic equity claims that cannot be brought in municipal courts and that fall within the exclusive jurisdiction of the circuit courts.

III. Missouri's Declaratory Judgment Act expressly authorizes the Plaintiff-cities to bring these actions and any alleged remedies at law are inadequate.

Charter next argues that the circuit court should not have entered a declaratory judgment because the Plaintiff-cities had an adequate remedy at law. They claim (at 20) that either the "existing statutes that provide for the enforcement of delinquent tax obligations" or the cities' own ordinances provide the adequate legal remedy. Either way, neither mechanism provides adequate relief.

Charter begins by again re-writing (at 21) the Plaintiff-cities' petition, this time deeming it one for "tax collection." Charter argues that state statutes provide "the exclusive collection remedies available to the taxing authority." But none of the cited statutes, e.g., §§ 94.150, 94.310, 140.730, 140.740, RSMo, were raised by the parties to this appeal. Moreover, they deal with the collection of property taxes, not license taxes. *Accord City of Wellston v. SBC Commc'ns, Inc.*, 203 S.W.3d 189, 196 (Mo. Banc 2006).

In short, Charter has failed to identify any collection procedures that are applicable or "exclusive."[2]

The authority to seek a declaration to determine the applicability of ordinances to businesses operating within municipal boundaries is actually codified in Missouri's Declaratory Judgment Act, § 527.020, RSMo. The Act states that "[a]ny person… whose rights, status or other legal relations are affected by a… municipal ordinance,… may have determined any question of construction or validity arising under the… ordinance,… and obtain a declaration of rights, status or other legal relations thereunder." The Plaintiff-cities qualify as "any person" under the statute, so Missouri law expressly allows them to seek this equitable relief. *City of Jackson v. Heritage Sav. & Loan Ass'n*, 639 S.W.2d 142, 143 (Mo. App. E.D. 1982) ("municipal corporation is a 'person' under the statute"); *see also* Rule 87.05.

Given that the power to grant declarations of this nature is codified, it should come as little surprise that this Court has held – in the context of a City seeking to resolve a dispute over the scope of its ordinance, no less – that the Declaratory Judgment Act

[2] Even assuming an administrative scheme exists for license "tax collection," which MML denies, unless an ordinance or statute states that the procedures are "exclusive," they are not. *Accord* 20A Fed.Proc., L.Ed. § 48:1514, Election of Remedies ("The government is not held to any theory of election of remedies in deciding how to go about collecting taxes….The United States may maintain an action of debt for the collection of taxes even though another civil remedy is provided by law…Administrative remedies for the collection of taxes, if not made exclusive by statute, do not preclude the recovery of the tax by a common law action of debt."); *Howell v. United States*, 164 F.3d 523, 525 (10th Cir. 1998) (When Government pursues claim for unpaid taxes in court, as opposed to pursuing claim administratively, Government need not comply with notice and hearing requirements for assessments before obtaining judgment for tax liabilities, since lawsuit itself provides that information to taxpayer).

"furnishes a particularly appropriate method for the determination of controversies relative to the construction and validity of statutes and ordinances." *City of Camdenton*, 237 S.W.2d at 96. Several other cases are in accord.[3]

Charter argues (at 25) that the Plaintiff-cities also sought money damages, so the "[d]eclaratory judgment was thus used in this case not to obtain a declaration of the validity and scope of the Cities' Ordinances, but as a tool to collect delinquent taxes." But the seeking of additional relief, such as back taxes, did not extinguish the right to seek declarations in circuit court because the Act specifically allows for relief beyond the actual declaratory judgment. It provides that "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." Section 527.080, RSMo; *see also City of Creve Coeur v. Creve Coeur Fire Pro. Dist.*, 355 S.W.2d 857, 859 (Mo. 1962) (petition for a declaratory judgment "properly may seek additional relief,… including a claim for damages"); *State ex rel. Hawley v. City of St. Louis*, 531 S.W.3d 602, 609 (Mo. App. E.D. 2017) (same); *Ward Parkway Shops, Inc. v. C.S.W. Consultants, Inc.*, 542 S.W.2d 308, 311 (Mo. App. K.C. 1976) ("The respondent could properly seek coercive relief in addition to a declaration of rights, status and legal relations…. That fact does not, however, destroy the basic character of this action.").[4]

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[3] *Building Owners & Managers Ass'n v. City of Kan. City*, 231 S.W.3d 208, 210–11 (Mo. App. W.D. 2007); *Northgate Apartments, L.P. v. City of N. Kansas City*, 45 S.W.3d 475, 479 (Mo. App. W.D. 2001); *Mager v. City of St. Louis*, 699 S.W.2d 68, 70 (Mo. App. E.D. 1985); *see also Barker v. City of Springfield*, 2010 WL 6940301 (Mo. Cir. Ct. 2010), *aff'd*, 403 S.W.3d 600 (Mo. App. S.D. 2011).

[4] *See also Pollard v. Swenson*, 411 S.W.2d 837, 842 (Mo. App. K.C. 1967) ("[s]tandard text authority and Missouri decisions are in agreement that in a declaratory judgment

There is a reason for this: the court, as a matter of equity, should seek to provide complete and final relief in order to avoid subsequent litigation. *See City of St. Louis*, 531 at 609 (citing *Hudson v. Jones*, 278 S.W.2d 799, 804 (Mo. App. 1955) for the principle that "the purpose of a declaratory judgment is to *settle* rights and thus afford relief from uncertainty and insecurity – i.e., to provide complete relief").

That explains why this Court has deemed a declaratory judgment to be "a particularly appropriate method" for construing the validity of ordinances:[5] the alleged legal remedies urged by Charter are inadequate, in that they do not offer complete relief and inspire further litigation. For example, Charter envisions the filing of collection suits in municipal courts around the State. But doing so would only provide limited, backward-looking relief. It would resolve Defendants' past liability, if any, in one municipality at a time. It would not settle the parties' future rights and obligations with respect to ongoing tax payments, which is a primary purpose of the declaratory judgment vehicle. *See Wash. Univ. v. Royal Crown Bottling Co. of St. Louis*, 801 S.W.2d 458, 463 (Mo. App. E.D. 1990) ("No remedy at law would completely resolve this dispute…. An award of damages would not fully and finally settle the dispute between the parties regarding [future] obligations, and would not eliminate potential future litigation…. The

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action the court is not restricted to a mere declaration of rights in granting relief but may also administer affirmative or coercive relief"); *Satterfield v. Layton*, 669 S.W.2d 287, 289 (Mo. App. E.D. 1984) (trial court may give money judgment when such is warranted in declaratory judgment action); *Project, Inc. v. Productive Living Bd. for St. Louis County*, 234 S.W.3d 597, 604 (Mo. App. E.D. 2007) (reversing trial court's dismissal of action for declaratory judgment *and* injunctive relief).

[5] *City of Camdenton*, 237 S.W.2d at 96.

purpose of the Declaratory Judgments Act is 'to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations....'").

Moreover, Charter's proposed course of action would require the filing of debt actions[6] throughout the state every month (or quarter) as the taxes became due. A truer waste of judicial resources is hard to imagine. It is self-evidently "inadequate." *See State ex rel. Missouri Highway and Transp. Com'n v. Marcum Oil Co.*, 697 S.W.2d 580, 581 (Mo. App. W.D. 1985) ("[a]s a general rule, where an injury committed by one against another is continuous or is being constantly repeated, so that plaintiff's remedy at law requires the bringing of successive actions, that remedy is inadequate"); *see also Crown Diversified Holdings, LLC v. St. Louis County*, 452 S.W.3d 226, 230 (Mo. App. E.D. 2014) (the Declaratory Judgment Act has the purpose of affording relief from uncertainty and insecurity and of "reducing the multiplicity of litigation").

"Equity favors the prevention of a multiplicity of actions, and the interposition of a court of equity may be invoked to prevent a multiplicity of actions." 30A C.J.S. Equity § 36). This Court adopted that rule long ago, holding in a case that, like here, involved the validity of an ordinance as applied to a business that:

> The ordinances are continuous, and plaintiffs' business is continuous, and, under the ordinances, for each wagon load of coal sold and delivered in

[6] "Generally, a city can maintain an action to collect license fees or taxes as a debt." 9 McQuillin Mun. Corp. § 26:98 (3rd ed. 2005); *accord St. Louis v. United R. Co.*, 174 S.W. 78, 94 (Mo. 1914) (Taxes "are in the nature of debts arising out of and necessarily incident to the duty the citizen owes as his portion required to be contributed to the support of that intangible thing called the body politic; and the government, whether it be state or municipal, has the same right to enforce that duty as if it were a debt, and in the same way.").

> violation of the restrictive provisions thereof, the plaintiffs each become subject to an action in the municipal courts of the city for such violation. The fact that in each of such suits the plaintiffs might plead successfully the invalidity of the ordinances as a defense thereto does not give them an adequate remedy…. The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction.

Sylvester Coal Co. v. City of St. Louis, 130 Mo. 323, 32 S.W. 649, 650 (1895); *accord Moots v. City of Trenton*, 214 S.W.2d 31, 32 (Mo. 1948) (quoting *Sylvester Coal* and holding that no adequate remedy existed because of the possibility of successive actions); *see also Damon v. City of Kansas City*, 419 S.W.3d 162, 182 (Mo. App. W.D. 2013) ("[r]equiring each of the hundreds, if not thousands, of members of Subclass Two to individually comply with the allegedly faulty, illegal and confounding procedure contained in the Notice of Violation and then requiring each member to bring a separate individual action would not reduce litigation and would violate the purpose of the Declaratory Judgment Act"); *Bhd. of Stationary Engineers v. City of St. Louis*, 212 S.W.2d 454, 458 (Mo. App. 1948) ("[t]he members of the Brotherhood are entitled to be protected from the expense, vexation, and annoyance of such a multiplicity of proceedings; and equity may therefore rightfully intervene to determine, in one case, whether the ordinance is invalid for the reasons claimed").

The trial court therefore rightly rejected Charter's arguments in Charter's own case. As the trial court explained, "Winchester's equity claims are not cognizable in municipal courts," so it "cannot receive all of the relief it seeks (declarations, injunction, accounting) in such forums." MML App. at A4. Further, the "suit involves the

interpretation of tax ordinances now and in the future," so Charter's proposed path "would not fully and finally settle this dispute and eliminate the need for future litigation." *Id.* Instead, it would require "successive actions" to address Charter's alleged liabilities. "[S]uch a remedy is plainly inadequate." *Id.* Seeking a declaratory judgment would conserve resources, provide certainty, and eliminate future litigation, making it "perfectly suited to the Court's equitable powers." *Id.*, at A5.

Charter relies heavily on *State ex rel. SLAH, L.L.C. v. City of Woodson Terrace*, but that case is inapposite. 378 S.W.3d 357, 363 (Mo. 2012). There, Woodson Terrace enacted an ordinance that increased a hotel tax. The city sent the plaintiff-hotel an assessment form based on the new tax rate. *Id.* at 360. Believing the tax was unconstitutional, the hotel filed a declaratory judgment action rather than pay the tax under protest. *Id.* But because the city already had assessed the tax, the Court found that section 139.031, RSMo applied, and it required the hotel to make the payment under protest before challenging it. *Id.* at 361-62. This allowed the taxpayer to challenge an already-imposed tax while at the same time allowing the local government to "obtain the revenue necessary for their maintenance without protracted delay." *Id.* at 362.

Charter claims (at 25) that the Plaintiff-cities are trying to do the same thing "but from the opposite perspective." Yet, this "opposite perspective" is an important distinction. Because the hotel-taxpayer in *Slah* sought a declaratory judgment after receiving a notice but without first paying under protest, it deprived the city of much-needed revenue, and therefore defeated the entire purpose of section 139.031. But here, the cities are the plaintiffs instead of the taxpayers, which makes section 139.031

inapplicable on its face. *See* § 139.031(1), RSMo ("Any *taxpayer* may protest all or any part of any current taxes…") (emphasis added). Section 139.031 provides a remedy for aggrieved taxpayers, not for taxing authorities. *See Ford Motor Co. v. City of Hazelwood*, 155 S.W.3d 795, 798 (Mo. App. E.D. 2005) ("Section 139.031 provides the taxpayer with an exclusive remedy"). To say the least, it is ironic that Charter is complaining about the cities not requiring it and CenturyLink to first make payments under protest (thereby depriving Charter and CenturyLink of revenue) before determining the scope of an ordinance.[7]

This Court has distinguished *SLAH* under similar circumstances. *See City of Kansas City, Missouri v. Chastain*, 420 S.W.3d 550, 555 (Mo. 2014). In *Chastain*, Kansas City sought a declaratory judgment regarding the constitutionality of a proposed tax ordinance. *Id.* at 553-54. The defendant argued that Kansas City had an adequate remedy at law, in that it could enact the ordinance and then repeal it. But this Court disagreed. "Circuit courts have subject matter jurisdiction to enter declaratory

[7] Charter also errs in this Point by claiming that business license taxes must be "assessed" (at 26-27). But license taxes, like income taxes, become due without an assessment. *See SLAH*, at 363-64 ("The tax the city imposed on SLAH is a business license tax…It is not based on an assessed value of the hotel property..."); *Cedar Hill Cemetery Corp. v. District of Columbia*, 124 F.2d 286, 287 (D.C. App. 1941) (A business license "tax, like the federal income tax, becomes due without assessment"). Liability arises by virtue of the ordinance duties to report and pay over the taxes. *Accord Marvel v. U.S.*, 719 F.2d 1507, 1513-14 (10th Cir. 1983) (In action to collect federal withholding taxes, "even if we assume that the notices were defective in failing to name the individual taxpayers, such a defect would not affect the taxpayers' liability or defeat the Government's counterclaim for the unpaid taxes. Unlike the old theory of *ad valorem* taxation, under which liability for a tax depended on a formal act of assessment, there is no requirement in the Internal Revenue Code that before liability for employment taxes accrues, a notice of deficiency or assessment be given….Rather, liability arises by virtue of the statutory duties that are imposed to collect and pay over the taxes.").

judgments," and the city had the ability to seek a declaratory judgment regarding the validity of the proposed tax ordinance prospectively. *Id.* at 555.

That decision is in line with the requirement to "liberally" construe the Declaratory Judgment Act to effectuate its remedial purposes. *Stewart v. Shelton*, 201 S.W.2d 395, 398 (Mo. 1947). Charter's arguments, in contrast, would severely restrict the Act's uses by nullifying its express application to municipal ordinances (§ 527.020, RSMo) and a circuit court's "power to declare rights, status, and other legal relations" thereunder (§ 527.010, RSMo). If the mere specter of an ordinance violation forces such claims into municipal courts, then all avenues for declaratory, injunctive, and other equitable relief would be foreclosed whenever a municipal ordinance is at issue.

Thus, Charter is wrong when it claims that the Plaintiff-cities must bring their actions in municipal courts. Charter would have the Plaintiff-cities actually impose the tax on CenturyLink and Charter, and then have CenturyLink and Charter actually pay under protest before raising a challenge. Once they paid under protest, CenturyLink's and Charter's challenges would then need to be raised in circuit courts throughout the state since hundreds of cities have enacted the disputed ordinances. And that would be repeated every tax period. That approach makes no sense. The cost of attorneys in the multitude of actions would be unfathomable, and the clogging of the courts would be profound. Thankfully, Missouri does not require this approach, as the Plaintiff-cities can indeed seek declaratory, injunctive, and related relief – i.e., final and complete relief – in circuit court.

IV. The trial court dutifully interpreted and applied functionally-identical tax ordinances.

Charter's final Point concerns interpretation of the tax ordinances but again steers into uncharted waters by: (i) opposing the aggregate resolution of these claims (at 29, 32-33), and (ii) suggesting that Cameron's ordinance violates the Hancock Amendment to the Missouri Constitution, MO. CONST. art. X, § 22 (at 31-32). Neither of these issues were raised by the parties on appeal; thus, they are waived. *See Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 n. 1 (9th Cir. 1998) ("Generally, we will not consider on appeal an issue raised only by an amicus ... Appellee did not adopt amicus['] … argument in its brief; therefore, the issue has been waived.") (citations omitted); *Rider v. Julian*, 282 S.W.2d 484, 497 (Mo. Banc 1955) (amici curiae have no right to question constitutionality of a legislative act).

The interpretation of a tax ordinance is a question of law for the trial court. *Ludwigs v. City of Kansas City*, 487 S.W.2d 519, 522 (Mo. 1972). In Missouri, as elsewhere, the meaning of an ordinance is ascertained by reference to the language of the ordinance itself. *State ex rel. Sunshine Enterprises of Missouri, Inc. v. Board of Adjustment of the City of St. Ann*, 64 S.W.3d 310, 312 (Mo. banc 2002). Where the language is clear and unambiguous, a court will give effect to the language as written and will not engage in construction. *State v. Morrow*, 535 S.W.2d 539, 540 (Mo. App. K.C. 1976). The mere fact that litigants disagree over the meaning of a term does not render an ordinance ambiguous. *Bank of America Nat. Trust and Sav. Assoc. v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 461, 119 S.Ct. 1411 (1999) ("mere

disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong"); *accord Foremost Signature Ins. Co. v. Montgomery*, 266 S.W.3d 868, 873 (Mo. App. E.D. 2008); *Young Dental Mfg. Co. v. Engineered Products, Inc.*, 838 S.W.2d 154, 155-56 (Mo. App. E.D. 1992).

Charter misstates the law by asserting, without qualification, that tax laws are to be construed "against the taxing authority and in favor of the taxpayer" (at 29). This is true only in cases of ambiguity or doubt. *See United Air Lines, Inc. v. State Tax Comm'n*, 377 S.W.2d 444, 448 (Mo. banc 1964) (if "the language used is plain and unambiguous, there is no reason for any construction, … but where any real doubt exists in the construction of a taxing statute, the law requires that it be strictly construed in favor of the taxpayer"); *State v. Hallenberg-Wagner Motor Co.*, 108 S.W.2d 398, 400 (Mo. 1937) ("when 'ambiguous or doubtful, [revenue laws] will be construed strictly in favor of the taxpayer and against the taxing power,'…but, of course, the rule of strict construction may not serve to defeat the intention of the lawmaker"); *Cascio v. Beam*, 594 S.W.2d 942, 950 (Mo. banc 1980) (Seiler, dissenting) (where "statutory language is clear and there is no ambiguity it is well established that there is no room for construction of the language and the rule cited in the principal opinion to the effect that taxing statutes are to be construed strictly against the taxing authority has no application"); *see also Amerada Hess Corp. v. State ex rel. Tax Comm'r.*, 704 N.W.2d 8, 17 (N.D. 2005) ("the rule of strict construction of ambiguous tax statutes in favor of the taxpayer is a rule of last resort when other means of ascertaining the legislature's intentions have failed"). Here, the trial court found the ordinances free from ambiguity. LF9135 ("this Court gives effect to the

language as written without regard to extrinsic evidence and it does not engage in ordinance construction"). CenturyLink agrees. *See* Brief of Appellants/Cross-Respondents at 27 (the "Cities' business license taxes describe the tax base so that telephone companies can understand and comply"); at 58 (the "ordinance provisions … fully and properly describe the tax base"); at 60 ("by their express terms each ordinance specifies the services it intended to make subject to the tax"). Accordingly, there is no need for construction or resort to extrinsic evidence, such as expert affidavits, to explain their meaning. *State v. Morrow*, 535 S.W.2d at 540 (the meaning to be accorded legislative enactments "is for the court and not the dialectic of experts"); *State v. Kinder*, 942 S.W.2d 313, 334 (Mo. banc 1996); *Burke v. Moyer*, 621 S.W.2d 75, 79 n. 4 (Mo. App. W.D. 1981).

Although Amici fault the trial court for supposedly making "no effort to apply the specific language in the Cities' Ordinances" (at 29), this is belied by the trial court's actions. Not only did the court take pains to quote each ordinance and to detail its reasoning – over the course of multiple orders – but, as Charter acknowledges, it differentiated Wentzville's ordinance: it applied the unique language of Code § 640.010 to narrow Wentzville's tax base. *See* Brief of Amici Curiae at 29 n. 10 ("The Trial Court did correctly conclude that Wentzville could not collect on interstate services."). Thus, far from shirking its duty, the trial court appreciated the breadth of these taxes. *See Ludwigs*, 487 S.W.2d at 522 ("In its usual and ordinary meaning 'gross receipts' of a

business is the whole and entire amount of the receipts without deduction.").[8] It applied the specific language of Wentzville's ordinance but did not invent other tax exemptions. *Accord State ex rel. Mount Mora Cemetery v. Casey*, 109 S.W. 1, 4 (Mo. 1908) ("[a]n exemption from taxation exists only where it is expressed in explicit terms"); *State ex rel. Conservation Comm. v. LePage*, 566 S.W.2d 208, 211 (Mo. banc 1978) ("[w]e will not read into a tax exemptions that do not clearly appear therein"); *Missouri Church of Scientology v. State Tax Comm'n*, 560 S.W.2d 837, 844 (Mo. banc 1977) (claims of tax exemption "are not favored in the law").[9] This is in keeping with the principle that "taxation is the rule and exemption from taxation is the exception." *Home Builders Ass'n of Greater St. Louis v. St. Louis County Bd. of Equalization*, 803 S.W.2d 636, 639 (Mo. App. E.D. 1991); *see also Alberici Constructors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632, 636 (Mo. banc 2015) (an exemption will be allowed only "on clear and unequivocal proof"; "[a]ny doubt is resolved in favor of taxation").

It is Charter's argument, rather than the trial court's analysis, that suffers from a

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[8] *See also* Multistate Tax Compact, Art. II, § 6, at V.A.M.S. 32.200 ("'Gross receipts tax' means a tax, other than a sales tax, which is imposed on or measured by *the gross volume of business*, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax.") (emphasis added); *Stiehler v. Pub. Serv. Comm. of District of Columbia*, 629 A.2d 1211, 1214 (D.C. App. 1993) (the nature of a gross receipts tax is "all-encompassing"); *Taylor v. Rosenthal*, 213 S.W.2d 435, 437 (Ky. App. 1948) (when a tax is levied on gross receipts, "it applies to every penny a person, firm or corporation takes in regardless of the source from which it comes"); *Pacific Greyhound Lines v. Johnson*, 129 P.2d 32, 34 (Cal. App. 1942) ("all receipts not specifically excluded are to be included").

[9] Wentzville maintains that CenturyLink failed to satisfy its burden of demonstrating entitlement to any tax exemption. MML defers to Plaintiff-cities' arguments on that issue.

lack of rigor and specificity. Charter makes no attempt to explain how the Plaintiff-cities' tax bases diverge vis-à-vis the disputed receipts, save one (Wentzville). Charter points to no ordinance differences that are material, i.e., that would affect the outcome. This is understandable because the ordinances, whether "modernized" or not, operate similarly. They tax the gross receipts of "business" (telephone or exchange telephone) conducted in each community. *See City of Bridgeton v. Northwest Chrysler-Plymouth, Inc.*, 37 S.W.3d 867, 872 (Mo. App. E.D. 2001) ("[g]ross receipts are merely a means to calculate the occupational license tax; what is being taxed is the privilege of doing business in [the municipality]"). Since the disputed receipts often appear as charges on customer's monthly bills, it follows that they are part-and-parcel of CenturyLink's phone business. They necessarily derive from the business of supplying telephone or exchange telephone service in Missouri municipalities because CenturyLink engages in no other business there.

Charter's effort to narrow the base to something *less* than all of CenturyLink's receipts is unavailing. The language of the Plaintiff-cities' tax ordinances is not so limited. *Accord Commonwealth v. Brush Electric Light Co.*, 53. A. 1096, 1097 (Pa. 1903) ("The tax is not to be paid upon the gross receipts from electric lighting, but upon the gross receipts from the business of the company … *It is taxed on what it does*. The statute imposes the tax not upon a portion of its receipts, - those derived from a particular commodity it supplies to the public, - but upon all of its receipts from its general business conducted under its franchises.") (emphasis added); *Puget Sound Energy, Inc. v. City of Bellingham*, 259 P.3d 345, 347-48 (Wash. App. 2011) ("[T]he ordinance provides that

the electric utility tax be levied against persons engaged in '*the business of* selling or furnishing electric light and power.' … Contrary to [electric company's] assertion, 'the business' of selling or furnishing light and power is not limited to the actual provision of electricity. Rather, it encompasses the entire commercial enterprise of selling or furnishing electric light and power.") (emphasis in original).

Further, it is no defense to taxation that some of the underlying services may traverse municipal, or even state, lines. *See Kansas City v. Graybar Elec. Co.*, 485 S.W.2d 38, 42 (Mo. banc 1972) (a municipality's right to impose a business license tax "upon a corporation or business conducted within the city limits, although a portion of the business is carried on or the transaction is factually completed outside such municipality, is generally recognized") (collecting cases).[10] Nor is it a defense to taxation that some of the ordinances are old. *See City of Jefferson City, Mo. v. Cingular Wireless, LLC*, 531 F.3d 595, 608 (8th Cir. 2008) ("[N]othing about the term 'telephonic' in the tax ordinance is limited to the technology generally used to operate telephones in 1944…Springfield is not required to update its Code for the purpose of recognizing the advent of each new form of technology used to provide telephonic services."); *City of Jefferson City, Mo. v. Cingular Wireless, LLC*, 2005 WL 1384062 at *5 (W.D. Mo. 2005)

[10] *See also Sprint Spectrum, L.P. v. City of Eugene*, 35 P.3d 327, 328-29 (Or. App. 2001) ("*The ordinance does not tax individual transactions.* It is based instead on the provider's "*gross revenues derived from its telecommunication activities within the city.*"; rejecting Sprint's argument that it "effectively 'taxes telephone calls made to locations outside the City limits'") (emphasis in original and added); *Mayor and City Council of Baltimore v. Vonage America, Inc.*, 569 F.Supp.2d 535, 538-9 (D. Md. 2008) (VoIP provider subject to city's telecommunications tax, even though calls made or received by customers with city billing addresses did not necessarily originate or terminate in city).

("If the Defendants' approach were adopted, then each time that a new technology were incorporated into an existing service or product, the ordinances and charters of each city would have to be changed or no taxes could be collected.").[11]

The trial court found that "Defendants are liable for license taxes to each City for all revenue they receive they receive in that respective City." LF9135. This statement is uncontroversial and plainly correct. It comports with longstanding license tax and gross receipts principles. Because the Plaintiff-cities' tax bases are functionally identical, there was no reason to draw distinctions between business receipts. All are taxable under the Plaintiff-cities' ordinances unless specifically exempted.

CONCLUSION

A trial court is granted broad discretion in deciding whether to maintain a declaratory judgment action. The Charter Amici seek to limit that discretion. Their arguments run afoul of the Declaratory Judgment Act and longstanding precedent. They also violate the norms for amici participation by raising issues that no appellant believes have merit. Charter's arguments should be rejected.

[11] *See also AT&T Communications of the Mountain States, Inc. v. Dept. of Revenue*, 778 P.2d 677, 681-82 (Col. banc 1989) (AT&T's argument "conflicts with the longstanding principle of statutory construction which provides that a statute written in general terms applies to subjects or activities which come into existence after adoption of the statute, *including those which could not have been anticipated when the statute was enacted*… [T]he statute is not frozen in time as of 1935…") (emphasis added).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements of Rules 81.18 and 84.06. The entire brief contains 8,498 words.

/s/ John W. Hoffman

CERTIFICATE OF SERVICE AND SIGNING

The undersigned certified that a true copy of this document with exhibit was caused to be served via the Missouri electronic filing system on all counsel of record on this 21st day of March, 2018, and that he has signed and retained the original pursuant to Rule 55.03(a).

By: /s/ John W. Hoffman