No. SC95713

IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF THE PETITION OF MISSOURI-AMERICAN WATER COMPANY FOR APPROVAL TO CHANGE ITS INFRASTRUCTURE (ISRS), AND MISSOURI PUBLIC SERVICE COMMISSION,
Respondents,

v.

OFFICE OF THE PUBLIC COUNSEL,
Appellant.

Appeal from the Missouri Public Service Commission

BRIEF OF AMICUS CURIAE MISSOURI CHAMBER OF COMMERCE AND INDUSTRY IN SUPPORT OF RESPONDENTS MISSOURI PUBLIC SERVICE COMMISSION AND MISSOURI AMERICAN WATER COMPANY

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INTEREST OF AMICUS CURIAE

The Missouri Chamber of Commerce and Industry is the largest statewide general business organization in Missouri. It represents nearly 3,000 Missouri businesses, almost 200 local chambers of commerce, and a number of other business organizations. The Chamber seeks to address public policy issues affecting Missouri businesses and promote Missouri's economy by advancing policies that will attract and retain business and industry and foster job growth. The Chamber has a particular interest in having Missouri statutes, including those based on population figures, construed in a practical way that advances the intent of Missouri legislature and protects the expectations of Missouri residents, businesses, and political subdivisions. Missouri has a great many statutes tied to population levels, and the Chamber is concerned that the Office of Public Counsel's position here will undermine expectations throughout the state by making settled Missouri law subject to unforeseen and unpredictable population shifts.

INTRODUCTION

The Missouri Public Service Commission correctly found that Missouri American Water Company's petition was authorized by the ISRS statutes. The Missouri legislature intended statutes that depend on certain population levels for their applicability, like the statutes at issue here, to continue in force despite subsequent changes in population. Missouri has many such statutes, and the Office of Public Counsel's position—that these statutes' applicability must be revaluated every ten years—promises to bring chaos to the settled expectations of not just St. Louis County, but all Missouri political subdivisions, and Missouri residents and businesses as well.

The Missouri legislature, having repeatedly passed legislation tied to population levels, could not have intended to inject such uncertainty into Missouri law. Indeed, it did not. It passed an overarching statute—section 1.100.2, RSMo 2000[1]—that expressly provides for statutes like the one at issue here to continue in force, even when the population levels of a political subdivision no longer meet the originally applicable threshold.

The contrary result urged by OPC depends on manipulating two statutory construction aids—the presumption against superfluous language and the "*expressio unius*" maxim—to change the straightforward language of section 1.100.2 into something it was never meant to be.

ARGUMENT

I. The Missouri Public Service Commission Correctly Determined That Sections 393.1000 *et seq.* Remain Applicable To St. Louis County Because the County's Population Was Above One Million When The Statute Was Enacted and Section 1.100.2, Correctly Interpreted, Provides Generally That Missouri Statutes Based On Populations Of Political Subdivisions Continue To Apply Regardless Of Subsequent Population Changes.

No one disputes that St. Louis County was subject to sections 393.1000 *et seq.* when those statutes were passed in 2003. It was a charter county, and its population

[1] All citations to statute herein are RSMo 2000 unless specified otherwise.

based on the 2000 decennial United States census exceeded one million. *See* section 393.1003. Indeed, it was the only Missouri county to which the statute applied.

All that changed in 2011, says OPC. In July of that year, when the 2010 census results became effective, and St. Louis County missed the one million threshold by only about 1000 residents, OPC claims that the ISRS statutes now at issue simply ceased to operate. So too, by implication, did any other statute applicable to St. Louis County based on the one million population figure.

The same fate presumably awaits many more Missouri statutes applicable to political subdivisions based on population levels. For example, section 57.570 permits the sheriff in class-one counties "having more than five hundred thousand inhabitants and not having a charter form of government" to create a county highway patrol. Section 160.055 permits "urban school districts containing the greater part of a city which has more than three hundred thousand inhabitants" to "establish and enforce a regulation" age limits for attending public prekindergarten, kindergarten, and summer-school programs. Section 84.870 requires police officers "in cities of one hundred thousand inhabitants" be given 24 holidays annually. Every ten years, based on OPC's arguments, every one of those statutes—and hundreds more—must be reevaluated based on updated census data, and simply discarded if the specified population level is no longer met.

Could the Missouri legislature really have intended such a chaotic result? Of course not. It anticipated this very issue, and passed a general statute that clearly and succinctly addressed the issue presented by *all* Missouri statutes based on political subdivision population levels:

> Any law which is limited in its operation to counties, cities, or other political subdivisions having a specified population … shall be deemed to include all counties, cities or other political subdivisions which thereafter acquire such population … *as well as those in that category at the time the law passed.*

Section 1.100.2 (emphasis added).

In 1971, immediately before the 1970 census results were to become effective for purposes of Missouri statutes, the legislature passed an emergency measure adding a single sentence to section 1.100.2, ostensibly to ensure that statutes applying to the City of St. Louis based on its population level would not become invalid in view of its known population decline. OPC now relies on two interpretive canons to convert this 1971 sentence into something much broader—an effective repeal of the original sentence in section 1.100.2. First, says OPC, the new 1971 sentence would be superfluous if the original sentence had indeed been intended as a general clause conferring continuing effect on population-based laws, so it must operate as its own limited provision applying just to St. Louis City. And second, having bestowed this meaning on the 1971 sentence, OPC invokes the "*expressio unius*" maxim to argue that now population-based legislation directed at *only at the City of St. Louis* is intended to have continuing effect.

Neither statutory construction tool can bear this weight, as explained below.

A. The Presumption Against Superfluous Language Cannot Be Sensibly Applied As OPC Argues.

The plain intent of the Missouri legislature for decades has been that statutes keyed to population levels of political subdivisions continue to apply to those subdivisions, regardless of later changes in population. OPC's strained statutory interpretation cannot change this basic fact.

"The primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning." *State v. McLaughlin*, 265 S.W.3d 257, 267 (Mo. banc 2008). While statutory construction tools can of course be useful in construing uncertain passages, this Court has been careful to recognize their limitations:

> Rules of statutory construction cannot be rigidly applied. Most often, for every rule suggesting one resolution, another rule exists that suggests the contrary.

South Metropolitan Fire Protection Dist. v. City of Lee's Summit, 278 S.W. 3d 659, 666 (Mo. banc 2009) (citing Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950)). The main purpose of construction rules must be consistent with the goal of all statutory construction: "to determine legislative intent and give meaning to statutory language." *Id.* Construing statutes is proper "[o]nly when the legislative intent cannot be determined from the plain meaning of the statutory language." *United Pharmacal Co. v. Mo. Bd. Of Pharmacy*, 208 S.W.3d 907, 910 (Mo. banc 2006). And in

no event is statutory construction to be hyper-technical, or anything other than reasonable and logical. *Donaldson v. Crawford*, 230 S.W.3d 340, 342 (Mo. banc 2007).

For a number of years—at least since 1959—the Missouri legislature had a single sentence in place in section 1.100.2. That sentence specified that all statutes based on population levels of Missouri political subdivisions "shall be deemed to include" both subdivisions that later came to satisfy the stated population level "*as well as* those in the category at the time the law passed." Section 1.100.2 (emphasis added). This language was susceptible to only one reasonable and logical meaning. Although population-based statutes were meant to open-ended—new political subdivisions could come within their reach—they were *always* intended to apply to the political subdivisions targeted at enactment.

This reading makes perfect sense. One reason Missouri has so many population-based statutes is the legislature's need to avoid the constitutional prohibition against special laws. The Missouri Constitution's "Article III, section 40 prohibits the legislature from enacting 'special laws' when a general law can be made applicable." *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 334 (Mo. banc 2015). "Special laws are statutes that apply to localities rather than to the state as a whole and statutes that benefit individuals rather than the general public." *Id.* (internal quotation omitted)).

When the legislature needs to address the concerns of a particular political subdivision, it frequently uses existing population figures to make certain not just that the target jurisdiction is covered but that other jurisdictions could also come within its terms, thereby avoiding the "special laws" prohibition. But OPC's reading turns this process on

its head. Instead of recognizing the obvious point that the original political jurisdictions—the ones for which the legislation was specifically enacted—were always intended to remain subject to its terms, OPC pretends that the legislature's real concern was not with passing constitutional laws, but with particular population levels.

The pre-1971 language in section 1.100.2 merely ensured the practical result that the original targets of population-based legislation would always remain covered by that legislation, regardless of population shifts, unless the legislature affirmatively decided to repeal it. Otherwise totally unforeseeable results are possible, results that damage the expectations of Missouri political entities, residents and businesses.

The present ISRS statutes provide a perfect example. When passed in 2003, they were aimed directly at St. Louis County, given the 1 million population threshold the legislature chose, and of course could include any other political subdivisions that subsequently met this condition. But the legislature's determination that the ISRS procedure should be available in St. Louis County obviously did not depend on whether St. Louis County had 1 million residents, or only 999,000. The legislature could not have intended the ISRS statutes, not to mention many others like them, to simply vanish when the county's population unexpectedly dropped slightly under the 1 million threshold as of July 1, 2011.

OPC contends that the 1971 addition to section 1.100.2 would be superfluous if the original sentence had truly operated as a generally applicable clause ensuring continuing effect. But consider the context the circumstances facing the 1971 legislature. Although OPC avoids addressing the issue directly, in 1971 the legislature was

specifically concerned about statutes based on the City of St. Louis's population, which had been dramatically declining for many years. In May 1971, when it became apparent that the City would no longer meet the population threshold for any number of statutes because of the soon-to-be-applicable 1970 census figures, the General Assembly passed what it deemed an "emergency" measure to deal with the pressing issue before it: ensuring that any number of statutes governing the City did not suddenly become invalid. That emergency measure added a single sentence to the existing section 1.100.2 that by its terms applies *only* to St. Louis:

> Once a city not located in a county has come under the operation of such a law a subsequent loss of population shall not remove that city from operation of that law.

See H.B. 154, Laws of Missouri, 76th General Assembly 1st Regular Session, at 81-82.

Although OPC claims this sentence would be "superfluous" if the existing sentence had operated to keep the original subjects of population-based statutes covered, this misconstrues how legislatures operate. They frequently clarify existing law, or pass new laws out of an abundance of caution, even when existing laws would suffice. *See, e.g., Andresen v. Bd. of Regents of Mo. Western State College*, 58 S.W.3d 581, 589 (Mo. App. W.D. 2001) (concluding that legislative amendment "intended only to clarify existing law"); *Flipps Nine, Inc. v. Mo. Property and Cas. Ins. Guar. Ass'n*, 941 S.W.2d 564, 568 (Mo. App. E.D. 1997) ("While an amendment to a statute must be deemed to have been intended to accomplish some purpose, that purpose can be clarification rather than a change in existing law."); *Carter v. Pottenger*, 888 S.W.2d 710, 714 (Mo. App.

S.D. 1994) ("An amendment to a statute may be for the purpose of clarifying the meaning of the previously existing law."). Indeed, under OPC's misguided application of the superfluity canon, future legislative attempts to clarify existing law could have the perverse effect of changing the very meaning the legislature was trying to support.

Here the only reasonable conclusion is that the 1971 amendment to section 1.100.2 was passed as an emergency measure simply to ensure that the City of St. Louis would continue to have the benefit of statutes that applied to it based on assumed population levels.[2] It was merely a cautionary modification to make certain that the City of St. Louis, which faced an imminent loss of statutory coverage, would come under the general "continuing effect" clause that already existed. It was thus not "superfluous," and cannot change the original meaning of section 1.100.2's first sentence.

B. The "*Expressio Unius*" Canon Of Construction Also Fails to Advance OPC's Argument.

Having used the "superfluous" canon to turn the 1971 amendment into a narrow "continuing effect" clause solely applicable to the City of St. Louis, OPC turns to another construction tool, the "*expressio unius*" canon, to further subvert the legislature's intent.

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[2] Ironically, if the 1971 modification is read not as a clarification of an existing general clause applicable to all Missouri political subdivisions, but as a special provision solely for St. Louis (the only Missouri city not in a county), it might run the risk of itself being an unconstitutional special law. *See Labrayere*, 458 S.W.3d at 334; *but see Boyd-Richardson Co. v. Leachman*, 615 S.W. 2d 46, 52-53 (Mo. banc 1981).

While this canon of construction—that legislative omissions should be understood where necessary as deliberate exclusions—certainly can have merit, it cannot sensibly be applied in the present context.

Here the imminent threat facing the legislature in May 1971 was the looming effective date of the 1970 census—July 1, 1971—which directly threatened statutes applicable to the City of St. Louis.[3] The legislature's passage of an emergency measure addressing only St. Louis should not be read as some intention to *exclude* every other Missouri political subdivision from the continuing effect of statutes deliberately passed to apply to them. It instead should be read as a targeted response to a discrete—and imminent—threat to the City of St. Louis.

This Court has specifically recognized that the *expressio unius* construction maxim "is to be used with great caution." *Six Flags Theme Parks, Inc. v. Director of Revenue*, 179 S.W.3d 266, 270 (Mo. banc 2005) (quoting *Pippins v. City of St. Louis*, 823 S.W. 2d 131, 133 (Mo. App. 1992)). "The maxim should be invoked only where it would be natural to assume by a strong contrast that that which is omitted must have been intended for the opposite treatment." *Id.* (citing *Springfield City Water Co. v. City of Springfield*, 182 S.W.2d 613, 618 (Mo. 1944)). Here, the precise opposite is true. The

[3] Section 1.100.1 states that, for its purposes, "the effective date of the 1960 decennial census of the United States is July 1, 1961, and the effective date of each succeeding decennial census of the United States if July first of each tenth year after 1961." The effective date of the 1970 decennial census under the statute was thus July 1, 1971.

1970 census results were about to become effective, and they posed a direct threat only to the City of St. Louis. By responding directly to that limited threat with an emergency amendment, it cannot be said that the legislature *must have intended* to *reject* similar treatment for all other Missouri political subdivisions, and thereby subject all manner of population-based legislation to arbitary repeal.

The Court should reject OPC's attempts at statutory construction, and instead bring certainty to Missouri law by applying section 1.100.2 in the manner the Missouri legislature so plainly intended.

CONCLUSION

The Court should recognize section 1.100.2 for what it is—a general directive from the Missouri legislature that subsequent changes in the population of Missouri political subdivisions do not remove those subdivisions from the operation of laws that specifically applied to them at the time of enactment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was filed electronically this 8th day of August, 2016 causing a copy of the same to be transmitted to counsel for all parties of record in this action.

/s/William E. Quirk
Attorney for Amicus Curiae