No. SC-99419

IN THE SUPREME COURT
STATE OF MISSOURI

CHRISTOPHER ZANG,
Plaintiff/Appellant

vs.

CITY OF ST. CHARLES, MISSOURI
Defendant/Respondent

Appeal from the Judgment of the Circuit Court of
St. Charles County, Missouri, Division 7
The Honorable Daniel G. Pelikan
ED-109422

AMENDED SUBSTITUTE BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

This matter arises from a claim that the City of St. Charles, Missouri's Notice of Claim Charter Provision is unconstitutional. On January 19, 2021, Respondent City of St. Charles's Motion to Dismiss Count II of Plaintiff/Appellant's Petition (the only count at issue here) asserting that he was injured as a result of a dangerous condition of property in St. Charles because he failed to give proper notice of the condition to the City.

On January 25, 2021, Plaintiff/Appellant appealed the judgment. The Court of Appeals for the Eastern District of Missouri reversed and remanded the case on October 19, 2021. Respondent filed its Motion for Rehearing or in the Alternative, Motion to Transfer to the Supreme Court on November 3, 2021. On November 22, 2021, the Court of Appeals denied Respondent's Motion.

On December 6, 2021, Respondent filed its Motion for Transfer to the Supreme Court which this honorable Court sustained on April 5, 2022.

RESPONDENT'S STATEMENT OF FACTS

Preliminary Statement:

Appellant's Statement of Facts as filed in the Court of Appeals is improper pursuant to Rule 84.04(c) as it contains no citations to the record whatsoever. The statement is riddled with conclusory allegations and legal argument which is not permitted under the Missouri rules.

Respondent's Statement of Facts:

On April 22, 2020, Appellant filed his First-Amended Petition. [LF 2] Plaintiff alleged a metal bridge in the City of St. Charles was dangerous because it became slippery following a rainstorm, resulting in an injury when Plaintiff fell from his bicycle. [LF 2]. Respondent filed its Motion to Dismiss and associated exhibits on August 7, 2020. [LF 3-8] Respondent argued that Appellant failed to give proper notice of the alleged dangerous condition to the City and therefore, his claim was barred. *Id*.

On August 24, 2020, Appellant filed his Response to Respondent's Motion to Dismiss. [LF 9-11] In his Response, Appellant argued that the notice requirement was unconstitutional and void due to a conflict with R.S.Mo. §516.120 and the Missouri Constitution Article VI, §19. [LF 9, pp 3-7.] Appellant did not assert a conflict between St. Charles' notice provision and R.S.Mo. §537.600.1. *Id.* Further, Appellant did not, and does not, dispute that he failed to give notice within the 90-day period. *Id. See also* Appellant's brief at 4.

On September 9, 2020, Respondent filed its Reply. [LF 12] Respondent argued that the cases relied upon by Appellant were inapplicable because they addressed Charter provisions enacted prior to the 1971 amendment to the Missouri Constitution, specifically, Article VI §19, as opposed to Article VI §19(a). *Id*. Furthermore, it argued that under the current Missouri Constitution, the charter's notice provision is valid and enforceable. *Id*.

Less than an hour and a half prior to the hearing on Respondent's Motion to Dismiss, Appellant filed a sur-reply captioned "Response to Defendant City of St. Charles' Reply…" [LF 13] Appellant again argued that the notice requirement was void even if analyzed under the correct constitutional provision. *Id*.

On January 19, 2021, the Court granted the City of St. Charles' Motion for Summary Judgment as to Count I of Appellant's Petition (not at issue in this appeal) and St. Charles' Motion to Dismiss Count II of the Petition. [LF 16, Appx. 1] In his opinion, the honorable Judge Pelikan found that the St. Charles City charter provision "mimics four statutes that require similar notice provisions in other sizes and classes of cities…" and is "not inconsistent or in conflict with state law." (LF 16-2, Appx. 2] This appeal follows.

POINTS RELIED ON

II. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S PETITION BECAUSE SECTION 12.3 OF THE ST. CHARLES CITY CHARTER IS A CONSTITUTIONALLY VALID AND ENFORCEABLE NOTICE OF CLAIM REQUIREMENT IN THAT § 12.3 IS CONSISTENT WITH THE MISSOURI CONSTITUTION AND IT IS NOT LIMITED OR DENIED BY ANY EXISTING STATUTE OR THE ST. CHARLES CHARTER.

MISSOURI CONSTITUTION ARTICLE VI, § 19(a)

Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208 (Mo. banc 1986)

City of Kansas City v. Carlson, 292 S.W.3d 368 (Mo. App. W.D. 2009)

Findley v. City of Kansas City, 782 S.W.2d 393 (Mo. banc 1990)

ARGUMENT

STANDARD OF REVIEW

The sole question presented to this court is whether Section 12.3 of the City of St. Charles Charter is constitutionally valid and enforceable. "Whether a city exceeds its statutory authority in passing an ordinance is an issue" that is reviewed de novo. *City of Kansas City v. Carlson*, 292 S.W.3d 368, 370 (Mo. App. W.D. 2009), *citing Clifford Hindman Real Estate, Inc. v. City of Jennings*, 283 S.W.3d 804, 806-07 (Mo. App. E.D. 2009).

III. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S PETITION BECAUSE SECTION 12.3 OF THE ST. CHARLES CITY CHARTER IS A CONSTITUTIONALLY VALID AND ENFORCEABLE NOTICE OF CLAIM REQUIREMENT IN THAT § 12.3 IS CONSISTENT WITH THE MISSOURI CONSTITUTION AND IT IS NOT LIMITED OR DENIED BY ANY EXISTING STATUTE OR THE ST. CHARLES CHARTER.

Section 12.3 of the City of St. Charles Charter was enacted in accordance with the authority granted to the City by virtue of the Missouri Constitution Article VI §19(a) and is valid and enforceable as it does not conflict with the Missouri Constitution, statutes, or the City of St. Charles Charter. Appellant's sole point on appeal improperly asserts that Section 12.3 is void because it is either "limited, denied, or in conflict" with Missouri Statutes § 537.600.1(1), § 537.600.1(2), § 82.210, and § 516.120.[1] Appellant's Brief (hereafter "AB") at pg. 7.

[1] Appellant's claim that §12.3 conflicts with R.S.Mo. §537.600.1(1) and/or §537.600.1(2) was not before the trial court and is improperly raised for the first time in Appellant's brief. (LF 9, 13.)

Ordinances are presumed to be valid and lawful. *Carlson*, 292 S.W.3d at 373, *citing McCollum v. Dir. Of Revenue*, 906 S.W. 368, 369 (Mo. banc 1995). City ordinances are construed to be upheld "unless the ordinance is expressly inconsistent or in irreconcilable conflict with the general law of the state. *Id.* "Where its language will permit, an ordinance should be construed so as to uphold its validity as against a construction which would invalidate it." *Kansas City v. LaRose*, 524 S.W.2d 112, 117 (Mo. banc 1975).

This case presents a question of first impression as to the scope of powers granted to constitutional charter cities under the Missouri Constitution Article VI §19 (a) and the application of that power to municipal notice of claim charter provisions. Resolution is of utmost importance to both constitutional charter cities and, more importantly, the citizens of those municipal entities. At present, approximately 15% of Missouri cities are not covered by a notice of claim statute enacted by the state legislature. Most of these are constitutional charter cities with populations of less than 100,000, such as St. Charles. Notice statutes "are terms and conditions imposed by the government on the government's waiver of its immunity." *Findley v. City of Kansas City*, 782 S.W.2d 393, 394 (Mo. banc 1990). They work to protect the public coffers and allow municipalities to correct dangerous conditions; and are unequivocally constitutional. *Id.* By finding that the City of St. Charles is prohibited from adopting a notice of claim charter provision under the authority granted by Article VI § 19(a), the Court of Appeals erroneously divested the City of the powers granted by the Constitution. Moreover, disparate treatment of a small

group of municipalities and hundreds of thousands of citizens is injudicious when the Missouri Constitution grants those municipalities the same power as the state legislature.

A. Municipalities have all the power which the legislature could grant under the Missouri Constitution Article VI § 19(a).

The City of St. Charles is a constitutional charter city. *State ex Inf. Hannah v. City of St. Charles*, 676 S.W.2d 508, 509 (Mo. banc 1984). By virtue of Article VI Section 19(a) of the Missouri Constitution, constitutional charter cities have all the power that the legislature could grant. *St. Louis Children's Hospital v. Conway*, 582 S.W.2d 687, 690 (Mo. banc 1979). Section 19(a), adopted in 1971 provides:

> **Power of charter cities, how limited**. Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

Cooperative Home Care, Inc., 514 S.W.3d 578 (Mo. banc 2017).

Pursuant to its home rule authority, the electorate of the City of St. Charles approved the adoption of its Charter in 1981. *Hannah*, 676 at 509; §1.1 St. Charles Charter. The Charter specifically incorporates the language of §19(a):

> **SECTION 2.1 POWERS**.
>
> The city shall have all powers which the General Assembly of the State of Missouri has authority to confer upon any city, provided such powers are consistent with the Constitution of this State and are not limited or denied either by this charter or by statute. The city

shall, in addition to its home rule powers, have all powers conferred by law.

In accordance with these provisions and the authority granted it by the Missouri Constitution, the City also adopted § 12.3, which reads:

> **SECTION 12.3 NOTICE OF SUITS**.
>
> No action shall be maintained against the city for or on account of an injury growing out of alleged negligence of the city unless notice shall first have been given in writing to the mayor within ninety days of the occurrence for which said damage is claimed, stating the place, time, character and circumstances of the injury, and that the person so injured will claim damages therefor from the city.

There is no state notice of claim statute applicable to the City of St. Charles – or any other Constitutional Charter City with a population under 100,000. Section 12.3 of the St. Charles Charter is similar, but not identical to certain notice of claim statutes applicable to other municipalities in the State of Missouri. One such statute, § 82.210, applies to Constitutional Charter Cities with populations over 100,000. Section 82.210 reads:

> No action shall be maintained against any city of this state which now has or may hereafter attain a population of one hundred thousand inhabitants, on account of injuries growing out of any defect in the condition of any bridge, boulevard, street, sidewalk or thoroughfare in said city, until notice shall first have been given in writing to the

> mayor of said city, within ninety days of the occurrence for which such damage is claimed, stating the place where, the time when such injury was received, and the character and circumstances of the injury, and that the person so injured will claim damages therefore from such city.

Section 82.210.

St. Charles' charter provision requires notice of claims in more instances than the state notice of claim statutes applicable to various types of municipalities. Constitutional charter cities can establish their own procedures and limitations unless a statute is "so comprehensive and detailed as to indicate a clear intent that it should operate as both authorization and limitation." *Cape Motor Lodge*, 706 S.W.2d at 212, quoting Missouri Local Government at the Crossroads: Report of the Governor's Advisory Council on Local Government Law, p.5 (1968). If the ordinance is not preempted by statute and St. Charles acted within the constitutional parameters of Article VI § 19(a) and its own charter, the court will uphold the ordinance. *Cooperative Home Care, Inc.*, 514 S.W.3d at 578. A charter city is not required to exercise delegated powers in "precisely the same manner as prescribed by the general law of the state," but local legislation cannot create an inconsistent or irreconcilable conflict with state law. *Id. citing Missouri Bankers Ass'n, Inc. v. St. Louis Cnty.*, 448 S.W.3d 267, 272 (Mo. banc 2014).

Under this framework, and as fully set out herein, St. Charles' Charter provision §12.3, must be upheld by this court as no statute preempts its application and St. Charles enacted §12.3 in accord with the power granted to it by the Missouri Constitution Article

VI § 19(a) and by its own charter in §2.1. Furthermore, as explained below, § 12.3 is neither limited nor denied by any state statute and is therefore constitutionally valid and the trial court's ruling should be affirmed.

B. Statutes and Ordinances requiring timely notice are constitutional and are not in conflict with existing statutes.

This Court has already held that the statutes requiring notice of claims against municipalities are constitutional and that they do not conflict with the general statute of limitations (§ 516.120), or the waiver of sovereign immunity statute (§ 537.600.1). *Findley*, 782 S.W.2d at 394. Notice statutes protecting municipalities have been in place for more than 100 years. *See generally Waisblum v. City of St. Joseph*, 928 S.W.2d 414, 417 (Mo. App. W.D. 1996), Pursuant to the current state level statutes, notice within 90 days "is a ***condition precedent*** to maintaining an action against the city if the action arises from a defect in the condition of any bridge, boulevard, street, sidewalk, or thoroughfare." *Jones v. City of Kansas City*, 15 S.W.3d 736, 737 (Mo. banc 2000), *citing Dohring v. Kansas City*, 71 S.W.2d 170, 171 (1934) (internal quotations omitted) (emphasis added). "Failure to adhere to the notice requirements of the statute is fatal to the action." *Williams v. City of Kansas City*, 782 S.W.2d 64, 67 (Mo. banc 1990). Like the §82.210[2] analyzed by the *Jones* court, Section 12.3 of the City of St. Charles Charter requires notice be made to the mayor within 90-days of the place, time, character and

[2] Each of the four state notice statutes applying to Third Class Cities (§ 77.600), Fourth Class Cities (§ 79.480), Special Charter Cities (§ 81.060) and Charter Cities with over 100,000 inhabitants (§ 82.210), are treated identically when analyzed by the Courts. *See, generally, State ex rel. Sasnett v. Moorhouse*, 267 S.W.3d 717, 723 (Mo. App. W.D. 2008), *Schumer By and Through Schumer v. City of Perryville*, 667 S.W.2d 414, 416 (Mo. banc 1984), *Waisblum*, 928 S.W2d at 416.

circumstances of the injury, and that the person so injured will claim damages therefor.[3] In the present case there is no dispute that: (1) Appellant alleged a dangerous condition of a bridge led to his bicycle accident; and (2) Appellant did not give notice to St. Charles within 90-days of the accident (LF 2, AB at pg. 4).

In *Findley v. City of Kansas City*, the Missouri Supreme Court analyzed the 90-day notice requirement contained in R.S.Mo. §82.210 and found it a constitutional condition precedent to suit against a municipality under §537.600.1, and not in conflict with the general statute of limitations in §516.120. *Findley*, 782 S.W.2d at 394. Findley was injured when she tripped and fell on uneven pavement on a city sidewalk. *Id.* She did not comply with the 90-day notice statute and her case was dismissed with prejudice. *Id.* Findley argued that the notice of claim statute conflicted with the 5-year statute of limitations for a personal injury claim. *Id.* The court held that despite having the same practical effect as a statute of limitations, the notice of claim statute is rooted in sovereign immunity. *Id.* at 395. Notice statutes "are terms and conditions imposed by the government on the government's waiver of its immunity." *Id.* at 396. Since legislature can "constitutionally impose sovereign immunity by statute," it can also limit that immunity and impose certain conditions precedent, such as notice within 90 days. *Id. citing Winston v. Reorganized School District R-2*, 636 S.W.2d 324, 328 (Mo. banc 1982).

[3] §12.3 requires notice in more instances than the state level notice statutes such as §82.210, however, all would have required Appellant to give notice to the mayor within 90-days of his claim of injury allegedly arising from the condition of a bridge.

Findley next argued that the notice statute denied equal protection because it "creates two classes of tortfeasors (municipal and non-municipal) and two classes of injured persons, those injured by municipal negligence who must notify the mayor within ninety days of their accident or lose their ability to seek damages, and those injured by non-municipal negligence, who may wait five years to bring suit." *Id*. The court rejected this argument and held that by "permitting suits against a municipality only where an injured person has complied with a notice of claim provision, the legislature has chosen to permit suits against Cities only in narrow circumstances. *Id*. Further, the notice provisions are "rationally related to the legislature's desire to minimize a municipality's exposure to liability claims." *Id.* The court pointed out that such reasons include: allowing cities to investigate and defend against claims (*Travis v. Kansas City*, 491 S.W.2d 521, 524 (Mo. banc 1973)); protecting a city against old claims by giving it the opportunity to investigate "promptly while witnesses are available," (*Plater v. Kansas City*, 68 S.W.2d 800, 803 (Mo. 1933)); permitting "investigation before time changes the conditions or obscures the memory of witnesses," (*Wolf v. Kansas City*, 246 S.W.236, 239 (Mo. 1922)); and to "permit the city to correct dangerous conditions promptly so as to avoid additional risk to its citizens and visitors and exposure to liability." *Id*. The court noted that while the notice statute can have a "harsh result" (such as in Ms. Findley's case), notice of claim statutes limit a city's liability and protect the "public coffer" and are therefore constitutional. *Id*.

Here, as in *Findley*, Appellant alleges that he was injured by the condition of public property – in this case a bridge – for which he did not give notice within the

proscribed 90-day period. (AB pg. 4.) Procedurally, the present case and *Findley* are identical, in that the circuit court dismissed Appellant's cause of action for failure notify the city. Appellant here similarly asserts that § 12.3 of the City Charter requiring notice as a condition precedent to suit conflicts with the 5-year statute of limitations contained in R.S.Mo. § 516.120 and therefore, is invalid and unenforceable. AB pg. 19-22. As set forth by the Missouri Supreme Court in *Findley* however, it is within the purview of the government to limit how and when it will be subjected to suit[4]. Since the notice requirement contained in § 82.210 does not conflict with the general statute of limitations or § 537.600.1, St. Charles Charter § 12.3 likewise cannot be found in conflict as it reaches the same rational purpose and function of limiting municipal liability and protecting the "public coffer."

C. Appellant's reliance upon Heater, Gates, and Waisblum is misplaced as none of these cases are factually similar.

Plaintiff directs this Court to cases which are inapposite to the present case. *Heater v. Burt* involves a notice of claim charter provision analyzed under Article VI § 19, not Article VI §19(a) like case before this court. *Gates v. City of Springfield* relates to the analysis of a notice of claim charter provision in Springfield where § 82.210 actually applied and the two conflicted. And *Waisblum* simply concerned whether § 82.210 even applied to a constitutional charter city with a population under 100,000, which it does not.

[4] It is worth noting that *Findley* did not limit its holding to claims related to "discussion of notice of claim statutes to the conditions of bridges, boulevards, streets, sidewalks for thoroughfares, rather, it broadly addressed the right of governmental entities to limit the instances in which they consent to be sued.

1. *Heater v. Burt*, 769 S.W.2d 127, 128 (Mo. banc 1984)

Heater v. Burt, relied on by Appellant for the proposition that municipal notice of claims charter provisions are unconstitutional, is inapplicable as it is analyzed under a different constitutional framework than the present case. In *Heater*, the court analyzed a notice of claim ordinance passed by the City of Florissant pursuant to Article VI § 19. *Heater v. Burt*, 769 S.W.2d 127, 128 (Mo. banc 1984). The court noted that charter provisions must "be tested by the constitutional provision in effect at the time of the charter's adoption…not by a constitutional provision subsequently adopted. *Id*. at 128-29, *quoting Gates v. City of Springfield*, 744 S.W.2d 487, 489 (Mo. App. W.D. 1988; *City of Kansas City v. St. Paul Fire & Marine Ins. Co*., 639 S.W.2d 903, 905 (Mo. App. W.D. 1982). Specifically, § 19 required charter provisions to be "consistent with and subject to the Constitution and laws of the state." *Id*. The amended § 19(a), however, deletes that language and requires that charter provisions be upheld so long as they are "not limited or denied…by statute." *Id*. In striking the notice requirement in *Heater,* and the case it relied upon, *City of Kansas City v. St. Paul Fire & Marine Ins. Co.*, the court's analysis under § 19 was required because the charters pre-dated the 1971 amendment. *St. Paul Fire & Marine*, 639 S.W.2d at 905. Although the court found Florissant's notice of claim charter provision violated the 5-year general statute of limitations under § 19, the court specifically declined to opine whether or not the limitation at issue would pass muster under the amended Constitution. *Id.*

Judge Welliver's thoughtful dissent in *Heater*, is instructive. Judge Welliver points out that "Never before have any of the [notice of claim] statutes been held to be in

conflict with the general statute of limitations." *Heater*, 769 S.W.2d at 130. The majority opinion creates an untenable result because it holds that the notice of claim requirement unconstitutionally violates the general statute of limitations if passed by a city, but not if passed by the state legislature. *Id*. It defies logic that it is not the notice of claim that violates the statute of limitations, it is the entity that imposes the notice of claim requirement. The only logical interpretation of the majority opinion would be "that all cities in the future be deprived of the protection of the notice statutes." *Id*.

The City of St. Charles Charter was approved by the citizens on November 3, 1981; therefore, *Heater* and *St. Paul Fire and Marine* are inapplicable because they were analyzed under Article VI § 19. Section 12.3 must be analyzed under the broad grant of power contained in §19(a). Following *Heater*, this Court decided *Findley*, which is controlling. As set out *supra* in *Findley* notice of claim requirements do not conflict with the general statute of limitations or any other statute. Thus, the trial court did not err in granting St. Charles' Motion to Dismiss, and Appellant's point should be denied.

2. *Gates v. City of Springfield*, 744 S.W.2d 487 (Mo. App. S.D. 1988)

Appellant incorrectly relies upon *Gates* to argue that the St. Charles Charter provision conflicts with § 82.210. In *Gates v. Springfield*, Plaintiff alleged injuries from a motor vehicle accident. *Gates v. City of Springfield*, 744 S.W.2d 487 (Mo. App. S.D. 1988). The notice provision contained within Missouri statute §82.210, requiring notice for claims related to certain dangerous condition of property claims (i.e., bridges, sidewalks, and streets), applied to the City. *Id*. at 488. The City of Springfield also enacted a separate ordinance requiring notice within 90 days for ***any*** tort claim against

the city and required notice be made to the City Manager as opposed to the Mayor as set out in §82.210. *Id.* at 487-88. The court specifically found that the "circumstances under which notice of claims is required as a condition precedent to bringing an action for negligence against constitutional charter cities ***of one hundred thousand population*** have been limited by statute" and a "charter provision expanding such circumstances or imposing different conditions precedent [notice to different officials] exceeds the statutory limit." *Id.* at 490 (emphasis added). Importantly, because §82.210 applied to Springfield as a charter city with a population over 100,000, there was an actual conflict with the Ordinance because §82.210 already dictated how and to whom notice is to be given. *Id.*

Section 82.210 does <u>not</u> apply to the City of St. Charles. St. Charles is a constitutional charter city with a population under 100,000. Thus, unlike *Gates*, here no state notice of claim statute applies to St. Charles. Contrary to *Gates*, where both §82.210 and an ordinance conflicted, here there is only a single charter provision setting out the types of claims requiring notice and what notice is required, so there is no discord. *Gates* is therefore inapplicable, and the dismissal should be affirmed.

3. <u>Waisblum v. City of St. Joseph</u>

Appellant's reliance upon *Waisblum v. City of St. Joseph* is similarly flawed. In *Waisblum* the court analyzed whether § 82.210 itself applied to the City of St. Joseph, not whether the City of St. Joseph could have enacted an ordinance requiring notice similar to § 82.210. *Waisblum*, 928 S.W.2d 414. The City of St. Joseph urged the Court to look to the intent of the legislators when the notice statutes were originally enacted and find

that notice was required despite the plain language of §82.210. *Id.* at 417. The court reviewed the fascinating history of the notice statutes in Missouri:

> …prior to 1975, Missouri had four classes of cities: first, second, third and fourth. Historically, there was a statute applicable to each classification, which required that written notice of a claim for personal injury arising out of a defect in certain city property be given to the mayor within a specified number of days of the occurrence. *See* § 73.950, RSMo 1969; § 6454, RSMo 1929; *Cole v. City of St. Joseph,* 50 S.W.2d 623 (Mo.1932); § 75.860, RSMo 1969; § 5724, RSMo 1899; *Jacobs v. City of St. Joseph,* 127 Mo.App. 669, 106 S.W. 1072 (1908); § 77.600; and § 79.480. By 1975, all first- or second-class cities had chosen to become constitutional charter cities. 1 *Mo. Bar Local Government Law,* § 1.10 (Mo. Bar 2d ed.1986, 1990). Consequently, that same year, the General Assembly repealed all chapters of the Missouri statutes dealing with first- and second-class cities and eliminated all references thereto. *Id.* At the present, only four notice of claim statutes exist: § 77.600, governing third class cities; § 79.480, governing fourth class cities; § 81.060, governing special charter cities; and § 82.210, governing constitutional charter cities… In *Kieffer v. City of Berkeley,* 508 S.W.2d 295 (Mo.App. E.D.1974), the Eastern District of this court commented on the historical basis for the population requirement contained in § 82.210. "The Court stated: Although [§ 82.210] appears in the chapter with regard to constitutional charter cites, by its terms it applies to cities containing a population of at least 100,000 inhabitants.... This population requirement set forth in the statute was no doubt included because Article IX, Section 16, Constitution of 1875, which was in effect

> when § 82.210 was enacted in 1913, authorized adoption of a charter form of government in cities having a population of more than 100,000 inhabitants. By Article VI, Section 19, Constitution of 1945, V.A.M.S., this requirement was reduced to 10,000; and later, by amendment adopted October 5, 1971, to 5,000, but the statute was never changed."[5]

Id. While the court found merit in St. Joseph's argument that notice should be required based upon the historical application of the notice requirement to all classifications of cities, it could not ignore the plain language of §82.210, including its population requirement. *Id*. Since St. Joseph's population was under 100,000, §82.210 did not apply and Plaintiff was not required to comply with its notice provisions. *Id*.

As in *Waisbaum*, §82.210 by its plain language does not apply to St. Charles because St. Charles has a population of less than 100,000. Nothing in *Waisblum* found that St. Joseph could not have enacted a charter provision similar to §12.3 in St. Charles. In fact, the Court in *Waisblum* indicated that St. Joseph should be protected by a notice of claim statute as all municipalities had been prior to the constitutional amendments changing the population requirements for constitutional charter cities from 100,000 down to just 5,000. Thus, Waisblum is instructive as to the history of the state notice of claim statutes, but is irrelevant to the issues before this court in the present case. As discussed below, *Carlson* and *Cape Motor Lodge* demonstrate that St. Charles Charter §12.3 is

[5] As noted by Appellant, the state notice statutes cover "563 of Missouri's approximately 601 cities, or approximately 93.7% of all Missouri cities." (AB pg. 11.) Appellant does not point to any statute or Constitutional provision which prohibits the remaining 38 municipalities from enacting notice requirements or that expressly permits individuals to sue these 38 municipalities without giving prior notice. It is nearly unimaginable that the State of Missouri would segregate 6.3% of its cities in such a manner.

neither limited, denied or in conflict with either §82.210 or §537.600.1(2), as neither of these statutes prohibit St. Charles from enacting a notice provision. As such, the lower court's dismissal should be affirmed.

Moreover, the *Waisblum* Court's history lesson raises serious equal protection concerns. The equal protection clause of the Missouri Constitution provides "that all persons are created equal and are entitled to equal rights and opportunity under the law." MO. CONST. art. I, sec. 2. *Glossip v. Missouri Dep't of Transp. & Highway Patrol Employees' Ret. Sys*., 411 S.W.3d 796, 801 (Mo. 2013). By denying St. Charles the power to enact a notice provision at least as broad as those enacted by the Missouri legislature for other categories of cities, the Court of Appeals opinion in effect subjects constitutional charter cities with populations less than 100,000, and their residents, to increased exposure to lawsuits and claims and the accompanying burden on the taxpayers. The purpose behind notice of claim statutes is to protect the public coffers and give municipalities an opportunity to correct dangerous conditions. By refusing to permit constitutional charter cities with populations under 100,000, to protect themselves in accordance with the grant of power given them in the Missouri Constitution, the Court of Appeals for all practical purposes, increases the risk of financial burden of hundreds of thousands of Missouri citizens simply because they live in the 15% of municipalities not subject to a state statute. Such a result should not be condoned.

D. St. Charles is permitted to supplement state law and create additional requirements by and through its Charter without a resultant conflict.

Considerable latitude is granted to a constitutional charter city in the exercise of its powers. *ACI Plastics, Inc., v. City of St. Louis*, 724 S.W.2d 513, 516 (Mo. banc 1987). If a charter city's power to adopt an ordinance is challenged, the Court will uphold the ordinance upon finding: (1) the ordinance is not preempted by statute; and (2) the locality acted within the constitutional parameters of the authority delegated to it in its charter. *Cooperative Home Care, Inc.*, 514 S.W.3d 578 (Mo. banc 2017).

"Where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective." *LaRose*, 524 S.W.2d at 117, *citing* 56 Am.Jur.2d, Sec. 374, p. 409. The test to determine if there is a conflict between an ordinance and a statute is "whether the ordinance 'permits what the statute prohibits' or 'prohibits what the statute permits.'" *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 211 (Mo. banc 1986) *see also State ex rel. Teefey v. Bd. Of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 685 (Mo. banc 2000) ("Ordinances may supplement state laws without creating a conflict, but when the expressed or implied provisions of each are inconsistent or in irreconcilable conflict, then the statutes annul the ordinances."). If a charter city's power to adopt an ordinance is challenged, the Court will uphold the ordinance upon finding: (1) the ordinance is not preempted by statute; and (2) the locality acted within the constitutional

parameters of the authority delegated to it in its charter. *Cooperative Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 578 (Mo. banc 2017).

In *City of Kansas City v. Carlson*, the Western District evaluated whether Kansas City's smoking ban ordinance conflicted with the Indoor Clean Air Act (ICAA), R.S.Mo. §191.765-191.777." *Carlson*, 292 S.W.3d at 369-70. The ICAA's definition of public places specifically excluded bars and restaurants, however, the ordinance defined public places as inclusive of bars, restaurants, and pool halls, thereby banning smoking in these establishments. *Id*. at 370. Carlson, a restaurant and pool hall owner, argued that the ordinance conflicted with the ICAA and was therefore void. *Id*. Carlson asserted that because the definition of "public places" was different in the ICAA and the Ordinance, the two were in irreconcilable conflict and the Ordinance should be invalidated. *Id*. The court disagreed. *Id*. at 373-74.

The *Carlson* court reasoned that while the "ICAA states that its regulation of smoking in 'public places' does not include bars," it does not state that smoking in bars is "affirmatively granted" and it does not say that "smoking in bars cannot be prohibited by Cities." *Id*. at 373. Legislature could have included these grants or prohibitions, but did not, and therefore the ordinance does not conflict with the express language in the ICAA. *Id*. Furthermore, the court held that there is no "inherent conflict where a statute and an ordinance define terms differently." *Id*. at 374, *citing State ex rel. Teefey*, 24 S.W.3d at 685 ("Ordinances may supplement state laws without creating a conflict.), *See also LaRose*, 524 S.W.2d at 117 (Where State law prohibits certain conduct, and the ordinance prohibits more conduct of a similar nature, there is no conflict.)

In *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, Plaintiffs sought to invalidate an ordinance authorizing Cape Girardeau to enter into an Agreement with Southeast Missouri State University (SEMO) for the joint financing and construction of a Multi-Use Center and the accompanying ordinances issuing bonds and levying taxes to finance the project. *Cape Motor Lodge, Inc.*, 706 S.W.2d 208 at 209. Plaintiffs asserted that the ordinances were invalid because they conflicted with the Missouri Constitution and statutes. *Id.* at 210. Plaintiffs argued that Article VI, § 16 and its enabling statute, §70.220, permit a municipality to contract with certain enumerated entities to construct "any public improvement or facility," but that SEMO was not one of the specifically permitted entities resulting in an irreconcilable conflict with §16 and §70.220. *Id*. at 210-11. This Court disagreed. *Id*. at 212. Quite the contrary, the Court held that Article VI § 16 and R.S.Mo. §70.220 "contain no indication that the express enumerations of the entities named are to be considered as the exclusion of others not named." *Id. citing Bohrer v. Toberman, 227 S.W.2d 719 (Mo. banc 1950)*. Furthermore, §70.220 does not contain any "expressions that the legislature intended to preempt the area of limited cooperative agreements to only those entities named in the statute. *Id.* If this had been the legislative intent it could have so stated." *Id. citing Page Wester, Inc. v. Community Fire Protection Dist. Of St. Louis County*, 636 S.W.2d 62, 66 (Mo. banc 1982); *Comment*, State-Local Conflicts Under the New Missouri Home Rule Amendment, 37 Mo.L.Rev. 677 (1972). The court reasoned that the legislature actually "stated its intent to enable municipalities to effect economic development" by enacting §72.220 and did specifically articulate that its intent was to exclude the types of entities a city can contract with. *Id*. at

213, *citing School Dist. Of Kansas City v. Kansas City*, 382 S.W.2d 688, 692 (Mo. banc 1964). Thus, the Court held that the ordinance was not inconsistent with the statute as it did not "clearly and undoubtedly contravene some constitutional provision." *Id.*

As in *Carlson* and *Cape Motor Lodge*, there is nothing in §82.210, that prohibits constitutional charter cities with populations under 100,000 from enacting notice of claim charter provisions. Similar to *Carlson* and *LaRose*, there is nothing contained in § 82.210, that limits constitutional charter cities with populations under 100,000 such as St. Charles, from prohibiting "more conduct of a similar nature" than the state law prohibits. Although the state laws, such as § 82.210, prohibit suits against certain municipalities related to bridges, sidewalks, streets, and thoroughfares without notice, as set out in *Carlson* and *LaRose*, St. Charles can prohibit more conduct without creating a conflict. Further, identical to *Cape Motor Lodge*, nothing in § 82.210 expresses that the legislature intended to preempt the area of notice, especially not as to constitutional charter cities with populations under 100,000. Like the statutes at issue in *Carlson* and *Cape Motor Lodge*, neither §82.210 nor §537.600.1(1) affirmatively permits suits against charter cities with populations under 100,000 without notice, nor do they prohibit charter cities with populations under 100,000 from enacting their own notice of suit ordinances. Finally, as in *Carlson* and *Cape Motor Lodge*, the state legislature could have included these grants or prohibitions but did not do so. Thus, §12.3 of St. Charles' Charter should be upheld because it is not inconsistent with the statute in that it does not "clearly and undoubtedly contravene some constitutional provision."

E. The Court of Appeals erred in striking the entirety of §12.3 because it did not make a determination that St. Charles would not have enacted §12.3 if it did not include all claims of negligence.

"When an ordinance's provision is found to be invalid, the Court will not declare the entire ordinance void unless it determines that the municipality would not have enacted the ordinance without the invalid portion." *City of St. Peters v. Roeder*, 466 S.W.3d 538, 547 (Mo. 2015), citing *Pearson v. City of Washington*, 439 S.W.2d 756, 762 (Mo. 1969). *See also State ex rel. City of St. Louis v. Mummert*, 875 S.W.2d 108, 109–10 (Mo. banc 1994); *Heidrich v. City of Lee's Summit*, 916 S.W.2d 242, 251 (Mo. App. 1995).

Section 12.3 requires notice of claims arising out of alleged negligence of the city. State notice of claim statutes, such as §82.210 require notice of claims arising out of alleged defects in the condition of boulevards, bridges, sidewalks, and thoroughfares. Even if the Court of Appeals believed the breadth of §12.3 exceeded the authority granted by Article VI § 19(a) because of the difference in claims for which notice is required, it should not have completely stricken the Charter provision. Rather, the Court of Appeals should have at a minimum preserved §12.3 to the extent it required 90-days' notice of claims of dangerous condition of "bridges, boulevards, streets, sidewalks, and thoroughfares," to be identical to state statutes. The Court of Appeals made no determination that St. Charles would not have enacted § 12.3 absent the inclusion of all negligence claims as would be required in order to invalidate the entire charter provision. Moreover, had the Court of Appeals stricken only the portion of the provision it deemed too broad, reversal would have been entirely unjustified since Appellant's sole claim is

that there was a dangerous condition of a bridge, which would have required 90-days' notice under the state statutes as well as the St. Charles Charter, and which Appellant concedes he did not provide.

CONCLUSION

This is a matter of first impression which necessitates interpretation by this honorable court. Notice of claim statutes enacted by the State legislature have been challenged and this court held them to be constitutional. Ordinances and charter provisions supplementing state law by creating additional requirements have likewise been upheld as constitutional and not in conflict with existing state statutes. Nevertheless, the Court of Appeals' flawed analysis resulted in it erroneously striking the entirety of §12.3 of the St. Charles Charter. The ensuing implication and impact on hundreds of thousands of Missouri citizens living in 15% of Missouri's municipalities is unjustifiable and baseless. St. Charles respectfully requests this honorable Court affirm the dismissal of Plaintiff's Amended Petition for failure to provide notice of his claim within 90 days.

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

i. That the attached Respondent's brief (SC99419) complies with the requirements of Supreme Court Rule 55.03.

ii. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 6,844 words and 575 lines of text, including this certification as performed by Word software; and

iii. That a true and correct copy of this brief was electronically filed directly with the Court of Appeals for the Eastern District of Missouri, on this 18th day of May, 2022, and that the files were scanned for viruses and are virus free; and

iv. That Appellant's counsel will receive service of this brief via the court electronic filing system and via email at:

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