

No. 87207

**In the
Supreme Court of Missouri**

CITIES OF WELLSTON and)	
WINCHESTER, MISSOURI, et al.,)	
on behalf of themselves and all)	
others similarly situated,)	On Appeal from the Circuit
)	Court of St. Louis City,
Plaintiffs-Appellants,)	State of Missouri
)	
v.)	No. 044-02645
)	
SBC COMMUNICATIONS, INC.,)	Honorable David L. Dowd,
et al.,)	Judge Presiding
)	
Defendants-Respondents.)	

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Defendants' *amicus* suggests that if the people do not like what is transpiring in the general assembly, their recourse is "to vote those officials out of office." (NCSL.Br. at 7.) But when the Missouri Constitution is at issue, the law is exactly the opposite. It is those groups who want to avoid the public aid, special law, and corporate debt restrictions in Article III, not just those who can persuade the general assembly to grant a tax exemption, which must resort to the ballot and seek a constitutional amendment. The people, on the other hand, are not limited to registering their complaint at the ballot box or to battling special interest groups in the halls of Congress: the Missouri Constitution is their first line of protection.

I. SPECULATIVE, FUTURE REVENUES DO NOT CONSTITUTE VALID CONSIDERATION UNDER ARTICLE III, § 39(5) FOR HB 209's DISCHARGE OF THE TAX INDEBTEDNESS, LIABILITY OR OBLIGATION DUE THE MUNCICIPALITIES.

A. Indebtedness, Liability or Obligation

Relying heavily on Beatty v. State Tax Commission, the SBC Defendants contend that Article III, § 39(5) does not apply because the Cities do not seek a liquidated sum and their right to collect is uncertain. (Resp.Br. at 31-37). Nearly all of their arguments rest on this flawed premise: because the tax does not satisfy Beatty's "fixed...sum certain" standard, it cannot qualify as a protected "indebtedness, liability or obligation" within the meaning of Article III, § 39(5). The telecom carriers are alone in their belief that Beatty governs these claims. Certainly, the general assembly did not believe that these tax

obligations were beyond the scope of constitutional safeguards, because they proffered “consideration... for the immunity and dismissal of lawsuits...” 92.089.1, RSMo. The general assembly had to conclude, and the Cities agree, that these are constitutionally-protected debts, liabilities or obligations, otherwise no “consideration” would have been required. Thus, a Beatty analysis is unnecessary.

The Cities further dispute SBC’s premise that its past tax obligations are “speculative” and not “fixed.” This is based on the mistaken assumption that a levy and assessment were required, as in a real estate context (Beatty), before which the amount due could not have been known or ascertained. The SBC Defendants fail to cite any authority for imposing a “levy and assessment” requirement on license taxes, except for inapposite references to 144.250.4, RSMo (requiring the director of revenue to estimate and assess the amount of state sales taxes owed when a delinquent fails to file a return) and 143.611.2, RSMo (the same with respect to state income taxes).¹ Their premise

¹ Even if these provisions could be extended to third-class and fourth-class cities (which are not mentioned therein), and further extended to license taxes (which are not mentioned therein), they would not afford the SBC Defendants relief, because each provision excuses an assessment in cases of “evasion.” Surely, SBC meets this definition, because, as alleged in the petition, Defendants have ignored demand letters, resisted efforts to ascertain the amount of taxes owed, and refused to cooperate in audits or inspections of their books (as authorized by the ordinances). [See, e.g., R-39 to R-41.] It

surely must be mistaken, if, over the course of 114 pages, the SBC Defendants cannot cite a single case holding that license tax collection requires a “levy and assessment.” (The Cities are not aware of any authority either.)

This is understandable. Unlike real estate taxes based on “value,” there is no comparable uncertainty with respect to license taxes, which typically are due each month and at a specified rate. Cf. Southern Building & Loan v. Norman, 32 S.W. 952, 954 (Ky.App. 1895) (“[i]t is practically impossible to compare a tax rate fixed on property on the *ad valorem* system with a rate fixed without reference to the value of property, but as

would be a novel defense indeed if a company could refuse all audit requests and then claim that no taxes are owed because the amounts due are “speculative” and “uncertain.”

To paraphrase the argument of the *amici*:

In this litigation, the carriers themselves have controlled when their tax liability will be calculated through their refusal to report the amount of their gross receipts.

That, however, does not mean that the amounts are not now ascertainable. The actual amount of the carriers’ gross receipts is a matter of historical fact, even though the carriers have kept that information secret. Thus, the precise amount of the tax liability of each defendant is “fixed as a sum certain”; it should not matter that the defendants themselves are the only ones who presently know what those amounts are.

(NLC/IMLA/NATOA/CTJ Br. at 19.)

a tax on the privilege of doing business”). If it were otherwise, there would be no way for T-Mobile, SBC, and all other businesses to report and pay taxes under the ordinances – as they have done for years. Further, the carriers would be unable to comply with the terms of HB 209, which impose the same requirements on a going-forward basis, albeit at a reduced rate. The amount of taxes due has been, and will continue to be, ascertainable through mere mathematical calculation. The term “fixed” means no more than capable of ascertainment by reference to a specified rate. See, e.g., Los Angeles Gas & Elec. v. City of Los Angeles, 126 P. 594, 596 (Cal. 1912) (“fix[ing] the amount of the license tax...is settled by another part of the ordinance as one-third of 1 per cent. of the gross receipts”; calculating the amount due is “purely ministerial”)

Thus, these taxes “vest” – immediately and always – each time “telephone service” occurs in a given municipality. See, e.g., State v. Youngstown Mining Co., 121 So. 550, 552 (Ala. 1929) (“The right of the state to collect a license or privilege tax provided for by the [Revenue Code of 1919] became, in a legal sense, vested in the state upon the mining of coal...The ascertainment of [the] amount due is a ministerial and not a judicial act...The excise tax...[imposed on the mining company]...is measured by a described per tonnage exaction based upon its corporate activity or the exertion of its corporate functions. And when so exercised the tax in question becomes a vested right in the state.”); Ernie Patti Oldsmobile, Inc. v. Boykins, 803 S.W.2d 106, 108 (Mo.App.E.D. 1990) (“[c]learly, retrospective repeal of the ordinance in question would impair the City’s ‘vested right’ to collect the license fee”), mtn. for rehearing and/or transfer to

Supreme Court denied.

Requiring a Beatty-type “assessment and levy” in this context would not only eliminate the self-reporting and payment of license taxes, but it would overrule Graham Paper v. Gehner and read the words “indebtedness, liability or obligation” out of Article III, § 39(5) altogether. The Court in Graham Paper clearly understood the people’s intent in adopting Article III, § 39(5), when it stated: “The language of this constitutional provision [predecessor of Article III, Section 39(5)] is *very broad and comprehensive* in protecting the state against legislative acts impairing obligations due to it, in that it prohibits the release or extinguishment, in whole or in part, not only of indebtedness to the state, county, or municipality, *but liabilities or obligations of every kind...*[A]n inchoate tax, though not due or yet payable, is such a liability or obligation as to be within the protection of the restriction against retrospective laws, and for the same reason we must hold that *such inchoate tax is an obligation or liability within the meaning of the constitutional provision now being considered.*” Graham Paper Co. v. Gehner, 59 S.W.2d 49, 52 (Mo. banc 1933) (emphasis added).²

² SBC baldly asserts that “the Beatty Court [was] fully briefed on Graham,” (Resp.Br. at 37), but Graham is not mentioned or discussed – anywhere – in Beatty, lending further credence to Plaintiffs’ point that there are crucial differences between the treatment of real estate taxes (as in Beatty) and other taxes. Graham Paper it is not outmoded or quaint, and it has not been impliedly overruled (as the Defendants argued

Ultimately, SBC’s goal is not to require an “assessment and levy” of license taxes, for which there is no support, but to have this Court read the word “adjudicated” into Article III, § 39(5), meaning there would be no protection for municipalities in the absence of an “adjudicated indebtedness, liability or obligation.” (See e.g., Resp.Br. at 33) (“The Cities...do not have a constitutionally protected right to collect the taxes they seek because their claims are disputed.”) Such a reading would necessitate a judicial amendment of fundamental law and it would encourage scofflaws to devise creative “disputes” for avoiding the payment of taxes. The taxes, once challenged, would not become “due” or “fixed” or “certain” until all administrative and legal remedies had been exhausted, including appeals to the U. S. Supreme Court, nor would penalties and interest begin to run until there had been such a final adjudication. Needless to say, such a limitation does not comport with Article III, §39(5)’s “very broad and comprehensive” language,” Graham Paper Co. v. Gehner, 59 S.W.2d at 52, but, rather, it seeks to undermine it.³

below); on the contrary, it continues to be cited with approval by this Court and others post-Beatty.

³ See also State v. Youngstown Mining Co, 121 So. at 552 (“[I]f the view contended for by the receiver for the denial of the right of the state to collect past-due and accrued excise...taxes [prevailed], the provision[] of...the Constitution...denying the right of rescission or release of obligation or liability held by the state against persons,

Finally, SBC argues that “nothing has been extinguished” because 92.089.2, RSMo, permits municipalities to sue in the future, thus, Article III, § 39(a) is inapplicable. (Resp.Br. at 38.) Elsewhere they claim that “[b]eginning July 1, 2006, the Cities may reinstate *this* collection action, subject *only* to the TTA’s immunity provision.” (Resp.Br. at 45.) (Emphasis added.) The assertions are preposterous and they can only result from a fundamental misreading of HB 209.

These actions can *never* resume if HB 209 is upheld. The University City action was commenced in 2001 seeking to collect unpaid telephone taxes dating back to 1997; the Wellston action was commenced in 2004 seeking to recover back-taxes due for five years as well.⁴ Even if the Cities pursue collection actions beginning July 1, 2006, they will have to overcome an immunity provision that lets telephone companies off the hook if they simply believe that taxes are not owed. Assuming Plaintiffs can divine the intent of telephone executives and prevail, back-tax collection would be limited to “three years for the alleged nonpayment or underpayment of the business license tax,” 92.086.12, RSMo, and not go back farther than July 1, 2003. Contrary to SBC’s assertion, the only

associations, or corporations, would not be observed.”).

⁴ The Cities based their claims on a five-year statute of limitations. See Kansas City v. Standard Home Improvement Co., Inc., 512 S.W.2d 915, 918 (Mo.App.K.C. 1974).

possible reading of HB 209 is that claims for the years 1997 to mid-2003 *have* been extinguished. If HB 209 is allowed to stand, one group alone – the telephone industry – will have operated in Missouri over a 7-year period, unfettered by the license tax obligations of all other businesses. Certainly, the general assembly understood this reality – that claims have been extinguished – because, again, it found it necessary to proffer some sort of “consideration.”

B. Consideration

Nowhere in its brief does SBC dispute Plaintiffs’ contention that it earns substantial income from exchange access, interexchange access, special access, interconnection facilities and equipment for use, toll or long-distance, reciprocal compensation arrangements, and other sources or services (such as CallNotes), but refuses to report it and to pay taxes on it, even though it qualifies under the broad and all-encompassing definition of “gross receipts.” See Kirkwood Drug Co. v. City of Kirkwood, 387 S.W.2d 550, 554-55 (Mo. 1965) (“[i]n its usual and ordinary meaning, ‘gross receipts’...is the whole and entire amount of...receipts without deduction”), overruled on other grounds, citing Laclede Gas Co. v. City of St. Louis, 363 Mo. 842, 253 S.W.2d 832. SBC’s position is akin to the wage earner who earns a \$100,000 annual salary, but then decides, unilaterally, that he will only pay income taxes on \$65,000. Ignoring demand letters and audit requests, the wage earner waits for collection efforts to begin and then thwarts a speedy resolution by resorting to removal petitions, motions to dismiss, motions for summary judgment, multiple writs and appeals, discovery objections

and protective orders (see University City), until such time as the general assembly is able to create a tax exemption to further the state's economic development. According to the wage earner, this scenario creates no constitutional impediment under Article III, § 39(5), because the taxing authority is better-off without his tax payment: its "costly" litigation has ended and future tax streams will more than make up for any potential loss in revenue. Once more, the underlying premise is flawed.

The SBC Defendants contend that the "consideration" required by Article III, § 39(5) flows from the compromise of disputed litigation. They reason that the Cities have gained much, because the SBC Defendants waived a valid defense, not asserted below, to the effect that long distance and access service did not occur "within the city" as required by Winchester's and Wellston's ordinances (thus, no taxes are owed on such "gross receipts"). (Resp.Br. at 34-35.) Even if this argument had merit, and it does not,⁵ what

⁵ See, e.g., AT&T Communications of the Mountain States, Inc. v. Department of Revenue, 778 P.2d 677, 681-84 (Colo. banc 1989) ("The issue before this court is whether the sale of local telephone exchange network access services used in connection with interstate telephone calls is subject to sales tax under section 39-26-104(1)(c), 16B C.R.S. (1982), which taxes 'all intrastate telephone and telegraph service.' ...Evidence presented at trial in this case showed that access services and long distance calls are not one indivisible product, as ATTCOM contends, but are separate, identifiable, and quantifiable services...Other telecommunications cases consistently have held that the

defenses justify SBC's failure to pay "gross receipt" taxes on other income earned "within the cities," such as revenue derived from end user common line (EUCL) charges, CallNotes, reciprocal compensation arrangements, and other services alleged in Plaintiffs' Amended Petition. No defenses are asserted in Respondents' Brief, thus, the record is silent on the "consideration" for these lost revenue streams.

More fundamentally, how can it be said that SBC has "waived a valid defense" to these claims? HB 209's telecommunications tax uses terms largely identical to those above – "doing business within the borders of [a] municipality" (92.077.(1), RSMo) – which "boundary" language currently is found in the ordinances of Blue Springs and Maryland Heights, among others. [See University City Record on Appeal at R-827 and R-918 (Appeal No. 87208).] Since SBC failed to pay license taxes on long distance and access to these cities in the past, can we now trust SBC – on faith – to do so under this language in the future? If not, then what "valid defense" has been waived and what have these cities gained? Conversely, if SBC does pay in the future, it is an admission that such taxes were owed, under existing ordinances, at all times during the past five (5) years. Simply put, the fact that SBC is not required to forego its stated defenses is further

interstate nature of telecommunications does not necessarily mean that its component parts are indivisible and exempt from state taxation." *Held*: "We conclude that access services are intrastate telephone services within the meaning of the Colorado sales tax law...").

confirmation that HB 209's "consideration" is illusory.

Perhaps realizing this, the SBC Defendants suggest other benefits to off-set the Cities' loss in revenue, to wit: "[b]y granting municipalities *continued permission* to tax telecommunications companies, the General Assembly provided substantial consideration." (Resp.Br. at 40.) (Emphasis added.)⁶ After a statement like this, there seems to be little need to further discuss Article III, § 39(5). It is an admission that the Cities already possess the right to tax telephone service and that they are gaining nothing in the future. Thus, going forward, the carriers may or may not comply with *existing* tax law (depending upon whether they choose to waive their "defenses"), and if they do, it will be at an arbitrary and reduced rate. It follows, *ipso facto*, that no consideration flows to the municipalities under HB 209 – either from the general assembly or the carriers – because they possess no rights, benefits or privileges beyond that which they had at the outset. See, e.g., State ex rel. Kansas City v. State Highway Commission, 163 S.W.2d 948, 953 (Mo. banc 1942) (If "we examine the contract before us carefully it will appear that the commission gave up no privileges, powers or immunities and assumed no obligations except those which were imposed upon it in any event by the statute. The mere promise to do that which the statute required it to do in any event could not

⁶ This parallels a comment by Defendants' *amicus* about the power of the state legislature "to abolish its cities entirely if it so chose," (NCSL.Br. at 10), as if a municipality's continued existence should be gratitude enough under Article III, § 39(5).

constitute a consideration.”).⁷

There is no authority for the proposition that a tax due, owing and paid in 2007 can suffice for non-payment of the same tax due and owing in 2002. Moreover, to rest legal “consideration” on such a tenuous thread, namely, a carrier’s promise to pay in the future, is fraught with peril. Although the SBC Defendants dismiss the idea that “a carrier might stop operating” in a city as “speculative,” (Resp.Br. at 40), it is a documented fact. In

⁷ In addition, SBC suggests that HB 209 “confers consideration by expanding municipal tax bases...[because it]...permits municipalities to tax wireless and intrastate long-distance revenues, which were previously not included in the tax base.” (Resp.Br. at 42.) This argument overlooks the plain language of HB 209, wherein it is stated that any prospective tax “shall have a revenue-neutral effect.” 92.086.6, RSMo. Moreover, it depends upon the thoroughly discredited notion that wireless carriers are not “telephone companies” within the meaning of Plaintiffs’ gross receipt tax ordinances. See, e.g., City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc., 14 S.W.3d 54, 59 (Mo.App.E.D. 1999) (“The [wireless] services Southwestern Bell provided clearly fell within the definition or genus of a telephone company...Southwestern Bell [Mobile Systems, Inc.] fell within the class of ‘telephone companies’ under section 94.270, such that the City had the authority to impose a business license fee on it.”).

If these revenues are taxable under HB 209, which lifts language verbatim from the current ordinances, then they were taxable to begin with.

University City and elsewhere, MCI WorldCom provided mobile telephone service before declaring bankruptcy during the pendency of the University City action on July 29, 2002. [See University City Record on Appeal at R-305 (Appeal No. 87208).] Thus, there will never be tax dollars flowing from MCI to University City in the future to compensate it for the time period before 2002, when MCI operated in the city with impunity.

Numerous other concerns are readily apparent: What if a carrier stops doing business in University City in the future? What if a carrier's customer base does not increase or remain constant in the future, but rather decreases? What if HB 209 is repealed next year?⁸ Indeed, the most "speculative" aspect of HB 209 is the notion that these Cities will receive tax dollars twenty, ten or even one year from now.

A promise to pay taxes in the future is meaningless for purposes of federal statutes. See, e.g., Wright, Miller & Cooper, Federal Practice and Procedure, § 3708, at 250-251 (3rd ed.) (anticipated, future tax revenues cannot be utilized to satisfy amount-in-controversy required for federal jurisdiction, because "it cannot be assumed...that [the business] will continue to be subject to the tax, or that the taxing statute will remain in

⁸ See, e.g., Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133, 3 L.Ed. 162 (1810) ("one legislature is competent to repeal any act which a former legislature was competent to pass; and...one legislature cannot abridge the powers of a succeeding legislature."); SC Testing Technology, Inc. v. Dept. of Environmental Protection, 688 A.2d 421, 425 (Me. 1996) ("The Legislature may not enact a law that purports to bind a future Legislature.").

effect and not be modified by legislation”), citing Healy v. Ratta, 292 U.S. 263, 270-271, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934). There is no principled reason for applying a lesser, watered-down standard to the Missouri Constitution.

II. HB 209 CONTRAVENES THE PUBLIC AID RESTRICTION IN ARTICLE III, § 38(a) BY GRANTING TAX FORGIVENESS TO PRIVATE ENTITIES THAT PERFORM NO FUNCTION OF GOVERNMENT.

Without benefit of authority, the SBC Defendants assert that MO. CONST. Article III, §38(a) does not apply because the amounts due the municipalities are “unliquidated” and “uncertain,” thus, no public funds are involved. (Resp.Br. at 46.) Continuing this theme, they argue that “there is no ‘public money’ until a final judgment is entered declaring the Cities entitled to the taxes they seek.” (Id.) However, Article III, § 38(a) does not impose a “vested right” or “fixed sum certain” requirement. It simply states: “the general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation...” MO. CONST. Article III, §38(a). The prohibition focuses on the nature of the aid and on the character of the recipient; its application does not depend on funds having entered the public treasury, as Section 38(a)’s “public credit” language plainly attests.

SBC’s Beatty analysis spills-over to this section, but there is no precedent for linking the definition of “public money” to the concept of “fixed sums” or “vested rights.” Instead, the “public funds” analysis is much more pragmatic: it recognizes that foregoing the collection of a tax – via tax amnesties, tax credits, tax forgiveness, tax

exemptions or tax subsidies – depletes the local treasury and results in public aid to the recipient. See Curchin v. Missouri Industrial Development Board, 722 S.W.2d 930, 933 (Mo. banc 1987) (“This tax credit is as much a grant of public money or property and is as much a drain on the state’s coffers as would be an outright payment by the state to the bondholder upon default. There is no difference between the state granting a tax credit and foregoing the collection of the tax and the state making an outright payment to the bondholder from revenues already collected...The allowance of such a tax credit constitutes a grant of public money or property within Article III, Section 38(a) of the Missouri Constitution.”); Opinion of the Justices to the Senate, 401 Mass. 1202, 514 N.E.2d 353, 355 (Mass. 1987) (“tax subsidies...are the practical equivalent of direct government grants”); Rosenberger v. Rector & Visitors, 515 U.S. 819, 861 n. 5, 115 S.Ct. 2510, 2532 n. 5, 132 L.Ed.2d 700 (1995) (“the large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies”); Sommer v. City of St. Louis, 631 S.W.2d 676, 680 (Mo.App.E.D. 1982) (“tax abatement does not differ significantly from an expenditure of public funds, since in either case the conduct complained of could result in the treasury’s containing less money than it ought to”).

In University City, T-Mobile [wireless carrier] and SBC [wireline carrier] have paid a 9% gross receipt tax on “telephone service” under §5.84.010 of the Municipal Code for years. See Resp.Br at 24 (“SBC paid taxes for decades on...local telephone

services”); University City Record on Appeal at R-1148 to R-1152 (Appeal No. 87208).⁹ Undoubtedly, these revenues constitute public funds. To excuse other wireless carriers from such payments (and SBC from full payment), as HB 209 does, does not make the resulting loss any less a “public” concern – as policemen, firemen, and other employees whose livelihoods depend on such revenues can attest.

Here, a select portion of the telephone industry has been granted back-tax forgiveness and prospective tax relief enjoyed by no other businesses – hardware stores, service stations, electric companies, clothing manufacturers, gas utilities, and other telephone companies – operating in local jurisdictions. The idea that similarly-situated companies can be relieved of a tax paid by all other businesses, and not qualify as public aid recipients, is incongruous. If SBC’s position is adopted, constitutional analysis will turn on whether the taxes have been paid, collected or adjudicated (i.e., whether they have entered the public treasury), a simplistic approach rejected by the courts above and by Article III, §38(a) itself.

Alternatively, the SBC Defendants argue that even if “public funds” are involved, an exception exists for aid that serves a public, as opposed to a private, purpose. No “public purpose” language appears in Article III, § 38(a), although courts here and elsewhere have made such “public purpose” allowances. See, e.g., Fust v. Attorney Gen.,

⁹ Obviously, the amounts due University City were not too “speculative” and “uncertain” for these carriers to ascertain.

947 S.W.2d 424, 429 (Mo. banc 1997) (“[i]f a grant serves a public purpose, then it does not violate the constitutional prohibition against granting public monies to private entities”).

The “determination of what constitutes a public purpose is primarily for the legislative department,” Menorah Med. Ctr. v. Health & Educ. Facilities Auth., 584 S.W.2d 73, 78 (Mo. banc 1979), however, courts retain power – in the discharge of their duties – to review an expenditure to see if it serves a public or private purpose.¹⁰ A public purpose is not presumed from the mere passage of a legislative enactment, and “the stated purpose of the legislature, as pronounced in [the statute], is not dispositive.”

¹⁰ The dichotomy makes for a difficult balance: a court cannot both check the legislature against constitutional violations, as it must, and wholly defer to the legislature’s judgment about what constitutes a “public purpose.” Thus, although respect is accorded a legislative determination, the judiciary cannot abdicate review of an expenditure if Article III, § 38(a) is to have any vitality. Cf. Hayes v. State Property and Buildings Commission, 731 S.W.2d 797, 815-16 (Ky. 1987) (Stephenson, J., dissenting) (Section 177 of the Kentucky Constitution [similar to Article III, §38(a)] “does not, anywhere, mention ‘public purpose.’ In effect, the majority opinion has amended Section 177 by adding ‘except for a valid public purpose.’ Together with leaving the determination of public purpose to the legislature, the majority opinion has in effect repealed Section 177.”).

Curchin v. Missouri Industrial Development Board, 722 S.W.2d 930, 934 (Mo. banc 1987). Where the legislature’s judgment is found to be arbitrary and unreasonable, its determination will be overturned. Menorah Med. Ctr., 584 S.W.2d at 78 (“arbitrary and unreasonable” standard).

Here, the general assembly has offered as HB 209's purpose the following:

The general assembly finds and declares it to be the policy of the state of Missouri that costly litigation which have or may be filed by Missouri municipalities against telecommunications companies, concerning the application of certain business license taxes to certain telecommunications companies, and to certain revenues of those telecommunications companies, as set forth below, is detrimental to the economic well-being of the state, and the claims of the municipal governments regarding such business licenses have neither been determined to be valid nor liquidated.

92.089.1, RSMo. The general assembly should be taken at its word: curbing the litigation expenses of out-of-state businesses, in tax collection suits where no money has changed hands, constitutes the “public purpose” behind HB 209.

Properly viewed, the general assembly’s reasoning cannot withstand minimal scrutiny. Taken to its logical conclusion, such fears would prevent tax collection suits against businesses altogether, out of concern for their litigation budgets, and cause a breakdown in the tax system statewide. The impotence of municipalities in such circumstances truly would impair the “economic well-being of the state” by making all

license tax payments voluntary.

Such absurdities aside, defraying the expenses of these litigants can *never* be considered a proper public purpose, because the carriers perform no function of government. See, e.g., Wright v. City of Danville, 675 N.E.2d 110 (Ill. 1996) (“[d]efraying the costs of purely private litigation has *always* been outside the bounds of a proper public purpose”) (emphasis added).

Realizing this infirmity, the SBC Defendants conjure other reasons for the general assembly’s action, such as conserving judicial resources and controlling telephone rates, none of which are mentioned in HB 209. (Resp.Br. at 49-50.)¹¹ In addition, the SBC Defendants ask the Court to make Missouri attractive for investment (*id.*), as if the

¹¹ Although it involved a special legislation challenge, the Kentucky Supreme Court’s comments in Tabler v. Wallace are particularly apt: “The creative abilities of lawyers suggesting possible reasons after the fact does not suffice to provide the kind of justification that is required for special legislation to be valid under...the Kentucky Constitution. Defense counsels’ arguments throughout have been to the effect that any reason however imaginative that *could* have existed requires us to uphold otherwise discriminatory legislation. On the contrary, there must be a substantial and justifiable reason apparent from legislative history, from the statute’s title, preamble or subject matter, or from some other authoritative source.” Tabler v. Wallace, 704 S.W.2d 179, 185-86 (Ky. 1986) (emphasis in original).

Constitution must be judicially amended to accommodate their pecuniary interests.

Finally, SBC expresses concern for customers' "skyrocketing" telephone rates under the ordinances (Resp.Br. at 51), after having insisted that HB 209 include a "pass through" provision that makes these same individuals, not the companies, responsible for all future business license taxes. See 92.086.13, RSMo. Such hypocrisy aside, Defendants ignore the fact that license taxes on "telephone service" are an expression of the popular will, imposed under ordinances adopted by the people's representatives – they are paid on all other types of business offerings and without any of the calamities predicted by SBC.

Constitutional decision-making is not poll driven: SBC's dubious premise that these taxes are unpopular and unnecessary cannot inform this Court's decision; its only duty is to apply Article III, § 38(a), while giving due regard to the language chosen by the people, its historical context, and the evils sought to be curbed.¹² In the performance of

¹² See, e.g., United States v. Butler, 297 U.S. 1, 62-63, 56 S.Ct. 312, 317-18, 80 L.Ed. 477 (1936) ("When an act of Congress [or in this case, the general assembly] is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, – to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."); State of Missouri v. Cason, 507 S.W.2d 405, 408 (Mo. banc 1974) ("This Court has recognized that in the construction of

this duty, the Court will not be, in any sense, usurping the role of the legislature, changing the tax structure or increasing the tax burden. It simply will be declaring and enforcing the law, i.e., the Missouri Constitution, and the law is made by the people.

III. ADDITIONAL CONSTITUTIONAL AND STATUTORY CONSIDERATIONS

Due to the space limitations imposed by Supreme Court Rule 84.06(b), Plaintiffs are unable to respond to the numerous constitutional and statutory construction arguments set forth in Respondents' Brief. By failing to do so, Plaintiffs do not mean to legitimize those arguments in any respect. Plaintiffs stand on the authority and arguments in their opening Brief, and fully support the retrospective legislation, separation of powers, and special law discussions in the Reply Brief of Plaintiffs-Appellants, submitted in University City Appeal No. 87208, all of which apply with equal force herein.

constitutional provisions it should undertake to ascribe to words the meaning which the people understood them to have when the provision was adopted.”).

By:

Stephen M. Tillery, # 41287
Steven A. Katz, # 38028
Douglas R. Sprong, # 39585
John W. Hoffman, # 41484
701 Market Street, Suite 300
St. Louis, MO 63101
Telephone: 314-241-4844
Facsimile: 314-588-7036
jhoffman@koreintillery.com

John F. Mulligan, Jr. #34431
7700 Bonhomme Avenue, Ste. 200
Clayton, MO 63105
(314) 725-1135 (Phone)
(314) 727-9071 (Fax)

Howard Paperner, P.C. #23488
9322 Manchester Road
St. Louis, MO 63119
(314) 961-0097 (Phone)
(314) 961-0667 (Fax)

ATTORNEYS FOR PLAINTIFFS-

APPELLANTS

RULE 84.06(c) CERTIFICATION

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2002 and contains 5,804 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via First Class Mail, postage pre-paid, this 27th day of March, 2006, addressed to the following:

John F. Medler, Jr.
Suzanne L. Montgomery
One SBC Center 35th Floor
St. Louis, MO 63101

Stephen B. Higgins
Ann Beck
Amanda J. Hettinger
Robert J. Wagner
Sharon B. Rosenberg
Thompson Coburn, LLP
One US Bank Plaza
St. Louis, MO 63101

*Attorneys for SBC Communications,
SBC Long Distance and Southwestern Bell
Telephone, LP, d/b/a SBC Missouri*

John W. Hoffman #41484