

**IN THE  
SUPREME COURT OF MISSOURI**

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**No. SC 87208**

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**CITY OF UNIVERSITY CITY, MISSOURI, *et al.*,  
Plaintiffs/Appellants**

**v.**

**AT&T WIRELESS SERVICES, INC., *et al.*,  
Defendants/Respondents**

**Consolidated with**

**ST. LOUIS COUNTY, MISSOURI, *et al.*,  
Plaintiffs/Appellants**

**v.**

**AT&T WIRELESS SERVICES, INC., *et al.*,  
Defendants/Respondents**

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**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY  
CAUSE NO. 01-CC-004454  
DIVISION NO. 4  
HONORABLE BERNHARDT DRUMM**

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## JURISDICTIONAL STATEMENT

Defendants–Respondents (hereinafter, the “Wireless Companies”) concur with Plaintiffs–Appellants (hereinafter, the “Municipalities”) that this Court has jurisdiction over this appeal pursuant to Article V, § 3 of the Missouri Constitution, which grants the Missouri Supreme Court exclusive appellate jurisdiction over questions involving the validity of a statute.<sup>1</sup>

## STATEMENT OF FACTS

In this appeal, the Municipalities ask this Court to strike down H.B 209, which was adopted in the 2005 session of the Missouri General Assembly and signed into law by Governor Blunt on July 14, 2005.<sup>2</sup> The Municipalities bringing this constitutional challenge include a group of Missouri cities and St. Louis County.<sup>3</sup> They assert that local tax ordinances specific to each Municipality allow them to tax wireless

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<sup>1</sup> The Respondents are specifically identified with their counsel on pages 112-114, *infra*. This brief is jointly submitted by all Respondents.

<sup>2</sup> The provisions of H.B. 209 are codified at RSMo. §§ 71.765, 92.074, 92.077, 92.080, 92.083, 92.086, 92.089, 92.092, 92.098, and 227.241-227.249.

<sup>3</sup> The cities include University City, Blue Springs, Cape Girardeau, Chesterfield, Dexter, Ellisville, Ferguson, Florissant, Gladstone, Independence, Jennings, Kirkwood, Manchester, Maplewood, Maryland Heights, Northwoods, O’Fallon, St. Joseph, Vinita Park, Warson Woods, Wellston, and Winchester. St. Louis and Springfield are parties to separate, related appeals.

telecommunication services offered by the Wireless Companies and that H.B. 209 unconstitutionally infringes upon the Municipalities' enforcement of those local ordinances. (R. 767-805).<sup>4</sup>

The seeds of this appeal germinated more than five years ago when certain municipalities attempted to raise additional tax revenue by asserting their existing utility license tax ordinances applied to wireless telecommunications services offered by the Wireless Companies. With limited exceptions, the ordinances at issue were adopted long before 1980, when: (1) Article X, Section 22 (part of the Hancock Amendment) first forbade cities and other political subdivisions from increasing taxes without voter approval; (2) the thought of modern wireless communications was largely unimaginable,

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<sup>4</sup> The Court has three related appeals before it. The Wireless Companies submit this brief in response to the briefs filed by the University City plaintiffs and St. Louis County in the consolidated appeal captioned *City of University City, Missouri, et al. v. AT & T Wireless Services, Inc., et al.*, Cause No. SC87208. Springfield and St. Louis City bring similar appeals in the matters captioned *City of Springfield v. Sprint Spectrum, L.P.*, Cause No. SC87238 and *City of St. Louis v. Sprint Spectrum, L.P.*, Cause No. SC87400, respectively. Cites herein are as follows: University City Record on Appeal - R. \_\_\_\_; St. Louis County Record on Appeal - C.R. \_\_\_\_; University City Brief - U. City Br. \_\_\_\_; St. Louis County Brief - County Br. \_\_\_\_; University City Appendix - App. Appx. \_\_\_\_; Respondents' Appendix - Resp. Appx. \_\_\_\_.

and (3) “telephone companies” were highly regulated monopolies/utilities that strung wires on poles or buried them along public rights-of-way.

The terms of the subject ordinances are as varied as the populations and geographic locations of the Municipalities. For example, the twenty-three ordinances of the Municipalities challenging H.B. 209 in this appeal use numerous, different terms to describe the business, service, or activity they seek to tax, including “telephone,” “telephone service,” “public utility,” “exchange telephone service,” “telephone or telegraph service,” “telephone company,” “telephone communicating system,” and “telephonic communication equipment.” *See, e.g.*, City of Blue Springs, § 645.020 (App. Appx. A4); City of Cape Girardeau, § 15-4 (App. Appx. A9); City of Chesterfield, Art. II, § 2 (App. Appx. A17); City of Ellisville, § 25-71.1 (App. Appx. A29); City of Florissant, § 14-602 (App. Appx. A47); City of Gladstone, § 17-26 (App. Appx. A62); City of St. Joseph, § 27-305 (App. Appx. A114). The tax rates of the ordinances vary greatly – from small flat fees to 10% of revenues received. *Compare* City of Cape Girardeau, § 15-4 (App. Appx. A9), *with* City of Northwoods, § 620.020 (App. Appx. A106). Some ordinances refer to “lines,” “poles,” “wires,” or “trimming vegetation.” *See, e.g.*, City of St. Joseph, § 27-305 (App. Appx. A114), and City of Jennings, § 19-52 (App. Appx. A76). Significantly, many of the ordinances also impose geographic restrictions on their applicability – for example, limiting their application to services provided or revenues derived for services provided “within the city.” *See, e.g.*, City of Kirkwood, § 23-209 (App. Appx. A80); University City, § 5.84.010 (App. Appx. A121). Many ordinances purport to tax only “local” telephone service, but others seek to tax

“toll” service. Compare *City of Ferguson*, § 42-45 (App. Appx. A41), with *City of Chesterfield* § 27-23 (App. Appx. A23).

The notable limitations in the ordinances may explain why the Municipalities did not seek to apply the ordinances to wireless service, despite its prevalence and substantial growth in the 1990’s. Not until after a decision by the Missouri Court of Appeals in *City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.* were the Municipalities apparently spurred on to claim that wireless services were subject to the patchwork of local utility tax ordinances. In considering their course of action after *Sunset Hills*, the Municipalities had at least two options. A city could amend its ordinance to include wireless service by submitting the issue to its local voters.<sup>5</sup> Alternatively, a city could take the position that its existing ordinance, although passed decades before wireless service was offered, covered such service. The Municipalities chose the second route.<sup>6</sup>

The University City plaintiffs filed their action on December 31, 2001, seeking to collect five years of back taxes, interest, and penalties for wireless service provided to

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<sup>5</sup> The City of Clayton, which is not a party to the present appeals, did just that in 2003. (Resp. Appx. A1-A4).

<sup>6</sup> Even though the Municipalities sued the Wireless Companies, some apparently had reservations about their legal position and the applicability of their ordinances. For example, University City amended its ordinance to include “wireless telephone service” in 2001. Nothing in the amendment suggests it was submitted to the city’s voters. See *University City, Ord. No. 6305* (App. Appx. A125).

their citizens. (R. 24-219). They also sought to enjoin the Wireless Companies from providing service in their cities until the Wireless Companies paid the taxes. (R. 47-48). The City of St. Louis filed suit on November 20, 2003. St. Louis County then filed suit on June 15, 2004. (County Br. at 16). Springfield filed its action on December 3, 2004. All plaintiffs seek similar relief.

The University City case illustrates the complexity, uncertainty, and past and future cost of the underlying litigation. There, the Wireless Companies have asserted numerous defenses based on both federal and state law, questioning the applicability of decades-old ordinances to wireless telecommunications service. (R. 340-357). Despite four-plus years of litigation, the parties in the University City action are no closer to resolving the disputed issues than the day the case was filed. For example, the court has not ruled on University City's motion for class certification filed nearly two years ago. (R. 715-720). A June 17, 2003 order addressing federal preemption issues also illustrates the unsettled nature of the claims in the case. In this order, Judge Romines concisely noted what is evident from even a cursory review of the ordinances: "The Court also notes the array of City Ordinances involved are not uniform in either language in regard to application or percentage taxation." (R. 712-714). After reviewing "extensive briefs," preceded by months of discovery focused solely on a single defense, Judge Romines observed "[s]uffice it to say that the Court's review indicates an area in flux, that begs for a complete and full political solution by the United States Congress." (R. 712-714).

It was into this morass of litigation, and after a call for legislation, that the Missouri General Assembly stepped in 2005. Months of legislative meetings, hearings,

testimony, negotiation, and drafting ultimately resulted in the legislative compromise embodied in H.B. 209. The legislation resolves the many issues in dispute and brings certainty to the applicability of the Municipalities' taxation of wireless services. H.B. 209 harmonizes the competing and diverse interests of the Municipalities—which seek a new source of taxable revenue with respect to the sales of wireless services—and the Wireless Companies, which seek to avoid the retroactive imposition of a new and additional tax to wireless service.

Specifically, H.B. 209 brings wireless service under the umbrella of the ordinances of all Missouri municipalities that currently impose gross receipts taxes on landline telephone service. It does so by providing a broad, uniform definition of “telecommunications service.” The Wireless Companies must pay taxes on a prospective basis at a rate that ensures that immediately after the effective date of H.B. 209, municipalities will receive the same level of revenue that all municipalities received under the prior interpretation and application of their respective ordinances. After that, H.B. 209 allows continued prospective taxation of wireless service. Additionally, H.B. 209 centralizes the tax collection function with the Department of Revenue, thereby eliminating cumbersome payment and collection processes. The legislative compromise fashioned by H.B. 209 required the Municipalities to dismiss the pending lawsuits in conjunction with providing immunity to the Wireless Companies for back tax liability.

Notwithstanding the legislative directive to dismiss the pending lawsuits, the Municipalities failed to do so. Consequently, the Wireless Companies filed motions seeking dismissals of the suits. (R. 731-760). Following oral argument, Judge Drumm

dismissed the University City action with prejudice on September 16, 2005, holding that “H.B. 209 is constitutional and requires the dismissal of this case, as consolidated [with the St. Louis County action], without further showing.” (R. 1412-1416). Similarly, Judge Sweeney entered an order on September 29, 2005, dismissing the Springfield action with prejudice. (Springfield Br. at 25). Finally, on November 1, 2005, Judge Dowd dismissed the City of St. Louis action with prejudice. (St. Louis Br. at 21). In each instance, the Municipalities appealed to this Court.

### **ARGUMENT**

While these cases were dismissed by the trial courts, the standard of review applied to dismissed cases has little relevance to the Municipalities’ appeals. The vast majority of their arguments are directed at the constitutionality of H.B. 209, and the “rules for challenges to the constitutional validity of statutes are well established.” *City of St. Charles v. State*, 165 S.W.3d 149, 150 (Mo. banc 2005). As this Court recently stated:

Statutes are presumed to be constitutional. Accordingly, the burden to prove a statute unconstitutional rests upon the party bringing the challenge. This Court will not invalidate a statute unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution. This Court will resolve all doubt in favor of the act’s validity and may make every

reasonable intentment to sustain the constitutionality of the statute.

*Reproductive Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, No. SC 86768, 2006 WL 463575, at \*2 (Mo. banc Feb. 28, 2006) (citations omitted). The Municipalities have not met and cannot meet their burden of showing that H.B. 209 clearly and undoubtedly violates the Missouri Constitution.<sup>7</sup>

The Municipalities argue that these presumptions do not apply “where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision.” See U. City Br. at 52 (quoting *Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 n.2 (Mo. banc 1992)). This exception, however, applies only in those rare instances where a statute’s violation of a particular constitutional provision is readily and clearly apparent. In the only two decisions invoking this exception, the statutes at issue imposed ad valorem taxes based on factors other than property value, directly contravening Article X, § 4(b)’s express requirement.<sup>8</sup> See generally *McKay Buick, Inc. v. Love*, 569 S.W.2d 740 (Mo. banc 1978); *McKay Buick, Inc. v. Spradling*, 529 S.W.2d 394 (Mo. banc 1975). The fact that the Municipalities file hundreds of pages of briefing and rely on extraneous materials in this

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<sup>7</sup> The standards in this paragraph apply to each of the Municipalities’ challenges unless the Wireless Companies designate a different standard.

<sup>8</sup> The *Witte* decision itself, quoted by the Municipalities in support of their argument, did not even apply this rarely invoked exception.

appeal demonstrates that it is not “readily and clearly apparent” that H.B. 209 is unconstitutional. There is no exception here to the strong presumption of H.B. 209’s constitutionality, and the Municipalities cannot satisfy their “extremely heavy” burden required to overcome this presumption.

**I. The Municipalities’ constitutional challenges are founded on an unsupportable characterization of the validity and certainty of their claims against the Wireless Companies.<sup>9</sup>**

Throughout their briefs, the Municipalities paint a picture of their claims against the Wireless Companies that is illusory. The Municipalities claims are not the undisputable, clearly ascertainable sums of delinquent, duly assessed taxes that they suggest. Moreover, their repeated suggestions that the Wireless Companies have only “frivolous” and “unfounded” defenses to the Municipalities’ claims are simply not true. (*See, e.g.*, U. City Br. at 60, 61, 68; County Br. 47, 48, 50.)

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<sup>9</sup> This section of the Wireless Companies’ brief responds to arguments made throughout the Municipalities’ briefs related to the nature of the Wireless Companies’ obligations to the Municipalities and, in particular, the existence and validity of defenses to the underlying ordinances. The Wireless Companies present a response here to avoid repetition throughout this brief.

**A. Strictly construing the Municipalities’ ordinances in favor of the Wireless Companies, the ordinances do not apply to the service provided by the Wireless Companies.**

Under the Municipalities’ existing ordinances, the Municipalities purport to tax a wide variety of different services and charges.<sup>10</sup> With limited exceptions, each city’s tax applies only to gross receipts derived from services provided “within the city.” Under this jumble of local legislation, at least two critical issues exist with respect to the language of each ordinance: (1) does wireless service provided by the Wireless Companies fall within the categories of service identified as taxable in the ordinance, and (2) if so, do the particular charges billed to any wireless customer relate to services provided “within the city.”<sup>11</sup> Construing the ordinances narrowly against the

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<sup>10</sup> Examples of the various services and charges subject to tax are: “telephone or telegraph service” (University City, § 5.84.010, App. Appx. A121); “utility service, including . . . telephone . . . for domestic and commercial consumption” (City of Blue Springs, § 645.020, App. Appx. A4); “exchange telephone service” (City of Maryland Heights, § 13-127, App. Appx. A100); and “local exchange revenue” and “public utility operation” (City of Ferguson, § 42-45, App. Appx. A41).

<sup>11</sup> One can imagine any number of possible methods for determining whether service provided with respect to a particular wireless call should be treated as “within the city,” including: (1) both ends of the call must be “within the city,” (2) one end of the call must be “within the city,” (3) the cell tower that originally picks up the call must be located in

Municipalities, as required by Missouri law, disputed issues like these must be resolved in favor of the Wireless Companies.<sup>12</sup> For every ordinance, substantial issues exist as to whether wireless service is subject to taxation given the unique limitations existing within the language of the ordinance. The many permutations and limitations contained in the ordinances create numerous issues requiring resolution through litigation. Certainly, “within the city” does not describe the service provided by the Wireless Companies, whose customers pay monthly fees for access to nationwide (or at least statewide) networks which enable customers to place calls to and from anywhere within those wide-ranging networks.

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the city, or (4) the wireless switch serving the call must be “within the city.” None of the Municipalities’ ordinances, however, gives any indication as to whether any of these methods (or any other method) should be used.

<sup>12</sup> This Court has held consistently that statutes relating to taxation are to be narrowly construed in favor of the taxpayer and against the taxing authority. *See, e.g., Cascio v. Beam*, 594 S.W.2d 942, 945 (Mo. 1980). This rule of statutory construction also applies to city ordinances. *See David Ranken, Jr. Tech. Inst. v. Boykins*, 816 S.W.2d 189, 191 (Mo. banc 1991) (“[T]he licensing tax set forth in the ... ordinance is to be strictly construed against the city. There is to be no ambiguity that [the taxpayer] was intended to be taxed under the ordinance and that the taxing power exists.” (emphasis added)), *overruled on other grounds by Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907 (Mo. banc 1997).

The Municipalities describe the need to construe the language of the ordinances as a “frivolous” defense. But the Municipalities’ conduct prior to the passage of H.B. 209 suggests that even they recognize that standard “telephone” tax ordinances do not apply to wireless service. For example:

- In 2000, the City of Springfield surreptitiously attempted to broaden the scope of its gross receipts ordinance—without a public vote, or even a city council resolution specifically mentioning the change—by adding the words “telecommunications services” to the ordinance, no doubt in recognition that the phrase “telephone service” from the original version of the ordinance was not broad enough to encompass wireless service. *See* Federal Order at 2, (R. 1053-1069); Springfield Council Bill No. 2000-181, (Resp. Appx. A5-A7);
- In 2001 or later, numerous other Municipalities broadened their gross receipts ordinances to include wireless telecommunications. *See, e.g.,* University City, § 5.84.015, App. Appx. A126 (adopted June 4, 2001, without a public vote) (defining “telephone service” to include, for the first time, “cellular telephone services”); City of Chesterfield, Ord. No. 1815, App. Appx. A20 (adopted January 23, 2002, without a public vote) (defining “exchange telephone service” to include, for the first time, “cellular telephone services”); City of Warson Woods, § 630.20.B(2), App. Appx. A142 (adopted June 19, 2001 without a public vote) (refers to

“wireless” service, whereas prior version referred only to “telephone” service);

- Many years passed after wireless technology obtained widespread use and acceptance before the Municipalities attempted to enforce their license tax ordinances against the Wireless Companies. Only after the opinion in *City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54 (Mo. App. 1999), did the Municipalities file lawsuits asserting that, despite years of inactivity against the Wireless Companies, the reference to “telephone companies” or “exchange telephone companies” in the Municipalities’ ordinances actually encompassed wireless telecommunications.

Finally, the need to construe the ordinances is apparent from the analysis done by many courts. Numerous courts have concluded that a statutory reference to “telephone” service does not include wireless service. *See, e.g., In re Topeka SMSA Ltd. P’ship*, 917 P.2d 827, 836 (Kan. 1996) (holding that provider of cellular service was not “transmitting to, from, through or in this state telephonic messages” and therefore was not a public utility); *Ram Broad. of Mich., Inc. v. Mich. Pub. Serv. Comm’n*, 317 N.W.2d 295 (Mich. Ct. App. 1982) (concluding that the term “telephone company” did not include providers of two-way mobile communication service); *Wilson Communications, Inc. v. Calvert*, 450 S.W.2d 842, 844 (Tex. 1970) (holding that provider of mobile radio service was not subject to gross receipts tax on entities operating “any telephone line or lines, or any telephone within this State and charging for the use of same”); *Radio Tel. Commc’ns, Inc.*

*v. Se. Tel. Co.*, 170 So. 2d 577, 581-82 (Fla. 1964) (holding that provider of mobile radio service was not “telephone company” and therefore not subject to jurisdiction of state utilities commission because the state legislature clearly did not contemplate such a use at the time of enactment). In each of these cases, the court found that the mobile radio service in question was not “telephone” service even though such radio service—like the Wireless Companies’ service—was connected with the public switched telephone network. See also *S. Message Serv. v. La. Pub. Serv. Comm’n*, 554 So. 2d 47, 52 (La. 1989) (describing disagreement between courts in various states about whether radio common carriers are “telephone companies”); *Mobile Radio Commc’ns, Inc. v. Dir. of Revenue*, No. RS-79-0199, 1982 WL 12037 (Mo. Admin. Hrg. Com. 1982) (holding that reference to “telephone” service in Missouri sales tax statutes did not include mobile radio service; Missouri legislature subsequently amended sales tax statute to provide that both “telephone” and “telecommunications” service would be subject to the sales tax in order to remedy the problem created by the distinction).

Given the ample authority supporting the Wireless Companies’ position, it is understandable that the Municipalities repeatedly cling to the June 9, 2005 Order issued in *City of Jefferson City, et al. v. Cingular Wireless LLC et al.*, Case No. 04-4099-CV-C-NKL (W.D. Mo. 2005) (the “Federal Order”). The Federal Order applies to only one city in this group of appeals – Springfield. Every other city, each with its own unique ordinance, was not involved in the case. Moreover, the Federal Order is merely an interlocutory order, still subject to an evidentiary hearing and appeal. Also, the Federal Order does nothing to resolve the issue as to whether the far-reaching wireless

service offered by the Wireless Companies could ever be treated as service provided “within the city.” In fact, the federal court stated specifically that “quantifying with precision the location where a call is made or received may be a problem in the damage phase of this dispute” and that “the dispute over the amount of taxes owed is not before the Court.” (Federal Order at 11, 16, R. 1053-1069). Thus, even if a Missouri state court were to agree with the federal court’s conclusion as to the scope of the term “telephone” (a conclusion the Wireless Companies dispute), the plaintiff municipality in that state court action would still face the heavy burden of demonstrating that charges billed to particular wireless customers are for service provided “within the city,” when the only known connection between such customer and the city is that the customer’s billing address is located within the city.<sup>13</sup>

As additional support for their contention that the Wireless Companies have only “frivolous defenses,” the Municipalities rely on *City of Sunset Hills v. Southwestern Bell*

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<sup>13</sup> During all of the litigation between the Municipalities and the Wireless Companies, the Municipalities have not cited one case holding that mobile telecommunications service should be treated as provided “within a city” merely because a customer’s billing address is located in the city. There is only one known case addressing this issue, and, in that case, the court held that mobile service cannot be treated as provided “within” a particular taxing jurisdiction simply because a customer’s billing address is located in the jurisdiction. *See Answer Iowa, Inc. v. Dep’t of Revenue*, 514 N.E.2d 488, 493-94 (Ill. Ct. App. 1987).

*Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo. App. 1999). In *Sunset Hills*, the applicable city ordinance purported to tax any business that operated a “telecommunications antenna” in the city. 14 S.W.3d at 56. There was a threshold issue in the case regarding whether the city ordinance was properly enabled under state law. RSMo. § 94.270 authorizes fourth class cities (such as Sunset Hills) to impose a license tax on “telephone companies,” and there was an issue as to whether maintaining a wireless communications tower/antenna in Sunset Hills could cause the taxpayer to be treated as a “telephone” company under Section 94.270. The court ruled in favor of the city on that enabling issue. *Sunset Hills*, 145 S.W.3d at 58-59. Once the threshold enabling issue was decided, however, there was no question that the defendant taxpayer operated a telecommunications tower/antenna located within Sunset Hills (i.e., the city’s “telecommunications antenna” ordinance clearly applied). Thus, the court in *Sunset Hills* was not asked to address the difficult statutory construction issues that courts will face when asked to determine whether the language of the Municipalities’ unique and varied ordinances (which apply to such things as “telephone service,” “utility service,” “exchange telephone service,” “local exchange service,” and “public utility operation”) should apply to wireless service. Finally, the *Sunset Hills* decision does not involve the disputed issue as to whether the “within the city” language in the Municipalities’ ordinances can be construed to cover all or any portion of the charges received by the Wireless Companies in exchange for providing nationwide wireless service to their customers.

**B. Even a brief explanation of the Wireless Companies’ Hancock Amendment defense illustrates that the Wireless Companies raise genuine defenses to the Municipalities claims.**

The Hancock Amendment, codified at Article X, § 22 of the Missouri Constitution and approved by Missouri voters on November 4, 1980, prohibits a Missouri city from (i) “levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution [as of November 4, 1980],” or (ii) “increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter [as of November 4, 1980],” unless such action is approved by city voters. MO. CONST. art. X, § 22(a). Also, if a city broadens the taxable base of an existing tax, that action violates the Hancock Amendment unless the city reduces the rate of the levy such that, when applied to the new base, the reduced levy yields an amount of gross revenue equal to the gross revenue received on the prior taxable base. *Id.* The broadening of the base of an existing tax “involve[s] the inclusion of new types of property, not previously taxed, within the tax base and against which a tax could be levied.” *Tannenbaum v. City of Richmond Heights*, 704 S.W.2d 227, 229 (Mo. banc 1986).

Prior to the onset of this litigation, the Municipalities never made an attempt to apply their license tax ordinances to the Wireless Companies—hence the request for five years of back taxes. Then, on the eve of the commencement of this litigation, and in a complete reversal of form, the Municipalities took the position that the Wireless Companies were subject to tax. This increase in tax occurred long after the adoption of the Hancock Amendment and without voter approval. The imposition of this additional

tax by the Municipalities is most certainly either the levy of a new tax, an increase in the current levy of an existing tax, or a broadening of the taxable base of an existing tax without a corresponding reduction in the rate of the levy.

The Municipalities' repeated assertions that the Wireless Companies have only "frivolous" defenses falls within the admonition, "they protest too much." A factual and legal basis exists for all of the defenses asserted by the Wireless Companies. These serious defenses represented substantial hurdles to the Municipalities' claims at the time of the passage of H.B. 209. The Municipalities' constitutional challenge must be viewed in the actual context that existed when H.B. 209 was enacted and not under the unrealistic scenario suggested in the Municipalities' briefs.

**II. H.B. 209 does not violate Article III, § 38(a): it does not involve a grant of public money or public credit, and it has a valid public purpose.<sup>14</sup>**

Article III, § 38(a) of the Missouri Constitution prohibits the General Assembly from granting public money or property or lending public credit to private persons, associations, or corporations, "excepting aid in public calamity." MO. CONST. art. III, § 38(a). A grant of public money to a private entity is not, standing alone, unconstitutional; if a grant of public money or credit serves a public purpose, it does not violate Article III, § 38(a). *Fust v. Attorney Gen.*, 947 S.W.2d 424, 429 (Mo. banc 1997). As explained below, H.B. 209 does not violate Article III, § 38(a) because it does not

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<sup>14</sup> This section of the Wireless Companies' brief responds to Point 1 of the St. Louis County brief and Point 3 of the University City brief.

grant public money or lend public credit to private companies, and even if it did, H.B. 209 has valid public purposes – to promote the economic well-being of the state and to promote uniformity and certainty in the taxation of telecommunication companies.

**A. H.B. 209 does not grant public money or lend public credit because no public funds are involved and no taxes are due and owing to the Municipalities.**

No provision of H.B. 209 authorizes or requires the payment of public funds or the lending of any public credit to the Wireless Companies or any other private party. Over a century ago, this Court confirmed that money, such as tax revenue, does not become a “public fund” until the taxes are collected and the money is paid into the treasury. *State ex rel. Kirkwood v. County Court*, 44 S.W. 734, 737 (Mo. 1898). And the “constitutional prohibition against the lending of credit is to prohibit the state from acting as a surety or guarantor of the debt of another.” *State ex rel. Jardon v. Indus. Dev. Auth.*, 570 S.W.2d 666, 676 (Mo. banc 1978).<sup>15</sup>

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<sup>15</sup> The Municipalities, in a footnote, cite to *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), as support for the proposition that “[t]he fact that the funds never enter the public treasury is nevertheless a use of public money subject to constitutional scrutiny.” (U. City Br. at 47 n.8; County Br. at 34 n.5.) *Rosenberger*, however, did not address a constitutional prohibition against the grant of public money to aid private enterprise. Rather, the *Rosenberger* Court addressed (1) whether a state university, by denying a student publication funding for printing costs

Recognizing that no public fund or credit is involved, the Municipalities insist taxes are due and owing to them by the Wireless Companies, ignoring that their claims have not been determined to be valid. Based on this flawed premise, the Municipalities argue the General Assembly’s balanced resolution of disputes concerning the applicability of the varied, decades-old ordinances in favor of a uniform taxing and collection system results in “a gift of public financial resources.” (U. City Br. at 49; County Br. at 31.) But without public monies collected and paid or public credit extended, and having only mere assertions that have not been determined to be valid, the Municipalities cannot establish any violation of Article III, § 38(a).

The Municipalities rely on *Curchin v. Missouri Industrial Development Board*, 722 S.W.2d 930 (Mo. banc 1987), a revenue bond tax credit case. In *Curchin*, a taxpayer challenged the constitutionality of a statute that allowed the Missouri Industrial Development Board to issue revenue bonds to select private businesses chosen by the Board. These bonds contained provisions for the allowance of a state tax credit to the

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because the publication was religiously themed, violated First Amendment rights to free speech and free press, and (2) whether funding for religious student publications violated the Establishment Clause. The *Rosenberger* Court, recognizing that Establishment Clause violations typically occur where governments make direct money payments to sectarian institutions, explained that there is “no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf.” *Id.* at 843.

bondholders for any unpaid principal and accrued interest in the event of default by the underlying obligor. *Id.* at 931. The Court ultimately determined the statute was unconstitutional under Article III, § 38(a) because “granting a tax credit and foregoing the collection of the tax” was no different from the state “making an outright payment to the bondholder” in the event of a default. *Id.* at 933.

The context of this dispute is entirely different. The legislation in *Curchin* could quite properly be equated with the state writing a check to the taxpaying bondholders—the taxpayers received a direct dollar-for-dollar credit against their *undisputed* state tax debt. Here, the Municipalities’ claims and the applicability of their ordinances are contested and unresolved. The Wireless Companies assert numerous, substantial defenses evidencing the unliquidated and disputed nature of the claims. *See* Section I, *supra*. When H.B. 209 was enacted, there was no certain—or even close to certain—liquidated liability to be discharged. From *Kirkwood* to the present, this Court has never struck down a statute because it *might* involve the payment of public funds, with that determination wholly dependent upon a municipality prevailing in the litigation of disputed tax claims. The Municipalities’ mere prediction of success does not sustain their heavy burden to demonstrate a clear and undoubted constitutional violation.

Beyond *Curchin*, the Municipalities cite a Louisiana Court of Appeals decision as instructive on Missouri constitutional jurisprudence. In that case, the Louisiana appellate court held that a tax increment financing (“TIF”) statute was an unconstitutional transfer, or donation, of public tax revenue directly to a private developer. *World Trade Ctr. Taxing Dist. v. All Taxpayers*, 894 So. 2d 1185, 1194-95 (La. Ct. App.), *aff’d*, 908 So. 2d

623 (La. 2005). Certainly, H.B. 209 does not provide for any TIF-like transfers. And the Municipalities fail to point out that the Missouri tax increment financing statute, RSMo. § 99.800; one from which the Municipalities willingly accept benefits through new projects within their boundaries, has been declared constitutional by Missouri courts. *See, e.g., Tax Increment Fin. Comm'n v. J.E. Dunn Constr. Co.*, 781 S.W.2d 70 (Mo. banc 1989); *State ex rel. Plaza Props., Inc. v. City of Kansas City*, 687 S.W.2d 875 (Mo. banc 1985). The Municipalities' citation to an inapplicable Louisiana case is not instructive in this appeal.<sup>16</sup>

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<sup>16</sup> The Municipalities also cite *Champ v. Poelker*, 755 S.W.2d 383, 385 (Mo. App. 1988), a case in which taxpayers challenged a transfer of money from the Industrial Development Authority of the City of St. Louis to a campaign committee for payment of the committee's debts. The court of appeals never reached the constitutionality of the payments; rather, it held the taxpayers lacked standing to make such a constitutional challenge. *Id.* at 386-89. *Champ* is not relevant to this case, and it in no way alters the rule this Court established in *Kirkwood* that funds do not become "public" until collected and paid into a municipality's treasury.

**B. H.B. 209 serves a public purpose by ending litigation that is detrimental to the State’s economic well-being and establishing uniformity and certainty in the taxation of telecommunications companies.**

Even if H.B. 209’s resolution of the disputed claims did involve a grant of public funds or public credit, H.B. 209 promotes the economic welfare of the state and thus serves a valid public purposes in compliance with Article III, § 38(a). *See Fust*, 947 S.W.2d at 429-30 (holding statute creating a tort victims’ compensation fund benefiting certain individuals at others’ expense constitutional because it served valid public purpose of reducing number of uncompensated tort victims requiring public assistance and limiting windfall recoveries to other tort victims).

Through the legislative fact-finding process—taking testimony, studying the issues, and considering reports and other data submitted by interested parties—the General Assembly determined the protracted litigation between the Municipalities and the Wireless Companies was “detrimental to the economic well being of the state . . .” RSMo. § 92.089.1. The costs that H.B. 209 addresses are not limited, as the Municipalities suggest, to the actual costs of the litigation. (*See County Br.* at 36.) The Municipalities ignore other costs of the litigation—the time spent by municipal and industry personnel on the litigation (e.g., managing the litigation, responding to discovery, and giving deposition testimony), the delay and uncertainty in collecting revenue to provide municipal services during years of continuing litigation, and the statewide expenditure of scarce judicial resources. By ending the litigation, the General

Assembly freed these resources and prospectively allowed the Municipalities to focus on providing services with the certainty of tax payments by the Wireless Companies. *Cf. Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys.*, 950 S.W.2d 854, 860 (Mo. banc 1997) (“[T]he legislature may have determined that it was in the public’s interest to end the expenditure of time, money and energy on intra-governmental litigation and to refocus the school districts on educating youth and the retirement system on administering the pension plan.”).

Missouri courts defer to the General Assembly’s determination of what constitutes a “public purpose.” *See Fust*, 947 S.W.2d at 430. The General Assembly’s expression of the public policy of the state is “entitled to weighty consideration.” *Jasper County Farm Bureau v. Jasper County*, 286 S.W. 381, 384 (Mo. 1926). *See also Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678, 682 (Mo. banc 2000) (“[W]hen the legislature has spoken on the subject, the courts must defer to its determinations of public policy.”). As explained by this Court long ago,

what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is invested with a large discretion, which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under the pretense of lawful authority, it has assumed to exercise one that is lawful.

*State ex rel. St. Louis v. Seibert*, 24 S.W. 750, 751 (Mo. 1893).

To determine whether there is a sufficient public purpose behind a grant of public money, Missouri courts employ the test described in *State ex rel. Jefferson v. Smith*, 154 S.W.2d 101, 102 (Mo. banc 1941). Under this test, “[i]f the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal, notwithstanding it also involves as an incident an expense, which, standing alone, would not be lawful.” *Id.* (emphasis added). On the other hand, “if the primary object is not to subserve a public municipal purpose, but to promote some private end,” the expense is unconstitutional, even if the public receives an incidental benefit. *Id.* “Not only has Missouri acknowledged that the ‘public purpose’ must change with the times, the courts have recognized as well that they must defer to the legislature when it declares that a specific purpose is public.” *J.C. Nichols Co. v. Kansas City*, 639 S.W.2d 886, 891 (Mo. App. 1982). The term “public purpose” is elastic and encompasses varying goals and objects of legislation. *See Fust*, 947 S.W.2d at 430.

Valid public purposes include promoting economic welfare and the expansion of telecommunications services. In *McKittrick v. Southwestern Bell Telephone Co.*, 92 S.W.2d 612, 613-614 (Mo. banc 1936), this Court held the General Assembly’s grant to telephone companies of the right to place their telephone lines under, along, and across public roads, streets, and waters without compensation to the public served a valid public purpose in promoting the expansion of telephone service. In *Jardon*, 570 S.W.2d at 675, this Court held a statute authorizing issuance of tax-exempt revenue bonds to finance the construction of facilities for private corporations was constitutional because it served the public purpose of stimulating economic welfare. Similarly, in *State ex rel. Wagner v. St.*

*Louis County Port Authority*, 604 S.W.2d 592, 596 (Mo. banc 1980), the Court held a statute authorizing the issuance of tax-exempt revenue bonds to a private corporation for the development of land near a river was constitutional because it served the public purposes of promoting the general welfare, encouraging private capital investment by fostering the creation of industrial facilities, increasing the volume of commerce, and promoting the establishment of a foreign trade zone.

Here, the General Assembly has declared it to be the State's public policy to improve its economic well-being by ending costly litigation and by establishing uniformity and certainty in the taxation of telecommunications companies. RSMo. § 92.089.1. These are, without a doubt, sufficient and valid public purposes. This Court must defer to the General Assembly's determinations. *See Fust*, 947 S.W.2d at 430; *Jasper County Farm Bureau*, 286 S.W. at 384.

To overcome this deference, the Municipalities must demonstrate the General Assembly's determination that H.B. 209's purpose is to promote the economic well-being of the state is arbitrary and unreasonable. *State ex rel. Wagner*, 604 S.W.2d at 596-97. The Municipalities assert two arguments: (1) "cash-strapped" municipalities will be unable to meet their budgets and will be required "to engage in borrowing due to tax revenue shortfalls," and (2) H.B. 209 allegedly "penalize[s] the law-abiding and discriminate[s] against all other businesses in an arbitrary fashion" by providing "an unfair competitive advantage to telephone companies at the expense of other businesses and utilities already operating in local jurisdictions" because at least one wireless provider has paid the taxes, and because "electric companies, gas companies, water

companies, and landline telephone companies have paid such municipal license taxes for decades.” (U. City Br. at 48-49; County Br. at 37.)

The first argument is disingenuous. The public services (street improvements, police and fire protection, etc.) for the period of the back taxes at issue have long since been provided. There cannot be a “revenue shortfall” threatening police or fire protection services provided years ago. And the Municipalities provide no record support for the claim that “borrowing” will be needed. In fact, H.B. 209 actually assists the Municipalities on a prospective basis by allowing them to budget date-certain revenue payments from Wireless Companies. If wireless services displace landline telephone service as the Municipalities predict, the fact that wireless is a “growth industry” only inures to the benefit of the Municipalities. (U. City Br. at 49.)<sup>17</sup>

Second, the decision of one wireless company to pay a tax rather than litigate its validity is a business decision, not binding on its competitors, and not a legal determination of the applicability of the tax. The Wireless Companies are not traditional, monopolistic utility companies.<sup>18</sup> They are engaged in a highly competitive industry,

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<sup>17</sup> Of course, each Municipality always had the ability to ask its voters to approve a new ordinance that actually applies to wireless service, thereby allowing it to collect wireless-based revenue even sooner.

<sup>18</sup> The Wireless Companies are not public utilities regulated by the Missouri Public Service Commission (“PSC”). Wireless service is specifically excluded from the definition of “public utility” and the jurisdiction of the PSC. RSMo. § 386.020(42), (53).

with numerous communications companies, including cable companies, offering various forms of telecommunications services to the Municipalities' residents—unlike the limited suppliers of gas, electric, water, and landline telephone service. The General Assembly's recognition of the obvious distinctions which exist between such different enterprises is clearly reasonable and not arbitrary.

The Municipalities' second argument is premised on a theory of unfair competitive advantage. They offer no support for this theory, and the Court should reject it. *See Jardon*, 570 S.W.2d at 675 (rejecting argument that statute authorizing issuance of bonds to finance one company's headquarters placed competitive hardship on other companies where appellant offered no evidence of the "hypothetical increase in competition," and any such increase would be outweighed by the public interest in an expanded economy). The Municipalities fail to sustain their burden of demonstrating that the General Assembly's determination that H.B. 209 serves a public purpose is arbitrary and unreasonable. *See State ex rel. Wagner*, 604 S.W.2d at 596-97. Their attempt to have this Court substitute its judgment for that of the General Assembly fails absent a showing that H.B. 209 "clearly and undoubtedly contravenes" Article III, § 38(a) and "plainly and palpably affronts" the fundamental law represented by Article III, § 38(a). *Smith v. Coffey*, 37 S.W.3d 797, 800 (Mo. banc 2001).

**III. H.B. 209 does not violate Article III, § 39(5): it compromises the Municipalities’ speculative claims in favor of fundamental state interests.<sup>19</sup>**

Article III, § 39(5) of the Missouri Constitution prohibits the Missouri legislature from “releasing or extinguishing . . . , without consideration, the indebtedness, liability or obligation of any corporation or individual due . . . any county or municipal corporation.” The Municipalities claim H.B. 209 violates § 39(5) by (1) immunizing telecommunications companies from the payment of certain municipal “telephone” license taxes for periods up to and including July 1, 2006 and (2) requiring the Municipalities (and certain other Missouri cities) to dismiss pending lawsuits to collect such taxes. (*See* U. City Br. at 53).

**A. H.B. 209 does not extinguish a debt to the Municipalities because their claims are not fixed as a sum certain.**

H.B. 209 does not extinguish an “indebtedness, liability or obligation”; instead, it requires the dismissal of lawsuits seeking to collect vigorously disputed claims. *Beatty v. State Tax Comm’n*, 912 S.W.2d 492 (Mo. banc 1995), this Court’s most recent and significant pronouncement on § 39(5), confirms that no liability is being extinguished in this case.

In *Beatty*, the Missouri legislature passed a new property tax law (H.B. 211) that expanded the definition of the term “residential property” to include apartment buildings.

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<sup>19</sup> This section of the Wireless Companies’ brief responds to Point 2 of the St. Louis County brief and Point 4 of the University City brief.

“Residential property” is subject to a favorable assessment rate. Thus, the effect of H.B. 211 was to reduce the property tax liability of taxpayers owning Missouri apartment buildings. H.B. 211 took effect on August 28, 1995, but purported to apply to all property owned on January 1, 1995. The plaintiff in *Beatty* argued the retroactive effect of H.B. 211 violated § 39(5). Specifically, the plaintiff pointed out that on January 1, 1995 (the day for determining which property would be subject to tax for 1995), certain taxpayers owned apartment buildings that were subject to the higher “commercial property” assessment rate. But because of H.B. 211, these taxpayers paid 1995 taxes at the lower “residential property” rate. According to the plaintiff, this amounted to a release or extinguishment of the taxpayers’ 1995 property tax liabilities in violation of § 39(5).

This Court disagreed, explaining that, “until the tax liability is fixed as a sum certain, the definitions used to arrive at that liability are subject to change by the legislature.” *Id.* at 497. Thus, the retroactive application of H.B. 211 did not violate § 39(5):

As we have previously explained, an inchoate obligation to pay some tax on real property accrues on January 1 of the tax year. The amount of that tax is not known with certainty until not later than September 20 of the tax year. Because the amount of the tax is uncertain until not later than September 20, no obligation, liability or indebtedness within the meaning of article III, section 39(5), exists until that date.

On August 28, 1995, H.B. 211 could not extinguish or release any taxpayers' indebtedness, liability or obligation because no taxpayer's tax liability had been determined by that date.

*Id.* at 498.

In short, this Court held that a tax liability does not amount to an “indebtedness, liability or obligation” within the meaning of § 39(5) “until the tax liability is fixed as a sum certain,” and that a mere “inchoate obligation to pay some tax” is not protected by § 39(5). As a result, such claims are subject to legislative compromise.<sup>20</sup>

The Municipalities cite *Graham Paper Co. v. Gehner*, 59 S.W.2d 49 (Mo. banc 1933), to support the position that their claims against the Wireless Companies fall within § 39(5). (U. City Br. at 58; County Br. at 39-40.) They seize on the Court's statement that “an inchoate tax . . . is such a liability or obligation as to be within the protection of [Article III, Section 39(5)].” *Id.* at 52. But this statement must be understood in the context of that case, which involved a liability that had been clearly determined in an amount that was easily ascertained—not the case here. And even if the statement in

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<sup>20</sup> The Municipalities suggest that H.B. 209 somehow confirms their existing ordinances were enforceable against the Wireless Companies in prior years. (U. City Br. at 62-63.) This simply is not true. Section 92.083.1(2) states very clearly that beginning July 1, 2006, the Municipalities' ordinances shall be construed to include wireless service. H.B. 209 says nothing about the merits of the Municipalities' back tax claims, as evidenced by the reference in Section 92.089.1 to the “uncertain litigation.”

*Graham Paper* was intended when written to be read broadly, apart from the context of that case, it is clear from this Court’s recent decision in *Beatty* that the earlier decision would no longer be good authority on that point. In *Beatty*, the Court held unequivocally that “an inchoate obligation to pay some tax” is not an “obligation, liability or indebtedness” within the meaning of § 39(5). Moreover, Section 39(5) does not prohibit extinguishing uncertain claims alleged to be owed after the taxable event. Rather, it bars extinguishing liquidated and certain claims, *Beatty*, 912 S.W.2d at 497-98, regardless of the taxable event.

The Municipalities need not struggle to distinguish *Beatty* and *Graham*. Where a tax is “certain” and “fixed,” it is an “indebtedness, liability or obligation” within the protection of the anti-extinguishment provision; where it is neither, it is unprotected. The taxes in *Graham* were liquidated and undisputed. The Municipalities’ claims are unliquidated and vigorously disputed, and thus unprotected by the anti-extinguishment provision.<sup>21</sup>

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<sup>21</sup> The Municipalities also cite *McKeever v. Dir. of Revenue*, 1980 WL 5130 (Mo. Admin. Hrg. Comm. 1980), in which the Administrative Hearing Commission determined that a settlement reached by the Director of Revenue was constitutional (and not an improper compromise of a fixed tax liability) because the claim had not been “truly assessed” or finally determined at the time it was settled. Like the Municipalities’ back tax claims here, the Director’s tax claims existed but had not been finally determined. Thus, *McKeever* supports the position that § 39(5) has no applicability here.

The Municipalities' claims fall far short of the *Beatty* "fixed as a sum certain" standard. The Municipalities have not audited the Wireless Companies, issued an assessment, or specified an amount in their Petition. (R. 767-805). Nor have they estimated any alleged deficiency. *See* RSMo. § 144.250.4 (Supp. 2004) (director of revenue must estimate delinquent taxpayer's gross receipts); RSMo. § 143.611.2 (same as to income); RSMo. §§ 94.150, 94.310 (third- and fourth-class cities enforce taxes "under the same rules and regulations . . . [as the] state and county"). Because the amount they seek is unliquidated, their claims are not constitutionally protected. *Cf. State ex rel. Carmichael v. Jones*, 41 So. 2d 280, 285 (Ala. 1949) (even where suit sought exact amount, this amount was unprotected from extinguishment because a "fixed" assessment "was the purpose of the suit"); *State ex rel. S. Real Estate & Fin. Co. v. City of St. Louis*, 115 S.W.2d 513, 514 (Mo. App. 1938) ("[u]ntil the amount of the tax was finally fixed and determined so that not only could relator be required to pay it but the city to accept it, there was no tax due the city from relator").

The Municipalities also argue that entry of the Federal Order supports their § 39(5) argument. Of course, the Federal Order does not establish a "fixed" and "sum certain" liability. Rather, it represents a preliminary finding that the companies involved in that case may owe "some" tax liability in two Missouri cities. *See supra* Section I. Under *Beatty*, such "an inchoate obligation to pay some tax" does not amount to an "indebtedness, liability or obligation" under Article III, § 39(5).

**B. Even if H.B. 209 extinguished a debt to the Municipalities, the State provided adequate consideration by guaranteeing a definite, steady, and broader revenue stream in the future.**

Even if the Municipalities' underlying claims against the Wireless Companies constituted an "indebtedness, liability or obligation," H.B. 209 does not violate § 39(5). Section 39(5) prohibits the General Assembly from "releasing or extinguishing . . . without consideration [an] indebtedness, liability or obligation." Here, the release of the back tax claims was not "without consideration."

Missouri's anti-extinguishment provision is "unique . . . in its inclusion of the words 'without consideration,' which were added by the Constitution of 1945." (U. City Br. at 52-53.) By qualifying the previous categorical prohibition, Missourians conferred on the General Assembly greater authority to extinguish indebtedness than existed (and exists) in states without such qualifying language, and than had previously existed in Missouri.<sup>22</sup> Because no Missouri court has addressed the meaning of "without

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<sup>22</sup> The Municipalities contend that "without consideration" is equivalent to Arkansas's requirement that no liability be discharged "save by payment into the public treasury." (U. City Br. at 53 n.12) (citing ARK. CONST. art. XII, § 12).) But Arkansas's provision predates Missouri's 1945 adoption of "without consideration." *See Tapley v. Futrell*, 62 S.W.2d 32 (Ark. 1933). Either Missourians were unaware of the Arkansas provision in 1945, in which case "without consideration" has an independent meaning, or else they affirmatively decided not to require "payment into the public treasury."

consideration” in the anti-extinguishment provisions, this Court must look to definitions commonly in use at the time of its adoption. *Akin v. Mo. Gaming Comm’n*, 956 S.W.2d 261, 263 (Mo. banc 1997). In 1945, “consideration” was defined as “something given in payment; a reward, remuneration.” OXFORD ENGLISH DICTIONARY 858-59 (1933, reprinted in 1961). Resp. Appx. A8-A11.

The legislative findings of H.B. 209 fit comfortably within the parameters of § 39(5). In H.B. 209, the Missouri legislature found specifically that the Municipalities did, in fact, receive “full and adequate consideration” for the resolution of their claims, declaring as follows:

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. The general assembly further finds and declares that the resolution of such uncertain litigation, the uniformity, and the administrative convenience and cost savings to

municipalities resulting from, and the revenues which will or may accrue to municipalities in the future as a result of the enactment of [RSMo.] Sections 92.074 to 92.098 are full and adequate consideration to municipalities, as the term “consideration” is used in Article III, Section 39(5) of the Missouri Constitution, for the immunity and dismissal of lawsuits outlined in [RSMo. § 98.089.2].

RSMo. § 92.089.1.

The Municipalities suggest that by declaring the Municipalities are receiving “full and adequate consideration,” the Missouri legislature has somehow “invaded the province of the judiciary” and engaged in “legislative overreaching.”<sup>23</sup> (U. City Br. at 60; County Br. at 46.) To the contrary, this Court gives great deference to declarations made by the Missouri legislature. For example, in *Laret Investment Co. v. Dickmann*, 134 S.W.2d 65 (Mo. banc 1939), the legislature passed a law creating a particular housing authority and declared the housing authority was a “municipal corporation” incorporated for essential public purposes, ensuring the housing authority’s property would be exempt from property tax. The Court accepted the declaration:

The finding and declaration of the General Assembly are not binding on this court, but are entitled to great weight. We do not know, and are not at liberty to ascertain, what evidence

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<sup>23</sup> For additional discussion on this point, *see* Section VI, *infra*.

they had before them; we can only indulge the presumption that the evidence was sufficient to justify them in finding the existence of the conditions set forth in their declaration. We must presume that the [declarations were appropriate] unless it clearly appears that they are not in harmony with the provisions of the constitution.

*Laret Inv.*, 134 S.W.2d at 68.

Giving “great weight” to the specific findings of the Missouri legislature in H.B. 209, it is apparent that the Municipalities’ claims were not resolved “without consideration.” First, and most importantly, H.B. 209 states expressly that the consideration lies in the uniformity and additional revenues resulting from H.B. 209. All of the many issues related to the applicability of the hodgepodge of city ordinances are resolved effective July 1, 2006 (in favor of the Municipalities).

H.B. 209 also brings an end to costly litigation. *See, e.g., Fox v. Burton*, 402 S.W.2d 329, 334 (Mo. 1966) (the compromise of a doubtful claim is good consideration). Finally, H.B. 209, by its terms, provides streamlined administration and cost savings in the collection and remittance of taxes to the Municipalities. RSMo. § 92.086.3.

The Municipalities assert that H.B. 209 lacks “any consideration at all,” given that—in the words of the Municipalities—H.B. 209 only requires the Wireless Companies to waive their “frivolous” and “unfounded” defenses. (U. City Br. at 60, 61,

68.)<sup>24</sup> Such comments must be recognized for what they are—overstatements and exaggerations in the face of obvious facts to the contrary. And because the Municipalities’ argument depends on the proposition that the Wireless Companies gave up “nothing,” (U. City Br. at 64), the Municipalities have the heavy constitutional burden of proving that they can defeat every defense asserted by every wireless company in every case related to each ordinance. Yet, the language of the ordinances themselves demonstrates that substantial defenses exist. *See* Section I, *supra*. Furthermore, it is not necessary for this Court to decide the merits of the underlying cases. The question is whether the extinguishment of an “indebtedness, liability or obligation” was “without consideration.” The context provided by the varied ordinances more than resolves the

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<sup>24</sup> Relying on *Metts v. City of Pine Lawn*, 84 S.W.3d 106 (Mo. App. 2002), the Municipalities claim the Wireless Companies’ “have no defenses to compromise” because the Wireless Companies failed to pay the Municipalities’ taxes under protest in accordance with RSMo. § 139.031. (U. City Br. at 64 n.18; County Br. at 50-51.) *Metts*, however, does not address when a defendant taxpayer may raise affirmative defenses to claims brought by a taxing authority. Instead, *Metts* represents the entirely unremarkable proposition that when a taxpayer sues a taxing authority and seeks affirmative relief, the taxpayer must follow the statutory rules for doing so, whether the taxpayer seeks injunctive relief or is trying to obtain a tax refund. The Municipalities’ *Metts* argument is simply a rehash of their unsuccessful motion to strike the Wireless Companies’ affirmative defenses, the denial of which is not at issue in this appeal. (R. 687-694, 711).

point. Coupled with the legislative findings, the deference shown such findings by this Court, and the clarity, certainty, and prospective tax payments H.B. 209 provides, it is obvious that consideration exists.

Finally, the Municipalities claim that – as a result of H.B. 209 – they will suffer a “crippling loss of tax dollars” and must “survive on dramatically less revenue in the future.” (U. City Br. at 66, 68; County Br. at 52, 55; City Br. at 62.) But this claim is completely speculative and nothing in the record supports it. By removing uncertainty as to the applicability of the ordinances, H.B. 209 provides a real economic benefit to the Municipalities. Obviously, the Municipalities did, in fact, receive significant consideration under H.B. 209. While they may have wanted even more, their complaint does not rise to the level of a constitutional violation.

**IV. H.B. 209 Does Not Violate the Prohibition on Retrospective Lawmaking Found in Article I, § 13 of the Missouri Constitution.<sup>25</sup>**

The Municipalities’ argument that H.B. 209 violates Article I, § 13 of the Missouri Constitution fails at the threshold. This constitutional prohibition on retrospective legislation does not protect municipalities because municipalities are mere instrumentalities of the State, and the State may waive its own rights. *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys.*, 950 S.W.2d 854, 858 (Mo. banc 1997). Indeed, if the Municipalities’ position on the scope of Article I, § 13’s protections were accepted, it

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<sup>25</sup> This section of the Wireless Companies’ brief responds to Point 3 of the St. Louis County brief and Point 7 of the University City brief.

would render meaningless Article III, § 39(5), which specifically governs the circumstances under which the General Assembly may release or extinguish debts owed to municipalities.

Further, even if Article I, § 13 applied to the Municipalities, H.B. 209 does not impair vested rights or affect past transactions to the substantial prejudice of the parties. *M & P Enters., Inc. v. Transamerica Fin. Servs.*, 944 S.W.2d 154, 160 (Mo. banc 1997). The Municipalities' so-called right to back tax payments is not vested because it depends upon the happening of an uncertain event—a final, non-appealable judgment in their favor. Consequently, the Municipalities have no vested rights which are impaired by H.B. 209.

**A. Article I, § 13 does not protect the Municipalities.**

This Court has repeatedly held that the General Assembly may waive the rights of an instrumentality of the state without running afoul of Article I, § 13's prohibition on retrospective laws. *See, e.g., Savannah*, 950 S.W.2d at 858; *State ex rel. Meyer v. Cobb*, 467 S.W.2d 854, 856 (Mo. 1971). This Court clearly articulated the principle in *Savannah*:

Because the retrospective law prohibition was intended to protect citizens and not the state, the legislature may constitutionally pass retrospective laws that waive the rights of the state.

950 S.W.2d at 858. Municipalities are instrumentalities of the State and possess only the powers the legislature grants to them. *Siegel v. City of Branson*, 952 S.W.2d 294, 296 (Mo. App. 1997); *State ex rel. Kemper v. St. Louis, Kansas City & N. Ry. Co.*, 1881

WL 175, \*3 (Mo. 1881). In particular, municipalities in Missouri may only levy taxes in the manner and for the purposes granted by the state. *First Nat'l Bank of St. Joseph v. Buchanan County*, 205 S.W.2d 726, 729 (Mo. 1947). Thus, the General Assembly is free to waive the rights (if any) held by municipalities without running afoul of Article I, § 13.

*Savannah*, the most recent Missouri Supreme Court decision on the subject, controls here. In *Savannah*, Missouri school districts claimed the state retirement system owed them a refund of prior contributions to the teachers' retirement fund. 950 S.W.2d at 856-57. The outcome of the suit turned on whether the term "salary rate," as used in the retirement system rules, included certain fringe benefits. *Id.* While *Savannah* was still pending in the circuit court following remand, the Missouri legislature redefined the term "salary rate." *Id.* The circuit court granted the retirement system's motion to dismiss on the grounds that the amendment mooted the legal controversy. *Id.* The school districts thereafter challenged the constitutionality of the amendment. This Court rejected the school districts' argument, holding the retrospective law prohibition was intended to protect citizens—not the state. *Id.* at 858. Because the school districts were "creatures of the legislature," the legislature could waive or impair their rights without violating the prohibition on retrospective laws. *Id.*

The Municipalities acknowledge *Savannah* controls by devoting most of their argument to urging that it be overruled, including heavy citation to the dissent. (U. City Br. at 95-98; County Br. at 66-68.) Both the *Savannah* dissent and the Municipalities fail to recognize, however, that this Court has long-established precedent that municipalities cannot raise challenges under Article I, § 13. *See Graham Paper Co. v. Gehner*,

59 S.W.2d 49, 51-52 (Mo. banc 1933) (“The state may constitutionally pass retrospective laws impairing its own rights, and may impose new liabilities with respect to transactions already past on the state itself or on the governmental subdivisions thereof.”) (quoting *New Orleans v. Clark*, 95 U.S. 644, 24 L.Ed. 521); *State ex rel. Kemper*, 1881 WL 175, \*3 (Mo. 1881) (“Unlike a private corporation, no vested right in the nature of a contract exists in [municipalities], and it is competent to the Legislature to modify them at pleasure, or to take them wholly away.”). The *Graham Paper* holding is based, in part, on the fact that the Missouri Constitution already contains Article III, § 39(5), which governs the circumstances under which the rights of municipalities may be waived. *See* 59 S.W.2d at 51-52.

The Municipalities do not cite any cases expressly holding to the contrary. They cite *Planned Industrial Expansion Authority v. Southwestern Bell Telephone Co.*, 612 S.W.2d 772, 776 (Mo. banc 1981), in which this Court enforced the protections of Article I, § 13 on behalf of an instrumentality of the State. But whether Article I, § 13 extends to state instrumentalities was neither briefed by the parties nor addressed by the Court in *Planned Industrial*. There is thus not even an implicit acknowledgment of a rule contrary to the holdings of *Savannah*, *Graham Paper*, and *Kemper*.

Other cases cited by the Municipalities only weaken their position. For example, *First National Bank* relied upon Article III, § 39(5) of the Missouri Constitution, not Article I, § 13, because it recognized that municipalities are not protected under the latter provision. 205 S.W.2d at 731. *Accord Graham Paper*, 59 S.W.2d at 51-52.

Article III, § 39(5) states that the General Assembly shall not have the power “[t]o release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual due this state or any county or municipal corporation.” If, as the Municipalities insist, Article I, § 13 is broad enough to forbid the General Assembly from releasing or extinguishing the rights of municipalities, the Missouri Constitution would not contain a separate provision specifically setting out the circumstances under which the Legislature may release or extinguish the rights of municipalities. *See First Nat'l Bank*, 205 S.W.2d at 731 (relying on Article III, § 39(5) after citing *Graham Paper* for the proposition that Article I, § 13 does not prohibit the State from waiving its own rights). More importantly, the Missouri Constitution would not include the words “without consideration” in Article III, § 39(5), if Article I, § 13 already forbids the release or extinguishment of municipal rights even with consideration.

The Municipalities’ unduly broad interpretation of Article I, § 13 is merely an attempt to free themselves from the “without consideration” language of Article III, § 39(5). As the Wireless Companies have already demonstrated, *see* Section III(B), *supra*, H.B. 209 provides sufficient consideration under Art. III, § 39(5) to permit the release of the Municipalities’ self-proclaimed right to back taxes. This Court should not adopt an interpretation of Article I, § 13 that would render Article III, § 39(5) meaningless and effectively strip the “without consideration” language from the Missouri Constitution altogether. *See Thompson v. Comm. on Legislative Research*, 932 S.W.2d 392, 395 n.4 (Mo. banc 1996) (“Every word in a constitutional provision is assumed to

have effect and meaning; their use is not meaningless surplusage.”). Instead, this Court should uphold its long-standing precedent in finding that Article I, § 13 does not apply to municipalities.

**B. The Municipalities’ Purported Joinder of a Citizen Does Not Affect the Analysis of H.B. 209 Under Article I, § 13.**

Having failed to establish a right to the protections of Article I, § 13 on their own, the Municipalities seek to obtain vicarious protection under that section by recruiting citizens to act on their behalf. (*See* U. City Br. at 97-100) (suggesting that the purported joinder of the mayor of the City of Winchester affects the constitutionality of H.B. 209); (County Br. at 68-69) (suggesting the same for the joinder of the Director of Revenue and County Counselor).<sup>26</sup> The Municipalities’ litigation tactics show only that they have confused the question of “standing” with the question of whether municipalities have protected rights under Art. I, § 13. *See Ste. Genevieve Sch. Dist. R-II v. Bd. of Alderman*, 66 S.W.3d 6, 11 (Mo. banc 2002) (purpose of taxpayer standing is to give taxpayers “the ability to make their government officials conform to the dictates of the law when spending public money”).<sup>27</sup>

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<sup>26</sup> The Municipalities hurried to join the citizens in August 2005 after the passage of H.B. 209. (R. 762-805).

<sup>27</sup> In addition to missing the legal distinction, the Municipalities directly undermine their first point on appeal. The claim by the City of Winchester cannot on the one hand be brought by “the State” to avoid the implications of the *City of Wellston* ruling as the

Whether a citizen has standing to challenge the constitutionality of H.B. 209 is irrelevant to who has a protected vested right under Article I, § 13 to any back taxes that may be owed. *See City of Chesterfield v. Dir. of Revenue*, 811 S.W.2d 375, 377 (Mo. banc 1991) (holding that a city's statutory right to raise an issue on appeal did not mean that it had protected constitutional rights); *Town of Berlin v. Santaguida*, 181 Conn. 421, 423-24, 435 A.2d 980, 982 (1980) (“When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether . . . on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded.”). A taxpayer could not sue the Wireless Companies in his or her individual capacity to recover the payments allegedly owed. Instead, such an action could be brought, if at all, only on behalf of the municipality because any vested right in the back tax payments belongs only to the municipality. *See Mendelsohn v. State Bd. of Registration*, 3 S.W.3d 783, 785-86 (Mo. banc 1999) (concluding that vested rights for purposes of Art. I, § 13 are those which “give rise to a cause of action”). The inclusion of a taxpayer as a party to this action therefore does not affect the constitutionality of H.B. 209 under Article I, § 13.<sup>28</sup>

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Municipalities argue, (U. City Br. at 37), and on the other be brought by Mayor Winham to purportedly solve the Article I, § 13 issue, (U. City Br. at. 97-100). Separating the arguments by 60 pages does not make them any less inconsistent.

<sup>28</sup> To support their argument that the joinder of a taxpayer affects the constitutionality of H.B. 209 under Article I, § 13, the Municipalities point to the following dicta in

**C. H.B. 209 Does Not Infringe Upon a Vested Right.**

Even if the state were not empowered to waive the rights of the Municipalities, the Municipalities cannot establish they have a vested right:

[A] vested right . . . must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another.

*Fisher v. Reorganized Sch. Dist.*, 567 S.W.2d 647, 649 (Mo. banc 1978) (quotations omitted). Neither persons nor entities have any vested right in their expectation that a particular law will remain unchanged. *Beatty v. State Tax Comm'n*, 912 S.W.2d 492, 497 (Mo. 1995). Further, a right is not vested if it depends upon the happening of an uncertain event. *M & P Enters.*, 944 S.W.2d at 160 (Mo. banc 1997). For this reason,

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*Savannah*: “The analysis of this constitutional claim would be different had any one of the named parties been a teacher.” 950 S.W.2d at 858. But in *Savannah*, teachers made contributions to the retirement system in their individual capacities. The statute in *Savannah* thus had the effect of impairing vested rights of individuals (*i.e.*, parties who are protected under Article I, § 13) as well as the supposedly vested rights of school districts (*i.e.*, parties who are *not* protected under Article I, § 13); hence, this Court recognized the Article I, § 13 analysis could change if a teacher had been a party. H.B. 209, by contrast, if it impairs any rights, impairs only the rights of municipalities.

this Court has found that taxpayers do not have a vested right in the continued application of a particular tax classification. *Beatty*, 912 S.W.2d at 498. Instead, “until the tax liability is fixed as a sum certain, the definitions used to arrive at that liability are subject to change by the legislature.” *Id.* at 497.

The Municipalities do not have a vested right to collect past taxes from the Wireless Companies because considerable uncertainty exists regarding their ability to obtain a final judgment establishing liability. At best, the Municipalities have unliquidated, uncertain and unestimated claims, subject to substantial defenses. *See* Section I, *supra*.

**V. H.B. 209 Does Not Violate Article III, § 40’s Prohibition on Special Laws.<sup>29</sup>**

The Municipalities offer a handful of different theories for why they believe H.B. 209 violates the prohibition on special laws found in Art. III, § 40 of the Missouri Constitution. All fail to survive scrutiny. First, the Municipalities lack standing to raise arguments on behalf of utility companies. Second, the classifications created by H.B. 209 are reasonable and include all those who are “similarly situated,” and therefore are consistent with Art. III, § 40. Indeed, the Municipalities have enacted ordinances that make many of the very same classifications they now challenge. Finally, this Court has upheld similar classifications in other statutes.

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<sup>29</sup> This section of the Wireless Companies’ brief responds to Point 6 of the St. Louis County brief and Point 5 of the University City brief.

**A. The Municipalities do not have standing to challenge H.B. 209 on behalf of utility companies, landline telephone companies, and wireless telecommunication companies.**

Many of the Municipalities' "special law" challenges to H.B. 209 are based not on harm to the Municipalities themselves, but rather on purported injuries to utility companies, landline telephone companies, and wireless companies. *See* U. City Br. at 72-75 (arguing H.B. 209 improperly favors certain telecommunications companies vis-à-vis public utilities, other telecommunications companies, and landline telephone companies); County Br. at 84 (incorporating U. City's brief by reference).

The Municipalities do not have the right to raise these challenges. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his or her own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). "For a party to have standing to challenge the constitutionality of a statute, he must demonstrate that he is 'adversely affected by the statute in question . . .'" *W.R. Grace & Co. v. Hughlett*, 729 S.W.2d 203, 206 (Mo. banc 1987) (quoting *Ryder v. County of St. Charles*, 552 S.W.2d 705, 707 (Mo. banc 1977)) (emphasis added). This rule ensures there is a "sufficient controversy between the parties [so] that the case will be adequately presented to the court." *Id.*

**B. H.B. 209 Properly Classifies Telecommunications Companies Apart From Gas, Water, and Electric Companies.**

H.B. 209 does not impermissibly exclude gas, water, or electric companies from its provisions. Federal, state, and local laws routinely single out telecommunications companies for differential treatment, including many of the subject ordinances and the Mobile Telecommunications Sourcing Act (“MTSA”), 4 U.S.C. §§ 116-126, cited in the Municipalities’ briefs. *See, e.g.*, St. Joseph City Code at §§ 27-305 and 27-306 (imposing 7% tax on telephone companies but a tax of 6 ½% or less on gas, water and electric companies) (App. Appx. 115). If H.B. 209 violates special laws, the ordinances are equally invalid.

Differential treatment between classes of companies is permissible if there is some rational basis for it. *Blaske v. Smith v. Entzeroth, Inc.*, 821 S.W.2d 822, 832 (Mo. banc 1991). *See also United Fuel Gas Co. v. Battle*, 153 W.Va. 222, 250, 167 S.E.2d 890, 906 (1969) (upholding distinction between tax rates assessed on public utility gas companies and non-utility gas companies). Only wireless companies—and not gas, water, or electric companies—have been subjected to the Municipalities’ recent attempt to re-interpret their gross receipts ordinances. Municipalities across the state have been engaged in costly and time-consuming litigation with telecommunications companies, but no analogous litigation involving other industries exists. H.B. 209 thus more than satisfies the “rational basis” requirement of Art. III, § 40.

Given the disparate positions of telecommunications companies vis-à-vis gas, water, and electric companies, the Municipalities’ reliance on *Planned Industrial*

*Expansion Authority v. Southwestern Bell Tel. Co.*, 612 S.W.2d 772, 776-77 (Mo. banc 1981), fails.<sup>30</sup> The problem in *Planned Industrial* was that an easement was created for some utility companies whose services were provided through underground facilities, but not others. *Id.* at 777. The various types of utilities were thus “similarly situated” in the context of underground property rights. *Id.* *Planned Industrial* does not dictate that telecommunications companies must be treated identically to water, gas, and electric companies in every single context, nor would such a holding be appropriate.<sup>31</sup> Indeed, it

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<sup>30</sup> The Municipalities’ briefs list several cases without identifying the particular argument to which each case applies. *See* U. City Br. at 77 (asserting that “[i]ndividual analysis of these decisions is not necessary”); County Br. at 84 (incorporating U. City’s brief by reference). The Wireless Companies will discuss each case in the context of the argument to which it appears to relate.

<sup>31</sup> *Planned Industrial* analyzed whether a particular law was “special” even though neither party raised the issue and even though the issue was not necessary to the disposition of the case. *Id.* The precedential value of that aspect of *Planned Industrial Expansion* is therefore very limited. *State ex rel. Anderson v. Houstetter*, 140 S.W.2d 21, 24 (Mo. banc 1940) (“Such expressions of opinion, not in anywise necessary for the actual decision of any question before the court, are not controlling authorities in any sense, although they may at times have persuasive effect.”). Given the plethora of telecommunications-specific laws passed by federal, state, and local governments, that aspect of the opinion also lacks persuasive effect.

would invalidate, *inter alia*, the federal and local laws cited above that treat telecommunications companies differently than gas, water, and electric companies. See *Ross v. Kansas City Gen. Hosp. & Med. Ctr.*, 608 S.W.2d 397, 400 (Mo. banc 1980) (“[A] law which includes less than all who are similarly situated is special, but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis.”).

Other cases cited by the Municipalities are also inapposite. In *State ex rel. Ashby v. Cairo Bridge & Terminal Co.*, 100 S.W.2d 441, 444 (Mo. 1936), the General Assembly deliberately put ten types of utilities into a single class for purposes of a tax reporting statute, but then exposed only four of those utilities to penalties for failing to comply with their reporting obligations. *Id.* The Legislature's constitutional error was defining the class to include all ten utilities but then unjustifiably isolating certain members of the class for special treatment. *Id.* The same is true with respect to *Taylor v. Currency Services*, 218 S.W.2d 600, 604 (Mo. banc 1949), in which the Missouri Legislature enacted a law applying to all corporations, but then withdrew certain types of corporations from one of the burdens of the law. *Id.* H.B. 209 is far different. It defines the class as telecommunications companies only—i.e., it does not include gas, water, or electric companies—and therefore does not contain the inconsistency found in *Ashby* and *Taylor*.

**C. H.B. 209's Treatment of Telecommunications Companies Does Not Run Afoul of the Prohibition on Special Laws.**

The Municipalities' argue that H.B. 209 violates Article III, § 40 by treating telecommunications companies that have paid municipal gross receipts taxes less favorably than those who have not. This Court rejected a similar contention in *Savannah*. There, the plaintiff school districts argued that the subject statute had an impermissibly disparate effect on those school districts that had made overpayments under the previous definition of "salary rate" for the retirement fund at issue. *Savannah*, 950 S.W.2d at 860. This Court acknowledged the amendment would result in differential treatment for certain school districts, but upheld the statute as being "rationally related to several legitimate government objectives." *Id.* In particular, this Court recognized it would be expensive, complicated, and distracting for the adversely affected school districts to seek recovery of the overpayments. *Id.*

H.B. 209 is far less troublesome than the statute upheld in *Savannah*, and therefore falls well within constitutional limitations. In *Savannah*, a Missouri appellate court had already interpreted the relevant statutory language, and the General Assembly stepped in later to redefine it. Here, by contrast, no state court has held that any of the many permutations of "telephone," as used in the Municipalities' ordinances, applies to wireless service, nor has any court interpreted the term "within the city" in the context of wireless telecommunications. The Municipalities rely upon the Federal Order, which itself is not yet final, and even expresses doubt on the "within the city" issue. Moreover, the federal court's expressions on state law issues are not binding on state courts. H.B. 209 crafts a

reasonable approach on a going-forward basis, without affecting any prior interpretation by a state court or any final judicial interpretation by a federal court.

The Municipalities ignore *Savannah* and instead rely on *Laclede Power & Light Co. v. City of St. Louis*, 182 S.W.2d 70, 73 (Mo. banc 1944). Their reliance is misplaced. The ordinance in *Laclede* imposed a tax on some electric companies but not others. *Id.* H.B. 209, by contrast, permits the imposition of a tax on *all* telecommunications companies. *Laclede's* reasoning, therefore, does not apply to H.B. 209.

Also, the purported class of “telephone companies that failed to pay taxes” is open-ended. *See* U. City Br. at 72. H.B. 209 therefore must satisfy only the “rational basis” test, which it clearly does. *See Blaske*, 821 S.W.2d at 832. The General Assembly acted rationally in concluding that enough of the resources of the Municipalities, the Wireless Companies, and the judiciary had been wasted in the numerous lawsuits across the state, and therefore acted reasonably in establishing prospective certainty on municipal taxation of all wireless companies. *See Savannah*, 950 S.W.2d at 860.

**D. Wireless Carriers Are Not Similarly Situated With Landline Telephone Companies.**

The Municipalities next challenge H.B. 209 on the ground that it arbitrarily distinguishes between wireless companies and landline telephone companies. (U. City Br. at 72-73.) This challenge fails on the merits because, as the Municipalities themselves have acknowledged, wireless carriers and landline telephone companies are not similarly situated.

Some examples of distinctions made by the Municipalities between “telephone companies” and wireless companies include Springfield’s covert addition of “telecommunications services” in 2000, University City’s expansion of the definition of “telephone service” in 2001 and the rush to file lawsuits against the wireless companies only after the *Sunset Hills* decision. *See* Section I, *supra*.

Like the Municipalities, many courts have recognized that distinctions exist between landline telephone companies and providers of wireless telecommunications services. *See* Section I, *supra*. These distinctions demonstrate that the immunity granted to wireless companies under H.B. 209 does not violate the Missouri Constitution even though identical immunity is not granted to landline telephone companies. Instead, the General Assembly had a rational basis for any distinction that may exist between these two types of companies. *See Savannah*, 950 S.W.2d at 860.

On a prospective basis, the terms “telephone company,” “exchange telephone company,” and similar phrases used in municipal gross receipts ordinances will be construed to include wireless telecommunications. *See* RSMo. § 92.083.1(2). The General Assembly added this provision to simplify the statewide scheme for municipal taxation of telecommunications companies. *See* RSMo. § 92.086 (establishing centralized administrative scheme for collection of municipal gross receipts taxes). It does not mean, as the Municipalities now claim, that “telephone company” and “exchange telephone company” included wireless providers all along. *See* RSMo. § 92.089 (recognizing that “the claims of the municipal governments regarding such business licenses have neither been determined to be valid nor liquidated”). Accordingly,

H.B. 209 is not unconstitutional in its treatment of landline telephone companies vis-à-vis wireless companies.

**E. Telecommunications Companies Are Not Similarly Situated With Municipalities and Do Not Require Similar Treatment.**

The Municipalities assert that H.B. 209 is unconstitutional because it “bars municipalities from pursuing class litigation against telephone companies . . . but does not foreclose telephone companies from pursuing class litigation against municipalities to recover payment of the same tax.” (U. City Br. at 73.) This is not surprising—there is no authority for the proposition that municipalities can even be members of a class, nor is there any authority for the proposition that municipalities and telecommunications companies must be treated in identical fashion by the legislature.

The Municipalities' only citation in support of their position is a reference to *AT&T Wireless PCS, LLC, et al. v. Jeremy Craig, et al.*, Case No. 04-CC-000649 (St. Louis County Circuit Ct.), which the Municipalities insinuate is a class action. It is not, and does not purport to be. (Resp. Appx. A12-A76). Each plaintiff and each defendant in the case has been properly joined as a named party. The Wireless Companies are unaware of any Missouri case in which telecommunications companies sought class action certification in a tax refund case, so there was little reason the General Assembly would address that circumstance in H.B. 209.

The General Assembly may have had a number of grounds for deciding to preclude municipalities from acting as a class in future collection cases. In particular, the Legislature may have sought to avoid the possibility of a municipality being bound by a

judgment or settlement in a case in which the municipality did not participate. *See Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (“[T]he judgment in a ‘class’ or ‘representative’ suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.”). Moreover, there are serious questions about whether municipalities would even be bound by a class-wide settlement that was not approved in accordance with the laws in each municipality, thus raising the prospect of unfairness to a defendant who tried to settle with municipalities on a class-wide basis. *See, e.g.*, Springfield City Charter at § 19.26 (“All contracts, agreements and other obligations entered into, and all ordinances and resolutions passed after the adoption of this Charter and contrary to the provisions thereof shall be void.”) (Resp. Appx. A77-A84). The General Assembly rationally could have decided to preclude this possibility.

**F. The Municipalities’ General Attack on the Rationality of H.B. 209 Fails.**

The Municipalities’ next challenge to H.B. 209, although located in the “special laws” section of their briefs, appears to be a general attack regarding the relationship between H.B. 209’s stated purposes and its actual substantive provisions. (*See U. City Br.* at 74-75.) To the extent the Municipalities are arguing that a better law could have been passed to achieve the General Assembly’s goals, the argument is of no constitutional significance. *See State ex rel. Voss v. Davis*, 418 S.W.2d 163, 169 (Mo. 1967) (“The courts, as a general rule, cannot inquire into the motive, policy, wisdom, or

expediency of legislation.”); *Blaske*, 821 S.W.2d at 835 (arguments that a statute is “unwise or unfair” “must be addressed to the legislature”).

Alternatively, the Municipalities' argument could be seen as another attack on the purported distinctions between telecommunications companies and public utilities like gas, water, and electric companies. For the reasons described in Section V(A) *supra*, that argument fails.

**G. H.B. 209 Properly Classifies Municipalities.**

The Municipalities use H.B. 209's reference to November 4, 1980, as a basis for asserting that the statute is closed-ended and therefore governed by a higher standard of constitutional scrutiny.<sup>32</sup> (U. City's Br. at 75). *See also* RSMo. § 92.086.10 (exempting cities that, prior to November 4, 1980, had a gross receipts ordinance that specifically included the words “wireless,” “cell phones,” or “mobile phones”). Their interpretation, however, distorts the “closed-ended” concept in a way this Court could not possibly have intended when it discussed that concept in *Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. banc 1997), *Harris v. Missouri Gaming Commission*, 869 S.W.2d 58, 65 (Mo. banc 1994), *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993), *State ex. rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 920-21 (Mo. banc 1993), and *School*

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<sup>32</sup> The Municipalities make no showing that the class of cities exempt from H.B. 209 is as closed-ended as they allege. They merely assert that “there are over 200 Missouri cities and municipalities with telephone license tax ordinances that would not qualify for either exemption,” without citing any record support. (U. City Br. at 75, n.29.)

*District of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 222 (Mo. banc 1991).

H.B. 209 uses the November 4, 1980 date because that date is constitutionally significant—it is the effective date of the Hancock Amendment to the Missouri Constitution, after which all new taxes must be approved by the electorate. But reference to a constitutionally significant historical date should not be the basis for striking down a statute. Municipalities that complied with their obligations under the Hancock Amendment (or that had an ordinance that specifically mentioned wireless companies prior to the effective date of the Hancock Amendment) should not be lumped together with those that did not.

The closed-ended classifications in the cases cited above were based on characteristics over which the affected entities had no historical control, namely, geographic location (*Tillis, Harris*), proximity to a “city not within a county” (*O’Reilly, Riverview Gardens, Harris*), or population at a fixed point in time (*City of Blue Springs*). The affected entities in those cases could have not done anything, past or present, to become part of the group receiving special rights (or, in the case of the City of Blue Springs, to avoid being part of the group burdened with special obligations). The Municipalities in the instant case, by contrast, had every opportunity prior to H.B. 209 to comply with their Hancock Amendment obligations by holding a public referendum to determine whether wireless companies should be subjected to a tax. The fact that they chose not to do so in favor of filing lawsuits should not afford them a basis for invalidating H.B. 209. Instead, their failure to act illustrates that they are not similarly

situated with municipalities that did comply with their Hancock Amendment obligations. *Ross*, 608 S.W.2d at 400.

The General Assembly balanced H.B. 209's potential impact on Missouri's economy and Missouri telecommunications customers with any potential detriment to municipalities. Excluding Hancock-compliant municipalities from the legislation helped achieve this balance. *See Union Elec. v. Mexico Plastic Co.*, 973 S.W.2d 170, 174 (Mo. App. 1998) (substantial justification existed based on the "importan[ce] to balance the economic enticements offered to prospective business with sound municipal revenue"). *See also Blaske*, 821 S.W.2d at 829 ("It is not the Court's province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination.") (punctuation omitted).

Similarly, by excusing Hancock-compliant municipalities from certain H.B. 209 provisions, the General Assembly promoted the policies underlying the amendment, thereby satisfying the substantial justification requirement. *Cf. Kenefick v. City of St. Louis*, 29 S.W. 838, 841 (Mo. 1895) ("Legislation which is . . . appropriate to carry into effect a positive command of the organic law, or . . . directly contemplated by its terms, cannot justly be held to be either special or local, within the true intent and meaning of the constitution."); *State ex rel. Garvey v. Buckner*, 272 S.W. 940, 942 (Mo. banc 1925) (same).

These unique circumstances, i.e. certain municipalities taxing wireless revenues in compliance with Hancock, while others ignored Hancock's requirements, also substantially justify H.B. 209. *See Hunter Ave. Prop., L.P. v. Union Elec.*, 895 S.W.2d

146, 154-55 (Mo. App. 1995) (approving special legislation benefiting only a single utility company as substantially justified where it was based on “a unique set of circumstances which [was] unlikely to arise again in the near future”).

**VI. The Municipalities lack standing to invoke the separation-of-powers doctrine; nevertheless, H.B. 209 does not violate the separation-of-powers principles set forth in Article II, Section 1 of the Missouri Constitution.<sup>33</sup>**

The Municipalities argue that because H.B. 209 is “adjudicative” in nature, it violates separation-of-powers principles. (U. City Br. at 83; County Br. at 80.) First, the Municipalities lack standing to invoke the separation-of-powers doctrine. Second, even if the Municipalities had standing, H.B. 209 does not violate the doctrine. Contrary to the Municipalities’ argument, H.B. 209 does not direct judicial action, interpret prior law, or impact a final judgment. Rather, it addresses state tax policy well within the General Assembly’s constitutional authority to do so.

**A. The Municipalities do not have standing to invoke the separation-of-powers doctrine because it exists to protect citizens, not government entities.**

This Court has held that statutory instrumentalities of government lack standing to invoke the separation-of-powers doctrine. In *Savannah R-III School District v. Public School Retirement System*, the legislature enacted a law effectively ending litigation

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<sup>33</sup> This section of the Wireless Companies’ brief responds to Points 4 and 5 of the St. Louis County brief and Point 6 of the University City brief.

brought by a school district. 950 S.W.2d 854, 857 (Mo. banc 1997). See Section IV(A), *supra* (discussing *Savannah's* facts in more detail). The school district argued the statute effectively mooted a pending case, invalidly encroaching on the judicial function. *Id.* at 859. The Court made short shrift of this argument, finding that, as a “creature of the legislature,” a school district lacked standing to invoke the separation-of-powers doctrine:

The reason for the separation of powers is to protect the liberty and security of the governed. In the context of a claimed impingement of the judicial function by the legislature, it is the citizens' rights, established either by a specific provision in the constitution or by a final adjudication in a court of law, that are protected from legislative diminution. By this standard, the school districts have not demonstrated an encroachment on the judicial function.

*Id.* (emphasis added).

Thus, just as in *Savannah*, the Municipalities cannot raise a separation-of-powers challenge, as they are “mere creatures of the state.”

**B. H.B. 209 does not interfere with judicial decision making because it does not contravene a final judgment.**

Even if the Municipalities had standing to invoke the separation-of-powers doctrine, H.B. 209 does not violate Article II, § 1 of the Missouri Constitution. The purpose of the separation-of-powers clause is “to prevent the concentration of unchecked power in the hands of one branch of government.” *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. banc 1993). “This language, however, does not erect an impenetrable wall of

separation between the departments of government.” *Dabin v. Dir. of Revenue*, 9 S.W.3d 610, 613 (Mo. banc 2000).

This Court has already conclusively resolved the Municipalities’ argument regarding interference with judicial decision making. In *Savannah*, in response to a school district’s claim that a statute that effectively ended litigation brought by the school district violated separation-of-powers principles, the Court rejected the claim because “if a court has not yet finally adjudicated an issue in a pending case, even a retroactive amendment to the governing law does not constitute a separation of powers violation.” *Savannah*, 950 S.W.2d at 858. In *Savannah*, this Court relied on the Supreme Court’s decision in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), which, like *Savannah*, holds that the legislature (in this case, the United States Congress) can make changes in the law and apply those changes to cases still pending.<sup>34</sup>

Thus, the legislature can amend the law to abrogate a pending claim at any time prior to a court’s entry of a final, non-appealable order without encroaching on the judicial function.<sup>35</sup> With H.B. 209, the General Assembly amended the

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<sup>34</sup> This Court looks to federal courts on separation of powers questions. *See, e.g., State Auditor v. JCLR*, 956 S.W.2d 228, 231 (Mo. banc 1997) (citing *INS v. Chadha*, 462 U.S. 919 (1983)).

<sup>35</sup> The Municipalities’ reliance on *United States v. Klein*, 80 U.S. 128 (1871), is misplaced. (U. City Br. at 88, n.38; County Br. at 78-79.) In suggesting that H.B. 209 violates separation-of-powers principles by prescribing a rule of decision in a pending

telecommunications business license tax scheme. But, it does not alter any final, non-appealable order in any case. Furthermore, H.B. 209 does not direct any court to dismiss the Municipalities’ lawsuits—it requires the Municipalities to voluntarily dismiss their lawsuits without prejudice.

The Municipalities’ contention that § 92.089.2 of H.B. 209 violates separation-of-powers principles because it retroactively alters the court of appeals’ construction of the term “telephone companies” in *City of Sunset Hills v. Southwestern Bell Mobile Systems*, 14 S.W.3d 54 (Mo. App. 2000), evidences their misunderstanding of the standard set forth in *Savannah* and *Plaut*. (U. City Br. at 81 n.33; County Br. at 79-80.) *Plaut* makes clear that governing law may be amended and applied in pending cases without violating separation of powers, so long as no final, non-appealable judgment has been entered in that case:

Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.

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case, the Municipalities misstate Supreme Court precedent—subsequent decisions have significantly limited *Klein*. See, e.g., *Plaut*, 514 U.S. at 218 (“Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress amends applicable law.”).

\* \* \*

Congress may require (insofar as separation-of-powers limitations are concerned) that new statutes be applied in cases not yet final but still pending on appeal.

514 U.S. at 227 & 233 n.7 (emphasis in original). Thus, as no final, non-appealable judgment has been entered in any of the cases currently on appeal, the Municipalities' separation-of-powers challenge fails.

Ignoring *Savannah*, the Municipalities cite cases from other states that are clearly distinguishable. Unlike the statutes at issue in *Roth v. Yackley*, 396 N.E.2d 520 (Ill. 1979), *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So. 2d 392 (La. 2005), and *Federal Express Corp. v. Skelton*, 578 S.W.2d 1 (Ark. 1979), H.B. 209 was not enacted in an attempt to clarify the intention of a prior legislature in enacting an already existing statute. Rather, H.B. 209 simply amends existing law to provide for a new telecommunications taxation scheme.

Additionally, contrary to the Municipalities' suggestion, several other states have addressed similar challenges and, recognizing the principles articulated in *Plaut*, upheld the constitutionality of similar laws. See *Mayor of Detroit v. Arms Tech., Inc.*, 669 N.W.2d 845 (Mich. Ct. App. 2003) (holding that law eliminating retroactive liability to municipality does not violate due process, separation of powers, or title-object clause); *Sturm, Ruger & Co., Inc. v. City of Atlanta*, 560 S.E.2d 525 (Ga. Ct. App. 2002) (holding the application of a law eliminating retroactive liability to municipality, and extinguishing existing lawsuit, does not violate the due process, equal protection,

contract, or bill of attainder clause of either the federal or state constitutions); *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001) (holding that law eliminating retroactive liability to municipality does not violate separation of powers, among other things).

**C. The General Assembly’s declarations of public policy supporting dismissal of the lawsuits and “full and adequate consideration” do not violate separation-of-powers principles.**

The Municipalities claim H.B. 209 violates the separation-of-powers doctrine because it declares that certain things are “full and adequate consideration” within the meaning of Article III, § 39(5). (U. City Br. at 82 n.34.) Legislative constructions of the meaning of provisions in the Missouri Constitution “are not binding upon the courts,” *Gantt v. Brown*, 149 S.W. 644, 645-46 (Mo. 1912), although they are clearly entitled to “great weight,” *Laret Inv. Co. v. Dickmann*, 134 S.W.2d 65, 68 (Mo. 1939). This Court has ultimate authority to fulfill its judicial function, and § 92.089.1 does not violate separation-of-powers principles.

**D. H.B. 209 does not impermissibly encroach upon the executive branch, as the Missouri Constitution expressly grants to the General Assembly the power to collect taxes, and the General Assembly is free to delegate that power to whichever agency it deems fit.**

The Municipalities argue that by “transferring” the power to collect, administer, and distribute local license taxes from municipalities to the Director of Revenue, the General Assembly impermissibly encroached upon the executive branch. (U. City Br. at 90.) The Missouri Constitution, however, expressly states the “taxing power may be

exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes.” MO. CONST. art. X, § 1. *See also Henry v. Manzella*, 201 S.W.2d 457, 459 (Mo. banc 1947) (“Article X, § 1 of the Missouri Constitution broadly confides the whole taxing power to the Legislature.”). Contrary to the Municipalities’ contention, the General Assembly hardly assumes executive power by delegating its tax collection function to the Director of Revenue.

Nor does the General Assembly interfere with executive branch performance by shifting the power to collect taxes from municipalities to the Director. “Cities and like municipal corporations have no inherent power to levy and collect taxes, but derive their powers in that respect from the lawmaking power.” *State ex rel. Emerson v. City of Mound City*, 73 S.W.2d 1017, 1025 (Mo. banc 1934). Thus, this Court has recognized that

[t]he taxing power belongs alone to sovereignty. No such power inheres in municipal corporations. This principle is universally recognized. Therefore as municipal corporations have no inherent power of taxation, consequently they possess only such power in respect thereto which has been granted to them by the Constitution or the statutes.

*Id.* (citing 6 *McQuillin Municipal Corporations* (2 Ed.), § 2523, at 275). That the General Assembly chose to shift the tax collection function from one executive department to another does not violate separation-of-powers principles—the power to

collect taxes is a function granted wholly to the General Assembly, and the General Assembly is free to delegate that power.

Some of the Municipalities also erroneously assert that, pursuant to their charters, the power of enforcing their tax ordinances belongs to them, and therefore H.B. 209 encroaches on their executive function by “mandating dismissal” of these lawsuits and by “forbidding audits and new enforcement actions.” (County Br. at 72-73.) In essence, these Municipalities argue their charters trump the provisions of H.B. 209 that provide for the dismissal of these lawsuits.

Charter or not, the authority of a municipality to tax is granted by the legislature, and it can thus be limited by the legislature. “A county or a city, charter or otherwise is *imperium in imperio*, that is, a government within a government. ... A charter does not transform a county or city into a government apart from and superior to the state.” *St. Louis County v. Univ. City*, 491 S.W.2d 497, 499 (Mo. banc 1973). *See also Kansas City v. J. I. Case Threshing Mach. Co.*, 87 S.W.2d 195, 203 (Mo. banc 1935) (finding that taxing authority granted by charter must be consistent with and subject to the constitution and laws of the State, and is subject to the right of the legislature to change or revoke these powers). This limitation on a municipality’s authority applies to taxation laws. *See, e.g., Coleman v. Kansas City*, 182 S.W.2d 74, 77-78 (Mo. banc 1944) (rejecting city’s argument that the state statute did not apply to it because its charter provided a complete system of taxation); *J.I. Case*, 87 S.W.2d at 203 (rejecting the notion that the constitutional limitation on special laws that change a city charter restricted the General Assembly’s power over taxation).

Finally, even the Municipalities recognize the legislature may “control the executive branch by passing amendatory or supplemental legislation and presenting such legislation to the governor for signature or veto, or, by the power of appropriation.” *Mo. Coal. for the Env’t v. Joint Comm’n on Admin. Rules*, 948 S.W.2d 125 (Mo. banc 1997). (County Br. at 73.) The Municipalities argue, however, that H.B. 209 does not amend the enabling statutes and the Municipalities’ tax ordinances because the text of H.B. 209 does not expressly use the term “amend.” (County Br. at 73.) This hypertechnical argument is refuted by H.B. 209’s text:

Notwithstanding any provisions of this chapter or chapter 66, 80, or 94, RSMo., or the provisions of any municipal charter, after August 28, 2005, no municipality may impose any business license tax, tower tax, or antennae tax on a telecommunications company except as specified in sections 92.074 to 92.098.

And § 92.083.1 similarly addresses the Municipalities’ business license tax ordinances to promote uniformity and certainty:

On or after July 1, 2006, if any city, county, village, or town has imposed a business license tax on a telecommunications company, as authorized in this chapter, or chapter 66, 80, or 94, RSMo., or under the authority granted in its charter, the terms used in such ordinance shall be construed, for the purposes of section 92.074 to 92.098, to have the meanings set forth in this section, regardless of any contrary definition in the ordinance...

In sum, H.B. 209 does not impermissibly encroach on any executive function. The Court should reject the Municipalities' separation-of-powers challenge.

**VII. H.B. 209's dismissal requirements are mandatory and not conditioned on subjective good faith, but even if they were not mandatory, the Municipalities' conclusory allegations that the Wireless Companies lacked subjective good faith do not suffice to save their claims.<sup>36</sup>**

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<sup>36</sup> This section of the Wireless Companies' brief responds to Point 2 of the University City brief and Point 9 of the St. Louis County brief. The standard of review for this argument is that applied to a typical dismissal: "When reviewing the dismissal of a petition, the pleading is granted its broadest intendment, all facts alleged are treated as true, and it is construed favorably to the plaintiff to determine whether the averments invoke substantive principles of law which entitle the plaintiff to relief." *Farm Bureau Town & Country Ins. Co. v. Angoff*, 909 S.W.2d 348, 351 (Mo. banc 1995). "If the motion to dismiss should have been sustained on any meritorious ground alleged in the motion, the ruling of the trial court will be affirmed." *Id.* "A trial court properly grants a motion for judgment on the pleadings if, from the face of the pleadings, the moving party is entitled to a judgment as a matter of law." *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. banc 2000).

**A. H.B. 209 requires immediate dismissal of this litigation without any showing of subjective good faith.**

H.B. 209 requires the immediate dismissal of this litigation, and it does not condition that dismissal on subjective good faith. Instead, H.B. 209 unequivocally states: “If any municipality, prior to July 1, 2006, has brought litigation or causes an audit of back taxes for the nonpayment by a telecommunications company of municipal business license taxes, it shall immediately dismiss such lawsuit without prejudice . . . .” RSMo. § 92.089.2 (emphasis added). Thus, H.B. 209 sets forth only four requirements for immediate dismissal, none of which is a showing of subjective good faith. If (1) a municipality, (2) brought litigation before July 1, 2006, (3) against a telecommunications company, (4) seeking to recover for nonpayment of municipal license taxes, the municipality “shall immediately dismiss such lawsuit . . . .” RSMo. § 92.089.2.

The Municipalities’ entreaty that the Wireless Companies had to prove subjective good faith prior to dismissal improperly reads the word “immediately” right out of H.B. 209. *See Hannibal Trust Co. v. Elzea*, 286 S.W. 371, 377 (Mo. 1926) (“Another cardinal rule in the construction of statutes is that effect must be given, if possible, to every word, clause, and sentence.”) Simply put, dismissal cannot be “immediate” if a showing of subjective good faith is required.

The Municipalities’ strained interpretation would also eliminate the General Assembly’s finding that “resolution of such uncertain litigation” formed part of the consideration for H.B. 209’s new tax scheme from the statute. RSMo. § 92.089. The “resolution” that the General Assembly intended to take place could not occur if the

dismissal of the litigation were conditioned on a showing of subjective good faith, which could itself be uncertain.

Further, the maxim of statutory construction *expressio unius est exclusio alterius* applies—that the General Assembly did not express any further conditions demonstrates that the General Assembly excluded any further conditions to dismissal. *State ex rel. Goldberg v. Barber & Sons Tobacco, Inc.*, 649 S.W.2d 859, 861 (Mo. 1983). The General Assembly certainly knew how to condition dismissal on a showing of subjective good faith yet it did not do so.

As distinguished from dismissal of pending litigation, the inclusion of the subjective good faith standard in H.B. 209 addresses telecommunications companies that have not yet been sued. The General Assembly clearly contemplated that some municipalities might sue after the enactment of H.B. 209. *See* RSMo. § 92.089.1 (“costly litigation which have or may be filed by Missouri municipalities against telecommunications companies . . . is detrimental to the economic well being of the state . . . .”) (emphasis added). Once a telecommunications company establishes its subjective good faith, it is “entitled to full immunity from, and shall not be liable to a municipality, for the payment of disputed amounts of business license taxes, up to and including July 1, 2006.” RSMo. § 92.089.2.

Ending litigation by a political subdivision of the state is a permissible desire of the General Assembly and a permissible requirement of legislation. *See Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys.*, 950 S.W.2d 854, 860 (Mo. banc 1997). But dismissal conditioned on the subsequent litigation of subjective good faith is illusory. Such an

interpretation would prolong and perpetuate the “costly litigation” and would be antithetical to the General Assembly’s desire to promote the “economic well being of the state” by requiring the immediate dismissal of this litigation. RSMo. § 92.089. Because H.B. 209 does not condition dismissal of existing litigation on a finding of subjective good faith, the trial courts did not err in dismissing the Municipalities’ lawsuits.

**B. Even if H.B. 209’s subjective good faith language applied to litigation pending when it was enacted, the Municipalities’ conclusory allegations of the Wireless Companies’ lack of good faith are insufficient to preclude dismissal.**

In an attempt to circumvent H.B. 209’s dismissal requirement, the Municipalities amended their petitions to insert conclusory allegations regarding good faith, merely parroting H.B. 209’s statutory language. (*See* R. 731-744, 767-805; C.R. 30-95). Without any supporting facts, the Municipalities alleged:

92. Defendants’ failure to pay the license taxes is not based on a good faith belief on the part of any Defendant that:

A. it was not a telephone company covered by the municipal business license tax ordinance, or the statute authorizing the enactment of such taxing ordinance, or did not provide telephone service as stated in the business license tax ordinance, and therefore owed no business license tax to the municipality; or

B. that certain categories of its revenues did not qualify under the definition or wording of the ordinance as gross receipts or revenues upon which business license taxes should be calculated.

(R. 792).

83. Defendants' failure to pay the taxes dues and owing under county's license tax ordinance is not based on a good faith belief on the part of any Defendant that either:

(1) It was not a telephone company covered by County's license tax ordinance, or Section 66.300 RSMo., or did not provide telephone service as stated in County's license tax ordinance, and therefore owed no business license tax to County; or

(2) That certain categories of its revenues did not qualify under the definition or wording of the ordinance as gross receipts or revenues upon which business license taxes should be calculated.

(C.R. 81-82).

Contrary to the Municipalities' assertions, these formulaic, fact-deficient allegations cannot and do not preclude dismissal. Missouri courts disregard boilerplate, conclusory allegations of lack of good faith or bad faith in ruling on motions to dismiss. *W. Robidoux Printing & Lithographing Co. v. Mo. State Highway Comm'n*, 498 S.W.2d 745, 749 (Mo. 1973); *State ex rel. State Tax Comm'n v. Briscoe*, 451 S.W.2d 1, 5 (Mo. 1970). And courts deem only well-pleaded facts as true on motions for judgment on the

pleadings. *Ste. Genevieve Sch. Dist. R-II v. Bd. of Alderman*, 66 S.W.3d 6, 11 (Mo. banc 2002).

Because the Municipalities’ allegations regarding the Wireless Companies’ subjective good faith beliefs are nothing more than unsupported recitations of statutory language—and are not well-pleaded facts—the allegations are not deemed admitted for purposes of the motions to dismiss, and the trial courts did not need to consider such allegations to determine whether the Municipalities stated a cause of action under H.B. 209. The trial courts, therefore, properly disregarded the Municipalities’ “lack of good faith” allegations in dismissing these cases. This Court should therefore affirm the judgments of the trial courts.

**VIII. H.B. 209 Provides Clear Standards for Dismissal and Immunity And Is Not Void for Vagueness.<sup>37</sup>**

The Municipalities contend H.B. 209 is void for vagueness, challenging the inclusion of the term “subjective” and claiming the statute is “loose.” (U. City Br. at 102-04.)<sup>38</sup> But it is “well established that if the law is susceptible of any reasonable and

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<sup>37</sup> This section of the Wireless Companies’ brief responds to Point 8 of the University City brief.

<sup>38</sup> The Municipalities have waived any void-for-vagueness challenge by failing to reference any constitutional provision. *Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo.banc 1989) (party must “designate specifically the constitutional provision claimed to have been violated”). And because any reference would have been to the Missouri and

practical construction which will support it, it will be held valid, and . . . the courts must endeavor, by every rule of construction, to give it effect.” *Harjoe v. Herz Fin.*, 108 S.W.3d 653, 655 (Mo. banc 2003) (quotations omitted).

The Municipalities’ vagueness argument fails for several reasons. First, the term “subjective” does not need to be construed at all as applied to these cases because H.B. 209 requires their immediate dismissal without any showing of subjective good faith. *See* Section VII(A), *supra*. Second, litigating the issue of “subjective good faith” as a condition to dismissal surely would prolong and perpetuate the “costly litigation which have . . . [been] filed,” and would be antithetical to the General Assembly’s desire to promote the “economic well being of the state” by requiring the “immediate” dismissal of existing litigation. RSMo. § 92.089.

The Municipalities’ rhetorical questioning of Missouri taxing policy from August 28, 2005 to July 1, 2006 also has a simple answer. Those telecommunications companies that have been paying voluntarily under certain ordinances without protest will continue paying under those ordinances. During that same period, those companies that have not

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federal due process clauses, which afford the Municipalities no protection, they lack standing to even raise this challenge. *See U-Haul Co. v. City of St. Louis*, 855 S.W.2d 424, 426 (Mo.App.1993) (“The ‘void-for-vagueness’ constitutional attack arises from the requirements of due process of both the United States and Missouri constitutions.”); *City of Chesterfield v. Dir. of Revenue*, 811 S.W.2d 375, 377 (Mo.banc 1991) (“municipalities...are not ‘persons’ within the protection of the due process...clause[]”).

been paying under various ordinances, or who have paid under protest, would not pay until the taxation scheme established by H.B. 209 takes effect on July 1, 2006.

The use of word “subjective” does not render H.B. 209 vague simply because, as the Municipalities contend, the standard “is idiosyncratic to each telephone company” and “based on the personal wishes and desires of Defendants.” (U. City Br. at 102.) The term subjective enjoys common—and constitutional—use in the law. *See, e.g., Psychiatric Healthcare Corp. of Mo. v. Dept. of Soc. Servs.*, 100 S.W.3d 891, 902-03 (Mo. App. 2003) (state Medicaid regulation allowing physician to make a subjective determination as to whether a Medicaid beneficiary’s healthcare was not medically necessary is not unconstitutionally vague). *See also Cohn v. Dept. of Prof’l Regulation*, 477 So. 2d 1039 (Fla. Dist. Ct. App. 1985) (statute providing that a pharmacist in good faith may dispense controlled substances is not void for vagueness); *New York v. Goldberg*, 369 N.Y.S.2d 989 (1975) (ruling that the term “good faith” is neither too vague a standard by which physicians must act nor by which a jury may judge conduct); *Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs*, 575 P.2d 835, 842 (Co. banc 1978) (ruling that statute not void for vagueness because the word “necessary” implies a requirement of a good faith determination).

The standard for determining whether a statute is void for vagueness is “whether the terms or words used are of common usage and are understandable by persons of ordinary intelligence.” *Bd. of Educ. v. State*, 47 S.W.3d 366, 369 (Mo. banc 2001) (quotations omitted). “Neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague.” *State ex rel. Zobel*

*v. Burrell*, 167 S.W.3d 688, 692 (Mo. banc 2005). And the degree of specificity required—or the degree of vagueness tolerated—depends in part on the nature of the statute at issue, with economic regulation “subject to a less strict vagueness test . . . .” *Psychiatric Healthcare Corp.*, 100 S.W.3d at 903 (quoting *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982)). Similarly, the fact that the application of a statute is disputed does not render the statute unconstitutionally vague.

This Court recently reaffirmed these standards in upholding a criminal statute that requires physicians to counsel patients of “indicators,” “contraindicators,” “risk factors,” and “situational factors” of an abortion at least 24 hours prior to performing an abortion, and makes it a crime to willfully and knowingly violate that statute. *Reproductive Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, No. SC86768, 2006 WL 463575, at \*2-\*3 (Mo. banc Feb. 28, 2006). The Court rejected a void for vagueness challenge, holding that the counseling requirement was equivalent to the physician’s duty to obtain informed consent. *Id.* at \*3-\*4.

Finally, H.B. 209 is not unconstitutionally vague because it defines “subjective good faith belief” as a belief that the telecommunications company did not owe a tax because it (1) was not a telephone company covered by the license tax ordinance; (2) was not a telephone company covered by the statute authorizing the enactment of the license tax ordinance; (3) did not provide telephone service as stated in the license tax ordinance; or (4) had certain categories of revenue that did not qualify as taxable gross receipts or revenues under the definition or wording of the license tax ordinance. *See* RSMo. § 92.089.1. The Municipalities contention that “subjective good faith belief” is

individualized as to each telecommunications company and is therefore an arbitrary standard that is void for vagueness has no merit. *See Planned Parenthood*, 2006 WL 463575 at \*3-\*4. “Subjective good faith belief” is a term that reasonable people can understand, as even the Municipalities admit, (U. City Br. at 102), and the definition described in H.B. 209 suffices under the law.

In sum, the Municipalities’ “void for vagueness” argument fails at many levels and for many reasons and does not alter the unconditional mandate of the General Assembly that this state’s political subdivisions “shall immediately dismiss” these lawsuits. RSMo. § 92.089.2.

**IX. H.B. 209 does not violate Article X, section 3 or Article I, section 2 of the Missouri Constitution or the Fourteenth Amendment to the United States Constitution, and the Municipalities do not have standing to raise these uniformity and equal protection issues.<sup>39</sup>**

**A. The Municipalities lack standing to assert uniformity and equal protection issues.**

The Municipalities assert that application of H.B. 209 leads to an unconstitutional lack of uniformity forbidden by Article X, § 3 of the Missouri Constitution and unlawful classification in violation of equal protection under Article I, § 2 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution.

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<sup>39</sup> This section of the Wireless Companies’ brief responds to Points 9 and 10 of the University City brief and Points 7 and 8 of the St. Louis County brief.

Specifically, the Municipalities assert H.B. 209 sets arbitrary classifications by granting immunity to those who have not paid the questionable license taxes without granting immunity to those who have paid the taxes and by treating telephone companies differently than providers of gas, water, or electrical services. (U. City Br. at 111-12; County Br. at 85, 92.)

As a threshold matter, the Municipalities lack standing to raise these constitutional challenges. A party must demonstrate that he is “adversely affected by the statute in question” to have standing to challenge that statute. *W.R. Grace & Co. v. Hughlett*, 729 S.W.2d 203, 206 (Mo. banc 1987) (quoting *Ryder v. County of St. Charles*, 552 S.W.2d 705, 707 (Mo. banc 1977)). In other words, a litigant must have a “personal stake” in the resolution of the issue raised. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 53 (Mo. banc 1999).

The Municipalities assert distinctions in support of their uniformity and equal protection challenges that do not adversely affect them. Payment of past taxes by certain companies does not vest the municipalities with a right to complain about the treatment of those companies. Any adverse effect of these distinctions would be felt by companies that, for whatever reason, paid taxes to municipalities other than under protest, or that are gas, water, or electricity service providers. And any benefit to the Municipalities is too attenuated to provide the Municipalities standing to raise uniformity and equal protection arguments.

Likewise, the individual plaintiffs have no standing to assert these constitutional issues. These individuals are not members of any of the claimed distinct classes. Hence,

they lack standing to complain about the treatment of one class vis-à-vis a member of another class.<sup>40</sup>

Furthermore, Article I, § 2 applies to “persons.” The individual appellants have sued in their official capacities. (R. 767-805.) As such, they are legally no different than the organizations they represent. *Robb v. Hungerbeeler*, 370 F.3d 735, 739 (8th Cir. 2004). The Municipalities are not “persons” either. See *City of Chesterfield v. Dir. of Revenue*, 811 S.W.2d 375, 377 (Mo. banc 1991); *State ex rel. Brentwood Sch. Dist. v. State Tax Comm’n*, 589 S.W.2d 613 (Mo. banc 1979) (school district, as an agent of the government, does not have standing to pursue a claim for violation of due process because it is not a “person”); *State ex rel. Mehlville Fire Prot. Dist. v. State Tax Comm’n*, 695 S.W.2d 518, 521 (Mo. App. 1985) (political subdivision is not a “person” within the Missouri due process clause). Because neither the Municipalities nor the agents of the Municipalities are “persons,” they are prohibited from challenging H.B. 209 on equal protection grounds.

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<sup>40</sup> The individual appellants’ attempt to rely on taxpayer standing fails as they cannot demonstrate any direct expenditure of funds generated through taxation or, given the revenue-neutral effect of H.B. 209 as set forth in RSMo. § 92.086.6, an increased levy in taxes or a pecuniary loss attributable to the challenged transaction. *E. Mo. Laborers Dist. Coun. v. County of St. Louis*, 781 S.W.2d 43, 47 (Mo. banc 1989). Moreover, even taxpayer standing would not permit them to assert uniformity and equal protection claims in which they lack a direct interest. See Section V(A) *supra*.

**B. H.B. 209 Presents No Uniformity or Equal Protection Issues.**

Article X, § 3 of the Missouri Constitution provides that “[t]axes . . . shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.” Article I, § 2 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution guarantee persons equal rights and protections under the law. The Municipalities argue that H.B. 209 violates these provisions, resting their argument on two comparisons: (1) those companies that in the past paid gross receipts taxes without challenge to those that did not pay based upon a subjective good faith belief that the ordinances were inapplicable to their services; and (2) “telephone companies” as opposed to providers of gas, water, or electrical services. The arguments fail as detailed below.

**1. H.B. 209 applies uniformly to all similarly situated class members.**

Two important principles guide courts considering whether a tax is “uniform upon the same class or subclass of subjects.” MO. CONST. art. X, § 3. First, a tax is presumed uniform. *Vill. of Beverly Hills v. Schulter*, 130 S.W.2d 532, 535 (Mo. 1939). Second, the constitutional provision does not require absolute uniformity, but only that the same category of subjects, as reasonably classified by the General Assembly, be taxed uniformly. *State ex rel. Jones v. Nolte*, 165 S.W.2d 632, 636 (Mo. banc 1942).

In this case, the General Assembly could reasonably treat non-paying companies having a subjective good faith belief that the ordinances were inapplicable to them differently from entities who paid without protest. *See Pipe Fabricators, Inc. v. Dir. of*

*Revenue*, 654 S.W.2d 74, 77 (Mo. banc 1983) (it is not forbidden to treat one class of entities differently from another).

Treating those that voluntarily pay a tax differently from those that either do not pay the tax or pay the tax “under protest” is consistent with Missouri law. For example, except in certain circumstances, a taxpayer who elects to pay a tax without following the protest procedures outlined in RSMo. § 139.031 generally waives any right to recovery if the tax is found to be excessive or otherwise inapplicable after the tax has been paid. *Buck v. Leggett*, 813 S.W.2d 872, 878 (Mo. banc 1991). Although arguably unfair to the taxpayer, this fundamental precept prevents burdening taxing jurisdictions with the potential hardship of having to refund taxes they have received in reliance on the validity of their taxing statutes or ordinances. *See Lane v. Lensmeyer*, 158 S.W.3d 218, 222-223 n.7 (Mo. banc 2005).

The Municipalities’ uniformity argument ignores the important fact that payment by those companies that paid the tax was voluntary. Such a self-determined act removes a paying company from any uniformity analysis. In *Mid-America Television Co. v. State Tax Commission*, 652 S.W.2d 674 (Mo. banc 1983), affiliated corporations that could not file a consolidated Missouri tax return asserted a uniformity challenge to Missouri income tax statutes that arguably allowed a larger federal income tax deduction for affiliated corporations that could file a consolidated Missouri tax return. This Court noted that the complaining companies elected to be part of their class of companies and, as a result, could not be heard to complain of the consequences of that choice. *Id.* at 681.

Here, those companies who paid elected to pay. This self-determined act defeats a uniformity challenge.

Furthermore, telecommunications companies and providers of gas, water, and electrical services are not a “natural class.” Each provides different types of services, to different customers, and requires different services from the municipality. The Municipalities’ own taxing schemes proves this point. *See* Section V(B), *supra*.

But even if there were such a “natural class,” uniformity requirements do not prohibit tax sub-classifications—only those that are arbitrary, unreasonable, or without substantial justification. *Bert v. Dir. of Revenue*, 935 S.W.2d 319 (Mo. 1996). Telecommunications companies are as different from water, gas, and electric companies as they are from construction companies or banks. The ordinances themselves evidence the long history of recognizing these inherent differences by providing different methods or rates of taxation for different businesses.<sup>41</sup>

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<sup>41</sup> The Municipalities make a one sentence argument that a uniformity issue exists as certain municipalities are not subject to adjustment or capping of their various tax rates. (U. City Br. at 108.) This does not raise a uniformity issue, as the tax imposed is uniform throughout the municipality whatever its rate. Moreover, the rational basis for this distinction among the municipalities is explained in section V(G) of this brief.

**2. H.B. 209 does not violate the Equal Protection Clauses of the United States or Missouri Constitutions because any differing treatment of entities is based upon a rational basis.**

Assuming, *arguendo*, that H.B. 209 results in a classification of taxpayers, it does not violate the Equal Protection Clauses of the Missouri or United States Constitutions. When considering tax classifications under attack for violation of equal protection, the Court applies a rational basis standard to determine the constitutionality of the tax classification adopted by the legislature. *Brookside Estates v. Tax Comm'n of Mo.*, 849 S.W.2d 29, 31 (Mo. banc 1993); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). If the tax classification bears a rational relationship to a legitimate legislative objective, the constitutionality of the classification will be upheld. A classification will be sustained if any state of fact reasonably can be conceived to justify it. *FCC*, 508 U.S. at 313-4. A legislative choice “is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004) (citing *FCC*, 508 U.S. at 315). “[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. . . . Where there are ‘plausible reasons’ for [legislative] action, ‘[the court’s] inquiry is at an end.’” *FCC*, 508 U.S. at 313-4.

In conclusory fashion, the Municipalities allege that H.B. 209 denies equal protection by: (1) exempting select businesses from taxation; (2) arbitrarily classifying for taxation purposes; and (3) discriminating against companies that paid taxes. (U. City Br. at 112.) H.B. 209’s classifications, however, are rationally related to legitimate

government interests. H.B. 209 applies the same tax rate and base to every telecommunications company within each taxing municipality and establishes certainty in the only industry engaged in rampant license tax litigation. This certainty will eliminate variations in telecommunications companies' tax payments based on their differing interpretations of ordinances, and municipalities' corresponding individualized enforcement.

Furthermore, the classification is rationally related to the Missouri tax protest procedure. Those taxpayers who are not protected by RSMo. § 139.031 were on notice as a matter of law that their unprotested tax payments were unrecoverable. It is ironic that the very parties raising this constitutional challenge are the taxing entities that Missouri tax procedure protected at the expense of taxpayers who paid tax without protesting the payments. *Lane v. Lensmeyer*, 158 S.W.3d at 222, n. 7; *Metal Form Corp. v. Leachman*, 599 S.W.2d 922, 925 (Mo. banc 1980). Because this rational classification is grounded in Missouri tax procedure, the Municipalities' citations of authority from other states are of no relevance.

The Municipalities' citation to *City of St. Louis v. Western Union Telegraph Co.*, 760 S.W.2d 577 (Mo. App. 1988), is misplaced. There, the classification (taxing only telegraph companies that provide telegraph service) was invalid because there was no rational basis for that classification.

In summary, RSMo. § 92.089.2 violates neither the Uniformity Clause of the Missouri Constitution nor the Equal Protection Clauses of the Missouri and United States Constitutions.

**X. H.B. 209 complies with both the single-subject and clear-title rules set forth in Article III, § 23 of the Missouri Constitution.<sup>42</sup>**

H.B. 209 is titled “AN ACT to amend Chapters 71, 92, and 227, RSMo., by adding thereto eighteen new sections relating to the assessment and collection of various taxes on telecommunications companies, with an effective date for certain sections.” And it contains provisions referred to as the “Municipal Telecommunications Business License Tax Simplification Act” (hereinafter, the “License Tax Act”), in addition to certain provisions referred to as the “State Highway Utility Relocation Act” (hereinafter, the “Relocation Act”). The title of H.B. 209 and its provisions do not violate the single-subject and clear-title rules of Article III, § 23.

**A. The Relocation Act fairly relates to the subject described in H.B. 209’s title: the assessment and collection of taxes on telecommunications companies.**

Article III, § 23 provides that no bill shall contain “more than one subject which shall be clearly expressed in its title.” The purpose of the single-subject rule is to “keep individual members of the legislature and the public fairly apprised of the subject matter of pending laws and to insulate the governor from ‘take-it-or-leave-it’ choices when contemplating the use of the veto power.” *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 326 (Mo. banc 2000) (quoting *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 325-26

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<sup>42</sup> This section of the Wireless Companies’ brief responds to Points 11 and 12 of the University City brief.

(Mo. banc 1997)). Missouri courts, however, have “consistently attempted to avoid an interpretation of the Constitution that will ‘limit or cripple legislative enactments any further than what was necessary by the absolute requirements of the law.’” *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994) (quoting *State v. Miller*, 45 Mo. 495, 498 (1870)). As a result, the use of the single-subject rule to contest the constitutionality of statutes is disfavored, and the constitutionality of those statutes is strongly presumed. *City of St. Charles v. State* 165 S.W.3d 149, 150 (Mo. 2005); *C.C. Dillon*, 12 S.W.3d at 327. This Court interprets the single-subject rule “liberally” and upholds the constitutionality of a statute against a procedural attack unless the act “clearly and undoubtedly” violates the constitutional limitation. *See C.C. Dillon*, 12 S.W.3d at 327.

The test to determine if a bill violates the single-subject rule is whether the challenged provision “fairly relates to the subject described in the title of the bill”; “has a natural connection to the subject”; or “is a means to accomplish the law’s purpose.” *City of St. Charles*, 165 S.W.3d at 151 (quoting *Fust v. Attorney Gen.*, 947 S.W.2d 424, 428 (Mo. banc 1997)). The test does not concern the relationship between individual provisions, but instead focuses on the relationship between the challenged provision and the subject of the bill as expressed in its title. *See id.*; *C.C. Dillon*, 12 S.W.3d at 328.

To determine the subject of a bill, the Court first looks to its title as finally passed. *See C.C. Dillon*, 12 S.W.3d at 329. The subject also includes “all matters that fall within or reasonably relate to the general core purpose of the proposed legislation.” *City of St. Charles*, 165 S.W.3d at 151.

For example, in *City of St. Charles v. State*, the City of St. Charles filed suit to challenge the constitutionality of S.B. 1107, which was entitled “An Act To repeal [certain sections], and to enact in lieu thereof forty-three new sections relating to emergency services, with penalty provisions.” *Id.* The bill also included provisions prohibiting utilization of tax increment financing (“TIF”) in charter counties of a certain population in an area designated as a flood plain by federal authorities. *See id.* St. Charles argued the bill violated the single-subject rule because the TIF provisions did not relate to “emergency services.” *Id.*

But this Court disagreed, holding the TIF provisions were “sufficiently related to the subject of the bill—emergency services—to pass constitutional muster.” *Id.* Noting that while “in the abstract there seems to be no connection” between emergency services and TIF, this Court explained that the “obvious and significant goal of the TIF amendments is to ensure that adequate emergency services are available in certain areas that need them most—‘area[s] designated as flood plain.’” *Id.* at 151-52. “That goal,” this Court continued, “is sought to be achieved by prohibiting new TIF districts in flood plain areas . . . so that there is less likelihood that development will occur, thus less need for emergency services.” *Id.* at 152. As a result, the TIF provisions fairly related to emergency services, the subject of S.B. 1107. *Id.*

Similarly, in *C.C. Dillon* a company challenged the constitutionality of S.B. 883, which allowed cities and counties to regulate billboards more strictly than provided for in state billboard regulations. 12 S.W.3d at 324. As finally passed, S.B. 883 was titled “An Act to repeal [certain sections] relating to transportation, and to enact in lieu thereof two

new sections relating to the same subject.” *Id.* The company challenged S.B. 883 under the single-subject rule, arguing the inclusion of the billboard regulations introduced multiple subjects. *Id.* at 329. Again, this Court upheld the statute, pointing out the “very function of billboards is to capture the attention of the traveling public,” and billboards have been “inextricably linked to highway transportation by federal and state legislation,” and holding that billboards “fairly relate to, or are naturally connected with, transportation.” *Id.*

As expressed in H.B. 209’s title, its subject concerns “the assessment and collection of various taxes on telecommunications companies . . . .” The Relocation Act fairly relates to and has a natural connection with the subject of H.B. 209. It requires telecommunications companies that own “utility facilities” (as defined by RSMo. § 227.242(21)) within the rights-of-way along state highways to relocate such facilities at their own expense, while the License Tax Act simplifies the taxation on the revenues telecommunications companies derive from those facilities, thereby reducing their transaction costs in paying taxes. Thus, H.B. 209 reallocates benefits and obligations with respect to the cost of doing business in Missouri municipalities.

Like the statutory link between billboards and highway transportation described in *C.C. Dillon*, federal law inextricably links taxation on telecommunications companies to the use of rights-of-way. *See, e.g.,* 47 U.S.C. § 253(c) (permitting state and local governments to manage public rights-of-way and to require fair and reasonable compensation from telecommunications providers for use of public rights-of-way). Indeed, the Municipalities themselves, in the very ordinances at issue, tie taxation to

right-of-way use. For example, St. Joseph Code § 27-305 inextricably links gross receipts taxes on businesses “operating . . . a telephone communicating system” to their use of the city’s rights-of-way:

Every person engaged in the business of operating for compensation a telephone communicating system, together with plant and facilities, including radio transmitters, and through wires and cables upon poles or in conduits along, upon, over or under the streets, alleys, parkways or other publicly owned premises within the city...shall pay to the city...a license tax and fee...

(App. Appx. 114-15) (emphasis added). Congruous with the connection between taxation of telephone companies and those companies’ use of the rights-of-way in the Municipalities, the Relocation Act allows certain municipalities to enact local ordinances regarding the use of municipal non-state highways, streets, and roads. *See* RSMo. § 227.249.

The codification of the relationship between taxes and the use of rights-of-way under federal law and in the Municipalities’ own ordinances provides the precise sort of linkage that suffices to show a “fair relation” or “natural connection.” *See C.C. Dillon*, 12 S.W.3d at 327-330. H.B. 209 complies with the single-subject rule.

**B. H.B. 209’s title clearly indicates that it amends Chapter 227.**

The clear-title rule is designed to prevent fraudulent, misleading, and improper legislation, by providing that the title should indicate in a general way the kind of legislation being enacted. *C.C. Dillon*, 12 S.W.3d at 329 (*citing Fust*, 947 S.W.2d at

429). Under this rule, if the title of a bill contains a particular limitation or restriction, any provision that exceeds the limitation in the title is invalid because the title “affirmatively misleads the reader.” *Id.* The touchstone of the clear-title rule is that the bill’s title cannot be underinclusive. *Id.* The title of a bill, however, need only indicate the general contents of the act. *Id.*

The Municipalities contend H.B. 209’s title is underinclusive and affirmatively misleading because it gives “a reader the mistaken impression that H.B. 209 pertains exclusively to taxes on telecommunications companies without alerting the reader to Chapter 227’s provisions specifying the manner in which utilities in highway right-of-ways may be constructed or relocated.” (U. City Br. at 114.) To the contrary, a member of the legislature or the general public reading H.B. 209’s title immediately learns it is “[a]n act to amend chapter[.] . . . 227,” which is entitled “State Highway System” and which deals extensively with utilities’ rights-of-way under and along state highways. *See, e.g.*, RSMo. § 227.130 *et seq.* Because H.B. 209’s title notifies a reader that the bill affects Chapter 227, H.B. 209 conforms with the clear-title rule.

**C. Even if the Court were to determine H.B. 209 violates Article III, § 23, the Relocation Act is severable from H.B. 209.**

Even if the Court were to find that H.B. 209 contains multiple subjects, the License Tax Act survives because it was the bill’s original, controlling purpose as clearly expressed in the title. A violation of the single-subject rule will not invalidate a bill if the Court is “convinced beyond reasonable doubt that one of the bill’s multiple subjects is its

original, controlling purpose and that the other subject is not.” *Hammerschmidt*, 877 S.W.2d at 103.

In making this determination, the Court considers whether the challenged provision is essential to the bill’s efficacy, is one without which the bill would be incomplete and unworkable, and is one without which the legislators would not have adopted the bill. *See id.* If the Court determines a bill “contains a single central [remaining] purpose,” then it will sever the portion of the bill containing the additional subject, and the bill will stand with its “primary, core subject intact.” *Id.* “In determining the original, controlling purpose of the bill for purposes of determining severance issues, a title that ‘clearly’ expresses the bill’s single subject is exceedingly important.” *Id.* The Court also looks at the text of the bill and its progression through the General Assembly. *See id.*, 877 S.W.2d at 103-04.

In *Hammerschmidt*, this Court considered whether to sever provisions allowing a county to adopt a constitution from a bill that primarily concerned elections. *See* 877 S.W.2d at 103-04. After reviewing the entire bill, the Court concluded the county-constitution provisions were “not essential to the efficacy of the bill,” the election provisions were “both complete and workable” without the county-constitution provisions, and “the legislature would have adopted the bill without [the county-constitution provisions].” *Id.* at 104. Accordingly, the Court held the county-constitution provisions were severable and allowed the election provisions of the bill to remain in effect. *Id.* *See also* *SSM Cardinal Glennon Children’s Hosp. v. State*, 68 S.W.3d 412, 418 (Mo. banc 2002); *Nat’l Solid Waste Mgmt. Ass’n v. Dir. of Dep’t. of*

*Natural Res.*, 964 S.W.2d 818, 822 (Mo. banc 1998); *Carmack v. Dir., Mo. Dep't. of Agric.*, 945 S.W.2d 956 (Mo. banc 1997).

In this case, even if the Court found a single-subject violation, the Relocation Act is severable from the remainder of H.B. 209. From its inception, H.B. 209 was concerned with municipal business license taxes on telecommunications companies. The original, controlling purpose of H.B. 209, as expressed in its title, was to amend sections relating to the assessment and collection of various taxes on telecommunications companies. Chapters 71 and 92, as amended by H.B. 209, contain the central purpose of the legislation, and both chapters are complete and workable without the Relocation Act. Finally, a review of H.B. 209's history demonstrates the legislature would have passed H.B. 209 without the inclusion of the Relocation Act.<sup>43</sup> Accordingly, the Relocation Act is severable from the License Tax Act.

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<sup>43</sup> On April 20, 2005, before the bill included the Relocation Act, it passed by a vote of 97 to 55 in the House. On May 2, the Senate Committee on Economic Development, Tourism and Local Government passed a senate committee substitute that did not include the Relocation Act, making a "do pass" recommendation to the entire Senate. On May 10, the Senate passed the bill as amended to include the Relocation Act, with a vote of 23 to 8. On May 12, 2005, the House passed the amended bill, with a final vote of 105 to 52. See Activity History for HB209, <http://www.house.state.mo.us/bills051/action/aH.B.209.htm>.

**XI. The Municipalities cannot avoid H.B. 209’s lawsuit-dismissal requirement by claiming the State is a plaintiff.<sup>44</sup>**

On August 9, 2005, Judge Dowd ruled that tax collection actions by third and fourth class cities “must be brought in the name of the state.” *City of Wellston v. SBC Communications, Inc.*, Cause No. 044-02645 (St. Louis City Circuit Ct. Aug. 9, 2005). (See also U. City Br. at 36-37.) The University City plaintiffs responded by amending their petition to, in the alternative, bring the claims of the third and fourth class cities in the name of the State. They now reason that H.B. 209 does not apply to their case since it requires dismissal of claims brought by municipalities, not by the State. (U. City Br. at 37.)

The amended petition does not change the fact that the third and fourth class cities are the real parties in interest in the University City case. See *State ex rel. Mo. Water Co. v. Bostian*, 280 S.W.2d 663, 669 (Mo. banc 1955) (finding no support for contention that State is a proper party merely because real party in interest filed action as relator). The attorneys representing the “State” in the University City case are the same attorneys who have been representing these plaintiffs for years. But “[i]n legal actions on behalf of the

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<sup>44</sup> This section of the Wireless Companies’ brief responds to Point 1 of the University City brief. The standard of review for this argument is that applied to a typical dismissal. See *supra* at 85 n.36.

state, only the Attorney General may represent the state with sovereign power.”<sup>45</sup> *Neel v. Strong*, 114 S.W.3d 272, 275 (Mo. App. 2003). *See also* RSMo. § 27.060 (“The attorney general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state . . . .”). The shell-game the Municipalities play by using a fictitious “State” plaintiff should not be permitted by this Court.

### **CONCLUSION**

For the foregoing reasons, the Wireless Companies respectfully request that this Court affirm the judgment, as amended, entered below.

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<sup>45</sup> The only other party authorized to bring suit on behalf of the State is the prosecuting attorney of a particular county, in certain circumstances. *See* RSMo. § 56.060.

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## **CERTIFICATE OF COMPLIANCE**

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 2000 and contains 27,440 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 3-1/2 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 with the clerk.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served by Federal Express, postage prepaid this 13th day of March, 2006, to:

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