IN THE SUPREME COURT OF MISSOURI

Case No. SC87238

CITY OF SPRINGFIELD,
Plaintiff-Appellant,

v.

SPRINT SPECTRUM, L.P.,
Defendant-Respondent.

Appeal from the Circuit Court of Greene County, Missouri
Thirty-First Judicial Circuit, The Honorable J. Miles Sweeney, Presiding Judge
Case No. 104CC5647

REPLY BRIEF OF APPELLANT CITY OF SPRINGFIELD

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I. The Application of Springfield's Ordinance to Sprint Has Already Been Judicially Determined and Sprint Is Improperly Seeking an Advisory Opinion of this Court.

Sprint claims Springfield's Ordinance does not apply to the wireless services provided by Sprint and it does not know the meaning of the phrase "within the city," as it appears in Springfield's Ordinance. (Resp. Br. at 10-17.) Clearly, Sprint disagrees with the decision of Judge Laughrey, which held Springfield's Ordinance was enforceable and applicable to all the wireless companies.[1] (Springfield Br. at 24; A22-24.)

If, as Sprint suggests, the provisions of HB 209 are constitutional, then what Springfield's Ordinance provides as to who is subject to its gross receipts tax and how it is calculated is completely irrelevant because Section 92.086.4 of HB 209 prescribes how local taxing ordinances are to be applied beginning July 1, 2006. (A53.)

Sprint seems to be asking this Court to issue an advisory opinion as to the application

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[1]Sprint contends Judge Laughrey's decision is not binding upon it because it was not a party to that litigation. Sprint neglects to mention that Sprint Corporation, Sprint Spectrum, L.P.'s parent company, remained as a party in the federal district court litigation, asserting a counterclaim against Springfield based on Hancock, presumably as an affected taxpayer. Judge Laughrey ruled against Sprint Corporation on its Hancock counterclaim. (A29-A30.)

of Springfield's Ordinance, i.e. what does "within the city" mean? The Declaratory Judgments Act does not authorize courts to render advisory opinions. Richard L. Schnake, 17A MISSOURI PRACTICE SERIES § 87.01-1. Springfield respectfully submits it is inappropriate for Sprint to argue, in the context of an appeal challenging the constitutionality of HB 209, extraneous issues regarding alleged ways to minimize its tax liability under Springfield's Ordinance in hopes of obtaining an advisory opinion from this Court.

II. HB 209 Violates Article III, § 38(a) by Gratuitously Extinguishing the Wireless Companies' Corporate Tax Debt And, Thereby, Uses Public Monies to Aid Private Enterprise.

Sprint contends HB 209 does not violate Article III, § 38(a) of the Missouri Constitution because the amounts due to Springfield for taxes have not been determined to be valid or liquidated and thus, no "public funds" are involved. (Resp. Br. at 19.) Contrary to Sprint's assertion, Article III, § 38(a) does not qualify its prohibition by imposing a "vested right" or "fixed sum certain" requirement. It simply states: "the general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation . . . ." MO. CONST. art. III, § 38(a). The prohibition focuses on the nature of the aid and the character of the recipient; its application does not depend on funds having entered the public treasury, as Section 38(a)'s "public credit" language plainly attests.

Without citation to authority, Sprint suggests the definition of "public money" is

linked to the concept of valid or liquidated claims.[2] However, there is no precedent for linking the definition of "public money" to the concept of "fixed sums" or "vested rights." Instead, the "public funds" analysis is much more pragmatic: it recognizes that requiring a municipality to forego the collection of a tax – via tax amnesties, tax credits, tax forgiveness, tax exemptions or tax subsidies – depletes the local treasury and results in public aid to the recipient. *See Curchin v. Missouri Indus. Dev. Bd.*, 722 S.W.2d 930, 933 (Mo. banc 1987) ("This tax credit is as much a grant of public money or property and is as much a drain on the state's coffers as would be an outright payment by the state to the bondholder upon default. . . . . The allowance of such a tax credit constitutes a grant of public money or property within Article III, Section 38(a) of the Missouri Constitution."); *Sommer v. City of St. Louis*, 631 S.W.2d 676, 680 (Mo. Ct. App. E.D. 1982) ("tax abatement does not differ significantly from an expenditure of public funds, since in either case the conduct complained of could result in the treasury's containing less money than it ought to").

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[2]Sprint contends Springfield has ignored "that its claims have not been determined to be valid or liquidated." (Resp. Br. at 19.) To the contrary, Judge Laughrey has determined Springfield's Ordinance is enforceable and applies to mobile telephone services within the city. (A14-A30; L.F. 216-232.) Further, it is not speculation to assert Springfield will experience a loss of revenue as a result of HB 209's forgiveness of all back taxes of Sprint and the other wireless telephone companies and the reduction of the rate of tax and taxable base Springfield must utilize in the future under HB 209.

In Springfield, T-Mobile has paid (and continues to pay) a 6% gross receipt tax pursuant to the City's Ordinance.[3] (L.F. 5, 14, 163.) Undoubtedly, these revenues constitute public funds. If Sprint's position is adopted, constitutional analysis will turn on whether the taxes have been paid, collected, or adjudicated (i.e., whether they have entered the public treasury). This is a simplistic approach rejected by the courts above and by Article III, § 38(a) itself. To excuse Sprint from paying delinquent gross receipts taxes, as HB 209 does, does not make the resulting loss any less a "public" concern – as the police and firefighters whose livelihoods depend on such revenues can attest.

Predictably, Sprint argues even if "public funds" are involved, an exception exists for aid that serves a public, as opposed to a private, purpose. As noted in Springfield's initial brief, this court retains the power – in the discharge of its duties – to review the law to see if it serves a public or private purpose. A public purpose is not presumed from the mere passage of a legislative enactment, and "the stated purpose of the legislature, as pronounced in [the statute], is not dispositive." *Curchin*, 722 S.W.2d at 934. Where the legislature's judgment is found to be arbitrary and unreasonable, its determination will be overturned. *Menorah Med. Ctr. v. Health & Educ. Facilities Auth.*, 584 S.W.2d 73, 78 (Mo. banc 1979).

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

The general assembly finds and declares it to be the policy of the state of

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[3]Obviously, the amounts due Springfield under its Ordinance were not too "speculative" and "uncertain" for this wireless carrier to ascertain.

> 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.

MO. REV. STAT. § 92.089.1. The General Assembly should be taken at its word: curbing the litigation expenses of out-of-state businesses, in tax collection suits where no money has changed hands, constitutes the "public purpose" behind HB 209.

Properly viewed, the General Assembly's stated policy cannot withstand minimal scrutiny. Taken to its logical conclusion, such fears of "costly litigation" arising from suits by municipalities to collect delinquent taxes would prevent tax collection actions against businesses altogether, out of concern for their litigation budgets, and cause a breakdown in the tax system statewide. The impotence of municipalities in such circumstances truly would impair the "economic well-being of the state" by making all license tax payments voluntary.

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

added).

Realizing this infirmity, Sprint conjures up other reasons for the General Assembly's action, such as conserving judicial resources and time spent by municipal and industry personnel on the litigation, none of which are mentioned in HB 209. (Resp. Br. at 23-24.) In addition, Sprint argues establishing uniformity and certainty in the taxation of telecommunications companies is such a valid public purpose that HB 209 actually "assists the Municipalities on a prospective basis by allowing them to budget date-certain revenue payments from Wireless Companies." (Resp. Br. at 29.)

Again, these reasons are arbitrary and unreasonable. Springfield does not need any "assistance" from the legislature under the guise of HB 209, to collect its gross receipts taxes from Sprint in the future, if it is at the expense of losing delinquent taxes Sprint failed to pay in the past. (A14-A30; L.F. 216-232.) Simply stated, the primary object of HB 209, which releases certain telephone companies from paying taxes, does not serve a public municipal purpose.

III. HB 209 Gratuitously Extinguishes a Corporate Tax Debt, Thereby Releasing a Corporate Indebtedness, Liability, or Obligation Due the Municipalities in Violation of Article III, § 39(5).

A. Indebtedness, Liability or Obligation

Sprint contends that Article III, § 39(5) does not apply because no protected "indebtedness, liability or obligation" is being extinguished in this case since the tax liability does not satisfy the "fixed . . . sum certain" standard of *Beatty v. State Tax Commission*, 912

S.W.2d 492 (Mo. banc 1995).[4] (Resp. Br. at 32-36.) Sprint is alone in its belief that *Beatty* governs these claims. Certainly, the General Assembly did not believe that these tax obligations were beyond the scope of constitutional safeguards, because they proffered "consideration . . . for the immunity and dismissal of lawsuits . . . ." MO. REV. STAT. § 92.089.1. The General Assembly had to conclude, and Springfield agrees, that the tax liability is a constitutionally-protected obligation, otherwise no "consideration" would have been required. Thus, a *Beatty* analysis is unnecessary.

Springfield further disputes Sprint's premise that its past tax obligations are "speculative" and not "fixed." This is based on the mistaken assumption that an audit, levy, and assessment were required, as in the ad valorem or real estate tax context, before the amount due could have been known or ascertained. Sprint fails to cite any authority for its position an audit, levy, and assessment are prerequisites for its liability to pay.

This is understandable. Unlike ad valorem taxes, there is no comparable uncertainty with respect to license taxes, which typically are due quarterly pursuant to Springfield's Ordinance and at a specified rate. If it were otherwise, there would be no way for T-Mobile,

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[4]Importantly, *Beatty* involved an ad valorem tax – based on property value – hence the requirement that the municipality "assess" and apply the tax rate. This presents a different situation from the gross receipts tax at issue herein where the taxpayer is required to self-report its gross receipts, apply the tax rate itself, and then remit taxes. (L.F. 450.)

SBC, and all other businesses to pay taxes under the ordinances – as they have done for years. Further, the wireless telephone companies would be unable to comply with the terms of HB 209, which impose the same requirements on a going-forward basis, albeit at a reduced rate. The amount of taxes due has been, and will continue to be, ascertainable through the mathematical calculation telephone companies apply to their revenue. The term "fixed" means no more than not subject to change or fluctuation. MERRIAM-WEBSTER COLLEGIATE DICTIONARY 440 (10th ed.).

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

Requiring a *Beatty*-type "assessment and levy" in this context would not only eliminate the self-reporting and payment of license taxes, but it would overrule *Graham*

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

Ultimately, Sprint's goal is to have this Court read the words "adjudication" into Article III, § 39(5). *See e.g.*, Resp. Br. at 36 ("Springfield's claims are not constitutionally protected. . . . Even if Springfield seeks to tax all wireless receipts . . . its claims are still unliquidated because the tax base is disputed . . . .") Such a reading would necessitate a judicial amendment of fundamental law that requires disputed taxes to be paid under protest and would encourage scofflaws to devise creative "disputes" for avoiding the payment of taxes. The taxes, once challenged, would not become "due" or "fixed" or "certain" until all administrative and legal remedies had been exhausted, including appeals to the United States Supreme Court, nor would penalties and interest begin to run until there had been such a

final adjudication. Needless to say, such a limitation does not comport with Article III, § 39(5)'s "very broad and comprehensive" language," *Graham Paper*, 59 S.W.2d at 52, but, rather, it seeks to undermine it.

Finally, Sprint's references to Mo. Rev. Stat. § 144.250.4 (requiring the director of revenue to estimate and assess the amount of state sales taxes owed when a delinquent fails to file a return) and Mo. Rev. Stat. § 143.611.2 (the same with respect to state income taxes) are inapposite. Even if these provisions could be extended to a charter city such as Springfield (which is not mentioned in the statutes), and further extended to license taxes (which are not mentioned in the statutes), they would not afford Sprint relief, because each provision excuses an assessment in cases of "evasion." It is a novel defense indeed if Sprint can assert that it "does not bill for wireless service on a 'call by call' basis" and "simply charges each customer a monthly lump sum fee for access to [its] nationwide network" (Resp. Br. at 11) and then claim that no taxes are owed because it can't figure out which portion of the charges are taxable. *See Norton Co. v. Department of Revenue of State of Illinois*, 340 U.S. 534, 535-36, 71 S. Ct. 377 (1951). If Sprint believes it should pay Springfield on less than all of its revenues, the burden is on Sprint to figure it out under the MTSA, 4 U.S.C.A. § 123(b). There is no question that Sprint provides local telephone service in the City. *See* Henry M. Rivera & Cheryl Tritt, *Local Exchange Competition*, 465 PLI/Pat 7, 9-14 (1996 ("reciprocal compensation for transport and termination of calls applies when two carriers collaborate to complete a local call") (emphasis added).

In this litigation, Sprint has controlled when its tax liability will be calculated through

its refusal to report its gross receipts. However, that does not render the amount not ascertainable. The actual amount of Sprint's gross receipts is a historical fact, even though Sprint has kept that information secret. Thus, the amount of Sprint's tax liability is "fixed as a sum certain;" and it should not matter that Sprint is the only one who presently knows that information.

B. Consideration

Sprint argues that even if Springfield's claims constitute an "indebtedness, liability or obligation," HB 209 does not violate Article III, § 39(5) because the release of the back tax claims was not "without consideration." (Resp. Br. at 38.) Sprint contends that the "consideration" required by Article III, § 39(5) lies in HB 209's purported guarantee of a definite, steady, and broader revenue stream to the City. (Resp. Br. at 38, 40.)

This assertion is unsupportable because going forward HB 209 reduces Springfield's tax rate from the current 6% to 5%. Springfield will also lose revenue because HB 209 reduces the tax base upon which gross receipts are calculated from "gross receipts" under the City's Ordinance to the lesser base of "retail sales." MO. REV. STAT. §§ 92.083.1(1), 92.086.6 (A052-A053); (L.F. 99-100, 450). It follows, *ipso facto*, that no consideration flows to Springfield under HB 209 – either from the General Assembly or the telephone companies – because Springfield possesses no rights, benefits, or privileges beyond that which it had at the outset. *See, e.g., State ex rel. Kansas City v. State Highway Commission*, 163 S.W.2d 948, 953 (Mo. banc 1942).

Remarkably, Sprint suggests that HB 209 "actually expands the tax base . . . to 'all

receipts from the retail sale of telecommunications service taxable under § 144.020 . . . .'" (Resp. Br. at 44.) This argument overlooks the plain language of HB 209, wherein it is stated that any prospective tax "shall have a revenue-neutral effect." MO. REV. STAT. § 92.086.6. How can a tax on "retail sales," as opposed to "gross receipts" of a telephone company ever be considered an expansion of the tax base? Such a belief can only spring from the thoroughly discredited notion that wireless carriers are not "telephone companies" within the meaning of Springfield's gross receipt tax ordinance. *See, e.g.,* Laughrey opinion and *City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo. Ct. App. E.D. 1999).

There is no authority for the proposition that a license tax due to be paid in 2007 can suffice for non-payment of the same taxes due and owing from 1999 to the present. To rest legal "consideration" on such a tenuous thread, namely, a telephone company's promise to pay in the future, is fraught with peril; and is seemingly recognized by the General Assembly's use of "will or may" in Section 92.089.1. The concerns are apparent: What if a telephone company stops doing business in Springfield in the future? What if a telephone company's subscriber base does not increase or remain constant in the future, but rather decreases? What if HB 209 is repealed next year? Indeed, the most "speculative" aspect of HB 209 is the notion Springfield will receive any tax dollars in the future. An obligation to pay future taxes is meaningless consideration.

IV. HB 209 Violates the Prohibition Against Retrospective Laws under Article I, § 13 of the Missouri Constitution.

HB 209 violates Article I, § 13, which prohibits a law "retrospective in its operation" because it impairs Springfield's right to collect the back taxes due and owing by Sprint under its Ordinance for time periods prior to its enactment on August 28, 2005. *Graham Paper*, 59 S.W.2d at 51. Sprint responds to this argument by contending: first, that the Legislature waived the municipalities' right to collection of the back taxes due and owing; and second, that even if the Legislature was prohibited from waiving the rights of the municipalities, the municipalities never had a "vested right" to collect past taxes anyway.

There is no dispute as to Sprint's contention that municipalities derive their power to tax from the state; but Sprint's contention misses the point, namely, at the relevant time periods at issue in this lawsuit, the State had already given the municipalities the power to tax telephone service, pursuant to Section 94.270. (Springfield is a charter city empowered to tax gross receipts of telephone companies by the Missouri Constitution, Missouri Statutes §§ 94.270 and 82.010, and its charter. (L.F. 7-8.)) Springfield used that power to enact its Ordinance taxing those engaged in a telephone business (L.F. 7-8); and it is undisputed that at all times prior to August 28, 2005, Springfield had the right to tax telephone businesses.

The sole argument Sprint advances in support of its contention that municipalities are not protected Article I, § 13 is based upon *Savannah R-III Sch. Dist. v. Public Sch. Ret. Sys.*, 950 S.W.2d 854 (Mo. banc 1997). In *Savannah*, however, the Court held only that the constitutional ban on retrospective laws does not apply to school districts and that a school district, as an instrumentality of the State, could not challenge legislation as constitutionally retrospective. The Court said absolutely nothing about the applicability of Article I, § 13 to

municipalities.

The ultimate issue is whether municipalities should be treated the same as school districts with respect to their standing to challenge retrospective legislation under Article I, § 13. Strong policy reasons militate against treating them the same.

A municipality, unlike a school district, is not merely an "instrumentality" of the State. As this Court has recognized, there are crucial difference between school districts and municipalities. *See Kansas City v. School Dist. of Kansas City*, 201 S.W.2d 930, 933 (Mo. 1947) ("a school district is in no sense a municipal corporation with diversified powers"). Municipalities, charged with the "grave responsibilities" of local self-government, *id.* at 934, are corporate bodies of citizens, and citizens are who "the retrospective law prohibition was intended to protect." *Savannah*, 950 S.W.2d at 858. Judge Robertson recognized this very dispute in his dissent:

> Of course, one could argue that municipal corporations are state instrumentalities, too. If one follows the majority, municipalities cannot challenge the legislature's enactment of laws retrospective in operation, either. But do we really want to say that? I think not. Local governments exist as much to insulate citizens from distant government as to carry out the state's duties.

Id. at 860-861 (Robertson, J. dissenting). The principal opinion in *Savannah* recognized, "the retrospective law prohibition was intended to protect citizens." *Id*. at 858. It should be remembered, as the dissent in *Savannah* did, that local governments are instrumental in

protecting citizens from the State's otherwise all-encompassing power. No better example of the State Legislature's attempt to exert all-encompassing power exists than in this case. That power can, if unchecked, morph into abuse, as one writer has suggested:

> [R]etroactive lawmaking may promote legislative self-dealing. Legislators may curry favor with influential campaign contributors to ensure their reelection. By either eliminating or strictly applying the Missouri constitutional prohibition on retrospective laws, the governed may be better protected against favoritism and graft.

Matthew D. Turner, *Retrospective Lawmaking in Missouri: Can School Districts Assert Any Constitutional Rights Against the State?*, 63 Mo. L. Rev. 833, 848 (1998). When it comes to issues like the power to tax, municipalities assert the rights of their citizens who would otherwise be powerless to challenge corporate behemoths, like Sprint, who have already demonstrated that they can exert influence over the Legislature in a way no ordinary citizen could.

Springfield has a vested right to the tax proceeds from its Ordinance. A "vested right" is "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 by another." *La-Z-Boy Chair Co. v. Director of Economic Development*, 983 S.W.2d 523, 524 (Mo. banc 1999). It is a universally accepted principle that once an obligation to pay a tax accrues, it is a "vested right" beyond the authority of a legislature to disturb. *See Graham Paper*, 59 S.W.2d at 52 ("an inchoate tax, though not yet due or payable, is such an

obligation or liability as to be within the protection of the restriction against retrospective laws"). For Sprint to contend, as it does herein, that Springfield does not have a vested right to collect taxes from it because it does not have a final judgment against Sprint for back tax liability is to turn logic on its head and to make the state tax protest procedure virtually meaningless.

Moreover, to claim as Sprint does, that separate provisions of the constitution, namely Article I, § 13 and Article III, § 39(5), cannot protect the same rights or prohibit the same governmental overreaching is not the law. It has long been recognized separate constitutional provisions may protect the same interests. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967).

Springfield had a vested right to its past due taxes imposed by Ordinance. HB 209's attempt to retroactively eliminate that vested right cannot stand under Article I, § 13; and the Legislature cannot waive a municipality's vested rights under the rubric that it is waiving rights of the State.

V. HB 209 Violates Article III, § 40, of the Missouri Constitution Prohibiting Special Laws.

A. Standing

Sprint argues that Springfield lacks standing to raise a "special law" challenge because Springfield has not been directly affected by HB 209 in the same manner as utilities and businesses that have paid the license taxes. (Resp. Br. at 51-52.) However, "[a]rguments . . . that local government units are 'mere arms of the state' with no

independent right to attack statutes that affect them – have been expressly rejected in favor of a standing doctrine concerned primarily with 'sufficient controversy between the parties' regarding matters which 'directly affect them.'" *Arsenal Credit Union v. Giles*, 715 S.W.2d 918, 921 (Mo. banc 1986).

Springfield has been "directly affected" by HB 209, because its telephone license tax has been "capped," its back-tax claims have been extinguished, and it has been treated differently than the City of Jefferson and Clayton in each of these regards. Given the public importance of the controversy, its immediate impact on substantial segments of the population, and its direct bearing on local services, it would be an "abdication of judicial responsibility" to do what the telephone companies suggest, namely, to defer ruling on the constitutionality of HB 209, even though the constitutional issues are fully briefed and presently before the Court. *See Connecticut Light and Power Co. v. City of Norwalk*, 425 A.2d 576, 579 (Conn. 1979).

B. Arbitrary and Unconstitutional Business Classifications

There can be little doubt that HB 209 creates tax disparities between natural classes (the telephone industry vs. the gas, water and electric industries), within natural classes (those telephone companies that paid taxes vs. those telephone companies that did not), and between Missouri municipalities (the City of Jefferson and Clayton vs. all other municipalities – discussed, *infra.*). To the extent that any of these distinctions are based on immutable characteristics, such as the municipal classifications (*see* MO. REV. STAT. §§ 92.086.10 and 92.089.2), the law is closed-ended and "facially special". *See, e.g., Harris v.*

Missouri Gaming Commission, 869 S.W.2d 58, 65 (Mo. banc 1994). The unconstitutionality of such a special law is presumed; thus, the parties defending HB 209 must demonstrate a "substantial justification" for their special treatment, not the "rational basis" Sprint suggests. *Id.*

Sprint attempts to meet its burden by suggesting that the General Assembly had a "rational basis" for these classifications, because only telephone companies have been subjected to "costly and time-consuming litigation . . . [N]o analogous litigation involving other industries exists." (Resp. Br. at 53.) The reason these lawsuits are confined to the telephone industry is because other businesses have paid their license taxes. If litigation costs constitute a "substantial justification" for disparate treatment, such reasoning could be extended to all tax collection suits and would render the municipal safeguards in Article III, § 39(5) meaningless. Undoubtedly, the General Assembly has the power to treat businesses differently, but such distinctions traditionally are based on historic or economic differences between them, and not on whether they did or did not pay taxes. There is simply no authority for the proposition that pending litigation, as opposed to business practices and methods, provides a "substantial" basis for classifying private companies under Article III, § 40.

Sprint attempts to distinguish *Planned Industrial Expansion Auth. of the City of St. Louis v. Southwestern Bell Telephone Co.*, 612 S.W.2d 772, 778 (Mo. 1981), but offers little in the way of support for its position. In *PIE*, Southwestern Bell challenged the City's right to seek a declaratory judgment that a statute violated Article I, § 13. *Id*. at 776. This Court

held the City had standing to raise a Section 13 challenge to the statute, and struck the statute as "a law retrospective in its operation." *Id*.

In support of its position, Sprint cites only four cases; all of which concerned legislation markedly different from HB 209. For example, this Court declined to extend the rational basis analysis used in *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. banc 1992), to tax cases. *See Sneary v. Director of Revenue*, 865 S.W.2d 342, 347 (Mo. banc 1993) ("*Blaske* does not address the issue at bar. Whether a rational basis exists to distinguish between architects and materialmen in setting different statutes of limitations involves considerations altogether inapplicable to [a] sales tax statute.").

Like *Blaske*, the Court in *Savannah* applied a "rational basis" test to uphold legislation that mooted a lawsuit between two governmental entities, the State and school districts. The Court concluded that, *inter alia*, "the 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 . . . ." *Savannah*, 950 S.W.2d at 860. In contrast, this litigation is between the City and a private corporation over a challenge to legislation that requires the dismissal of pending litigation to collect delinquent taxes. HB 209 does not serve a legitimate public purpose, but rather seeks to curb the expenses of delinquent telephone companies, none of whom perform any function of government. *Savannah* does not go so far as to hold that putting an end to pending litigation between a city and a private corporation provides substantial justification for relieving the corporation of its obligation to pay delinquent taxes.

Sprint's burden in this instance is not to suggest a conceivable reason, or even a rational reason, for HB 209's distinctions, because its unconstitutionality is presumed. Only a "substantial justification" will suffice, and none has been offered here. There is a good reason for this – no court has ever held that curbing the expenses of private litigants to a tax dispute is befitting constitutional recognition.

C. Arbitrary and Unconstitutional Municipal Classifications

HB 209 exempts certain municipalities from having to adjust their business license tax rates and to dismiss their back-tax claims. MO. REV. STAT. §§ 92.086.10 and 92.089.2. The exemptions are based upon, *inter alia*, dates that have passed ("prior to November 4, 1980"), preexisting ordinance language ("had an ordinance imposing a business license tax on telecommunications companies which specifically included the words 'wireless', 'cell phones', or 'mobile phones'"), and pending litigation ("had taken affirmative action to collect such tax"). The classifications do not permit a municipality's status to change, i.e., to come within such classifications in the future, but rather grant exemptions based on unchanging, historical facts.

Only two municipalities qualify for the exemptions – the City of Jefferson and Clayton, Missouri. Although Sprint maintains Springfield "makes no showing that the class of cities exempt from HB 209 is as closed-ended as it alleges" and "Springfield asserts (without any proof) that only Jefferson City and Clayton fall in HB 209's exception" (Resp. Br. at 57), Sprint apparently forgot it admitted in its briefing before the trial court below that "[i]t is undisputed that these two exceptions are applicable to the City of Clayton and

Jefferson City respectively." (L.F. 495.) Given HB 209's prerequisites, there is no way for other municipalities to qualify for these exemptions in the future. Sprint hardly disagrees: it does not bother to explain how other cities might qualify for the exemptions.

Instead, Sprint simply justifies such discrimination on the basis of Hancock. (Resp. Br. at 58-59.) Despite Sprint's suggestion otherwise, even prior to the enactment of HB 209, Judge Laughrey determined in the federal court litigation Springfield's Ordinance applied to wireless telephone companies, **and** there was no Hancock issue with respect to Springfield's Ordinance. (A14-A30.) Sprint also suggests "by excusing Hancock-complaint municipalities from certain HB 209 provisions, the General Assembly promoted the policies underlying the amendment, thereby satisfying the substantial justification requirement." (Resp. Br. at 59.) Sprint's justification is imagined as it appears nowhere in the text of HB 209. As previously discussed, the General Assembly succinctly stated the goal of HB 209 was to eliminate "costly litigation . . . filed by Missouri municipalities against telecommunications companies, concerning the application of certain business license taxes to certain telecommunications companies . . . ." MO. REV. STAT. § 92.089.1. In light of this legislative goal, it is readily apparent that no "substantial justification" exists for the Legislature to carve-out the City of Jefferson and Clayton as it did. Thus, the statutory exemptions do not advance the legislative goal, but actively undermine it, violating the Constitution's prohibition against special laws.

VI. HB 209 Violates the Separation of Powers Principles in Article II, § 1 of the Missouri Constitution.

A. Standing

Sprint cites *Savannah* for the proposition that statutory instrumentalities of government lack standing to invoke the separation of powers doctrine. 950 S.W.2d at 858. *Savannah* does not stand for that position. On the contrary, by reaching the merits of the school district's judicial encroachment argument, this Court implicitly recognized that statutory instrumentalities of government do have standing to invoke the separation of powers doctrine. *Id.* at 858-859.

B. Judicial Encroachment

Sprint argues HB 209 does not interfere with judicial decision making because it does not contravene a final judgment. (Resp. Br. at 64.) Sprint's reliance on *Savannah* is misplaced. In *Savannah*, unlike HB 209, the Legislature amended the statutes on which the lawsuits were based, but did not mandate the dismissal of pending lawsuits or otherwise attempt to prescribe a rule of decision to the judicial department. *Savannah*, 950 S.W. 2d at 859.

The cases cited by Sprint relating to firearms legislation are not analogous to this case. The firearms legislation enacted by the Missouri Legislature, Mo. Rev. Stat. § 21.750, completely preempted any attempts by a city to regulate the manufacturers of firearms. In contrast, HB 209 does not address regulation nor attempt to vest all authority to tax telecommunication companies exclusively in the State by repealing Missouri Statutes Section 94.270. It continues to allow Springfield to tax telecommunication companies such as Sprint under the Ordinance, which is authorized by Section 94.270. When the legislature

seeks to limit that long-standing right by requiring a municipality to dismiss pending litigation to collect delinquent gross receipts taxes, it must do so within the confines of constitutional mandates. *See Morial v. Smith & Wesson Corp.*, 785 So.2d 1, 9, 13 (La. 2001) (holding that the legislature is free, within constitutional confines, to pass legislation and holding that a home rule municipal government possesses powers within its jurisdiction as broad as that of the state – except when limited by laws permitted by the constitution) (emphasis added)).

Here, HB 209 attempts to prescribe a rule of decision to the judicial department in violation of Article II, § 1 of the Missouri Constitution.

VII. Application of HB 209 Violates the Uniformity Provision of Article X, § 3 and the Equal Protection Clause of Article I, § 2 of the Missouri Constitution.

A. Standing

Sprint argues Springfield lacks standing to raise an equal protection claim because municipalities are not "persons" under the Equal Protection Clause. Notwithstanding the cases cited by Sprint, which are not factually similar, Springfield directs the Court's attention to the case of *City of St. Louis v. Western Union Telegraph Co.*, 760 S.W.2d 577 (Mo. Ct. App. E.D. 1988), wherein the City of St. Louis challenged the trial court's decision that a license tax on telegraph companies, but not on telephone companies, violated, *inter alia*, the equal protection provisions of the Missouri Constitution. *Id.* at 579. The opinion in that case does not directly discuss standing, but necessarily recognized the City of St. Louis had standing to challenge the trial court's decision on the constitutionality of the license tax.

Sprint is advancing the same argument rejected by this Court in *Arsenal Credit Union v. Giles*, where the credit union argued city officials lacked standing to challenge the constitutionality of a statute because they were not aggrieved. *Arsenal Credit Union*, 715 S.W.2d at 919. This Court addressed the issue of standing and stated "[i]t has been aptly stated that for standing sufficient to attack the constitutionality of a statute a party must demonstrate he is 'adversely affected by the statute in question. . . .'" *Id.* at 920 (quoting *Ryder v. County of St. Charles*, 552 S.W.2d 705, 707 (Mo. banc 1977)). The Court then stated that the "rationale of the standing requirement" is to insure that there is "sufficient controversy between the parties" such that the case will "be adequately presented to the court." *Id.* (internal quotations omitted).

In this case, Springfield has demonstrated it will be adversely affected by HB 209's rate cap, dismissal provision, and the immunity given to telephone companies for back-tax liability. There is clearly "sufficient controversy between the parties that the case will be adequately presented to the court" to satisfy the "primary objective" of the standing doctrine. *See Arsenal Credit Union*, 715 S.W.2d at 920. For these reasons, Springfield has standing to challenge the constitutionality of HB 209, including raising equal protection claims.

B. Uniformity

In its initial brief, Springfield explained why HB 209's tax classifications and exemptions do not apply uniformly to the same class of subjects and are not reasonable. Sprint argues absolute uniformity is not required and 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. (Resp. Br. at 81.) However, as previously discussed in connection with Article I, § 13, such a classification is not reasonable and ultimately confers a retroactive benefit to telephone companies based on characteristics of the taxpayer, namely their subjective belief as to whether or how much of a municipality's gross receipts tax they owed. *See State ex rel. Stephan v Parrish*, 891 P.2d 445, 457 (Kan. 1995) (a grant of tax amnesty based solely on a characteristic of a taxpayer violates tax uniformity).

HB 209's preferential treatment of private telephone companies who refused to pay their taxes, even after the Eastern District ruled in *City of Sunset Hills*, 14 S.W.3d at 59, that Southwestern Bell Mobile Systems (a wireless defendant in a companion case) fell within the class of telephone companies under Mo. Rev. Stat. § 94.270, violates the tax uniformity mandate of Article X, § 3.

C. Equal Protection

Sprint argues that the tax classification does not violate the Equal Protection Clause because it bears a rational relationship to a legitimate legislative objective in that it 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." (Resp. Br. at 84.) The tax exemption in Section 92.089.2 is arbitrary and unreasonable in that it treats similarly situated taxpayers differently based on a "subjective good faith belief" they were either not a telephone company covered by the business license tax ordinance or certain categories of their revenue did not qualify as gross receipts upon

which gross receipts taxes were calculated. *See City of St. Louis*, 760 S.W.2d at 583. In reality, HB 209's tax exemption violates the Equal Protection Clause because it creates two separate tax rates – 6% for those who have paid their taxes and 0% for those who have refused to pay their taxes. *Armco Steel Corp. v. Dept. of Treasury*, 358 N.W.2d 839, 844 (Mich. 1984).

VIII. HB 209 Violates the Single Subject and Clear Title Requirements of Article III, § 23 of the Missouri Constitution.

House Bill 209 contains two distinct acts, the "Municipal Telecommunications Business License Tax Simplification Act" and the "State Highway Utility Relocation Act", addressing incompatible subjects under a title that only mentions the subject matter of the first. As Springfield's initial brief shows, HB 209 clearly and undoubtedly violates the single subject and clear title requirements of Article III, § 23 of the Missouri Constitution.[5]

CONCLUSION

The City of Springfield respectfully requests the Court to declare HB 209 unconstitutional, reverse the trial court's judgment of September 29, 2005, and remand this matter for further proceedings.

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[5]Due to the space limitations imposed by Supreme Court Rule 84.06(b), Springfield is unable to respond to some of the arguments set forth in Respondent's Brief. Springfield does not mean to legitimize those arguments in any way, but would stand on the authority and arguments set forth in its opening Brief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the original and ten copies of Appellant's Reply Brief, as well as a floppy disk of same conforming to Mo. R. Civ. P. 84.06(g), were hand-delivered to the Clerk of the Court for filing, and two true and correct copies of Appellant's Reply Brief and a floppy disk containing Appellant's Reply Brief, were delivered via United States Mail, first class, postage prepaid, this 28th day of March, 2006, to

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CERTIFICATE OF COMPLIANCE UNDER RULE 84.06(c)

COMES NOW John W. Housley, of lawful age and having been duly sworn, states that this Brief complies with the limitations contained in Supreme Court Rule 84.06(b), as required by Rule 84.06(c).

I further state that the number of words contained in this Brief is 7,625, and that this Brief was prepared with and formatted in WordPerfect 8.0.

I further state that a floppy disk containing the Brief is being filed herewith, and said disk is double-sided, high density, IBM-PC compatible, 1.44 MB 3 ½ inch size and said disk has been scanned by Norton AntiVirus Corporate Edition for viruses and is virus free.

STATE OF MISSOURI §
§ ss.
COUNTY OF GREENE §

John W. Housley, being of lawful age and being first duly sworn upon his oath, states that he is the attorney and agent above named, and the facts and matters as stated above are true according to his best information, knowledge and belief.

_____
John W. Housley

Subscribed to before me this 28th day of March, 2006.

_____
Notary Public

My Commission Expires: