No. 87238

In the Supreme Court of Missouri

CITY OF SPRINGFIELD,	)	
	)	On Appeal from the Circuit
Plaintiff-Appellant,	)	Court of Greene County
	)	
v.	)	No. 104CC-5647
	)	
SPRINT SPECTRUM, L.P.,	)	Hon. J. Miles Sweeney
	)	Judge Presiding
Defendant-Respondent.	)	

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici National Association of Consumer Advocates ("NACA") and Foundation for Taxpayer and Consumer Rights ("FTCR") submit this brief in support of Plaintiffs-Appellants and others similarly situated (the "Cities") and urge that H.B. 209 be found unconstitutional.

NACA is an organization of more than 1,000 attorneys who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. NACA is committed to consumer justice and its members and their clients actively promote a fair marketplace that forcefully protects consumers, particularly those of modest means. To achieve this, NACA maintains a forum for information sharing among consumer advocates and serves as a voice for its members and consumers in the ongoing struggle to curb unfair and abusive business practices.

FTCR is a nationally recognized, California-based, non-profit education and advocacy group organized under section 501(c)(3) of the Internal Revenue Code. Founded in 1985, FTCR employs teams of public-interest lawyers, policy experts, strategists, public educators, and grassroots activists to advance and protect the interests of consumers and taxpayers, including by bringing taxpayer actions to require the assessment and collection of unpaid taxes by businesses. FTCR has, since its inception, been particularly involved in representing the interests of consumers in regulatory matters, especially emphasizing the interests of utility ratepayers in matters before the legislature, the courts and state agencies.

FTCR has also advocated on behalf of cell phone customers to protect their rights to fair billing and customer service practices.

STATEMENT OF FACTS

Amici NACA and FTCR adopt the statements of fact of all Plaintiffs-Appellants.

ARGUMENT

I THE TRIAL COURT ERRED IN UPHOLDING HB 209 FROM CONSTITUTIONAL CHALLENGES BECAUSE IT VIOLATES THE MISSOURI CONSTITUTION, WHICH PROHIBITS GRANTING PUBLIC MONIES, GIFTS, OR FAVORS TO PRIVATE INTERESTS AND SHIFTING THE TAX BURDEN TO LOCAL GOVERNMENTS, IN THAT IT SPECIFICALLY GRANTS A SELECT INDUSTRY SPECIAL PROTECTION FROM PAST TAX LIABILITY AND USURPS LOCAL TAX REVENUES TO ACHIEVE ITS PURPOSE.

HB209, being "nonseverable" by its terms (Section 92.092, RSMo), requires only one constitutional infirmity for Sections 92.074 through 92.092 to be struck down. HB 209 provides that back taxes are forgiven and uncollectable for those phone companies which chose not to pay taxes when they became due and payable. It did so purportedly because collection litigation was "costly", "uncertain" and "detrimental to the economic well being of the state". Section

92.089.1, RSMo Supp. 2005.[1] Thus, the State, through the actions of the General Assembly, chose to subsidize select and powerful phone companies by allowing those who had chosen not to pay to keep their past taxes and penalties. By shifting the cost of this subsidy to local governments, the State was able to keep all of its own revenue.[2] Such action violated Art. III, Sections 38(a) and 39(5), MO. Const. 1945 and Art. X, Section 16, MO. Const. 1945, as amended 1978.

The people act to protect themselves. The State of Missouri has had four constitutions in its history. In the last two, the people of Missouri adopted provisions designed to protect themselves and governmental resources from private and powerful interests seeking special favors and outright gifts of public assets. Because these protections are located in a state constitution, it is up to the

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[1] The State did not forgive taxes owed by telephone companies to it, or others, although its actions for collection would be equally "costly" and "detrimental" as collection efforts by local governments.

[2] The State easily could have achieved the same result with its own funds by providing a one hundred percent credit against State taxes for amounts of taxes, penalties and litigation expenses actually paid by the companies. However, the State chose instead to use local taxes owed the Cities to fund this corporate giveaway. The corporations are now free to use funds that should have been paid to local governments in any manner they choose, including paying benefits to corporate executives or increased shareholder payments.

State's courts in the first instance to protect the people in accordance with the letter and spirit of the Constitution. In doing so and when necessary, as *Amici* suggest here, the State's courts strike down an offending law to accomplish the will of the people. See, e.g., State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991) ("If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid."). For the reasons set forth below and in the Plaintiffs'-Appellants' briefs, this Court should strike down HB 209 as violative of Constitutional protections put in place by the people.

HB 209 violates Art. III, Sections 38(a) and 39(5), MO. Const. 1945 and Art. X, Section 16, MO. Const. 1945, as amended 1978. How and with what language the people have chosen to protect themselves must be considered in the historical context in which such actions were taken, as well as in light of the evils sought to be curbed. As noted by Kennth H. Winn, Ph.D., the State Archivist of Missouri, in his essay *IT ALL ADDS UP: Reform and the Erosion of Representative Government in Missouri, 1900-2000*, 1999-2000 Official Manual Article, Secretary of State Records Service, State Archives, at p. 17,[3]

> "the 1875 Constitution, which lasted until 1945, is perhaps best understood as a fiscal document aimed at controlling the vices of post-Civil War Missouri government".

[3] A copy of this essay may be found at http://www.sos.missouri.gov/archives/pubs/article/ article.asp.

What were those vices? Dr. Winn explains that,

> "[a]lthough concern about the pernicious influence of moneyed lobbyists arose in America before the Civil War, a real fear of lobbyists and their money came only with the rise of big business in the late nineteenth century." Id, p. 19.

The power of corporations and their ability to obtain special favors was not lost on the American public or politicians of that period. As William Jennings Bryan stated to the Ohio 1912 Constitutional Convention,

> "The first thing to understand is the difference between the natural person and the fictitious person called a corporation. …
>
> "[T]he corporation is the handiwork of man and created to carry out a money-making policy…A corporation has no soul and cares nothing about the hereafter…
>
> "A corporation has no rights except those given it by law. It can exercise no power except that conferred upon it by the people through legislation, and the people should be as free to withhold as to give, public interest and not private advantage being the end view."

The people of Missouri and other States attempted to control corporate activities and to withhold special favors by restricting their general assemblies through their constitutions. As noted in the 1996 report of the California Constitution Revision Commission, entitled "Constitution Revision History and Perspective," with respect to the national climate on reform movements,

> "The depression of 1873-78 reduced many laborers to poverty [footnote omitted]…
>
> "Holding to the doctrine that government ruled by the consent of the governed, and that people instituted governments for their own benefit, citizens looked to government for remedy. But people increasingly perceived both federal and local government as corrupt and indecisive—the pawn of corporations and private interests whose unchecked speculations had triggered the financial crash and depression. The perception was not unfounded…State and municipal governments were even more seriously infected with the fraud and graft of party machines operating in such cities as New York…..
>
> "By the mid 1870s, reform movements were coalescing across the nation. Organized labor, agrarian associations, and women's suffrage groups were demanding among other things, restrictions on the powers of state legislatures, …To the chagrin of more conservative elements, the instruments through which they enacted their reforms were their state constitutions." [emphasis added] Id., *State Governance*, *p. 4.*

Missouri was part of this national movement for reform. Both the Constitutions of 1875 and 1945 prohibit giving public money to private interests (Art. III, Section 38(a), supra) and forgiving "the indebtedness, liability or obligation of any corporation or individual due this state or any county or municipal corporation." (Art. III Section 39(5), supra.) The words "without

consideration" were added to Section 39(5) in the 1945 Constitution. Other States followed suit and attempted to enact similar restrictions with the purpose of "disabl[ing] …the legislature from favoritism towards individual corporations or railroads." Dale S. Oesterle, *Lessons on the Limits of Constitutional Language from Colorado: The Erosion of the Constitution's Ban on Business Subsidies,* 73 U. Colo. L. Rev. 587, 590 (2002). [4]

Then, as now, business lobbyists besieged the Capitol and politicians willing to listen and to accept campaign contributions or other favors.[5] As Governor William Joel Stone noted in a special session of the legislature in 1895,

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[4] Colorado based its first constitution mostly on three other states' constitutions, including Missouri's 1875 Constitution. Id. at p. 590.

[5] A Public Citizen report issued in February 2002, entitled "Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills, First Public Citizen Report on '527' Groups Reveals Corporate Influence on Broadband, Tobacco and Money-Laundering Policies", shows the majority of contributions to campaigns come from 27 major industries, including telephone utilities. Regional Bell Companies alone contributed $277,666 to the campaign coffers of the Speaker of the House, the Majority Whip and Chief Deputy Whip in 2001 while legislation was being considered favoring them. This report may be found at http://www.citizen.org/congress/campaign/issues/nonprofit/articles.

"The bad and long continued example of the railroad lobby has become infectious. Others have fallen under its pernicious influence, until now the agents of more than one special interest are kept at the capitol to 'protect' their employers against the representatives of the people. About the streets and hotels they are ubiquitous; they swarm in the corridors of the capitol; they frequent committee rooms and public offices, and are almost as familiar to the halls of legislation as those entitled to seats by virtue of their commissions." Id. at p. 19.

Just as politicians of the late 1800s were wont to do, this General Assembly provided the telephone companies a gift of public money in direct violation of Art. III, Section 38(a) by forgiving and releasing their tax liabilities. Instead of writing the companies a check itself, the State told them to keep the money owed local governments. See, e.g., Champ v. Poelker, 755 S.W.2d 383, 388 (MoApp ED 1988), and Churchin v. Missouri Industrial Development Board, 722 S.W.2d 930, 933 (Mo. Banc 1987) (discussion on tax credits and grant of public money).[6]

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[6] In addition to Missouri's Article III restrictions, other restrictions on the General Assembly have been adopted by the people. One example is Article X, Section 16, MO. Const., supra, which contains an absolute prohibition on the State shifting the burden of any of its policies or programs, like subsidies through forgiven taxes, from State to local governments. Despite this prohibition, the General

The General Assembly cannot extinguish or release any tax, matured or otherwise, without consideration, as this would violate Art. III, Section 39(5). *Amici* submit that the most flagrant violation of the Missouri Constitution is the releasing of the corporate tax debt. As held by this Court following the adoption of the 1875 Constitution, and prior to the 1945 Constitution, a tax on income of a corporation that becomes due upon earning the income is an "inchoate tax [and] is an obligation or liability within the meaning of the constitutional provision" and therefore cannot be extinguished or released. Graham Paper Co. v. Gehner, 59 S.W. 2d 49, 52 (Mo banc 1933); State ex rel. Crutcher v. Koeln, 61 S.W.2d 750 (Mo. Banc 1933); see also State ex rel. Koel v. Southwestern Bell Telephone Co., 316 Mo. 1008, 292 S.W. 1037, 1039 (Mo. 1927) (wherein predecessor to SBC argued that the legislature "could not effect the rate of taxation prior to the time the [legislation] went into effect" at p. 1038). The Cities' license taxes in this instance, measured by gross receipts, are much like an "income tax", becoming due upon receipt of the funds, and not upon the end of a taxing period.

HB 209 gives as the reason for the need to forgive back taxes and penalties, and to do away with pending lawsuits, the cost of litigation and the economic

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Assembly chose to relieve telephone companies of their past due liabilities and of the costs of lawsuits with local dollars, not State dollars.

well-being of the State of Missouri.[7] Section 92.089, RSMo, as adopted. However, even in one of this State's darkest hours, the Great Depression, the General Assembly did not provide such a wholesale gift to corporations. At that time, there was a

> "depleted condition of public and private financial resources, the inability, for lack of tax collection, of many of [Missouri's] public schools to function adequately throughout [a] school term, and [the then] present likelihood of insufficient collection of revenue to support schools during the ensuing school year; [and a] great volume of taxes throughout the state remaining delinquent and bearing oppressively upon great numbers of property owners unable to meet the accumulated and accumulating interest and penalty charges thereon", Koeln, supra at p. 756.

The General Assembly at that time, however, only forgave the penalties, or in some instances only part of the penalties if suit was already proceeding, if taxes

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[7] It is telling that for members of the armed services who are away from the State or serving in combat zones, taxes are not forgiven at all. Rather, these individual taxpayers are granted more time to file their returns, see e.g. Section 41.950, RSMo, or are given only what the federal government allows under the Internal Revenue Code. See Section 413.121, RSMo. Back taxes and penalties are *not* forgiven. On the contrary, the State has actively prosecuted these individuals. See e.g. Paulson v. Missouri Dept. of Revenue, 961 S.W.2d 63 (Mo. App. WD 1998).

were paid before a date certain to deal with the true "economic well-being" of Missouri. This was a valid exercise of legislative authority that reached *all similarly situated taxpayers and not just the powerful* and did not involve requiring the dismissal of lawsuits or the forgiveness of taxes for which a liability or obligation had already been created. State ex rel. McKittrick v. Bair, 333 Mo. 1, 63 S.W.2d 64 (Mo. Banc 1933). People had to pay the taxes.

Obviously, the economic well-being of the State is not at risk if these lawsuits go forward and wealthy telephone companies pay their back taxes and penalties.

There is no consideration for forgiving the taxes of telephone companies. The people of Missouri, apparently desiring some flexibility in relinquishing debts and liabilities to their governments and having watched their fellow citizens lose homes and businesses because they could not afford taxes owed even with penalties forgiven, added the language "without consideration" to Art. III, Section 39(5) in the 1945 Constitution. This was on the heels of the Great Depression where, although the legislature had provided some relief to the masses of delinquent taxpayers, it could not forgive the actual paying of taxes in money. This Court may take judicial notice of "matters of common knowledge…as related to affairs of public interest and concern" , Koeln, 61 S.W2d at p.756. *Amici* suggest that the language "without consideration" means what it says: something of value must be exchanged for the liability released. That consideration should run to the entity to whom the tax is owed and be paid by he who owes it.

What consideration has been given for the release of back taxes? The General Assembly says that adequate consideration for HB 209 is the settling of uncertain litigation and the State collecting, at its cost, future taxes on a reduced tax base. *Amici* submit this is not consideration as meant by the Constitution. First, it does not flow from the party receiving the benefit of the statute, which is a portion of the telephone industry (those companies refusing to pay and who were sued). "Consideration" that is nothing more than payment of less taxes than one owed, and no taxes for back years, on a reduced base for some taxpayers and an increased base for others, with a cap that may be higher or lower than that in place previously for some cities, regardless of constitutional provisions related to increasing tax bases for local taxes, is illusory and non-existent. As stated by this Court in State ex rel. Kansas City v. State Highway Commission, 349 Mo. 865, 163 S.W.2d 948, 953 (Mo. banc 1942),

> The consideration of a contract can consist either in a benefit conferred upon the promisor or in a legal detriment to the promisee, which means that the promisee changes his legal position; that is, that he gives up certain rights, privileges or immunities which he theretofore possessed or assumes certain duties or liabilities not theretofore imposed upon him. [citation omitted]. If, however, we examine the contract before us carefully it will appear that the commission gave up no privileges, powers or immunities and assumed no obligations except those which were imposed upon it in

any event by the statute. The mere promise to do that which the statute required it to do in any event could not constitute a consideration. Id.

Here, the defendant phone companies gave up nothing and gained everything. The Cities gained nothing. What the General Assembly "bargained for" was nothing: it has no connection to individual obligations, debts, liabilities and who owed what to whom; it creates a reduced tax rate and a reduced tax base for most cities, an illegal tax base and tax rate for other cities subject to challenge, no payment of back taxes or penalties to any city except two which were "carved" out; and it lets the State charge cities to collect the reduced amounts coming in the future. (Section 92.089, RSMo.) Local governments lose money and lose control. This is not consideration. This is not what the people meant. The people meant that the government involved, on a case-by-case or situation-by-situation basis, could settle a debt, obligation or liability *if and when consideration was provided to the local government to whom the debt was owed*. This HB 209 does not do and therefore should be struck down.

CONCLUSION

HB 209 violates the provisions of Article III, Sections 38(a) and 39(5), MO. Const. 1945, and Art. X, Section 16, MO. Const. 1945, as amended 1978, and it should be struck down. HB 209 typifies the reason the framers of the 1875

and 1945 Constitutions, and the amendments thereto, sought to control the General Assembly and to prevent it from doling out public monies, favors and gifts to powerful interests.

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RULE 84.06 (c) CERTIFICATION

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2002 and contains 3,434 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 26th day of January, 2006, addressed to the following:

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