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JURISDICTIONAL STATEMENT

Defendant–Respondent Sprint Spectrum, L.P. (“Sprint”) concurs with Plaintiff–Appellant City of Springfield (“Springfield”) that this Court has jurisdiction over this appeal pursuant to Art. V, § 3 of the Missouri Constitution, which grants this Court exclusive appellate jurisdiction over questions involving the validity of a statute.

STATEMENT OF FACTS

In this appeal, Springfield asks this Court to address the constitutionality of legislation adopted in the 2005 session of the Missouri General Assembly and signed into law by Governor Blunt on July 14, 2005 – HB209.¹ Springfield asserts that its local tax ordinance (“Ordinance”) allows it to tax wireless telecommunication services offered by Sprint and other wireless companies (collectively, “the Wireless Companies”) and that HB209 unconstitutionally infringes upon Springfield’s enforcement of its Ordinance.²

¹ The provisions of HB209 are codified at Mo. Rev. Stat. § 71.675.1, §§ 92.074 - 92.098, and §§ 227.241 to 227.249.

² This Court has three appeals before it related to the Wireless Companies. Springfield brings the appeal captioned *City of Springfield, Missouri v. Sprint Spectrum, L.P.*, Cause No. SC87238. The University City Appellants and St. Louis County bring the appeal captioned *City of University City, Missouri, et al. v. AT&T Wireless Services, Inc., et al.*, Cause No. SC87208. The City of St. Louis brings the appeal captioned *City of St. Louis v. Sprint Spectrum, L.P.*, Cause No. SC87400. This brief is submitted in response to

On January 2, 1968, Springfield's City Council passed the Ordinance, imposing a six percent (6%) gross receipts tax on "telephone and telephonic service within the City." (L.F. 176-178.) Springfield adopted the Ordinance at a time when "telephone companies" were highly regulated monopoly utilities that strung wires on poles or buried them along public rights of way and the thought of modern wireless communications was largely unimaginable.³

The obvious limitations in the 1968 version of the Ordinance may explain why Springfield did not seek to apply the Ordinance to wireless service until recently, despite the prevalence of and substantial growth in wireless service in the 1990s. The 1968 version of the Ordinance by its terms only applied to "telephones and telephonic service"

Springfield's appeal. Springfield and the other appellants in the other wireless appeals are collectively referred to as "the Municipalities."

³ Springfield devotes a substantial portion of its Statement of Facts discussing Southwestern Bell Telephone, L.P. ("SBC"), a traditional land line telephone utility company not a party to this appeal. (*See* Springfield Br. at 20-23.) Springfield points to SBC representatives' testimony and correspondence expressing SBC's desire that Springfield apply the Ordinance to a new industry competing with land line telephones - wireless service. (*Id.*) Springfield relies on SBC's statements as if SBC's competitive desires somehow rise to the level of legal authority on the validity, applicability, and enforceability of Springfield's Ordinance against wireless service or, for that matter, on the effect of HB209 on the lawsuits against the Wireless Companies.

provided “within the city,” neither of which applies to wireless service. In considering its course of action in trying to apply its Ordinance to wireless service, Springfield had at least two options. First, it could seek to amend its ordinance to include wireless service by submitting the issue to its local voters.⁴ Second, it could take the position that its Ordinance, passed decades before wireless service was offered, covers such services. Springfield chose the second route, with a twist.

On June 2, 2003, Springfield “recodified” its Ordinance, expanding and broadening the tax base from “telephones and telephonic service within the city” to “telephones, and **telecommunications** and telephonic service, and **telecommunications** services, within the city.” (L.F. 009) (emphasis added). Springfield’s amendment to its Ordinance, via statutory recodification pursuant to RSMo. §71.943, was neither voted on by its residents nor even specifically considered by its city council; instead, the amendment was buried inside a “recodification” of the entire city code. (*See* L.F. 009.) Notably, the 2003 recodification did not affect § 70-481 of the City Code, which to this day imposes a duty on “all persons supplying *telephones and telephonic service* in the city” to “*remove or raise or lower their wires*” upon request. (L.F. 451) (emphasis added).

⁴ The City of Clayton, which is not a party to these appeals, did just that in 2003, “in accord with the requirements of Article X, Section 22 of the Missouri Constitution [i.e. the Hancock Amendment]... .” (*See* Clayton Ord. 5753, L.F. 554-55.)

The University City Appellants, consisting of twenty-two municipalities across the state, filed the first lawsuit against the Wireless Companies in December 2001 seeking to recover five years of back taxes, interest and penalties for wireless service and to enjoin the Wireless Companies from providing service in their cities. The City of St. Louis then filed suit seeking similar relief. St. Louis County followed suit, likewise seeking similar relief.

On May 12, 2004, less than one year after Springfield's recodification and expansion of the Ordinance's tax base, Springfield jumped on the bandwagon and filed suit in the United States District Court for the Western District of Missouri against several wireless companies ("Federal Lawsuit") (Springfield Br. at 23), including a different Sprint entity, Sprint Corporation. Springfield voluntarily dismissed Sprint Corporation from the Federal Lawsuit and re-filed its claim in the Circuit Court of Greene County against Sprint – a company that provides wireless service - seeking to enforce its Ordinance.⁵ (L.F. 005-016.)

It was amidst this morass of litigation between the Municipalities and the Wireless Companies, and after a call for legislation, that the Missouri Legislature took action in 2005. Through months of legislative meetings, hearings, testimony, negotiation, and

⁵ Springfield incorrectly asserts in its Statement of Facts that it voluntarily dismissed Sprint from the Federal Lawsuit. (Springfield Br. at 23.) Springfield did not name Sprint as a defendant in that litigation - it named Sprint Corporation, a company that does not provide wireless service.

drafting, the Legislature ultimately crafted the compromise embodied in HB209. The legislation resolves the many issues in dispute and brings certainty as to the prospective applicability of the Municipalities' taxation of wireless services. HB209 harmonizes the competing and diverse interests of the Municipalities – which seek a new and growing 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, HB209 brings wireless service under the umbrella of the ordinances of all Missouri municipalities that currently impose gross receipts taxes on land-line (i.e. local exchange) telephone service. It does so by providing a broad, uniform definition of “telecommunications service” so as to impose such taxes on wireless service. The Wireless Companies must pay the taxes on a prospective basis at a rate that ensures that: (1) immediately after HB209, the municipalities will receive the same level of revenue that municipalities received under the prior version, interpretation and application of their respective ordinances, in compliance with the Hancock Amendment; and (2) the municipalities prospectively will legally tax wireless services, which Springfield has dubbed the “fastest growing” part of the telecommunications industry. (Springfield Br. at 41.) Additionally, HB209 centralizes the tax collection function with the Department of Revenue, thereby eliminating the cumbersome and labor intensive process of each city collecting its own tax and each company sending separate payments to hundreds of municipalities across the state. The legislative *quid pro quo* for these benefits required

the Municipalities to dismiss the pending lawsuits in conjunction with providing immunity to the Wireless Companies for back tax liability.

This case illustrates the complexity, uncertainty and past and future cost of the underlying litigation between the Wireless Companies and the Municipalities. Sprint asserts numerous defenses based on both federal and state law, including a counterclaim seeking a declaration that Springfield's application of its Ordinance to wireless service violates the Hancock Amendment, Article X, Section 22 of the Missouri Constitution ("Hancock").⁶ (L.F. 029-036.) Fundamental questions exist concerning the applicability of the surreptitiously modified, decades-old Ordinance to wireless service.

⁶ Springfield expresses bewilderment as to why Sprint pays gross receipts taxes to Jefferson City, Missouri. (L.F. 11.) A simple review of Jefferson City's gross receipts tax ordinance reveals much - Jefferson City passed Ordinance 9309 on July 16, 1979 (before the effective date of Hancock, prohibiting implementation of a new tax or an expansion of the tax base without a corresponding reduction in levy without voter approval) (L.F. 561.) Jefferson City's pre-Hancock ordinance expressly defines "telephone service" and "telecommunication services" to "include all communication services (eg: telegraph, teletype, **mobile telephones**, pager services, etc.,)". (L.F. 558) (emphasis added). Unlike Jefferson City, Springfield, under the guise of "recodification," amended its Ordinance to apply to "telecommunications service" *after* the effective date of Hancock *and* without a vote of the people.

Notwithstanding the legislative directive to dismiss the pending lawsuits, Springfield refused to dismiss the underlying litigation against Sprint. Consequently, Sprint filed a motion seeking dismissal of the lawsuit. (L.F. 043-066.) Following briefing and oral argument, the Honorable J. Miles Sweeney dismissed Springfield's lawsuit with prejudice on September 29, 2005. (L.F. 714-15.) Judge Sweeney determined that "HB209 is constitutional and requires the dismissal of this case without further showing." (L.F. 714.) Springfield appealed to this Court.

ARGUMENT

The overarching issue in this appeal is whether industry-specific tax policies in Missouri should be set by the elected representatives in the legislature or by serial litigation. Invalidating HB209 not only would enable municipalities to circumvent, through litigation, the Legislature's plenary authority over municipal taxation, but also to cripple the Legislature's ability to deal with state-wide problems that exist at the municipal level.

While the trial court dismissed this case, the standard of review applied to dismissed cases has little relevance to Springfield's appeal. Springfield directs the vast majority of its arguments to the constitutionality of HB209, 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) (emphasis added).

Springfield, in challenging the constitutionality of HB209, must “negative every conceivable basis which might support it” and cannot overcome the presumption of constitutionality “by generalities of law or fact.” *Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 (Mo. banc 1992). Moreover, Springfield cannot sustain a constitutional challenge with conclusory assertions of unconstitutionality. *See Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989) (“A party asserting the unconstitutionality of a statute ... bears the burden of supporting that contention by at least relating his argument to the statute or ordinance and issue at hand.”); *Massage Therapy Training Inst. v. Bd. of Therapeutic Massage*, 65 S.W.3d 601, 605, 609 (Mo. App. 2002) (party must develop claim of unconstitutionality “by citation to relevant authority or argument beyond mere conclusions”). The Court must find a statute constitutional unless there is no possible interpretation of the statute that conforms to the requirements of the constitution. *Beatty v. State Tax Comm’n*, 912 S.W.2d 492, 495 (Mo. banc 1995).

Springfield does not and cannot meet its burden of showing that HB209 clearly and undoubtedly violates the Missouri Constitution. Springfield attempts to obfuscate its burden by misinterpreting dicta in a footnote in *Witte*, 829 S.W.2d at 439, n.2 (Mo. banc 1992). (*See* Springfield Br. at 35.) In a footnote, this Court stated: “...the rule concerning the presumption of constitutionality and the burden of proof [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.’” (*citing McKay Buick, Inc. v. Love*, 569 S.W.2d 740, 743 (Mo. banc 1978)). The *Witte* Court, however, did not apply that exception. 829 S.W.2d at 439, n.2.

In fact, this Court has only invoked that exception on *two* occasions – both decisions holding that the statutes at issue, on their face, directly contravened Art. X, § 4(b)’s express requirement of tax assessment based on property value. *See McKay Buick, Inc. v. Spradling*, 529 S.W.2d 394 (Mo. banc 1975) (statute imposing ad valorem tax on auto dealer of \$2.43 for each new motor vehicle and \$1.50 for each used vehicle, regardless of make or model, directly contravened Article X, § 4(b)’s requirement of property assessment for ad valorem taxes); *McKay Buick, Inc. v. Love*, 569 S.W.2d 740, 743 (Mo. banc 1978) (statute imposing ad valorem tax on auto dealers in an amount equal to 9.5% of gross amounts received from sales of new motor vehicles over a certain time period directly contravened Article X, § 4(b)’s requirement of property assessment for ad valorem taxes). Springfield fails to establish that the *McKay* exception applies in this case. Indeed, Springfield cannot credibly argue, on one hand, that HB209 “readily and clearly” violates the constitution, and yet, on the other hand, need 119 pages of argument,

relying on extraneous evidence such as deposition testimony (*see, e.g.* Springfield Br. at 20-21; L.F. 318) correspondence (*see, e.g.* Springfield Br. at 21-22; L.F. 309, 334), hypothetical competitive advantages (*see, e.g.* Springfield Br. at 47, 78, 102), hypothetical financial losses (*see, e.g.* Springfield Br. at 41, 65, 66), ordinances (*see, e.g.* Springfield Br. at 64, 67, 78), and interlocutory orders (*see, e.g.* Springfield Br. at 44, 46.).

Here, no exception exists to the strong presumption of HB209’s constitutionality and Springfield does not and cannot satisfy its “extremely heavy burden” required to overcome this presumption. The trial court properly entered judgment in Sprint’s favor on the basis of HB209’s dismissal requirement. RSMo. § 92.089.2.

I. Springfield’s constitutional challenges are founded on an unsupportable characterization of the validity and certainty of its claims against Springfield.⁷

Springfield suggests that Sprint has only “frivolous,” “groundless,” and “unfounded” defenses to Springfield’s claims under the Ordinance. (*See, e.g.* Springfield Br. at 58.) These statements are simply not true. In all of the cases currently before the court, the Wireless Companies have submitted numerous, good-faith defenses to the claims made by the Municipalities, including the following:

⁷ This section responds to arguments made throughout Springfield’s brief related to the existence and validity of defenses to its Ordinance. Sprint presents a comprehensive response here to avoid duplication throughout this brief.

A. Strictly construed in favor of Sprint, Springfield’s ordinance does not apply to Sprint’s services.

Springfield’s Ordinance applies only to gross receipts derived from “telephonic services” provided “within the city.” (L.F. at 198.) At least two critical issues exist with respect to the Ordinance: (1) does wireless service provided by Sprint 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.”

This Court has determined that “within the city,” as used in an ordinance regulating rates for telephone service, contemplates only local exchange telephone service - not telephone communication between a resident in the city and a person outside the city. *See Home Tel. Co. v. City of Carthage*, 139 S.W. 547, 549 (Mo. 1911). 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 the following: (1) both ends of the call must be “within the city”, (2) one end of the call must be “within the city”, and the charges for the call must be billed to an address in the city, (3) the cell tower that originally picks up the call must be located in the city, or (4) the wireless switch serving the call must be “within the city.”

Springfield’s Ordinance, however, gives no indication as to whether any of these methods (or any other method) should be used. And the issue is further complicated by the fact that, in almost all cases, Sprint does not bill for wireless service on a “call by call” basis. Rather, it operates a nationwide network and simply charges each customer a monthly lump sum fee for access to this nationwide network. Sprint accordingly has a

strong argument that the monthly nationwide access fees should never be treated as charges for service provided “within” a particular city.

Construing the Ordinance narrowly against Sprint, as required by Missouri law, disputed issues like these must be resolved in favor of Sprint.⁸ Substantial issues exist as to whether wireless service is subject to taxation given the limitations of the Ordinance’s language. The Ordinance’s limitations create numerous issues as to its applicability to wireless services. Certainly, “within the city” does not describe the services Sprint provides to its customers that pay monthly fees for access to nationwide (or at least statewide) networks enabling them to place calls to and from anywhere within those networks.

Springfield describes the need to construe the language of the ordinances as an unfounded, if not frivolous or groundless, defense. But Springfield’s conduct prior to the

⁸ This Court has consistently held 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).

passage of HB209 suggests that even it recognizes that standard “telephone” tax ordinances do not apply to wireless service. *See* discussion regarding Springfield’s “recodification” of Ordinance at pp. 2-3, *supra*.

Finally, Sprint’s ordinance construction defense is consistent with the weight of the authority in other states. 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. Corp.*, 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. Communications, Inc. v. Southeastern Tel. Co.*, 170 So. 2d 577, 581-82 (Fla. 1965) (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 Sprint’s service – was connected with the public switched telephone network. *See also S. Message Serv. v. Louisiana 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*, 1982 WL 12037 (Mo. Admin. Hrg. Com. 1982; Case No. RS-79-0199) (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 Sprint’s position, it is understandable that Springfield repeatedly clings to the June 9, 2005 Order issued in its Federal Lawsuit (the “Federal Order”) (L.F. 216-232). While the Federal Order applies to Springfield, it does not apply to Sprint. Sprint is not and was not a party to that litigation, and the Federal Order does not bind Sprint.⁹ Moreover, the Federal Order is merely an interlocutory order, still subject to an evidentiary hearing and appeal.¹⁰

⁹ Sprint Corporation, not Sprint, is a counterclaimant in that action seeking only a declaratory judgment. Although summary judgment was entered on that counterclaim (L.F. 232), the order is not yet appealable, and Sprint Corporation’s motion to vacate that judgment on the basis of HB209 is stayed pending outcome of these cases.

¹⁰ Not surprisingly, Springfield does not trumpet the decision of Judge Sweeney or the other circuit judges below in dismissing this and similar cases like it does the lone decision of the federal court.

The Federal Order does not resolve the issue as to whether the far-reaching wireless service Sprint provides could ever be treated as “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.” (L.F. at 226, 231.) 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 Sprint disputes), Springfield would still face the heavy burden of demonstrating that charges billed to a particular customer are for services provided “within the city,” when the only known connection between such customers and the city is that the customer’s billing address is located “within the city.”¹¹

As additional support for its contention that Sprint has only “unfounded defenses,” Springfield relies on *City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo. App. 1999). This case, however, has minimal impact on Sprint’s

¹¹ During all of the litigation between the Municipalities and the Wireless Companies, the Municipalities, including Springfield, 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. App. 1987).

defenses. In *Sunset Hills*, the applicable city ordinance purported to tax any business that maintained a telecommunications tower in the city. The threshold issue in the case was whether the city ordinance was properly enabled under state law. *Id.* at 58-59. 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. 145 S.W.3d at 58-59. Once the threshold issue was decided, there was no question that the defendant taxpayer owned a telecommunications tower located within Sunset Hills (i.e., the city’s “telecommunications antenna” ordinance clearly applied). Thus, the court in *Sunset Hills* was not asked to, and did not, address the difficult statutory construction issues that courts will face when asked to determine whether the Ordinance’s language should apply to wireless service. Finally, the *Sunset Hills* decision does not involve – and does not even mention – the clearly disputed issue as to whether the “within the city” language in the Ordinance can be construed to cover all or any portion of the charges Sprint receives in exchange for providing nationwide wireless service to its customers.

B. Even a brief explanation of Sprint’s Hancock defenses illustrates that Sprint raises substantial issues to Springfield’s claims.

The Hancock Amendment, (Article X, § 22 of the Missouri Constitution) 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, there is a Hancock violation 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).

On the eve of this litigation, and in a complete reversal of form, Springfield took the position that Sprint was subject to the Ordinance. Prior to that, Springfield never attempted to apply its Ordinance to Sprint - hence the request for five years of back taxes. This increase in tax, or new tax, occurred long after the adoption of Hancock and without voter approval. Springfield’s imposition of this additional tax is most certainly either the levy of a new tax or a broadening of the taxable base of an existing tax without a corresponding reduction in the rate of the levy.

II. HB209 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.¹²

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, HB209 does not violate Article III, § 38(a) because it does not grant public money or lend public credit to private companies, and even if it did, HB209 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. HB209 does not grant public money or lend public credit because no public funds are involved and no taxes are due and owing to Springfield.

No provision of HB209 authorizes or requires the payment of public funds or the lending of 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. Town of Kirkwood v. County Court of St. Louis County*, 44 S.W. 734, 737 (Mo.

¹² This section responds to Point 1 of Springfield’s brief.

1898). 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. of Jasper County*, 570 S.W.2d 666, 676 (Mo. banc 1978).

Recognizing that no public funds or credit is involved, Springfield insists Sprint owes it taxes, ignoring that its claims have not been determined to be valid or liquidated. Based on this flawed premise, Springfield argues the Legislature’s balanced resolution of disputes concerning the applicability of the varied, decades-old ordinances in favor of a uniform taxation and collection system results in “a gift of ‘public money’.” (Springfield Br. at 41.) But without public monies collected and paid or public credit extended, and having only mere assertions that have not been determined to be valid or liquidated, Springfield cannot establish any violation of Article III, § 38(a).

Springfield relies 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 RSMo. § 100.297, which allowed the Missouri Industrial Development Board (“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 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 than 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, Springfield’s claims and the applicability of its Ordinance are hotly contested. Years of litigation have failed to resolve fundamental questions concerning the applicability of ordinances like Springfield’s. Sprint, like the other Wireless Companies, asserts numerous, substantial defenses evidencing the unliquidated and disputed nature of the claims. *See* Section I, *supra*. In *Curchin*, there could be no question that state funds were going to be paid directly to the taxpayers, and therefore, the statute violated Article III, § 38(a). Here, there is no certainty that an actual tax liability exists or that it will be discharged under HB209. If Sprint prevails on the underlying claims, no actual liability will exist to be discharged. In that event, Springfield would have this Court strike down a statute that by definition does not involve the use of public funds.

Springfield offers only speculative assertions that it will lose tax revenue under HB209. But a statute does not violate Article III, § 38(a) merely because it *might* involve the payment of public funds. *Cf. Sommer v. City of St. Louis*, 631 S.W.2d 676, 679-80 (Mo. App. 1982) (to confer taxpayer standing under Article III, § 38(a), a tax abatement can only be deemed an expenditure of public funds if “a loss of revenue to the city ‘arises as a *necessary conclusion*’,” if a court “can conclude from the record that a net loss of revenue to the city is a *possible result*” of the alleged expenditure but cannot determine such loss is a “*necessary result*,” there is no public fund expenditure) (emphasis added).

Springfield also cites *Champ v. Poelker*, 755 S.W.2d 383, 385 (Mo. App. 1988), 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 under Article III, § 38(a); rather, it held the taxpayers lacked standing to make such a constitutional challenge. Springfield also relies on dicta from *Sommer*, in which the court of appeals held that a city alderman, a taxpayer and an unincorporated citizens coalition lacked standing to challenge the constitutionality of a city ordinance providing a partial tax abatement to a redevelopment corporation under RSMo. §353.110. 631 S.W. 2d at 679. As in *Champ*, the appellate court never reached the constitutionality of the tax abatement under Article III, § 38(a). The dicta relied upon by Springfield from *Champ* and *Sommer* is irrelevant to this case and in no way alters the rule this Court established in *Kirkwood* that funds do not become "public" until collected and paid into a city's treasury.

Springfield's repeated citation to the Federal Order ignores a fundamental principle – it is merely an interlocutory order, still subject to an evidentiary hearing and appeal. Obviously, the Federal Order does not establish a certain "tax liability" on the part of any taxpayer. Rather, it states: "the dispute over the amount of taxes owed is not before the Court." (L.F. at 231.) Thus, even if Sprint provides service that the district judge concluded is subject to the Ordinance (a conclusion the Wireless Companies dispute), nothing in the Federal Order addresses how the particular tax liability would be computed or if back taxes are actually owed. Under these circumstances, Springfield's

back tax claim against Sprint remains vastly different from the fixed and certain tax credit in *Curchin*.

Springfield cites to two additional cases from this Court, which lend no support to its Article III, § 38(a) challenge. First, in *State ex rel. Board of Control of St. Louis School and Museum of Fine Arts*, this Court held that a tax statute directing tax revenue to be given to Washington University to support the art museum, a department of the university, was an unconstitutional grant of public money to a private corporation. 115 S.W. 534, 548 (Mo. 1908). H.B 209 provides for no such transfer of support to any private corporation. Next, in *State ex rel. St. Louis Police Relief Ass'n v. Igoe*, this Court held that a police relief association fund created by statute was not supported, wholly or in part, by public money where the funds at issue consisted of money accumulated by the police commissioners board from: (a) funds belonging to unincorporated police relief groups; (b) the sale of unclaimed property; (c) fines assessed by any police commissioner board against officers; (d) fees paid by members of any police relief group; and (e) a percentage of any rewards allowed to any officer. 107 S.W.2d 929, 934 (1937). This case gives no help to Springfield's Article III, § 38(a) challenge.

Springfield fails to meet its heavy burden of demonstrating that HB209 clearly and undoubtedly involves a grant of public money or public credit. HB209 does not violate Article III, § 38(a) of the Missouri Constitution.

B. HB209 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 HB209’s resolution of the disputed claims did involve a grant of public funds or public credit, HB209 promotes the economic welfare of the state and thus serves a valid public purpose 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 Legislature 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 HB209 addresses are not limited to, as Springfield suggests, the actual costs of the litigation. Springfield asserts that “costly litigation” refers only to the legal budgets of the Wireless Companies because Springfield’s attorneys are retained on a contingent-fee basis. (*See* Springfield Br. at 44.) Springfield ignores 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 providing

testimony),¹³ 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 Legislature freed up 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. Public Sch. Ret. Sys. of Mo.*, 950 S.W.2d 854, 860 (Mo. banc 1997) (“The legislature may have determined 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 . . .”).

Missouri courts defer to the Legislature’s determination of what constitutes a “public purpose.” *Fust*, 947 S.W.2d at 430. The Legislature’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) (“ . . . when the legislature has spoken on the subject, the courts must defer to its determination 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

¹³ Notably, Springfield’s in-house attorney appears on the brief in this Court and on the pleadings below. (*See, e.g.* L.F. 016, 041, 053, 311, 314, 587, 701, 715, 719.)

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. City of St. Louis v. Seibert, 24 S.W. 750, 751 (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. City of 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. City of 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. *Fust*, 947 S.W.2d at 430.

The Missouri Supreme Court adopted this test, verbatim, from an 1888 decision by the Vermont Supreme Court, *Bates v. Bassett*, 15 A. 200, 202 (Vt. 1888). Despite a few courts’ use of shifting nomenclature when stating the test, analysis of the cases makes clear that courts focus on the primary “purpose” or “object” of the legislation. For

example, in *Curchin*, the majority labeled the test as the “primary effect” test, yet cited the test language directly from *State ex rel. Jefferson*, which does not mention the word “effect” but focuses on the primary purpose, or object, of the expenditure. See *Curchin*, 722 S.W.2d at 934 (citing *State ex rel. Jefferson*, 154 S.W.2d at 102). Judge Rendlen, dissenting in *Curchin*, took issue with the majority’s use of the phrase “primary effect” and referred to the test as one of “primary purpose.” *Id.* at 936. Appellate courts, although citing to the same test enunciated in *State ex rel. Jefferson*, are not uniform in the terminology used to describe the it. Compare *J.C. Nichols Co.*, 639 S.W.2d at 892 (referring to the test as the “primary purpose” test) with *Rice v. Ashcroft*, 831 S.W.2d 206, 209 (Mo. App. 1991) (referring to the test as the “primary effect” test). Despite the confusion on the test’s name, this much is clear – the test looks to the primary object (purpose) of the expenditure to determine if a public expenditure has a public purpose. *State ex. rel Jefferson*, 154 S.W.2d at 102. Focusing on the purpose makes sense in that the purpose can be determined from the face of the legislation while the effects often cannot be determined, if at all, until after the legislation is implemented. Even then, effects of legislation would be difficult to measure with certainty.

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 Legislature’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 a private corporation's facilities 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 Legislature 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. These are, without a doubt, sufficient and valid public purposes. This Court must defer to the Legislature's determinations.¹⁴ *Fust*, 947 S.W.2d at 430; *Jasper County Farm Bureau*, 286 S.W. at 384.

¹⁴ Further, the principle of *expressio unius est exclusio alterius* applies to the issue of deference to the legislature. For example, Article III, § 40(30) of the state constitution specifically provides that "where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject." MO. CONST. art. III, § 40(30). That the framers of the state constitution excluded from Article III, § 38(a)

To overcome this deference, Springfield must demonstrate that the Legislature’s determination that HB209’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 597. Springfield asserts two arguments: (1) HB209 is “counterfactual” as it relates to “costly litigation” and the representation that Springfield’s claims have not been determined “valid”; and (2) HB209 “provides an unfair competitive advantage to the wireless telephone companies who did pay their taxes to Springfield, such as T-Mobile.” (Springfield Br. at 44-47.)

Springfield’s first argument lacks merit. First, it highlights Springfield’s narrow view of the “costs” of the litigation, which, as discussed above, ignores other costs of litigation. Also, Springfield’s argument that the true direct effect of H.B 209 is to “trammel” upon its right to access to courts by requiring dismissal of the litigation disregards the fact that the Legislature has, on more than one occasion, created legislation affecting access to the courts by prohibiting certain causes of action,¹⁵ or effectively ending litigation brought by political subdivisions.¹⁶

(and other sections) a provision on non-deference to the legislature demonstrates that deference should indeed be given to the Legislature’s determination of public purpose (as well as other determinations).

¹⁵ RSMo. §21.750.5 (prohibiting state and political subdivisions, including counties and cities, from bringing suit against firearms or ammunition manufacturers, trade associations or dealers for damages, abatement or injunctive relief and applying such prohibition to any pending litigation). *See also City of St. Louis v. Cernicek*, 145 S.W.3d

Springfield also argues HB209 will cause “cash-strapped municipalities” to be unable to meet their budgets, requiring them to “engage in borrowing due to tax revenue shortfalls.” (Springfield Br. at 41.) The 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 that were provided years ago. Springfield provides no record support for the claim that “borrowing” will be needed. In fact, HB209 actually assists the Municipalities on a prospective basis by allowing them to budget date-certain revenue payments from Wireless Companies. If wireless services displace land-line telephone service as Springfield predicts, the fact that wireless is a growth industry only inures to the Municipalities’ benefit. (*See* Springfield Br. at 41.) 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.¹⁷

Further, HB209’s statement that “the claims of the municipal governments have neither been determined to be validated nor liquidated” is not, as Springfield insists, false

37, 43 (Mo. App. 2004) (upholding the dismissal of pending litigation pursuant to that statute).

¹⁶ *See, e.g. Savannah R-III Sch. Dist. v. Public Sch. Ret.*, 950 S.W.2d 854, 860 (Mo. banc 1997).

¹⁷ *See* n.4, *supra*.

or unreasonable. (Springfield Br. at 45.) Springfield implies that both the General Assembly and the Governor knowingly made false statements because the Federal Order had been entered and *Sunset Hills* decided when the Governor signed the bill in July of 2005. (*Id.* at 45-46.) However, the Federal Order is not a final, appealable order and does not “validate” Springfield’s claims, as it expressly acknowledges significant uncertainty about the services and revenues to which Springfield’s Ordinance applies.¹⁸ *Sunset Hills* likewise does not validate Springfield’s claims.¹⁹ Further, Sprint was not a party to that litigation, so the Federal Order does not “validate” Springfield’s claim.

Springfield’s second argument is likewise flimsy. The decision of one wireless company to pay a questionable tax rather than litigate its validity is a business decision that is neither binding on its competitors nor a legal determination of the applicability of the tax. It does not show, much less demonstrate “clearly and undoubtedly,” that the General Assembly’s determination is arbitrary or unreasonable.²⁰ Further, any complaint

¹⁸ “*Quantifying with precision the location where a call is made or received may be a problem in the damage phase of this dispute ... there is uncontroverted evidence that some ... services occur within the limits of Jefferson City of Springfield.*” (L.F. at 226) (emphasis added.) See discussion of the Federal Order in Section I.A, *supra*.

¹⁹ See discussion of *Sunset Hills* in Section I.A, *supra*.

²⁰ To support its argument that HB209’s public purpose is arbitrary, Springfield cites *Kilmer v. Mun*, 17 S.W.3d 545, 552, n. 21 (Mo. 2000) (discussed arbitrary classification for equal protection purposes) and *Airway Drive-In Theatre Co. v. City of St. Ann*, 354

of unfair competitive advantage belongs to that wireless company, which, as a party to the University City Appeal, supports H.B 209. *See* Resp. A. 13. Moreover, Springfield’s repeated reference to SBC’s “urging” that Springfield apply the Ordinance to Wireless Companies does not render its Ordinance valid and enforceable against Sprint. To the contrary, HB209 addresses SBC’s competitive concerns and levels the playing field by requiring land-line and wireless companies alike to pay municipal business license taxes. Springfield offers no support for its unfair competitive advantage 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).

Springfield, offering this Court nothing but unfounded speculation and the unsurprising yet constitutionally irrelevant assertions of a competitor, fails to sustain its burden of demonstrating that the Legislature’s determination that HB209 serves a public purpose is “arbitrary and unreasonable.” *See State ex rel. Wagner*, 604 S.W.2d at 597. Springfield’s attempt to have this Court substitute its judgment for that of the Legislature fails: absent a showing that HB209 “clearly and undoubtedly contravenes” Article III,

S.W.2d 858 (Mo. banc 1962) (municipality may divide a taxable class if classifications are reasonable and not arbitrary), neither of which addressed whether the Legislature’s determination of public purpose was arbitrary for purposes of Article III, § 38(a).

§ 38(a) and “plainly and palpably affronts” the fundamental law represented by Article III, § 38(a), this Court should not substitute its judgment for that of the Legislature.²¹ *Smith v. Coffey*, 37 S.W.3d 797, 800 (Mo. banc 2001).

III. HB209 does not violate Article III, § 39(5): it compromises Springfield’s speculative claims in favor of fundamental state interests.²²

Article III, § 39(5) of the Missouri Constitution prohibits the Legislature from “releasing or extinguishing . . . , without consideration, the indebtedness, liability or obligation of any corporation or individual due . . . any county or municipal corporation.” Springfield claims HB209 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 Springfield to dismiss its pending lawsuits to collect such taxes.

A. HB209 does not extinguish a debt to Springfield because its claims are not fixed as a sum certain.

HB209 does not extinguish a definite liability; instead, it requires the dismissal of lawsuits seeking to collect vigorously disputed claims. *Beatty v. State Tax Comm’n*, 912

²¹ *Cf. Mid-State Distrib. Co. v. City of Columbia*, 617 S.W.2d 419, 424 (Mo. App. 1981) (“We might have the opinion that the ordinance was not really an effective or efficient engine to achieve the desired end. But we cannot substitute our judicial judgment for the legislative judgment of the lawmaker . . .”).

²² This section responds to Point 2 of Springfield’s brief.

S.W.2d 492 (Mo. banc 1995), this Court’s most recent, and most significant, pronouncement on § 39(5), confirms that no liability is being extinguished in this case.

In *Beatty*, the Legislature passed a new property tax law (H.B. 211) that expanded the definition of the term “residential property” to include apartment buildings. “Residential property” is subject to a favorable assessment rate. *Id.* at 494. 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 *Beatty* plaintiff 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, stating: “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.” *Beatty*, 912 S.W.2d 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, § 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.

Springfield cites *Graham Paper Co. v. Gehner*, 59 S.W.2d 49 (Mo. banc 1933), to support its position that its claims against Sprint fall within § 39(5). (Springfield Br. at 50.) In *Graham*, the Court held 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 based on this Court's recent decision in *Beatty*, *Graham* is no longer 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).²³ 912 S.W.2d at

²³ Springfield also cites *McKeever v. Dir. of Revenue*, 1980 WL 5130 (Mo. Admin. Hrg. Comm. 1980) (Springfield Br. at 53), 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

498. Moreover, *Graham* involved a sum certain. *See Graham*, 59 S.W.2d at 50 (“It was agreed that . . . the tax increase would be \$1,635.20. This is the amount in dispute.”). Thus, *Graham’s* reference to the tax there as “inchoate” or “unmatured” simply meant that the liquidated, undisputed amount was “not due or yet payable.”²⁴ *Id.* at 52.

Springfield quotes heavily from an 1874 Iowa Supreme Court decision, *City of Dubuque v. Illinois Central R. Co.*, claiming the legislation at issue in that case, which was held unconstitutional, is similar to HB209. (Springfield Br. at 54-55) (*citing* 39 Iowa 56, 1874 WL 416 (Iowa 1874)). In *Dubuque*, however, there was a *final* judgment as to

“truly assessed” or finally determined at the time it was settled. (This was true even though, prior to the settlement, the Director had sent a notice of assessment to the taxpayer specifying the precise amount of the taxpayer’s alleged deficiency.) Like Springfield’s back tax claims here, the Director’s tax claims existed but had not been finally determined. Thus, *McKeever* supports the position that § 39(5) does not apply here.

²⁴ Springfield also cites to *First Nat’l Bank v. Buchanan County*, which involved a sum certain and does not support Springfield’s position: “The ordinance . . . levies a tax on all the banks totaling \$28,902.25.” 205 S.W.2d 726, 728 (Mo. 1947) (*See* Springfield Br. at 86.) Similarly, *Ernie Patti Oldsmobile, Inc. v. Boykins* involved a dispute over the return of tax monies *paid* in protest pending a determination of whether the sales tax was repealed – a liquidated amount – and the court of appeals upheld the ordinance. 803 S.W.2d 106, 108 (Mo. App. 1990). Neither case supports Springfield.

tax liability *plus an assessed amount* of taxes. *Id.* at *1-2. Springfield has neither a final judgment as to liability nor an assessed tax amount against Sprint.

Springfield's claims fall far short of the *Beatty* "fixed as a sum certain" standard. Springfield has not audited Sprint, issued an assessment, or specified an amount in its Petition. (L.F. 005-016.) Springfield's 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 the 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 realtor be required to pay it but the city to accept it, there was no tax due the city from realtor"). Even if Springfield seeks to tax all wireless receipts at a given rate, its claims are still unliquidated because the tax base is disputed, i.e. there has been no determination as to what receipts are attributable to wireless service provided "within the city" under the Ordinance. *See supra* Section I.A. *See also State ex rel. Ford Motor Co. v. Gehner*, 27 S.W.2d 1, 3 (Mo. banc 1930) (holding that corporate income taxes like those in *Graham* were not a sum certain even after the taxpayer earned income because the tax assessor had not finally calculated the tax base and "[i]n no sense does the statute itself determine the amount of the taxes").

In an attempt to avoid the implications of *Beatty*, Springfield relies on the Federal

Order.²⁵ The Federal Order does not fix any “sum certain” tax liability against anyone, much less non-party Sprint; rather, it represents a preliminary finding that the companies involved in that case may owe “some” tax liability in two cities. *See supra* Section I.A. Under *Beatty* such “an inchoate obligation to pay some tax” does not amount to an “indebtedness, liability, or obligation” under Article III, § 39(5). *See Beatty*, 912 S.W.2d at 498.

To further dodge *Beatty*, Springfield argues that it has a claim to inchoate and past due taxes because the taxable event for a gross receipts tax is “the billing of the revenue.” (Springfield Br. at 52.) This argument, as with all of Springfield’s arguments, presupposes that its Ordinance, as written, applies to wireless service – an issue that has not been determined by any final judgment of any Missouri court, state or federal.²⁶ This argument does not bring Springfield outside *Beatty*’s reach for the simple reason that no

²⁵ Springfield goes so far as to rely on the following dicta in the district court’s abstention order (not the Federal Order): “. . . the plaintiffs had an inchoate property right to any past due taxes . . .” (*See* Springfield Br. at 51.) The issues of whether Springfield had such a right and whether HB209 violates Article III, § 39(5) were not before the district court, which was expressly abstaining from any such determination, and the district court provided no reasoned analysis in support of its conclusory speculation.

²⁶ Springfield incorrectly relies on *The May Dept. Stores Co. v. Dir. of Revenue*, 1986 WL 23204 *15 (Mo. Adm. Hrg. Comm. 1986). Like Springfield, counsel for Sprint could not locate any Missouri case law supporting this remarkable position.

liability is “fixed as a sum certain.”²⁷ *Beatty* at 498.

B. Even if HB209 extinguished a debt to Springfield, the State provided adequate consideration by guaranteeing a definite, steady, and broader revenue stream in the future.

Even if Springfield’s underlying claims against Sprint constitute an “indebtedness, liability or obligation,” HB209 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.”

HB209’s legislative findings fit comfortably within § 39(5)’s parameters. In HB209, the 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

²⁷ Springfield proposes that *Graham* supports its argument because the *Graham* Court held that income tax liabilities already incurred cannot be waived or compromised by the legislature. (Springfield Br. at 53.) An income tax, however, is not the same as a business license tax, such as the Ordinance. *Cf. King v. Procter & Gamble*, 671 S.W.2d 784, 785 (Mo. banc 1984) (franchise taxes are not income taxes); *Brennan v. Dir. of Revenue*, 937 S.W.2d 210, 212 (Mo. banc 1997) (out of state franchise tax not income tax for which tax credit was available).

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.

Springfield suggests that by declaring that the Municipalities are receiving “full and adequate consideration,” the Legislature has somehow “invaded the province of the judiciary” and engaged in “legislative overreaching.”²⁸ (Springfield Br. at 56-57.) To the

²⁸ For additional discussion on this point, see *infra* at Section VIII.

contrary, this Court gives great deference to declarations made by the Legislature.²⁹ 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 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.

Id. at 68.

Giving “great weight” to the Legislature’s specific findings in HB209, it is apparent that Springfield’s claims were not resolved “without consideration.” First, and most importantly, HB209 states expressly that the consideration lies in the uniformity and additional revenues resulting from HB209. All of the many issues related to the applicability of the hodgepodge of city ordinances are resolved effective July 1, 2006.

²⁹ *See also* Section II. B, *supra*.

HB209 also brings an end to costly litigation. *See, e.g., Crutcher v. Koeln*, 61 S.W.2d 750-754 (1933) (the compromise of a doubtful claim is good consideration). Finally, HB209, by its terms, provides consideration in the form of streamlined administration and cost savings in the collection and remittance of taxes to the Municipalities. RSMo. § 92.086.3.

Springfield asserts that HB209 lacks consideration given that—in the words of Springfield’s—HB209 only requires Sprint to waive its “unfounded” defenses that lack legal or common sense. (Springfield Br. at 58, 59.)³⁰ Yet it is the legislature, not Sprint, that must give Springfield consideration.³¹ Even so, such comments must be recognized

³⁰ Relying on *Metts v. City of Pine Lawn*, 84 S.W.3d 106 (Mo. App. 2002), Springfield claims Sprint waived all its defenses by failing to pay Springfield’s taxes under protest in accordance with RSMo. § 139.031. (Springfield Br. at 62-63.) *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. Springfield also suggests that Sprint’s failure to file a Hancock case undercuts Sprint’s claim to a valid defense to the Ordinance. (Springfield Br. at 62.) This suggestion is curious, at best, considering that Sprint asserted a counterclaim against Springfield for violation of Hancock. (L.F. 034-036.)

³¹ *See* MO. CONST. art. III, § 39(5).

for what they are—hyperbole in the face of obvious facts to the contrary. Because Springfield’s argument depends on the proposition that Sprint gave up “nothing,”³² Springfield bears the heavy constitutional burden of proving – clearly and unmistakably - it can defeat every defense asserted by Sprint. The language of the Ordinance itself demonstrates that substantial defenses exist. *See supra* Section I. One cannot avoid Hancock by calling a new tax a “recodification.”³³ Moreover, it is not necessary for this Court to decide the merits of the underlying case.³⁴ The question is whether the extinguishment of an “indebtedness, liability or obligation” was “without consideration.” The context provided by the Ordinance more than resolves the point. Coupled with the legislative findings, the deference shown such findings by this Court, and the clarity,

³² (*See, e.g.* Springfield Br. at 58, 65.)

³³ In expanding its Ordinance through recodification, Springfield overlooked the section of its city code that clearly demonstrates its pre-recodification Ordinance applied only to land-line telephone companies. (*See* L.F. 451.) Adding “telecommunications” would have been mere surplusage had the Ordinance already applied to other communication methods such as wireless.

³⁴ Springfield argues that HB209’s statute of limitations period will prevent it from being able to collect on unpaid taxes for the years 1999 through 2003. (Springfield Br. at 66, n.14.) This assertion is confusing. HB209’s limitation period will apply only if this Court upholds HB209. If this Court upholds HB209, Springfield will not be able to sue Sprint for any alleged back tax liability for those years. *See* RSMo. § 92.089.2.

certainty, and prospective tax payments HB209 provides, it is obvious that consideration exists.

Springfield also argues, for the first time, that Sprint should be estopped from arguing that the Ordinance does not apply to wireless service because the Wireless Companies, as an industry, lobbied for the Federal Mobile Telecommunications Sourcing Act (“MTSA”). (Springfield Br. at 59.) This argument was not raised below and cannot be argued here. *Christeson v. State*, 131 S.W.3d 796, 800, n.7 (Mo. banc 2004) (“claims not presented to the motion court cannot be raised for the first time on appeal”). In any event, this argument extremely oversimplifies both the MTSA and Sprint’s defenses to the applicability of the Ordinance to wireless service. The MTSA is the first step of local taxation of wireless service. It simply sets forth rules governing state and local taxation of wireless service, recognizing, as does the Federal Order, that taxation of wireless service is complicated. (See L.F. at 226, 231.) The MTSA allows governments to tax a wireless provider only for customers having a “primary place of use” within the taxing jurisdiction. (L.F. 425-426.) The MTSA neither provides that any existing municipal business license tax automatically applies to wireless service nor resolves the Hancock and “within the city” issues inherent in the Ordinance. See *supra* Section I. By lobbying for the MTSA, the Wireless Companies in no way consented to retroactive application of inapplicable taxes to wireless service.

Springfield also argues now, for the first time, that H.B 209 will cause Springfield to lose revenue because it changes Springfield’s definition of gross receipts to one with a

narrower tax base.³⁵ This argument was not raised below and cannot be argued here. *Christeson*, 131 S.W.3d at 800, n.7. In any event, this argument is wrong. H.B 209 actually expands the tax base – Springfield’s Ordinance, as written, only applies to gross receipts for service “within the city,” whereas the tax base for H.B 209 will be “all receipts from the retail sale of telecommunications service taxable under § 144.020 . . .” See RSMo. § 92.083.1(1). In other words, HB209 removes the “within the city” limitation in the Ordinance.

By removing uncertainty as to the applicability of Springfield’s Ordinance and others, HB209 provides a real economic benefit to Springfield and other municipalities. Springfield receives valuable consideration under HB209; while it may have wanted even more, its dissatisfaction does not rise to the level of a constitutional violation.

IV. HB209 does not violate the prohibition on retrospective lawmaking found in Article I, § 13 of the Missouri Constitution.³⁶

Springfield’s argument that HB209 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. Public Sch. Ret. Sys.*, 950 S.W.2d 854, 858 (Mo. banc 1997). Indeed, if

³⁵ Springfield’s definition of gross receipts is neither in the record on appeal nor in its appendix. (See L.F. 001-729; A. 001-060.)

³⁶ This section responds to Point 4 of Springfield’s brief.

Springfield's position on the scope of Article I, § 13's protections is accepted, it would render meaningless Article III, § 39(5), which specifically governs the circumstances under which the Legislature may release or extinguish debts owed to municipalities.

Even if Article I, § 13 did apply to municipalities, HB209 does not impair vested rights or affect past transactions to the substantial prejudice of Springfield. *See M & P Enters., Inc. v. Transamerica Fin. Servs.*, 944 S.W.2d 154, 160 (Mo. banc 1997) (citing *Dial v. Lathrop R-II Sch. Dist.*, 871 S.W.2d 444, 447 (Mo. banc 1994)). Springfield's 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 its favor. Consequently, Springfield has no vested rights impaired by HB209.

A. Article I, § 13 does not apply to Springfield.

This Court has repeatedly held that the Legislature 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); *Graham Paper Co. v. Gehner*, 59 S.W.2d 49, 51-52 (Mo. banc 1933). 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.

Savannah, 950 S.W.2d at 858. Municipalities are instrumentalities of the State and possess only the powers the legislature grants to them. *State ex rel. Kemper*, 1881 WL 175, *3 (Mo. App. 1881); *Siegel v. City of Branson*, 952 S.W.2d 294, 296 (Mo.

App. 1997). Missouri municipalities 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. Thus, the Legislature 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. 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.* at 857. While *Savannah* was still pending in the circuit court following remand, the 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.*

Springfield acknowledges that *Savannah* controls by devoting most of its argument to urging that it be overruled, including heavy citation to the dissent. (Springfield Br. at 90-92.) Both the *Savannah* dissent and Springfield fail to recognize, however, that this Court has long-established precedent that municipalities cannot raise challenges under Article I, § 13. *See Graham*, 59 S.W.2d at 51-52 ("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 (1877)); *State ex rel. Kemper*, 1881 WL 175, *3 (“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* 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.

Springfield suggests that it is not a political subdivision because the constitution, at times, speaks of municipalities and political subdivisions in the disjunctive. (Springfield Br. at 92.) Notwithstanding Springfield’s strained attempts to locate ambiguity in the Missouri Constitution, this Court has already concluded that municipalities are instrumentalities of the State. *See Marshall v. City of Kansas City*, 355 S.W.2d 877, 883 (Mo. 1962) (“A municipal corporation has been referred to as a miniature state within its locality and as an instrumentality of the state established for the convenient administration of local government.”); *Arkansas-Missouri Power Corp. v. City of Kennett*, 156 S.W.2d 813, 817 (Mo. 1941) (“[A] municipal corporation is a mere creature of the state and not in itself a sovereign.”); *Donovan v. City of Kansas City*, 175 S.W.2d 874, 881 (Mo. 1943) (“Missouri cities are creatures of the state, exercising powers conferred by expressed or implied provisions of law.”). *Savannah’s* holding thus applies with equal force to Springfield as to school districts.

Springfield cites other cases that only weaken its position that it has protected rights under Article I, § 13. (See Springfield Br. at 86.) For example, *First National Bank of St. Joseph v. Buchanan County*, 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*, 59 S.W.2d at 51-52.

Article III, § 39(5) completely belies Springfield's argument; that section 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 Springfield insists, Article I, § 13 is broad enough to forbid the Legislature from releasing or extinguishing the rights (if any) 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* 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.

Springfield's unduly broad interpretation of Article I, § 13 is merely an attempt to free it from the "without consideration" language of Article III, § 39(5). As Sprint has

already demonstrated, *see* Section III. B, *supra*, HB209 provides sufficient consideration under Article III, § 39(5) to permit the release of Springfield’s 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. Committee 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. HB209 does not infringe upon a vested right.

Even if the State were not empowered to waive the rights of municipalities, Springfield cannot establish it has 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. No. R-V of Grundy County, 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 Com’n*, 912 S.W.2d 492, 496 (Mo. banc 1995). Further, a right is not vested if it depends upon the happening of an uncertain event. *M & P Enters., Inc. v. Transamerica Fin.*

Servs., 944 S.W.2d 154, 160 (Mo. banc 1997). For this reason, 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.

Springfield does not have a vested right to collect past taxes from Sprint because considerable uncertainty exists regarding its ability to obtain a final judgment establishing liability. At best, Springfield has unliquidated, uncertain and unestimated claims, subject to substantial defenses. *See supra* Section I.

Springfield relies on *Graham* for the proposition that an “inchoate tax” is a recognizable right under the prohibition against retrospective laws. (Springfield Br. at 85-86.) However, *Graham* relied on Art. III, § 39(5), not Art. I, § 13, and therefore provides no support to Springfield’s Art. I, § 13 retrospective law challenge to HB209.

V. HB209 does not violate Article III, § 40’s prohibition on special laws.³⁷

Springfield offers five theories for why it believes HB209 violates the prohibition on special laws found in Article III, § 40 of the Missouri Constitution. All fail to survive scrutiny. First, Springfield lacks standing to raise arguments on behalf of utility companies or other businesses. Second, the classifications created by HB209 are reasonable and include all those who are “similarly situated,” and therefore are consistent with Article III, § 40. Indeed, Springfield has enacted ordinances that make many of the

³⁷ This section responds to Point 3 of Springfield’s brief.

very same classifications it now challenges,³⁸ and this Court has upheld similar classifications in other statutes.

A. Springfield does not have standing to challenge HB209 on behalf of utility companies, landline telephone companies, and wireless telecommunication companies.

Many of Springfield’s “special law” challenges to HB209 are based not on harm to Springfield itself, but rather on purported injuries to utility companies, landline telephone companies, and certain wireless companies. (*See* Springfield Br. at 76-78.) Springfield does not have standing 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*

³⁸ At least some of Springfield’s ordinances impose different tax rates on different service providers, even though such service providers now provide overlapping services, specifically cable television service as compared to telephone service. *See e.g.* SPRINGFIELD MO. ORD. 70-453 (L.F. 563) (imposing a 5% gross receipts tax on cable television services as opposed to the 6% tax on telephonic service); SPRINGFIELD MO. ORD. 70-84 (L.F. 564-574) (imposing varying license fees on various service providers). If Springfield’s argument is correct, its own taxing schemes are unconstitutional.

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.* Springfield lacks standing to raise special law challenges on the basis of alleged violations of the rights of gas, water, electric, landline telephone companies, and wireless companies, that are perfectly able to petition Missouri courts on their own.

B. HB209 properly classifies telecommunications companies apart from gas, water, and electric companies.

HB209 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 (imposing special rules unique to the wireless telecommunications industry for municipal taxation), cited in Springfield’s brief. (*See* Springfield Br. at 61-62.) Springfield itself treats telecommunications companies differently. *See, e.g.*, City Code at §§ 100-1 *et seq.* (imposing right-of-way “fee” on telecommunications companies but not on gas, water, electric or any other company) (L.F. 576-584.) Differential treatment between classes of companies is permissible as long as some rational basis exists for it. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 832 (Mo. banc 1991). *See also United Fuel Gas Co. v. Battle*, 167 S.E.2d 890, 906 (W.Va. 1969) (upholding, under rational basis test,

distinction between tax rates assessed on public utility gas companies and non-utility gas companies).

Only telecommunications companies—and not gas, water, or electric companies—have been subjected to the serial litigation in which the Municipalities 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. HB209 thus more than satisfies the “rational basis” requirement of Article III, § 40.

Given the disparate positions of telecommunications companies vis-à-vis gas, water, and electric companies, Springfield’s reliance on *PIEA*, 612 S.W.2d at 776-77, fails. (Springfield Br. 77-78.) *PIEA* involved an easement granted to 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.* *PIEA* 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. Indeed, it 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 (“[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.”).

PIEA 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 *PIEA* is therefore very limited. *See, e.g., 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.

C. HB209's treatment of telecommunications companies does not run afoul of the prohibition on special laws.

Springfield argues that HB209 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 859. 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.* at 860. 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.*

HB209 is far less troublesome than the statute upheld in *Savannah*, and therefore falls comfortably within constitutional limitations. In *Savannah*, a Missouri appellate court had already interpreted the relevant statutory language, and the Legislature stepped in later to redefine it. Here, by contrast, no state court has held that the Ordinance applies to wireless companies, nor has any court interpreted the term “within the city” in the context of wireless telecommunications. Springfield relies upon the Federal Order, which itself is not final, and expresses doubt on the “within the city” issue. Moreover, the federal court's expressions on state law are not binding on state courts. *See Railroad Comm’n of Texas v. Pullman Co.*, 312 U.S. 496, 499 (1941) (“[N]o matter how seasoned the judgment of the [federal] district court may be [on state law], it cannot escape being a forecast rather than a determination.”). HB209 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.

Also, the purported class of “telephone companies that failed to pay a city’s business license tax,” (*see* Springfield Br. at 78) is open-ended. HB209 therefore must satisfy only the “rational basis” test, which it clearly does. *See Blaske*, 821 S.W.2d at 832. The Legislature acted rationally in concluding that enough of the resources of the Municipalities, 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. Telecommunications companies are not similarly situated with municipalities and do not require similar treatment.

Springfield cites no authority for its assertion that HB209 unconstitutionally “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.” (Springfield Br. at 78-79.) The court should therefore deem it waived. *See State v. Nicklasson*, 967 S.W.2d 596, 618 (Mo. banc 1998) (holding that appellant’s argument in brief with no citation to authority and no argument to support conclusions was waived). In any event, this is unsurprising—no authority exists for the proposition that municipalities can even be members of a class, nor does any authority exist for the proposition that municipalities and telecommunications companies must be treated in identical fashion by the legislature.

In an attempt to create support for its position, Springfield refers to *AT&T Wireless PCS, LLC, et al. v. Jeremy Craig, et al.*, case no 04-CC-000649 (Circuit Court of St. Louis County, filed February 13, 2004, which Springfield insinuates is a class action. (*See* Springfield Br. at 79, n. 20.) It is not, and does not purport to be. *See* Resp. A. 19-36. (docket sheet for this litigation showing consolidation of cases but no motion for class certification on file). The citation thus shows only that Springfield has no real support for its position. *Cf. St. Louis Teachers Ass'n v. Bd. of Educ. of City of St. Louis*, 456 S.W.2d 16, 19 (Mo. 1970) (“A grave constitutional question cannot thus lightly be raised.”) (internal punctuation omitted).

The Legislature may have had many grounds for deciding to preclude municipalities from acting as a class in future collection cases. In particular, it 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. A. 37-38. The Legislature rationally could have decided to preclude this possibility.

E. HB209 properly classifies municipalities.

Springfield uses HB209'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 scrutiny.³⁹

³⁹ Springfield makes no showing that the class of cities exempt from HB209 is as closed-ended as it alleges. Springfield asserts (without any proof) that only Jefferson City and Clayton fall in HB209's exception (Springfield Br. at 75, n.18), but it tries to convince itself that its Ordinance should be included in the exception because the Federal Order

(Springfield Br. at 73.) *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”). Springfield’s interpretation, however, distorts the “closed-ended” concept in a way this Court could not possibly have intended when it discussed the concept of “closed-ended” versus “open-ended” classifications 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 District of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 222 (Mo. banc 1991).

HB209 uses November 4, 1980 as the basis for a distinction between municipalities because that date is constitutionally significant—*i.e.*, it is the effective date of Hancock, after which all new taxes must be approved by the electorate. Thus, HB209 is “closed-ended” only in the sense that Hancock itself is “closed-ended.” 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 Hancock (or that had an ordinance that specifically mentioned wireless companies prior to the effective date of Hancock) should not be lumped together with those that did not.

found that “wireless companies are telecommunication companies which provide ‘telephone service’ in both the City of Springfield and Jefferson City.” (Springfield Br. at 74.) The Federal Order, however, does not carve Springfield out of HB209.

By excusing Hancock-compliant municipalities from certain HB209 provisions, the Legislature 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 commend 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).

The closed-ended classifications in the cases cited by Springfield 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). Springfield, by contrast, had every opportunity prior to HB209 to comply with its Hancock obligations by holding a public vote to determine whether wireless companies should be subjected to a tax. The fact that it chose not to do so does not afford it a basis for invalidating HB209. Instead, its failure to act illustrates that it is not similarly situated with municipalities that *did* comply with their Hancock Amendment obligations. *See Ross v. Kansas City Gen. Hosp. & Med. Center*, 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.”).

The Legislature balanced HB209’s potential impact on Missouri’s economy and 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.”) (quotations omitted).

These unique circumstances, i.e. certain municipalities taxing wireless revenues in compliance with Hancock, while others ignored Hancock’s requirements, also substantially justify HB209. *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.”).

F. Springfield’s general attack on the rationality of HB209 fails.

Springfield’s final challenges to HB209 under Article III, § 40 are that its “classifications are not germane” to its purpose and it arbitrarily regulates city affairs and grants special rights, privileges or immunities to corporations “where a general law can be made applicable.” (Springfield Br. at 81.) Although crafted as a special law

challenge, it appears to be a general attack regarding the relationship between HB209's stated purposes and its provisions. (See Springfield Br. at 81-83.) To the extent Springfield argues that a better law could have been passed to achieve the Legislature'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.”). Alternatively, Springfield’s arguments 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 *supra* in Section V. A., the argument fails.

If a statute is special on its face, it is constitutional where “some characteristic of the excluded item provides a reasonable basis for excluding it, considering the purpose of the enactment.” *State v. Gilley*, 785 S.W.2d 538, 540 (Mo. banc 1990) (citing *State ex rel. Pub. Defender Comm’n v. County Court of Greene County*, 667 S.W.2d 409, 412-13 (Mo. banc 1984)). Springfield attacks all of “HB209’s classifications” under Article III, § 40(30). (Springfield Br. at 82.) Sprint has addressed each of these “classifications” above and has demonstrated a reasonable basis for each. Accordingly, HB209 complies with Article III, § 40(30).

VI. Springfield lacks standing to invoke the separation-of-powers doctrine; nevertheless, HB209 does not violate the separation-of-powers principles set forth in Article II, Section 1 of the Missouri Constitution.⁴⁰

Springfield argues that because HB209 is “adjudicative” in nature, it violates separation-of-powers principles. (Springfield Br. at 109.) First, Springfield lacks standing to invoke the separation-of-powers doctrine. Second, HB209 does not violate the doctrine. Contrary to Springfield’s argument, HB209 does not direct judicial action, interpret prior law, or impact a final judgment. Rather, it addresses state tax policy well within the Legislature’s constitutional authority.

Springfield sweepingly asserts that HB209 “differ[s] in kind and degree from all other bills passed by the Legislature in recent (or even distant) memory.” (Springfield Br. at 110-111.) This assertion is unfounded. Springfield forgets, for example, that: (1) RSMo. § 66.300 *caps* - at 5% - the *gross receipts tax rate* at which a county can tax “public utilities,” including telegraph service or *exchange telephone service*; and 2) RSMo. § 21.750.5 *prohibits* any county, city, town, village or any other political subdivision *from filing a lawsuit* to recover against any firearms or ammunition manufacturer, trade association or dealer for damages, abatement or injunctive relief resulting from or relating to the lawful design, manufacture, marketing, distribution, or sale of firearms or ammunition to the public and applies the prohibition to lawsuits filed as of the effective date of the statute and all future lawsuits. *See City of St. Louis v.*

⁴⁰ This section responds to Point 8 of Springfield’s brief.

Cernicek, 145 S.W.3d 37, 43 (Mo. App. 2004) (affirming dismissal of lawsuit based on finding that Legislature prohibited litigation via § 21.750(5)).

A. Springfield does 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*, the legislature enacted a law effectively ending litigation brought by a school district. 950 S.W.2d at 857. *See supra* Section IV. A (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 separation-of-powers:

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) (internal citations omitted).

Thus, just as in *Savannah*, Springfield cannot raise a separation-of-powers challenge, as it is a “mere creature of the state.”

B. HB209 does not interfere with judicial decision making because it does not contravene a final judgment.

Even if Springfield had standing to invoke the separation-of-powers doctrine, HB209 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, 613-14 (Mo. banc 2000).

This Court has already conclusively resolved Springfield’s argument. 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, 218-19 (1995), which, like *Savannah*, holds that the legislature (or the United States Congress) can make changes in the law and apply those changes to pending cases.

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.⁴¹ With HB209, the Legislature amended the telecommunications business license tax scheme.⁴² But, it does not alter any final, non-appealable order in any case. Moreover, HB209 does not direct any court to dismiss the Municipalities' lawsuits but instead requires the Municipalities themselves to dismiss their lawsuits. *See* RSMo. § 92.089.2.

Springfield's contention that § 92.089.2 of HB209 violates separation-of-powers principles because it retroactively alters the judicial construction of its Ordinance found in the Federal Order, evidences its misunderstanding of *Savannah* and *Plaut*. (Springfield Br. at 108-09.) *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:

⁴¹ Springfield misplaces reliance on *United States v. Klein*, 80 U.S. 128 (1871). (Springfield Br. at 112.) In suggesting that HB209 violates separation-of-powers principles by prescribing a rule of decision in a pending case, Springfield misstates Supreme Court precedent, as 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.”).

⁴² HB209 addresses both the state enabling statutes and the municipal ordinances. *See* RSMo. §§ 92.080 (amending inconsistent enabling statutes), 92.083 (construing terms in municipal ordinances prospectively to have same meanings as set forth in HB209).

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.

* * *

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 the Federal Order is not a final, non-appealable judgment, Springfield's separation-of-powers challenge fails.

Avoiding *Savannah*, Springfield cites cases from other states that are 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), HB209 was not enacted to clarify the intention of a prior legislature in enacting an already existing statute. Rather, HB209 simply amends existing law to provide for a new taxation scheme.

Additionally, contrary to Springfield's 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 due process, equal protection, contract, or bill of attainder clauses 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 others). Even though enacted while this and similar cases were pending, HB209 does not violate the Missouri Constitution’s separation-of-powers principle.

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.

Springfield claims HB209 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). (Springfield Br. at 109, n.31.) 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. banc 1939). This Court has ultimate authority to fulfill its judicial function. Section 92.089.1 does not violate separation-of-powers principles.

D. HB209 does not impermissibly encroach upon the executive branch, as the Missouri Constitution expressly grants the General Assembly the

power to collect taxes, and the General Assembly is free to delegate that power to whichever agency it deems fit.

Springfield argues that by “transferring” the power to collect, administer, and distribute local license taxes from municipalities to the Director of Revenue (“Director”), the Legislature impermissibly encroached upon the executive branch. (Springfield Br. at 112-14.) The Missouri Constitution 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 Springfield’s contention, the Legislature hardly “assumes executive power” by delegating its tax collection function to the Director.

Nor does the Legislature 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. That the Legislature 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 Legislature, and it is free to delegate that power.

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.” *St. Louis County v. Univ. City*, 491 S.W.2d 497, 499 (Mo. banc 1973).⁴³ HB209 does not impermissibly encroach on any executive function and does not violate the separation-of-powers principle.

The standard of review applicable to Springfield’s non-constitutional challenges is also well established. “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 Bur. 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

⁴³ Accordingly, HB209 permissibly limits this right with its “subjective good faith” provisions, which encroaches neither the judicial branch nor the executive branch, as Springfield suggests. (*See* Springfield Br. at 109, n.31; 113, n.33.)

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).

VII. HB209 Does Not Require Showing of Subjective Good Faith for Dismissal and Does Not Permit Springfield to Re-file this Case on or After July 1, 2006.

A. HB209’s dismissal requirements are mandatory and not conditioned on subjective good faith.⁴⁴

Ending litigation by a political subdivision of the state is a permissible desire of the Legislature and a permissible requirement of legislation.⁴⁵ *See Savannah*, 950

⁴⁴ This section responds to Point 7 of Springfield’s brief.

⁴⁵ The standard of review applicable to Appellant’s non-constitutional challenges is also well established. “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 Bur. 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).

S.W.2d at 860. But dismissal conditioned on litigating subjective good faith surely 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. Although subjective good faith is mentioned in HB209, HB209 clearly requires the *immediate* dismissal of the underlying litigation, and it does not condition that dismissal on subjective good faith. While Sprint has no doubt that its subjective good faith would be demonstrated, HB209 simply does not require such a showing in this case.⁴⁶

Instead, HB209 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, HB209 sets forth 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.

⁴⁶ The trial court found that the pleadings and objective factors establish Sprint’s subjective good faith belief. (App. A 001-002.) While Sprint agrees with this conclusion, it is unnecessary to the questions at hand, as HB209 requires immediate dismissal without further showing.

The Court must give effect to every word of the statute, and Springfield’s entreaty that Sprint had to prove subjective good faith prior to dismissal reads the word “immediately” right out of HB209. *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.

Springfield’s strained interpretation would also read the legislature’s finding that “resolution of such uncertain litigation” formed part of the consideration for HB209’s new tax scheme out of the statute. RSMo. § 92.089.1. The “resolution” that the legislature 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, or if Springfield could later bring yet another lawsuit against Sprint seeking back taxes allegedly due for periods before July 1, 2006.

Further, the maxim of statutory construction *expressio unius est exclusio alterius* applies—that the legislature did not express any further conditions demonstrates that the legislature excluded any further conditions to dismissal. *State ex rel. Goldberg v. Barber & Sons Tobacco, Inc.*, 649 S.W.2d 859, 862 (Mo. 1983). The legislature certainly knew how to condition dismissal on a showing of subjective good faith yet did not do so. *See id.*

Because HB209 does not condition dismissal of existing litigation on a finding of subjective good faith,⁴⁷ the trial court did not err in dismissing Springfield’s lawsuit.

B. Springfield’s crabbed reading of HB209 contradicts both the statutory text and legislative intent.

Springfield’s crabbed interpretation of HB209 as propagating more litigation does not square with the statutory text or the legislative intent and leads to absurd results. (Springfield Br. p. 66 n.14.) Its interpretation accordingly violates the cardinal rules of statutory construction and withers under analysis.⁴⁸ As this Court stated in *Murray v. Mo. Highway and Transp. Com’n.*, 37 S.W.3d 228, 233 (Mo. banc 2001):

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning. Construction of statutes should

⁴⁷ Springfield incorrectly relies on *Cheek v. United States*, 498 U.S. 192, 206 (1991) to claim a “willfulness element” that negates subjective good faith. (Springfield Br. at 105). *Cheek* is a federal criminal prosecution for tax evasion in which the statute expressly required proof of willfulness, which HB209 does not.

⁴⁸ In the *Wellston* case, Respondents SBC Communications, Inc., et al. (“SBC”) propose a similar construction of HB209. See Brief of Respondents in Case No. 87207. The analysis set forth in this section also demonstrates that SBC’s suggested construction of HB209 likewise cannot be squared with the statutory text or intent.

avoid unreasonable or absurd results. Furthermore, the legislature is not presumed to have intended a meaningless act. (internal citations and quotations omitted).

Applying these principles, the Court must reject Springfield's absurd reading of HB209.

Springfield argues that HB209 permits municipalities to re-file their lawsuits beginning July 1, 2006. (Springfield Br. at 66, n. 14.) It claims that Sprint (and other telecommunications companies), in such a second wave of lawsuits, would have to show subjective good faith to have immunity under HB209 ("Second Wave Lawsuits"). Springfield reads HB209 as calling not for an end to the existing litigation but for nothing more than a "time out" from the existing litigation - but Second Wave Lawsuits and a time out in no way square with the statutory text.

The text of HB209 demonstrates the legislature's intent to *end*, not to postpone and certainly not to perpetuate, the "costly litigation which have or may be filed against telecommunications companies ... [that is] detrimental to the economic well being of the state." RSMo. § 92.089.1. Indeed, the statutory text provides remarkable clarity on the legislature's intent – "the *resolution* of such uncertain litigation ... " forms part of the consideration for the "immunity and *dismissal* of lawsuits... ." *Id.* (emphasis added)

Yet under the "interpretation" proffered by Springfield, HB209 permits Second Wave Lawsuits seeking much the same back taxes as are at issue in this lawsuit. *See* Springfield Br. at 66, n. 14.) But that position simply makes no sense – Second Wave Lawsuits would unquestionably mean more costly litigation, i.e. more of the very thing that the legislature found "detrimental to the economic well being of the state... ."

RSMo. § 92.089.1. Similarly, such Second Wave Lawsuits fly in the face of the legislature’s intent to have “resolution” of the back tax litigation in exchange for a new, certain tax scheme going forward. *Id.*

HB209 contains two separate mechanisms to promote the economic well being of the state: 1) resolution of the litigation by dismissal of pending lawsuits, and 2) immunity. RSMo. § 92.089.2. HB209 first requires that lawsuits brought before July 1, 2006 “shall immediately be dismissed... .” *Id.* HB209 next provides immunity to telecommunications companies that are sued on or after July 1, 2006 for taxes accruing before that date, so long as those as-yet-not-sued companies establish their subjective good faith belief for not paying the taxes alleged to be due. *Id.* Sprint discusses these two mechanisms below.

1. HB209 resolves, and therefore terminates, the current “economically detrimental” litigation.

To promote the well being of the state, HB209 requires dismissal of any “economically detrimental” litigation filed before July 1, 2006. To achieve its goal of bringing “resolution” to “costly litigation,” HB209 imposes a moratorium, not a time out, on litigation filed before July 1, 2006 seeking back taxes. RSMo. § 92.089.2. That moratorium effectively ensures that the current lawsuits come to an end once and for all, i.e. the “costly” and “economically detrimental” litigation ends.

Springfield’s proffered interpretation of HB209 would mean that HB209 does not achieve its express intent to “resolve” the “costly”, “economically detrimental” litigation, RSMo. § 92.089.1, but only achieves an otherwise inexplicable “time out” to the

detrimental litigation. Second Wave Lawsuits would be no less costly than the existing wave of litigation that the legislature sought to resolve.

The “without prejudice” language in HB209’s dismissal provision has a simple explanation that is apparent right from the text. HB209’s drafters, knowing there was ongoing litigation, did two things. One, the drafters took care to craft the legislation in conformance with the Missouri Constitution (*see, e.g.* RSMo. § 92.089.1 “resolution of such uncertain litigation...,” and other enumerated benefits of HB209, “are full and adequate consideration to municipalities, as the term ‘consideration’ is used in Art. III, § 39(5) of the Missouri Constitution”). Two, the drafters correctly anticipated that the litigating municipalities might challenge the constitutionality of HB209.⁴⁹ To accommodate those challenges, the legislature only required the municipalities to dismiss their litigation without prejudice, as opposed to “with prejudice,” as had been required by early versions of HB209. *See* Resp. A. 39-43. Dismissal without prejudice would allow the municipalities to reinstate their lawsuits in the event one of the threatened constitutional challenges were successful. So the “without prejudice” language, read in context, does not signal the ability of municipalities to file Second Wave Lawsuits, as Springfield asserts. All the language does is preserve the right of a municipality that

⁴⁹ It would not be unreasonable to surmise that the legislature learned, through lobbying by municipal attorneys and representatives, that the municipalities threatened constitutional challenges to HB209.

complied with the statutory mandate that it dismiss its own lawsuit to re-file that lawsuit if an attack on the presumptively constitutional legislation succeeded.

2. HB209 provides immunity, upon a showing of subjective good faith, to carriers that have not (yet) been sued.

In providing immunity, HB209 anticipated yet another contingency. Having brought “resolution” to then-pending lawsuits, and having imposed a litigation moratorium until the effective date of the new taxation scheme to be implemented under HB209 (July 1, 2006), the drafters of HB209 recognized two things: 1) municipalities that had not yet sued might attempt to sue, after July 1, 2006, carriers that had not yet been sued for back taxes that allegedly accrued *before* July 1, 2006; and 2) any municipality benefiting from HB209’s new tax framework needed the ability to sue to collect taxes accruing, under HB209, on and after July 1, 2006. Clumsily or not, HB209 struck a compromise on these points, as follows:

- municipalities that had not (yet) sued telecommunications companies (that had not (yet) been sued) could move forward with back tax litigation on and after July 1, 2006, seeking to recover taxes allegedly accruing before that date, but those as-yet-to-be-sued telecommunications companies have immunity if subjective good faith is established. RSMo. § 92.089.2 ; and
- having clarified in HB209 that on and after July 1, 2006, the decades-old land-line ordinances would thereafter apply to wireless, thus “resolving” the “costly litigation,” the legislature took away the subjective good faith defense and lawsuit immunity as to taxes accruing, under HB209, on and

after July 1, 2006. *See* RSMo. § 92.089.2 (“full immunity ... up to and including July 1, 2006.”)

It accordingly is no accident that immunity ends on July 1, 2006 and the new tax scheme of HB209 takes effect on the very same day. HB209 thus establishes: 1) an end to costly, economically detrimental litigation, existing at the time of enactment or filed any time before July 1, 2006, seeking back taxes; 2) a defense to new litigation filed against new parties *after* July 1, 2006 seeking back taxes allegedly accruing *before* July 1, 2006 under ordinances of theretofore dubious applicability; and 3) the ability of municipalities to impose, collect, and sue for taxes accruing *after* July 1, 2006, as HB209 itself resolved the applicability of the cities’ decades-old ordinances to wireless on a going forward basis. For these reasons, Springfield’s interpretation of HB209 as propagating more litigation directly contradicts the statutory text as well as the legislative intent apparent on the face of the statute.

VIII. HB209 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 Springfield does not have standing to raise these uniformity and equal protection issues.⁵⁰

A. Springfield lacks standing to assert uniformity and equal protection issues.

Springfield asserts that application of HB209 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. Specifically, Springfield contends HB209 sets arbitrary classifications by granting immunity to those who have not paid the questionable license taxes but granting no immunity to those who have paid the taxes and by treating telephone companies differently than providers of gas, water, or electrical services. (Springfield Br. at 95-96, 102.)

As a threshold matter, Springfield lacks standing to raise these constitutional protections. 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)) (emphasis added). In other words, a litigant must have a

⁵⁰ This section responds to Points 5 and 6 of Springfield’s brief.

“personal stake” in resolution of the issue raised. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 53 (Mo. banc 1999).

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

Moreover, Article I, § 2 applies only to “persons.” Springfield is not a “person” entitled to protection under the equal protection clause, and therefore it lacks standing to challenge HB209 on equal protection grounds. *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, 615 (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 Protection Dist. v. State Tax Comm’n*, 695 S.W.2d 518, 521 (Mo. App. 1985) (political subdivision is not a “person” within the due process clause).

B. HB209 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 protections under the law. Springfield argues that HB209 violates these provisions, resting its argument on two comparisons: (i) 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 (ii) “telephone companies” as opposed to providers of gas, water, or electric. (Springfield Br. at 95-96, 102.) These arguments fail as detailed below.

1. HB209 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 Legislature, be taxed uniformly. *State ex rel. Jones v. Nolte*, 165 S.W.2d 632, 636 (Mo. banc 1942).

In this case, the Legislature 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 permissible 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).

Springfield's uniformity argument ignores the important fact that those that paid did so voluntarily. 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 state tax return asserted a uniformity challenge to Missouri income tax statutes that arguably allowed a larger federal income tax deduction for affiliated corporations that were permitted to file a consolidated Missouri tax return. This Court noted that the complaining companies chose 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. The 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. Springfield's argument fails on its face. But even if there were such a "natural class," the 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, 321 (Mo. banc 1996). Telecommunications companies are as different from water, gas, and electric companies as they are from construction companies or banks. Springfield's ordinances themselves recognize these inherent differences by providing different methods or rates of taxation for different businesses.⁵¹ Such differing treatment is constitutional.⁵²

2. HB209 does not violate the Equal Protection Clauses of the United States of Missouri Constitutions because any differing treatment of entities has a rational basis.

Assuming, *arguendo*, that HB209 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

⁵¹ See n.38, *supra*.

⁵² Springfield takes a one sentence stab at claiming that a uniformity issue exists as certain municipalities are not subject to adjustment or capping of their various tax rates. (Springfield Br. at 96-97.) This does not raise a uniformity issue as the tax imposed is uniform throughout the municipality as the authority levying the tax. Moreover, the rational basis for this distinction among municipalities is explained in Section V.E, *supra*.

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 classification is constitutional. A classification will be sustained if *any* state of fact reasonably can be conceived to justify it. *Id.* 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.

Springfield conclusorily alleges that HB209 denies equal protection by: (1) exempting select businesses from taxation; (2) arbitrarily classifying for taxation purposes; and (3) discriminating against companies that paid taxes. (Springfield Br. at 101-102.) HB209’s classifications, however, are rationally related to legitimate government interests. HB209 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, which already established the classification by providing no remedy to a

taxpayer paying its tax other than under protest. 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 indeed ironic that the very parties raising this constitutional challenge are the taxing entities that Missouri protest procedure protected at the expense of taxpayers who paid tax without protesting the payments. *Lane*, 158 S.W.3d at 723, 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,⁵³ the authority from other states Springfield cites do not apply.

In summary, HB209 does not run afoul of the Equal Protection Clauses of the Missouri and United States Constitutions nor does it violate the uniformity clause of the Missouri Constitution.

IX. HB209 complies with both the single-subject and clear-title rules set forth in Article III, § 23 of the Missouri Constitution.⁵⁴

HB209 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.” HB209

⁵³ Springfield’s citation to *City of St. Louis v. Western Union Telegraph Co.*, 760 S.W.2d 577 (Mo. App. 1988), is misplaced. (Springfield Br. at 100.) There, the classification (taxing only telegraph companies, as opposed to other companies, that provide telegraph service) was invalid because there was no rational basis for that classification.

⁵⁴ This section responds to Points 9 and 10 of Springfield’s brief.

contains provisions referred to as the “Municipal Telecommunications Business License Tax Simplification Act” (“MTTA”), in addition to certain provisions referred to as the “State Highway Utility Relocation Act” (“SHURA”). The title of HB209 and its provisions do not violate the single-subject and clear-title rules.

A. SHURA fairly relates to the subject described in HB209’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 (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. *C.C. Dillon*, 12 S.W.3d at 327, *City of St. Charles v. State* 165 S.W.3d 149, 150 (Mo. banc 2005). 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 (quoting *Hammerschmidt*, 877 S.W.2d at 102).

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, 427-28 (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.* at 151-52; *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*, 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 areas 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.* at 151. Noting that while “in the abstract there seems to be no connection” between emergency services and TIF, the 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 152. “That goal,” this Court explained, “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 relate” to emergency services (the subject of S.B. 1107) and thus the bill did not violate the single-subject rule. *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. *See* 12 S.W.3d at 324-25. 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.* at 325. The company challenged S.B. 883 under the single-subject rule, arguing the inclusion of the billboard regulations introduced multiple subjects. *See 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 billboards “fairly relate to, or are naturally connected with, transportation.” *Id.* at 327.

As expressed in HB209's title, its subject concerns "the assessment and collection of various taxes on telecommunications companies...." The subject of HB209 includes all matters that "fall within" or "reasonably relate to" the assessment and collection of these taxes. *See C.C. Dillon*, 12 S.W.3d at 329; *City of St. Charles*, 165 S.W.3d at 151. Under the applicable test, this Court must consider whether SHURA fairly relates to, has a natural connection to, or is an incident or means to accomplish the assessment and collection of various taxes on telecommunication companies. *See, e.g., C.C. Dillon*, 12 S.W.3d at 328.

SHURA fairly relates to and has a natural connection with the subject of HB209. 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 MTTA simplifies the taxation on the revenues telecommunications companies derive from those facilities, thereby reducing their transaction costs in paying taxes. Thus, HB209 reallocates benefits and obligations with respect to the cost of doing business in Missouri municipalities. The inclusion of SHURA in HB209 in no way constitutes a clear and undoubted violation of the single-subject rule.

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, Springfield itself imposes a franchise fee on telecommunications companies for right-of-way use. (*See* L.F. 576-584.) Congruous with the connection between taxation of telephone companies and those companies' use of the rights-of-way in the Municipalities, SHURA 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 Springfield's 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. HB209 complies with the single-subject rule.

B. HB209'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 rule is that the bill's title cannot be underinclusive. *Id.* The title, however, need only indicate its general contents. *Id.*

Springfield contends HB209's title is underinclusive and affirmatively misleading because it gives "a reader the mistaken impression that HB209 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.” (Springfield Br. at 115.) To the contrary, a member of the Legislature or the general public reading HB209’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 HB209’s title notifies a reader that the bill affects Chapter 227, HB209 conforms with the clear-title rule.

C. Even if the Court were to determine HB209 violates Article III, § 23, SHURA is severable from HB209.

Even if the Court were to find that HB209 contains multiple subjects, MTTA 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, 961 (Mo. banc 1997).

In this case, even if the Court found a single-subject violation, SHURA is severable from MTTA. From its inception, HB209 was concerned with municipal business license taxes on telecommunications companies. The original, controlling purpose of HB209, 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 HB209, contain the central purpose of the legislation, and both chapters are complete and workable without SHURA. Finally, a review of HB209’s

history demonstrates the Legislature would have passed HB209 without the inclusion of SHURA.⁵⁵ Accordingly, SHURA is severable from MTTA.

Similarly, even if the Court were to find a clear-title violation, it would not be fatal to § 71.675 or §§ 92.074-92.098 (MTTA). Rather, only SHURA would be unconstitutional. *See Nat'l Solid Waste Mgmt. Ass'n*, 964 S.W.2d at 822 (holding that where clear-title rule has been violated, the bill is unconstitutional only to the extent that it refers to a subject not clearly expressed in the title). Therefore, the provisions set forth in MTTA survive any attack on HB209 under both the single-subject and clear-title rules.

CONCLUSION

For the foregoing reasons, Sprint respectfully requests that this Court affirm the judgment entered below.

⁵⁵ On April 20, 2005, before the bill included SHURA, 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 SHURA, making a “do pass” recommendation to the entire Senate. On May 10, the Senate passed the bill as amended to include SHURA, 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, Resp. A. 44-45.*

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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 (____) U.S. Mail, postage prepaid; (____) fax; (____) Federal Express; and/or (____) hand delivery this ____ day of _____, 2006, to:

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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 and contains _____ words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is New Times 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.
