

No. 87207

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**In the  
Supreme Court of Missouri**

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

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**BRIEF OF PLAINTIFFS-APPELLANTS**

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## **I JURISDICTIONAL STATEMENT**

On October 19, 2005, the Missouri Court of Appeals, Eastern District, transferred this case to the Missouri Supreme Court for disposition of the Cities' constitutional challenges to HB 209. The Court of Appeals' statement of jurisdiction is as follows:

"Under Article V, Section 3 of the Missouri Constitution, the Missouri Supreme Court has exclusive appellate jurisdiction of all cases involving the validity of a statute. This Court is without jurisdiction to consider the appeal. The Court transfers the case to the Missouri Supreme Court where jurisdiction lies. Art. V, III, MO. CONST. of 1945, as amended."

(Order at p. 2, dated October 19, 2005.)

## **II STATEMENT OF FACTS**

### **A. The Ordinances**

Plaintiffs-Appellants, the Cities of Wellston and Winchester, Missouri (hereinafter "the Cities"), have adopted ordinances that impose a business or occupational license tax on companies engaged in supplying or furnishing telephone service within the Cities. (R-45 to R-52.) The tax is equal to a percentage of the companies' gross receipts. (Id.)

Typical of such ordinances is the one codified by Winchester, the relevant portions of which provide:

- (i) 640.010 of the Code provides as follows: "Pursuant to the laws of Missouri, every firm, person or corporation now or hereafter engaged in the

business of supplying or furnishing telephone or telephone service in the City of Winchester, Missouri, shall pay to the said City as a license or occupational tax six percent (6%) of the gross receipts derived from such business within the said City.”

- (ii) § 640.020 of the Code provides as follows: “Every person, firm or corporation engaged in the business hereinbefore set forth in the City of Winchester is hereby required to file with the City Clerk of said City, on or before the last day of each calendar month, a sworn statement showing the gross receipts derived from such business during the preceding calendar month; and at the same time pay to the City Treasurer the tax hereinbefore set forth.”
- (iii) § 640.030 of the Code provides as follows: “The City Clerk and such other persons as may be designated by the Board of Aldermen from time to time, is and are hereby authorized to investigate the correctness and accuracy of the statement so filed and for that purpose shall have access at all reasonable times to the books, documents, papers and records of any person making such return in order to ascertain the accuracy thereof.”
- (iv) § 640.050 of the Code provides as follows: “Each and every offense and each day such violation continues shall be deemed a separate offense.”

Winchester Municipal Code, Chapter 640. (R-45 to R-46.) Wellston’s license ordinance contains provisions similar to those above, and it imposes a license tax of 5% on gross receipts derived from exchange telephone service. Wellston Code of Ordinances §§ 13-131 and 13-132. (R-47 to R-52.)

**B. The Litigation**

On December 30, 2004, the Cities sued Defendants-Respondents, SBC Communications, Inc., Southwestern Bell Communications Services, Inc., and Southwestern Bell Telephone, L.P. (hereinafter “the SBC Defendants”), alleging underpayment of gross receipt taxes. (R-6 to R-25.) Specifically, the Cities allege that the SBC Defendants generate revenue from exchange access, interexchange access, special access, interconnection facilities and equipment for use, toll or long-distance, reciprocal compensation arrangements, and other sources or services, but they refuse to report it and to pay taxes on it. (R-39 to R-40.) The Cities seek, *inter alia*, declaratory relief, an accounting, payment of back-taxes, and an injunction against future violations of their ordinances. (R-41 to R-43.)

The lawsuit was filed in the Circuit Court of St. Louis City, removed to federal court, and remanded by U.S. District Judge Perry. (R-145 to R-153.) Upon remand, Circuit Judge Dowd dismissed the action for lack of standing. (R-353 to R-359.) According to Judge Dowd, “tax collection actions must be brought in the name of the state. [Third and fourth class cities] are not authorized to bring collection actions in their own names, and in fact, are not authorized to bring collection actions at all.” (See Order at p. 5, dated August 8, 2005 [R-357].) Wellston and Winchester appealed this ruling to the Missouri Court of Appeals, Eastern District.

**C. House Bill 209**

On July 14, 2005, the Governor signed into law HB 209, which purports to immunize and release telephone companies from their existing license tax obligations. HB 209 targets this lawsuit and provides, *inter alia*:

“In the event any telecommunications company, prior to July 1, 2006, failed to pay any amount to a municipality based on a subjective good faith belief that either:

- (1) It was not a telephone company covered by the municipal business license tax ordinance, or the statute authorizing the enactment of such taxing ordinance, or did not provide telephone service as stated in the business license tax ordinance, and therefore owed no business license tax to the municipality; or
- (2) That certain categories of its revenues did not qualify under the definition or wording of the ordinance as gross receipts or revenues upon which business license taxes should be calculated;

such a telecommunications company is entitled to full immunity from, and shall not be liable to a municipality for, the payment of the disputed amounts of business license taxes, up to and including July 1, 2006 ...If any municipality, prior to July 1, 2006, has brought litigation or caused 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 and shall cease and desist from continuing any audit..."

92.089.2, RSMo. The first clause is designed to shield wireless telephone companies from liability for non-payment of taxes. The second clause is designed to protect the SBC Defendants from liability for under-reporting their gross receipts (*i.e.*, underpayment of municipal license taxes).

HB 209 took effect on August 28, 2005 – while this matter was on appeal – prompting the SBC Defendants to file another motion to dismiss. The Cities responded that HB 209 violates numerous provisions of the U.S. and Missouri Constitutions, and asked the Court of Appeals to disregard HB 209's preclusive effect and to address the merits of the trial court's ruling. The Cities argued that HB 209 was not considered by the

court below, did not form a basis for its ruling, and did not apply to these claims as a matter of statutory construction. In the alternative, if HB 209 did bar the underlying claims, the Cities asked the Court to disregard the doctrine of mootness, because the appeal presents matters of substantial public importance needed to guide public officials. Upon application of the SBC Defendants, the Court of Appeals transferred this case to the Missouri Supreme Court for handling and disposition of the Cities' constitutional challenges to HB 209. (See Order at p. 2, dated October 19, 2005.)

### **III POINTS RELIED ON**

1. The trial court erred in dismissing this case for lack of standing under §§ 94.150 and 94.310, RSMo, because third and fourth class cities are authorized to bring license tax collection and enforcement actions in their own names.

City of St. Charles v. Union Electric Co. of Missouri, 185 S.W.2d 297 (Mo.App.Stl. 1945)

State on Inf. of Bloebaum v. Broeker, 11 S.W.2d 81 (Mo.App.Stl. 1928)

State ex rel. George v. Dix, 141 S.W. 445 (Mo.App.K.C. 1911)

9 McQuillin Mun. Corp. § 26:98 (3<sup>rd</sup> ed. October 2005)

53 C.J.S. Licenses § 106 (West July 2005)

2. The Court of Appeals erred in transferring this case to the Supreme Court for disposition of the Cities' constitutional challenges to HB 209 without first determining: (i) whether HB 209 applies to the Cities' claims as a matter of statutory construction, and, if so, (ii) whether HB 209 bars the Cities' claims and this appeal, and, if so, (iii) whether the Cities' appeal falls within an exception to the doctrine of mootness.

Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47 (Mo. banc 1999)

Farm Bureau Town and Country Ins. Co. v. Angoff, 909 S.W.2d 348 (Mo. banc 1995)

State ex rel. Missouri Pub. Serv. Co. v. Fraas, 627 S.W.2d 882 (Mo.App.W.D. 1981)

Morrison v. State, 252 S.W.2d 97 (Mo.App.K.C. 1952)

Mootness On Appeal In The Supreme Court, 83 Harv.L.Rev. 1672 (May 1970)

3. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it gratuitously discharges a corporate tax liability in violation of MO. CONST. art. III, § 38(a), which prohibits the general assembly from using public monies to aid private enterprise.

Curchin v. Missouri Industrial Development Board, 722 S.W.2d 930 (Mo. banc 1987)

World Trade Ctr. Taxing Dist. v. All Taxpayers, 894 So.2d 1185 (La.App. 4 Cir. 2005), aff'd., 2005 WL 1528414 (La. 2005)

State ex rel. Bd. of Control of St. Louis School and Museum of Fine Arts v. City of St. Louis, 115 S.W. 534 (Mo. 1908)

Rubin, Constitutional Aid Limitation Provisions And The Public Purpose Doctrine, 12 St. Louis U. Pub. L.Rev. 143 (1993)

4. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it gratuitously discharges a corporate tax liability in violation of MO. CONST. art. III, § 39(5), which prohibits the general assembly from releasing a corporate indebtedness, liability or obligation

due a municipality.

Graham Paper Co. v. Gehner, 59 S.W.2d 49 (Mo. banc 1933)

First Nat. Bank of St. Joseph v. Buchanan County, 205 S.W.2d 725 (Mo. 1947)

Federal Express Corp. v. Skelton, 578 S.W.2d 1 (Ark. banc 1979)

State ex rel. Kansas City v. State Highway Commission, 163 S.W.2d 948 (Mo. banc 1942)

Ark. Op. Atty. Gen. No. 2003-025, 2003 WL 1347746 (Ark.A.G. 2003)  
§ 139.031, RSMo

5. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it regulates the affairs of cities, grants exclusive corporate privileges, and arbitrarily classifies for purposes of taxation in violation of MO. CONST. art. III, § 40, which inhibits the legislature's ability to pass local and special laws.

Laclede Power & Light Co. v. City of St. Louis, 182 S.W.2d 70 (Mo. banc 1944)

Planned Ind. Expansion Authority v. Southwestern Bell Tel. Co., 612 S.W.2d 772 (Mo. banc 1981)

Harris v. Missouri Gaming Commission, 869 S.W.2d 58 (Mo. banc 1994)

Tillis v. City of Branson, 945 S.W.2d 447 (Mo. banc 1997)

6. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it directs an outcome in pending cases, forecloses appellate review, and impedes municipal tax collection in violation of MO. CONST. art. II, § 1, which prohibits one branch of government from

impermissibly interfering with another's performance, or from assuming power that more properly is entrusted to another branch.

Mo. Coalition for the Environment v. Joint Comm. On Admin. Rules (JCAR), 948 S.W.2d 125 (Mo. banc 1997)

Unwired Telecom Corp. v. Parish of Calcasieu, 903 So.2d 392 (La. 2005)

I.N.S. v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (Powell, J., concurring)

United States v. Klein, 80 U.S. 128, 20 L.Ed. 519 (1871)

7. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it substantially impairs municipal rights in violation of MO. CONST. art. I, § 13, which prohibits the general assembly from enacting any law retrospective in its operation.

Graham Paper Co. v. Gehner, 59 S.W.2d 49 (Mo. banc 1933)

First Nat. Bank of St. Joseph v. Buchanan County, 205 S.W.2d 726 (Mo. 1947)

Ernie Patti Oldsmobile, Inc. v. Boykins, 803 S.W.2d 106 (Mo.App.E.D. 1990)

Planned Ind. Expansion Authority of City of St. Louis v. Southwestern Bell Telephone Company, 612 S.W.2d 772 (Mo. banc 1981)

8. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it arbitrarily and unreasonably classifies for purposes of taxation in violation of MO. CONST. art. X, § 3, which requires that taxes be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.

State ex rel. Transport Manufacturing & Equipment Co. v. Bates, 224 S.W.2d 996 (Mo. banc 1949)

City of Cape Girardeau v. Fred A. Groves Motor Co., 142 S.W.2d 1040 (Mo. 1940), overruled on other grounds

Drey v. State Tax Commission, 345 S.W.2d 228 (Mo. 1961)

Airway Drive-In Theatre Co. v. City of St. Ann, 354 S.W.2d 858 (Mo. banc 1962)

56 Am.Jur.2d Municipal Corporations § 756

9. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it arbitrarily classifies for purposes of taxation in violation of CONST. art. I, § 2 and MO. CONST. art. I, § 2, which guarantee equal protection of the law.

City of St. Louis v. Western Union Telegraph Co., 760 S.W.2d 577 (Mo.App.E.D. 1988)

State ex rel. Hostetter v. Hunt, 9 N.E.2d 676 (Ohio 1937)

Armco Steel Corp. v. Dept. of Treasury, 358 N.W.2d 839 (Mich. 1984)

State of Kansas v. Parrish, 891 P.2d 445 (Kan. 1995)

10. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it is both over-inclusive and under-inclusive in violation of the single subject and clear title requirements of MO. CONST. art. III, § 23.

Stroh Brewery Co. v. State of Missouri, 954 S.W.2d 323 (Mo. banc 1997)

National Solid Waste Mgmt. Assoc. v. Director of Dept. of Natural Resources, 964 S.W.2d 818 (Mo.banc 1998)

Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. banc 1994)

11. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it provides no legally fixed standards for determining what is prohibited and what is not in a particular case, and, thus, is void for vagueness.

Bd. of Educ. of the City of St. Louis v. State of Missouri, 47 S.W.3d 366 (Mo. banc 2001)

City of Waynesboro v. Keiser, 191 S.E.2d 196 (Va. 1972)

People v. Lee, 144 Misc.2d 11, 543 N.Y.S.2d 613 (County Ct. 1989)

State of Tennessee v. Thomas, 635 S.W.2d 114 (Tenn. 1982)

The American Heritage Dictionary (2<sup>nd</sup> ed. 1982)

12. Because the invalid provisions are so essentially connected with the remainder of the Act, they are not severable and those portions of HB 209 purporting to amend chapters 71 and 92, RSMo, are void in their entirety.

Labor's Educ. and Political Club Ind. v. Danforth, 561 S.W.2d 339 (Mo. banc 1977)

State ex rel. Transport Manufacturing & Equip. Co. v. Bates, 224 S.W.2d 996 (Mo. banc 1949)

In Re Constitutionality Of Section 251.18, Wisconsin Statutes, 236 N.W. 717 (Wis. 1931)

Zavaleta v. Zavaleta, 358 N.E.2d 13, 16 (Ill.App.1st Dist. 1976)

§ 1.140, RSMo

MO. CONST. art. III, § 40(4), (6) and (30)

#### **IV ARGUMENT**

**A. The trial court erred in dismissing this case for lack of standing under §§ 94.150 and 94.310, RSMo, because third and fourth class cities are authorized to bring license tax collection and enforcement actions in their own names.**

**Standard:** This Court “reviews whether or not [a party] has standing to pursue [its] claims...*de novo* and does not defer to the trial court’s order.” Switzer v. Hart, 957 S.W.2d 512, 514 (Mo.App.E.D. 1997).

Plaintiff Wellston is a third-class city. With respect to third-class tax suits, § 94.150, RSMo, provides:

“The enforcement of all taxes authorized by sections 94.010 to 94.180 shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes, including the seizure and sale of goods and chattels, both before and after said taxes shall become delinquent; provided, that all suits for the collection of city taxes shall be brought in the name of the state, at the relation and to the use of the city collector.”

§ 94.150, RSMO.

Plaintiff Winchester is a fourth-class city. With respect to fourth-class tax suits, § 94.310, RSMo, provides:

“The enforcement of all taxes authorized by sections 94.190 to 94.330 shall be made in the same manner as is provided by law for the collection and enforcement of the payment of state and county taxes, including the seizure and sale of goods and chattels after the taxes become delinquent. Where applicable in chapter 140, RSMo, the term ‘county’ shall be construed ‘city’, the term ‘county clerk’ shall be

construed ‘city clerk’, and the term ‘county collector’ shall be construed ‘city collector’ or other proper officer collecting taxes in the city.”

§ 94.310, RSMo.

The trial court concluded that such provisions dictate the method for collecting municipal license taxes, and require the Cities to bring suit “in the name of the state, at the relation and to the use of the city collector.” (Order, at pp. 3-4, quoting § 94.150, RSMo [R-355 to R-356].) According to the trial court, the Cities “are not authorized to bring collection actions in their own names, and in fact, are not authorized to bring collection actions at all.” (Order, at p.5 [R-357].)

Contrary to the trial court’s holding, §§ 94.150 and 94.310, RSMO, do not proscribe the method for enforcing and collecting business license (or “gross receipt”) taxes. The statutory provisions seek to conform municipal tax collection procedures to those utilized by the state and counties to collect their taxes. However, there is no such thing as a state business license tax, thus, there is no corresponding procedure for municipalities to follow. Similarly, with the exception of St. Louis County, there is no such thing as a county business license tax. Therefore, the general assembly did not intend for these provisions – §§ 94.150 and 94.310, RSMo – to govern the collection of local license taxes.

This conclusion is supported by history and precedent. Missouri courts have long recognized that the term “city taxes,” which appears in §94.150, RSMo, is a term of art; it is utilized to denote taxes other than license or occupation taxes. See, e.g., State ex rel. George v. Dix, 141 S.W. 445, 446 (Mo.App.K.C. 1911) (“though a tax, the courts of this state always have drawn distinctions between a strictly occupation or license tax and an ad valorem property tax...; and statutory remedies for the collection of ad valorem taxes

are not applicable to license taxes unless expressly made applicable in the statutes or ordinances relating to the latter class”); State on Inf. of Bloebaum v. Broeker, 11 S.W.2d 81, 83 (Mo.App.Stl. 1928) (“the Legislature...used the term ‘city taxes’ in the same sense...as ordinary property taxes, and did not intend to include license taxes therein”). Commentators have noted this distinction as well. See, e.g., 53 C.J.S. Licenses § 106 (West July 2005) (“statutory remedies for the collection of other taxes are not applicable to license taxes”), citing, inter alia, State ex rel. George v. Dix, 141 S.W. 445 (Mo.App.K.C. 1911).

The remedies and procedures available for the collection of ad valorem property taxes (i.e., “city taxes”) do not govern the collection of business license taxes (i.e., “gross receipt” taxes). Rather, unpaid license taxes are treated as ordinary debts, and they can be pursued as such by municipalities. 9 McQuillin Mun. Corp. § 26:98 (3<sup>rd</sup> ed. October 2005) (“Generally, a city can maintain an action to collect license fees or taxes as a debt...*Ordinarily, the action for the license fee may be brought in the name of the municipality*, and in accordance with the rules of practice and pleading in effect in the particular court.”) (emphasis added), citing, inter alia, City of St. Charles v. Union Electric Co. of Missouri, 185 S.W.2d 297 (Mo.App.Stl. 1945).

Because of their unique nature, municipalities are permitted to enforce and collect license taxes in their own names. For example, in City of St. Charles, supra., the following allegations were deemed sufficient to withstand a demurrer directed to the form of the petition:

“[The petition] began by reciting that defendant was a corporation located in St. Charles, and engaged in the business of supplying electricity for compensation. Then followed the allegation that plaintiff city had duly enacted an ordinance,

which was set out in haec verba, after which, not content with the mere recital of the ordinance, the petition went on to allege that by the terms of such ordinance, it was defendant's duty to file with the city clerk, on or before October 15, 1943, a sworn statement of the gross receipts from its business of supplying electricity in St. Charles for the preceding period of six months; that it was its further duty, on October 20, 1943, to pay to the city collector a tax equivalent to 5% of its gross receipts for the stated period; that pursuant to the ordinance, defendant did, on October 15, 1943, file a sworn statement of receipts showing a license tax due for that period of \$5,978.99; but that defendant did not, on or before October 20, 1943, or at any time since, pay the city collector the amount of tax due and payable on that date. Wherefore the plaintiff prayed judgment against defendant for the sum of \$5,978.99, together with interest thereon from October 20, 1943, and for its costs in such behalf expended."

185 S.W.2d at 303. The foregoing allegations do not differ in any material respect from the allegations set forth in the Cities' Amended Petition.

In addition to City of St. Charles, there are numerous decisions documenting instances where cities have brought license tax collection actions in their names only. See, e.g., City of Poplar Bluff v. Poplar Bluff Loan and Building Assoc., 369 S.W.2d 764 (Mo.App.Spr. 1963) (action by third-class city against a building and loan association to recover unpaid city license taxes); City of Bolivar v. Ozark Utilities Co., 191 S.W.2d 368 (Mo.App.Spr. 1945) (fourth-class city); City of Cape Girardeau v. Harris Truck and Trailer Sales, Inc., 521 S.W.2d 425 (Mo. 1975) (action brought by third-class city to collect a gross sales license tax from defendants), overruled on other grounds.

The trial court's order supports the Cities' interpretation of §§ 94.150 and 94.310,

RSMo. The cases cited by the court for the proposition that Missouri statutes provide the exclusive method for collecting taxes [State ex rel. Steed v. Nolte, 138 S.W.2d 1016 (Mo. 1940); Kansas City v. Field, 226 S.W. 27 (Mo. 1920)], all involve the pursuit of delinquent real estate or personal property taxes. The same holds true for cases cited for the proposition that municipalities lack standing to pursue tax collection actions in their own names [Christopher Noll v. John B. Morgan, 1899 WL 2092 (Mo.App.K.C. 1899); State ex rel. v. Robyn, 6 S.W. 243 (Mo. 1887); John B. Pollard v. Legrand Atwood, 1899 WL 1890 (Mo.App.Stl. 1899); City of Jefferson v. E.L. Edwards, 1889 WL 1939 (Mo.App.K.C. 1889); State ex rel. Pickett v. Truman, 64 S.W.2d 105 (Mo.banc 1933)]. The sole exception – and the only case cited by the trial court that involves license taxes – is City of St. Louis v. United Rys. Co. of St. Louis, 174 S.W. 78 (Mo. 1914), a suit by the City of St. Louis to enforce an amendment to its license tax ordinance that was *brought in the name of the city*.

The general assembly is presumed to have understood the historic distinction between license taxes and other taxes when enacting §§ 94.150 and 94.310, RSMo, and their predecessor versions. See, e.g., Person v. Scullin Steel Co., 523 S.W.2d 801, 803 (Mo. banc 1975) (“[i]n construing a statute, in an endeavor to determine the legislative intent, it is appropriate to consider its history, the presumption that the legislature had knowledge of the law, the surrounding circumstances and the purpose and object to be accomplished”). Every attempt should be made to harmonize these statutory provisions with the common law’s recognition of municipal standing to pursue license tax claims. See, e.g., State v. Thomas, 174 S.W.2d 337, 340 (Mo. 1943) (statutes should be construed in the light of the common-law rules in force at their passage); Estate of Williams v. Williams, 12 S.W.3d 302, 307 (Mo. banc 2000) (“[w]here doubt exists about the meaning

or intent of words in a statute, the words should be given the meaning which makes the least, rather than the most, change in the common law”).

Separately, the trial court erred when it engrafted language from § 94.150, RSMo, onto § 94.310, RSMo, which did not appear in the original text. The former provision states that “all suits for the collection of city taxes shall be brought in the name of the state, at the relation and to the use of the city collector,” but the latter provision contains no such language. The distinction exists for a reason: the legislature did not intend to impose such a requirement on fourth-class cities seeking to recover city taxes. See, e.g., Dept. of Labor and Ind. Relations v. Board of Public Utilities, 910 S.W.2d 737, 741 (Mo.App.S.D. 1995) (“where a statute imposes duties on a particular class of persons or entities but not on others, it is to be construed as excluding from its effect all those not expressly mentioned”); United States v. Juvenile Male J.A.J., 134 F.3d 905, 908 (8<sup>th</sup> Cir. 1998) (“[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”).

Here, the trial court applied a requirement applicable to third-class cities in §94.150, RSMo, to fourth-class cities governed by §94.310, RSMo, and amended §94.310, RSMo, in the process. The trial court was powerless to rewrite the statute in this fashion. See, e.g., State of Missouri v. Rowe, 63 S.W.3d 647, 650 (Mo. banc 2002) (“this Court, under the guise of discerning legislative intent, cannot rewrite [a] statute”); Brant v. Brant, 273 S.W.2d 734, 736 (Mo.App.Stl. 1954) (court cannot “usurp the function of the General Assembly, or by construction rewrite its acts”).

Finally, this is an equitable action whereby the Cities seek, in part, to obtain declaratory relief. The Cities seek a declaration that monies derived from the SBC

Defendants' services, e.g., exchange access, interexchange access, special access, interconnection facilities and equipment for use, toll or long-distance, reciprocal compensation arrangements, etc., constitute revenue or "gross receipts."<sup>1</sup> The right of a municipality to seek declaratory relief as to the meaning of its ordinance is unquestioned.

Missouri law is replete with examples of cities bringing declaratory judgment actions in their own names to resolve controversies surrounding the validity, construction or application of ordinances and contracts. See, e.g., City of Creve Coeur v. Creve Coeur Fire Prot. Dist., 355 S.W.2d 857, 860 (Mo. 1962); Kansas City v. McGee, 269 S.W.2d 662 (Mo. 1954) (city, mayor, and city council filed suit for declaratory judgment seeking to adjudicate whether city council was justified in refusing to submit the question of enactment of proposed ordinance to a vote of the people); City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. 1947) (city brought declaratory judgment action seeking determination of the legal power of the city to make collective bargaining contracts); City of Camdenton v. Sho-Me Power Corp., 237 S.W.2d 94, 96 (Mo. 1951) (city, under declaratory judgment act, sought to adjudicate the rights of Sho-Me Power Corporation to own and operate an electric distribution system in the city); Kirkwood Drug Co. v. City of Kirkwood, 387 S.W.2d 550 (Mo. 1965) (declaratory judgment action by drug corporation to determine the validity of city license tax on specific businesses, trades and

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<sup>1</sup> "In its usual and ordinary meaning, 'gross receipts' of a business is the whole and entire amount of the receipts without deduction." Kirkwood Drug Co. v. City of Kirkwood, 387 S.W.2d 550, 554-55 (Mo. 1965), overruled on other grounds, citing Laclede Gas Co. v. City of St. Louis, 363 Mo. 842, 253 S.W.2d 832.

occupations), overruled on other grounds. See also 9 McQuillin Mun. Corp. § 26:98 (3<sup>rd</sup> ed. October 2005) (“[a] suit in equity by a city may be an appropriate method for the enforcement of a licensing ordinance, particularly where restraint is sought against a continuing violation of an ordinance”).

For this additional reason, the trial court erred in finding that the Cities lack standing to pursue the instant action in their own names.

**B. The Court of Appeals erred in transferring this case to the Supreme Court for disposition of the Cities' constitutional challenges to HB 209 without first determining: (i) whether HB 209 applies to the Cities' claims as a matter of statutory construction, and, if so, (ii) whether HB 209 bars the Cities' claims and this appeal, and, if so, (iii) whether the Cities' appeal falls within an exception to the doctrine of mootness.**

**Standard:** “This Court, following a long line of cases, generally declines to rule on constitutional issues that are not essential to the disposition of the case, and retains jurisdiction nonetheless, where, as here, there is reversible error as to other issues.”

Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 53-54 (Mo. banc 1999).

Initially, the lower court should have determined whether or not HB 209 impacts the appeal and underlying claims before transferring them to this Court to resolve constitutional challenges to HB 209. See Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 53-54 (Mo. banc 1999). See also Farm Bureau Town and Country Ins. Co. v. Angoff, 909 S.W.2d 348, 355 (Mo. banc 1995) (“[C]onstitutional issues should not be addressed unless factual issues and issues of statutory construction are resolved. Also, the constitutional issues should not be resolved unless essential to the court’s decision.”) For example, HB 209 purports to grant lawsuit immunity based upon the “good faith belief”

of a telephone company that certain categories of its revenues do not qualify as “gross receipts” subject to taxation. 92.089.2(2), RSMo.<sup>2</sup> The question of “good faith” is a question of fact. See, e.g., Swartz v. Mann, 160 S.W.3d 411, 415 (Mo.App.W.D. 2005); Radloff v. Penny, 225 S.W.2d 498, 502 (Mo.App.Stl. 1949) (“[g]ood faith, when in issue is the ultimate fact,...and the question is ordinarily one of fact, for determination by the trier of facts”); Henry v. Tinsley, 218 S.W.2d 771, 777 (Mo.App.Spr. 1949) (“[t]he question of good faith is a question of fact”). The foregoing analysis is related here, because no court has determined (i) whether HB 209 applies to the Cities’ claims as a matter of statutory construction, and, if so, (ii) whether the SBC Defendants possessed a “good faith belief” sufficient to qualify for lawsuit immunity and/or dismissal. Further, because HB 209 took effect during the course of this appeal, there is no factual record to inform the Court’s decision on the issues.<sup>3</sup>

Assuming *arguendo* that HB 209 applies to these claims and immunizes the SBC

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<sup>2</sup> It is unclear from the terms of HB 209 whether such a “good faith belief” is required for lawsuit immunity, lawsuit dismissal, or both. See discussion at pages 94-98, *infra*.

<sup>3</sup> See, generally, Land Clearance For Redevelopment Auth. v. Kansas University Endowment Assoc., 805 S.W.2d 173, 176 (Mo. banc 1991) (“An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post trial-motion or on appeal.”)

Defendants from liability, then the lower court should have determined whether the appeal could proceed in spite of its passage. The Cities maintain that the Court need not reach any constitutional questions, because HB 209 cannot be invoked to foreclose this appeal.

- (i) **HB 209 does not foreclose this appeal, because it was not addressed by the court below, did not form a basis for its ruling, and is not the subject of this appeal.**

The trial court's ruling resulted from its analysis and application of two statutory provisions – §§ 94.150 and 94.310, RSMo – dealing with the collection and enforcement of city taxes. In reliance thereon, the Cities instituted another action in an effort to address the court's concerns about standing, State of Missouri, et al., v. SBC Communications, Inc., et al, cause no. 4:05-CV-01770-AGF, which was recently removed to the U.S. District Court for the Eastern District of Missouri. Having attempted to comply with the court's order, an unrelated enactment – HB 209 – should not be invoked to moot the Cities' only allowable attack on the original order. Such an outcome is disfavored. See, e.g., Mootness On Appeal In The Supreme Court, 83 Harv.L.Rev. 1672, 1680 n. 38 (May 1970) (“[w]hen an expired court order has been complied with by the challenging party, it would be especially unfortunate to rule his appeal moot, since appeal is the only allowable attack on such orders”), citing Carroll v. President & Comm'rs, 393 U.S. 175, 179 (1969).

HB 209 was not considered by the trial court and was not part of its deliberations. Further, it does not purport to amend or repeal the statutes forming the basis of the court's ruling (and this appeal). Because §§ 94.150 and 94.310, RSMo, remain unaffected by HB 209, the appropriateness of continuing this appeal is particularly great. As noted in a

related context:

“No absolute rule can be formulated to settle whether a change of law undermines a lawsuit. The process involves a reasoned examination of the points of contention and the new law to determine whether the issues raised in litigating the validity of activities under the old provision are still presented. The approach may be demonstrated by a claim challenging the validity, as a matter of statutory or constitutional authorization, of governmental activities pursuant to a law that is amended pending appeal. The relevant issue should be whether the principle contended for by the challenging party is satisfied by the new law. If it is, the case is moot; if not, the challenging party’s present interest in the litigation is not destroyed simply by the amendment.”

Mootness On Appeal In The Supreme Court, 83 Harv.L.Rev. 1672, 1679 (May 1970).

Thus, even if HB 209 had amended §§ 94.150 and 94.310, RSMo, this appeal could proceed. The fact that it does not, and that the standing issue is left unresolved by HB 209, militates even more strongly in favor of continuing the appeal and addressing the merits of the challenged activity (because the concerns raised by the Cities remain after

HB 209).<sup>4</sup>

- (ii) **HB 209 does not foreclose this appeal, because its application to these claims would not resolve, but merely delay resolution of, the issues presently before the Court.**

Even if the Cities were to comply with HB 209 and to “immediately dismiss [this] lawsuit *without prejudice*,” 92.089.2, RSMo, it would merely delay resolution of the

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<sup>4</sup> Alternatively, to the extent HB 209 forecloses appellate review of the standing issue, it is unconstitutional. “The quintessential power of the judiciary is to make *final* determinations of questions of law.” Asbury v. Lombardi, 846 S.W.2d 196, 200 (Mo. banc 1993) (emphasis in original). “This *power* is a nondelegable power resting exclusively with the judiciary.” Id. (emphasis in original). If HB 209 is construed to require dismissal of this action, and to preclude judicial review of the trial court order, it violates the separation of powers principles set forth in art. II, § 1 of the Missouri Constitution. See, e.g., Asbury v. Lombardi, 846 S.W.2d 196, 201 (Mo. banc 1993) (if statute is read to allow one party to unilaterally choose review on the record by an administrative commission, and thus preclude judicial review, statute would be unconstitutional as conflicting with separation of powers requirement of the State Constitution).

ultimate issue on appeal. The Cities would re-file the same action, wait for dismissal, and appeal once more to determine whether or not they possessed standing. The seminal opinion addressing this circumstance is Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911). Southern Pacific Terminal involved a suit to enjoin enforcement of an ICC order requiring a terminal company to cease and desist from granting an undue preference for a two-year period. The period expired while the case was on appeal. The Supreme Court noted the general rule calling for the dismissal of an appeal if, during its pendency, something occurs which precludes the Court from granting “effectual relief” to the appellant. But, it held the rule inapplicable, stating:

“In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis for further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers have their rights determined by the Commission without a chance of redress.”

Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911).

The likelihood of repetition of the controversy and the public interest in assuring appellate review are the key elements of the Southern Pacific Terminal doctrine.

Missouri courts take a similar view. See, e.g., State ex rel. Missouri Pub. Serv. Co. v. Fraas, 627 S.W.2d 882, 885 (Mo.App.W.D. 1981) (“[a]n exception...is made where an issue is presented of a recurring nature, is of general public interest and importance, and

will evade appellate review unless the court exercises its discretionary jurisdiction”), mtn. for rehearing and/or to transfer denied.

In the present case, the likelihood of repetition is a certainty. If this case is dismissed *without prejudice*, as contemplated by 92.089.2, RSMo, the Cities will re-file the action and appeal and continue appealing until the issue of governmental standing is determined. See, e.g., United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 898, 97 L.Ed. 1303 (1953) (“[t]he necessary determination is that there exists some cognizable danger of recurrent violation...which serves to keep the case alive”). Because the issue is “capable of repetition, yet evading review” after HB 209, and because it impacts other lawsuits pending in this State, the standing issue is still “alive.” Failing to address it would not only thwart the administration of justice, but undermine the goal of advancing judicial economy.

(iii) **HB 209 does not foreclose this appeal, because the issues involved are of substantial public importance and their resolution is needed for the guidance of public officials.**

Governmental standing to pursue a tax collection action not only impacts this suit, but other suits being pursued by many of these same parties. The manner in which such actions are brought is of vital importance to municipal governments in these and future enforcement actions. As evidenced by the trial court’s order, inapposite cases decided over one hundred years ago are being utilized to interpret statutes that govern the current actions of municipal bodies. Such a situation cries out for clear guidance to inform the actions of public officials. See Southern Pacific Terminal Co. v. ICC, 219 U.S. at 516, 31 S.Ct. at 284, quoting with approval, Boise City Irrig. & Land Co. v. Clark, 131 F. 415 (9<sup>th</sup> Cir. 1904) (court maintained an appeal concerning a water-rate ordinance that had expired

because of, *inter alia*, “the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter”).

Missouri courts acknowledge the principle that unsettled legal issues of public importance are appropriate for resolution on appeal. See, e.g., Morrison v. State, 252 S.W.2d 97, 100 (Mo.App.K.C. 1952) (appeal should not be dismissed where “the issue presented was of substantial public interest and...it was desirable that an authoritative determination be made for the future guidance of public officers in probably recurring cases”); Brockman v. State, 970 S.W.2d 398, 400 (Mo.App.W.D. 1998) (same). Clearly, the instant appeal involves matters of public importance. By definition, the municipal plaintiffs are public bodies and the taxes at issue are public funds. The public nature of the issues, and the need for construction of a tax statute, are sufficient reasons to maintain the challenged appeal.

For example, it is well-established that:

(i) “[a]ppeals have often been retained on the ground of public interest for the purpose of passing upon the validity or construction of statutes” 132 A.L.R. 1185 (June 2004), citing Pallas v. Johnson (1937) 100 Colo 449, 68 P2d 559, Golden v. People (1937) 101 Colo 381, 74 P2d 715, Re Madden (1895) 148 NY 136, 42 NE 534, Re Cuddeback (1896) 3 App Div 103, 39 NYS 388, Re Morgan (1906) 114 App Div 45, 99 NYS 775, Massachusetts v. Klaus (1911) 145 App Div 798, 130 NYS 713, O’Laughlin v. Carlson (1915) 30 ND 213, 152 NW 675, Dove v. Oglesby (1926) 114 Okla 144, 244 P 798, Cox v. Bristol (1926) 144 Va 286, 132 SE 187, and Doering v. Swoboda (1934) 214 Wis 481, 253 NW 657;

(ii) “[t]he fact that a final determination of a question involved in an appeal is

needed or will be useful as a guide for the conduct of public officers or bodies is...a reason for retaining an appeal which would otherwise be dismissed” 132 A.L.R. 1185 (June 2004), citing Boise City Irrig. & Land Co. v. Clark (1904, CCA 9<sup>th</sup>) 131 F 415, Wise v. First Nat. Bank (1937) 49 Ariz 146, 65 P2d 1154, Van de Vegt v. Larimer County (1936) 98 Colo 161, 55 P2d 703, State ex rel. Railroad Comrs. v. Southern Teleph. & Constr. Co. (1913) 65 Fla 67, 61 So 119, Re Madden (1895) 148 NY 136, 42 NE 534, Re Fairchild (1897) 151 NY 359, 45 NE 943, and New Rochelle Water Co. v. Maltbie (1937) 249 App Div 378, 292 NYS 650; and

(iii) “[a]ppeals have...been retained on the ground of public interest where they involved questions relating to taxation, revenue, or governmental financial affairs” 132 A.L.R. 1185 (June 2004), citing Wise v. First Nat. Bank (1937) 49 Ariz 146, 65 P2d 1154, Pitt v. Belota (1933) 108 Fla 292, 146 So 380, and Pardee v. Schuylkill County (1923) 276 Pa 246, 120 A 139.

Almost every governmental unit in the State is interested in a final determination of the standing issue. Undoubtedly, the question will recur in subsequent litigation. In such circumstances, HB 209 does not moot the Cities’ standing challenge; rather, this Court should consider the legal question presented on its merits.

**C. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it gratuitously discharges a corporate tax liability in violation of MO. CONST. art. III, § 38(a), which prohibits the general assembly from using public monies to aid private enterprise.**

If the primary object of a public expenditure “is not to subserve a public municipal purpose, but to promote some private end, the expense is illegal, even though it

may incidentally serve some public purpose.” Judge Welliver writing in Curchin v. Missouri Industrial Development Board, 722 S.W.2d 930, 934 (Mo. banc 1987), quoting State ex rel. City of Jefferson v. Smith, 348 Mo. 554, 154 S.W.2d 101, 102 (Mo. banc 1941).

**Standard:** Ordinary rules of statutory construction apply to the interpretation of the constitution, though “applied more broadly because of the permanent nature of constitutional provisions.” Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). “If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid.” State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality 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.” Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

The vast majority of state constitutions contain provisions that expressly bar the use of public monies to aid private enterprise. Missouri’s Constitution is no exception. It contains multiple, specific prohibitions barring the state and its political subdivisions from lending its credit or faith to, or subscribing to or owning stock in, or giving its resources away to, private companies. See, e.g. MO. CONST. art. III, §§ 38(a) and 39, and art. VI, §§ 23 and 25. The state’s forgiveness of the carriers’ tax debts in this instance falls directly within these constitutional prohibitions. It constitutes a “grant of public money” in aid of private enterprise, and, rather than benefitting the public at large, merely serves to enrich a small group of corporations.

Article III, Section 38(a) provides admirable clarity on this subject: “The general

assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation..." MO. CONST. art. III, § 38(a). It is undisputed that tax revenues qualify as "public money or property" within the meaning of Article III, Section 38(a). See, e.g., Champ v. Poelker, 755 S.W.2d 383, 388 (Mo.App.E.D. 1988) ("[p]ublic funds are 'funds belonging to the state or any...political subdivision of the state; more especially taxes... appropriated by the government to the discharge of its obligations'"), mtn. for rehearing and/or transfer denied, quoting State ex rel. St. Louis Police Relief Ass'n. v. Igoe, 340 Mo. 1166, 107 S.W.2d 929, 933 (Mo. 1937). Further, the term "corporation," as used in this section, "uniformly refers to private or business organizations of individuals" like the defendants in this case. City of Webster Groves v. Smith, 340 Mo. 798, 102 S.W.2d 618, 619 (Mo. 1937). Thus, "foregoing the collection of [a] tax" on private business, such as the municipal license taxes at issue, constitutes a grant of public aid within the meaning of Article III, Section 38(a). See, e.g., Curchin v. Missouri Industrial Development Board, 722 S.W.2d 930, 933 (Mo. banc 1987) ("This tax credit is as much a grant of public money or property and is as much a drain on the state's coffers as would be an outright payment by the state to the bondholder upon default. There is no difference between the state granting a tax credit and foregoing the collection of the tax and the state making an outright payment to the bondholder from revenues already collected...The allowance of such a tax credit constitutes a grant of public money or property within Article III, Section 38(a) of the Missouri Constitution."), rehearing denied.<sup>5</sup>

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<sup>5</sup> Courts throughout the country acknowledge that tax amnesties, tax credits, tax forgiveness, tax exemptions, and tax subsidies qualify as expenditures of public money.

The concerns animating the adoption of Article III, Section 38(a) over a century ago, and similar constitutional provisions around the country, are no less pressing today.

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See, e.g., Opinion of the Justices to the Senate, 401 Mass. 1202, 514 N.E.2d 353, 355 (Mass. 1987) (“tax subsidies...are the practical equivalent of direct government grants”); Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 236, 107 S.Ct. 1722, 1731, 95 L.Ed.2d 209 (1987) (Scalia, J. dissenting ) (“[o]ur opinions have long recognized – in First Amendment contexts as elsewhere – the reality that tax exemptions, credits and deductions are ‘a form of subsidy that is administered through the tax system’”); Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 791, 93 S.Ct. 2955, 2974, 37 L.Ed.2d 948 (1973) (money available through tax credit is charge made against state treasury; tax credit is “designed to yield a predetermined amount of tax ‘forgiveness’ in exchange for performing a certain act the state desires to encourage”); Rosenberger v. Rector & Visitors, 515 U.S. 819, 861 n. 5, 115 S.Ct. 2510, 2532 n. 5, 132 L.Ed.2d 700 (1995) (“the large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies”); Sommer v. City of St. Louis, 631 S.W.2d 676, 680 (Mo.App.E.D. 1982) (“tax abatement does not differ significantly from an expenditure of public funds, since in either case the conduct complained of could result in the treasury’s containing less money than it ought to”). The fact that the funds never enter the public treasury is nevertheless a use of public money subject to constitutional scrutiny. See, e.g., Rosenberger, 115 S.Ct. at 2523-24.

As Judge Welliver noted in striking down a state tax credit scheme in 1987:

“Along in 1820 and ‘30 and ‘40[,] it was the custom of the state to give large sums of money to railroads, canals, banks and so forth and the custom became so abused that nearly all the state constitutions wrote such sections as this in their fundamental law...Article IV, Section 46 of the Missouri Constitution of 1875, the predecessor to Article III, Section 38(a) of the Missouri Constitution of 1945, was adopted to prevent railroad grants. The provision was adopted despite the significant public benefit provided by the railroads. Accordingly, in our application of Article III, Section 38(a) of the Missouri Constitution, we have held grants with a primarily private effect to be unconstitutional, despite the possible beneficial impact upon the economy of the locality and of the state...Providing the tax credits to only a select few companies lends itself to abuse and is analogous to the railroad grants of yesteryear, which prompted the adoption of Article III, Section 38(a) of the Missouri Constitution. While it is possible that the projects to be supported by the tax credit-bearing revenue bonds could have a beneficial public impact, the grant of public money to these businesses’ bondholders is unconstitutional just as railroad grants were.”

Curchin, 722 S.W.2d at 934-35. See also State ex rel. Bd. of Control of St. Louis School and Museum of Fine Arts v. City of St. Louis, 115 S.W. 534, 546-47 (Mo. 1908) (“[t]he convention which framed the Constitution of 1875 was fully cognizant of the recklessness with which the counties and cities of this state had voted aid and granted assistance to corporations with a view to construct railroads and aid other corporate enterprises, and it inserted section 46 of article 4 (Ann. St. 1906, p. 195),” which provides that the

legislature shall not make any grant in aid of a private corporation), rehearing denied.<sup>6</sup>

The tax give-away envisioned by HB 209 is an even more direct and abusive grant of public aid to the private sector than the tax credit scheme rejected by Judge Welliver in Curchin, which required several conditions to be met before public aid could flow to private business. See Curchin, 722 S.W.2d at 933. HB 209 amounts to a naked gift of public financial resources ostensibly protected by constitutional mandate. See, e.g., World Trade Ctr. Taxing Dist. v. All Taxpayers, 894 So.2d 1185, 1194-95 (La.App. 4 Cir. 2005) (statute which relieved WTC hotel from presently existing hotel occupancy taxes violated state constitutional provision prohibiting state from loaning, pledging, or donating to any person any funds or property belonging to the state), aff'd, 2005 WL 1528414 (La. 2005). Not only is this harmful to residents of the affected municipalities, but it provides an unfair competitive advantage to telephone companies at the expense of other businesses and utilities already operating in local jurisdictions. For example, electric companies, gas companies, water companies, and landline telephone companies

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<sup>6</sup> See also Rubin, Constitutional Aid Limitation Provisions And The Public Purpose Doctrine, 12 St. Louis U. Pub. L.Rev. 143, 156-57 (1993) (“Opinion is unanimous that the impetus for the adoption of both state and local constitutional aid limitation provisions was the untrammelled and indiscriminate borrowing by governmental entities and the ruthless profiteering by private corporations and individuals...It was correctly thought that if local governmental agencies were restricted from rendering aid to [private] entities, the need to borrow would be lessened and the public trough would be closed to private entrepreneurs.”).

have paid municipal license taxes for decades. In carving out an exemption for Southwestern Bell, the general assembly has penalized the law-abiding and discriminated against all other businesses in an arbitrary fashion.

As Representative A.F. Morrison noted during the Indiana Constitutional Convention Debates of 1850, in support of a constitutional aid limitation: “corporations always labor and scheme for their individual benefit which is always antagonistic to the interests of the people.” See Rubin, Constitutional Aid Limitation Provisions And The Public Purpose Doctrine, 12 St. Louis U. Pub. L.Rev. 143, 157 (1993). Given the unequivocal language, history and purpose of Article III, Section 38(a), this Court's interest in maintaining the integrity of the Missouri Constitution and in protecting public financial resources must not yield to legislative overreaching, *i.e.*, a tax give-away to select companies premised upon nothing more than the pretext of advancing “the economic well being of the state” (92.089.1, RSMo).<sup>7</sup> To do otherwise, to “defer to the exigencies of economic development” out of judicial expediency (*id.*, at 144), would

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<sup>7</sup> In deciding the primary effect of a grant of public financial aid, “the stated purpose of the legislature, as pronounced in [the statute], is not dispositive. Rather, we must make the determination based upon the history and purpose of Article III, Section 38(a) of the Missouri Constitution and upon cases in which we have applied that constitutional provision.” Curchin, 722 S.W.2d at 934.

render the prohibitive wording of Missouri's constitutional aid limitations meaningless.<sup>8</sup>

**D. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it gratuitously discharges a corporate tax liability in violation of MO. CONST. art. III, § 39(5), which prohibits the general assembly from releasing a corporate indebtedness, liability or obligation due a municipality.**

“[T]he Plaintiffs had an inchoate property right to any past due taxes authorized by

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<sup>8</sup> See, e.g., World Trade Ctr. Taxing Dist. v. All Taxpayers, 894 So.2d at 1196-97 (“While we agree that creation of jobs and economic development may be in the ‘public interest’ under [the challenged statute] and a desirable and social good, we do not find that this type of development constitutes a ‘social welfare program for the aid and support of the needy’ as contemplated by § 14(B)(1) [similar to MO. CONST. art. III, § 38(a)]. Under the rationale espoused by the appellee, almost any economic development project could be found to meet the exception in § 14(B)(1) and the exception would quickly subsume the rule, essentially invalidating the prohibitions put forth in § 14(A) [similar to MO. CONST. art. III, § 38(a)]. Thus, although we recognize the social benefit in creating employment opportunities, especially for those who might lack opportunity in the economic sector, to find that the WTC TIF statute satisfies this particular exception to the constitutional ban on donation of public funds would render La. Const. art. VII, § 14 essentially meaningless.”), aff’d., 2005 WL 1528414 (La. 2005).

then existing law and HB 209 effectively takes away that property right.” Judge Laughrey writing in City of Jefferson, et al., v. Cingular Wireless, L.L.C., cause no. 04-4099-CV-C-NKL (W.D.Mo. Sept. 23, 2005) (Stay Order, at p. 6 n. 6).

**Standard:** Ordinary rules of statutory construction apply to the interpretation of the constitution, though “applied more broadly because of the permanent nature of constitutional provisions.” Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). “If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid.” State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality 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.” Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

Like the earlier public aid limitations, numerous state constitutions contain provisions prohibiting a corporate indebtedness, liability or obligation to the state (or its political subdivisions) from being released or discharged in any manner. Again, Missouri’s Constitution is no exception. Article III, Section 39, states: “The general assembly shall not have power:...To 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[.]” MO. CONST. art. III, § 39(5). It is unique only in its inclusion of the words “without consideration,” which were added by the Constitution of 1945 to the

provisions of the 1875 Constitution, Article 4, Section 51.<sup>9</sup>

HB 209 violates Article III, Section 39(5) by purporting to immunize a telecommunications company from liability for delinquent taxes owed prior to July 1, 2006, if it allegedly believed that certain categories of its revenues did not qualify as “gross receipts.” 92.089.2(2), RSMo. In addition, HB 209 calls for the dismissal of pending lawsuits brought by municipalities in the Circuit Court of St. Louis City and elsewhere seeking to enforce their rights and to collect such delinquent taxes. 92.089.2, RSMo.

For purposes of Article III, Section 39(5), it is undisputed that the words “indebtedness, liability or obligation” encompass taxes due and owing. Further, the gross receipt taxes imposed by plaintiffs’ ordinances constitute a matured “indebtedness”; they are not contingent or uncertain in any respect. This conclusion derives from the nature of the tax, which deems the collection of gross receipts to be the taxable event. See, e.g., The May Dept. Stores Co. v. Director of Revenue, 1986 WL 23204, at \*15 (Mo.Adm.Hrg.Com. 1986) (“[T]he entire tax imposed by Section 144.010 to 144.510, RSMo [sales tax act] is a gross receipts tax and...the tax is levied and imposed upon the seller’s gross receipts. Since the collection and receipt of the purchase price in the form

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<sup>9</sup> Some state constitutions provide that no corporate liability can be discharged “save by payment into the public treasury” (*e.g.*, ARK. CONST. art. 12, § 12), presumably the functional equivalent of Missouri’s “without consideration” language, whereas other state constitutions are silent on the subject, refusing to permit states to compromise or discharge a pre-existing corporate indebtedness under any circumstances.

of gross receipts is the event which triggers...liability for the tax, we think it obvious that the taxable event under the sales tax act is the collection of gross receipts on account of the retail sale of tangible personal property, and we so hold.”). Once revenue is received, in effect generating the gross receipts, the tax is fixed and owing. This is made manifest by settled decisions (*e.g.*, May Dept. Stores, *supra*) and by the ordinances themselves, which treat gross receipt taxes as self-executing. Thus, in contrast to real estate and personal property taxes – which are due annually and cannot be known until there is an assessment and levy – municipal gross receipt taxes are due and quantifiable at the time they are incurred or shortly thereafter.<sup>10</sup> At this point, the business becomes liable for the

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<sup>10</sup> For example, the Winchester Municipal Code provides: “Every person, firm or corporation engaged in the business hereinbefore set forth in the City of Winchester *is hereby required to file with the City Clerk of said City, on or before the last day of each calendar month, a sworn statement showing the gross receipts derived from such business during the preceding calendar month; and at the same time pay to the City Treasurer the tax hereinbefore set forth.*” § 640.020, Winchester Municipal Code (emphasis added).

These self-executing features distinguish a gross receipt tax from the situation before the Court in Beatty v. State Tax Commission, and other cases involving the assessment and levy of property taxes, none of which are applicable here. See, e.g., Beatty v. State Tax Commission, 912 S.W.2d 492, 496-97 (Mo. banc 1995) (“[The challenged statute] operates retrospectively only if appellants had a right to pay a certain amount of tax that vested prior to [the statute’s effective date]. The determination of

gross receipt tax, which liability, then attached, cannot be compromised or reduced. See, e.g., James McKeever v. Director of Revenue, 1980 WL 5130, at \* 4

(Mo.Admin.Hrg.Com. 1980) (“[O]nce a tax liability has been finally assessed, i.e. computed at its exact rate, the Department of Revenue (D.O.R.) cannot then bargain or compromise for a lesser or greater amount than what it has determined is owed. For example, D.O.R. cannot compromise a tax liability at the time of sale to be less than the 3% rate authorized by statute” [under sales tax act].); Ark. Op. Atty. Gen. No. 2003-025, 2003 WL 1347746, at \*5 (Ark.A.G. 2003) (act of Arkansas legislature purporting to forgive gross receipts taxes previously incurred by truck and semitrailer owners was

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whether appellants had such a vested right requires a general discussion of the manner in which real property is taxed in Missouri...The determination of the amount of tax liability that attaches to a particular parcel of real property consists of two processes: the assessment of the property and the levying of the tax. Assessment is a process by which the assessor identifies property by parcel and owner, values it, classifies it and lists it so that taxing authorities can apply their tax levies...The second part of the taxing process, the levy, is the method by which the specific amount of tax due becomes known...As is evident from the statutory scheme, rights to a particular amount of tax do not vest in a taxpayer until assessment and levy are complete. At this point the government’s [inchoate] lien becomes ‘a fixed encumbrance’...and that taxpayer’s liability for tax is reduced to a sum certain...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.”).

illegal, because, *inter alia*, it “purports to forgive a matured tax obligation”).<sup>11</sup> See also

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<sup>11</sup> The Arkansas act was similar in language, and identical in effect, to HB 209.

The Arkansas Attorney General’s discussion and analysis of the act is polite, but withering.

To similar effect, but much less restrained, see City of Dubuque v. Illinois Central R. Co., 39 Iowa 56, 1874 WL 416 (Iowa 1874), wherein a statute releasing the property of railroads from taxation was passed subsequent to the assessment and levy of a tax for which an action was brought. Although quite old, and involving different constitutional infirmities, the Iowa Supreme Court’s decision is cited here for the forcefulness of its language and conclusions:

*“The right of plaintiff [municipality] to the taxes in question and the obligation of defendant to pay them were perfect before the statute under consideration was enacted. Plaintiff had a valid, legal claim against defendant for the amount of the assessment. This claim – a chose in action – was property, and entitled to the same protection from the law as other property. It rested, as we have seen, upon a contract implied by the law, whereby defendant was bound to pay the money in suit to plaintiff. The statute in question deprives plaintiff of this property by declaring the taxes levied by the city shall not be collected, and by releasing defendant from their payment. It impairs the obligation of the contract implied by the law whereby defendant became bound to pay the taxes, by attempting to*

Federal Express Corp. v. Skelton, 578 S.W.2d 1, 6 (Ark. banc 1979) (legislative enactment exempting aircraft, aircraft equipment, and railroad parts, cars, and equipment from compensating use tax impaired a matured “indebtedness” and was unconstitutional).

In the alternative, if not a matured “indebtedness” within the meaning of Article III, Section 39(5), then, at a minimum, the gross receipt tax imposed by plaintiffs’ ordinances constitutes a “liability or obligation” under this provision. See, e.g., Graham

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relieve defendant therefrom and declaring plaintiff shall not enforce its lawful claim therefor. *Here, by a statute, is an attempt to deprive plaintiff of its property without due process of law, and to utterly impair the obligation of a valid contract. The legislature is expressly prohibited by the constitution from the exercise of such despotic and oppressive power...It is true that the legislature may take away the powers conferred upon the city – may destroy its corporate existence, but cannot divest it of property or rights under contracts lawfully acquired. The State, by legislation, may decree the death of the municipality, and may become its executioner, but cannot seize and dispose of its estate at will. The authority of the legislature to take away or abridge municipal powers by no means carries with it authority to destroy rights of property, and rights under contract, acquired while those powers were lawfully possessed and exercise.”*

City of Dubuque, 39 Iowa 56, 1874 WL 416, at \*\*2 and 7 (emphasis added).

Paper Co. v. Gehner, 59 S.W.2d 49, 52 (Mo. banc 1933) (“The language of this constitutional provision [predecessor of Article III, Section 39(5)] is very broad and comprehensive in protecting the state against legislative acts impairing obligations due to it, in that it prohibits the release or extinguishment, in whole or in part, not only of indebtedness to the state, county, or municipality, *but liabilities or obligations of every kind*...[A]n inchoate tax, though not due or yet payable, is such a liability or obligation as to be within the protection of the restriction against retrospective laws, and for the same reason we must hold that *such inchoate tax is an obligation or liability within the meaning of the constitutional provision now being considered.*”) (emphasis added).

In either case, to the extent HB 209 purports to immunize the SBC Defendants from back tax liability, or to forgive, waive, extinguish or release such previously-incurred taxes, it falls squarely within the express terms of Article III, Section 39(5). See Graham Paper Co., 59 S.W.2d at 52 (“[A]n unmatured tax...has sufficient vitality to be protected in favor of the state against being extinguished or released by legislative enactment.”); First Nat. Bank of St. Joseph v. Buchanan County, 205 S.W.2d 725, 731 (Mo. 1947) (city ordinance levying ad valorem tax on shares of stock of all banks in city was valid and operative for 1946, since statutes expressly repealing power of first-class cities to levy such tax did not become operative before July 1, 1946, when liability for city tax for 1946 was already fixed and hence could not be extinguished because of art. III, § 39(5) of Missouri Constitution); Federal Express Corp. v. Skelton, 578 S.W.2d at 6 (“The courts of other states have been unanimous in holding that a law or ordinance which attempts to release a tax liability, obligation or indebtedness violates provisions of their constitutions.” [collecting cases]).

Thus, the pivotal question is whether releasing the SBC Defendants’ tax liability

was “without consideration,” as contemplated by Article III, Section 39(5). According to the general assembly, the consideration for this discharge is “the resolution of [the parties’] uncertain litigation, the uniformity, and the administrative convenience and cost savings to municipalities from, and the revenues which will or may accrue to municipalities in the future as a result of the enactment of sections 92.074 to 92.098.” 92.089.1, RSMo. Each of these bases will be addressed below, but before proceeding, the Cities direct the Court’s attention to that portion of HB 209 wherein the general assembly declares that the foregoing shall constitute “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 subsection 2 of this section.” 92.089.1, RSMo. With such language, HB 209 attempts to make a conclusive finding about the meaning of a constitutional provision, namely, what is adequate “consideration” under Article III, Section 39(5). It is analogous to the legislature declaring that the death penalty for 15-year olds is not cruel or unusual, or that governmental discrimination against African-Americans is not a violation of equal protection. This is more than legislative overreaching; it is flatly prohibited by an uninterrupted line of precedent dating back to Marbury v. Madison. See, e.g., State ex rel. Dawson v. Falkenhainer, 15 S.W.2d 342, 343 (Mo. banc 1929) (legislature cannot dictate to courts construction of constitutional provisions).

Returning to the “consideration” proffered by the general assembly in support of its release of the carriers’ tax liability, it is stated that “the resolution of [the parties’] uncertain litigation” qualifies as “full and adequate consideration.” 92.089.1, RSMo. In Missouri, as elsewhere, consideration has been described as “either...a benefit conferred upon the promisor or...a legal detriment to the promisee, which means that the promisee

changes his legal position; that is,...he gives up certain rights, privileges or immunities which he theretofore possessed or assumes certain duties or liabilities not theretofore imposed upon him.” State ex rel. Kansas City v. State Highway Commission, 163 S.W.2d 948, 953 (Mo. banc 1942) (citing American Law Institute, Restatement of the Law of Contracts § 75), rehearing denied. Undoubtedly, the Cities have much to lose by dismissing their claims, but it is difficult to see how SBC’s legal position has changed as a result of this lawsuit “compromise.”

First, there is no dispute about the validity of the underlying ordinances. SBC has paid license taxes to Winchester and Wellston under these ordinances for years. See, e.g., Kirkwood Drug Company v. City of Kirkwood, 387 S.W.2d 550, 555 (Mo. 1965) (licensee who had filed license tax returns under city ordinance for fourteen years could not question the validity of the ordinance and thus avoid its burdens), overruled on other grounds.

Second, Missouri law is clear that “[i]n its usual and ordinary meaning, ‘gross receipts’...is the whole and entire amount of...receipts without deduction.” Kirkwood Drug Co. v. City of Kirkwood, 387 S.W.2d 550, 554-55 (Mo. 1965), overruled on other grounds, citing Laclede Gas Co. v. City of St. Louis, 363 Mo. 842, 253 S.W.2d 832. Thus, either the SBC Defendants generated receipts from their services and activities (i.e., exchange access, interexchange access, special access, interconnection facilities and equipment for use, toll or long-distance, reciprocal compensation arrangements, etc.), in which case taxes are owed, or they did not.

Third, from a procedural standpoint, the SBC Defendants have no rights, privileges or immunities to compromise. In Missouri, as in most states, there are well-established methods for protesting the payment of taxes, namely, the institution of a tax protest suit

under § 139.031, RSMo. By foregoing this exclusive method for disputing taxes, the SBC Defendants have waived any and all defenses to the underlying claims. See, e.g., Metts v. City of Pine Lawn, 84 S.W.3d 106, 109 (Mo.App.E.D. 2002) (“The fact that plaintiffs failed to pay the charges when due does not entitle them to enjoin enforcement of those payments when they failed to make a timely challenge as set out in Ring...Plaintiffs failed to ask the trial court for an injunction prior to the date the charges were due and failed to comply with the protest procedures of section 139.031. They now owe the delinquent charges. *They cannot create an alternate method of challenging the charges by merely withholding payment and raising their challenge when enforcement is attempted.* They are not entitled to relief from the consequences of their failure to timely pursue the remedies available to them.”) (emphasis added), mtn. for rehearing and/or to transfer denied.

Thus, the SBC Defendants have forfeited no privileges by foregoing litigation, except, possibly, a defense premised upon the belief that “certain categories of its revenues did not qualify under the definition or wording of the ordinance[s] as gross receipts or revenues upon which business license taxes should be calculated.”

92.089.2(2), RSMo. Even that contention must fail, however, because ignorance of the law is no defense. See Grace v. Missouri Gaming Commission, 51 S.W.3d 891, 903 (Mo.App.W.D. 2001) (“[p]ersons are conclusively presumed to know the law”).

Additionally, it is suggested by the general assembly that “full and adequate consideration” for the tax discharge derives from “the uniformity, and the administrative convenience and cost savings to municipalities from,...the enactment of sections 92.074 to

92.098.” 92.089.1, RSMo.<sup>12</sup> Presumably, this refers to the fact that, in the future, “the maximum rate of taxation on gross receipts shall not exceed five percent for bills rendered on or after July 1, 2006...” 92.086.9, RSMo. The economic implications of this are addressed in more detail below, but let there be no doubt about the practical effect of HB 209: it does not foster “uniformity.” For example, HB 209 still permits municipalities to impose gross receipt tax rates below 5%, which is what several municipal ordinances currently provide (*e.g.*, Florissant - 3%), while, at the same time, it allows select cities (*e.g.*, Clayton - 8%; Jefferson City - 7%) to exempt themselves from its provisions altogether. See 92.086.10, RSMo. Such a variance is not uniform.

Further, the cap does not qualify as “full and adequate consideration” or generate “cost savings” to the numerous municipalities with rates currently above 5% – rates based

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<sup>12</sup> It is worth noting that the various items of “consideration” detailed by the general assembly in 92.089.1, RSMo, are separated by the word “and.” This suggests that all such items must be present and valid in order for there to be “full and adequate consideration,” at least in the mind of the legislature. If any single ground or basis is infirm, then there can never be “full and adequate” consideration under a plain reading of the statute. The general assembly should be presumed to have known this, because it is an accepted and traditional rule of statutory construction. See, e.g., In re Commonwealth Trust Co. of Pittsburgh, 54 A.2d 649, 652 (Pa. 1947) (“The legislature is presumed to have intended that words used in a statute shall be construed according to their common and approved uses.”)

upon decisions of elected representatives and often as a result of popular votes – which must forego collection of back-taxes and survive on dramatically less revenue in the future (*e.g.*, University City - 9%, Ellisville - 7%, Ferguson - 6%, Gladstone - 7%, Independence - 9.08%, Jennings - 7.5%, Kirkwood - 7.5%, Maplewood - 9%, Northwoods - 10%, St. Joseph - 7%, Warson Woods - 9%, Winchester - 6%). Clearly, the cap does not generate “cost savings” to these municipalities, but rather monetary loss, and by obligating the carriers to do *less* than that which they are legally obligated to do, it cannot serve as “full and adequate consideration.” See, e.g., Asmus v. Pacific Bell, 999 P.2d 71, 90 (Cal. 2000) (“A promise to do less than one is legally obligated to do cannot constitute consideration.”).

Finally, it is declared by the general assembly that “the revenues which will or may accrue to municipalities in the future as a result of the enactment of sections 92.074 to 92.098” shall be deemed “full and adequate consideration.” 92.089.1, RSMo. The general assembly seems uncertain on this point, since it equivocates about whether tax revenues “will or may” accrue to the municipalities in the future.<sup>13</sup> What is clear from HB 209, however, is that back-tax revenues sought to be collected by the municipalities are gone forever, *i.e.*, discharged and released *via* HB 209's immunity and lawsuit dismissal provisions. Prospectively, things do not look much better for the municipalities: those cities with gross receipt tax rates currently above 5%, but now forced to reduce their rates to 5%, can be expected to lose millions of dollars of additional revenue in the future. No

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<sup>13</sup> In another portion of HB 209, it states that sections 92.074 to 92.098 “shall have a revenue-neutral effect.” 92.086.6, RSMo.

one can demonstrate that HB 209's speculative, future revenues are sufficient to off-set this loss in tax dollars.

Further, there is no assurance that all of these telephone companies will continue to do business in all of the municipalities, that subscribers will continue to do business with all of these telephone companies, or that HB 209 will remain in effect and not be modified by subsequent legislation. Cf., Wright, Miller & Cooper, Federal Practice and Procedure, § 3708, at 250-251 (3<sup>rd</sup> ed.) (anticipated, future tax revenues cannot be utilized to satisfy amount-in-controversy required for federal jurisdiction, because “it cannot be assumed...that [the business] will continue to be subject to the tax, or that the taxing statute will remain in effect and not be modified by legislation”), citing Healy v. Ratta, 292 U.S. 263, 270-271, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934). If just one carrier stops doing business in one municipality or enters bankruptcy or loses a customer – either thirty days or thirty years from now – that municipality has been denied HB 209's “consideration” as a matter of law.

More than just a crippling loss of tax dollars, this purported justification for HB 209 makes a mockery of the legal concept of “consideration.” The SBC Defendants have not paid taxes on the challenged services (i.e., exchange access, interexchange access, special access, interconnection facilities and equipment for use, toll or long-distance, reciprocal compensation arrangements, etc.) in the past, and HB 209 does not require them to do so in the future. Even if it did, the SBC Defendants simply would be complying with existing tax law, albeit at a reduced and preferred rate – a rate that is “revenue neutral” for purposes of the Cities’ coffers. In such circumstances, the law is clear that a promise to do that which one is legally obligated to do cannot serve as consideration. See, e.g., State ex rel. Kansas City v. State Highway Commission, 163

S.W.2d 948, 953 (Mo. banc 1942) (If “we examine the contract before us carefully it will appear that the commission gave up no privileges, powers or immunities and assumed no obligations except those which were imposed upon it in any event by the statute. The mere promise to do that which the statute required it to do in any event could not constitute a consideration.”); Wise v. Crump, 978 S.W.2d 1, 3 (Mo.App.E.D. 1998) (“[Defendant’s] promise to provide financial responsibility for his vehicle fails to provide the necessary consideration for the alleged contract. A promise to do that which one is already legally obligated to do cannot serve as consideration...”); Zipper v. Health Midwest, 978 S.W.2d 398, 416 (Mo.App.W.D. 1998) (same); Blandford Land Clearing Corp. v. National Union Fire Ins. Co. of Pittsburgh, 698 N.Y.S.2d 237, 243 (Sup.Ct.N.Y. 1999) (“promise to do no more than one is contractually or legally obligated to do is illusory”).

“Consideration” is not antiquated legal finery, but that which distinguishes a contract from a gift. See, e.g., Deli v. Hasselmo, 542 N.W.2d 649, 656 (Minn.App. 1996), citing Baehr v. Penn-O-Tex Oil Corp., 104 N.W.2d 661, 665 (Minn. 1960). The general assembly’s tax give-away, both retroactively and prospectively, designed to benefit a few at the expense of many, can only be considered a gift (or corporate welfare). All of its proffered bases for “consideration” being legally infirm, this Court should strike down HB 209 as violative of Article III, Section 39(5).

- E. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it regulates the affairs of cities, grants exclusive corporate privileges, and arbitrarily classifies for purposes of taxation in violation of MO. CONST. art. III, § 40, which inhibits the**

**legislature's ability to pass local and special laws.**

**Standard:** Ordinary rules of statutory construction apply to the interpretation of the constitution, though “applied more broadly because of the permanent nature of constitutional provisions.” Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). “If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid.” State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality 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.” Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

Article III, § 40 of the Missouri Constitution prohibits the general assembly from passing local or special laws in various, enumerated circumstances, especially where a general law can be made applicable to the subject addressed by the legislature.<sup>14</sup> “The

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<sup>14</sup> The Missouri Constitution is somewhat unique, because of its inclusion of the following language: “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). See McKaig v. Kansas City, 256 S.W.2d 815, 816 (Mo. banc 1953) (“there are only ‘three other states, viz. Minnesota, Kansas, Michigan, which have constitutional provisions expressly making the determination of the question of whether a general law can be made applicable a judicial question’”), rehearing denied, quoting City of Springfield v. Smith, 19 S.W.2d 1, 3 (Mo. banc 1929),

unconstitutionality of a special law is presumed.” Harris v. Missouri Gaming Commission, 869 S.W.2d 58, 65 (Mo. banc 1994), modified on denial of rehearing. See also Tillis v. City of Branson, 945 S.W.2d 447, 448 (Mo. banc 1997); State ex rel. City of Blue Springs v. Rice, 853 S.W.2d 918, 921 (Mo. banc 1993).

“Special legislation” is not easy to categorize. Its contours have evolved over time with the different attempts to identify and define “special laws.” In City of Springfield v. Smith, 19 S.W.2d 1, 6 (Mo. banc 1929), the Supreme Court found a law encompassing less than all who are “similarly situated” to be constitutionally infirm. Later, in Reals v. Courson, 164 S.W.2d 306, 307-08 (Mo. 1942), the Court declared “a statute which relates to particular persons or things of a class” to be special.<sup>15</sup> More recently, in Harris v. Missouri Gaming Commission, the Court’s test for special legislation focused on whether the challenged law was “open-ended” or “closed-ended.” Harris v. Missouri Gaming Commission, 869 S.W.2d at 65.

Regardless of the test employed, the “vice in special laws is that they do not embrace all of the class to which they are naturally related.” Reals v. Courson, 164 S.W.2d at 308. If an act “by its terms or in its practical operation,” can only apply to

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rehearing overruled.

<sup>15</sup> Also, in Reals v. Courson, the Court quoted approvingly from earlier decisions that found “[t]he test of a special law is the appropriateness of its provisions to the objects that it excludes... [citations omitted].” Reals v. Courson, 164 S.W.2d at 308, overruled in part on other grounds.

particular persons or things of a class, “it will be a special or local law, however carefully its character may be concealed by form of words.” *Id.* In evaluating any law, the judiciary must “use its own processes of logic in determining the presence or absence of reasonableness or unreasonableness in [a] given classification.” City of Springfield v. Smith, 19 S.W.2d at 3.

In light of these observations, HB 209 constitutes “special legislation” in one or more of the following respects:

- 1) The statute does not apply to all members of the same class. If the class is defined as “utilities,” HB 209 grants special rights, privileges and immunities to telephone utilities (*e.g.*, tax forgiveness, lawsuit dismissal, etc.) not enjoyed by other utilities (*e.g.*, gas, water, electric, etc.). Further, it “caps” prospective license taxes on telephone utilities at 5%, but it fails to confer the same benefit upon other utilities.
- 2) The statute does not apply equally to each member of the same class. If the class is defined as “telephone companies,” HB 209 grants special rights, privileges and immunities to telephone companies that failed to pay taxes, but not to telephone companies (wireline and wireless) that did.
- 3) The statute’s classifications are arbitrary and unreasonable. HB 209 bars municipalities from pursuing class litigation against telephone companies “to enforce or collect any business license tax” (71.675.1, RSMo), but it does not foreclose telephone companies from pursuing class litigation against municipalities to recover payment of the same tax.<sup>16</sup> In addition, it arbitrarily shields telephone

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<sup>16</sup> See, e.g., AT&T Wireless Services PCS LLC, et al v. Jeremy Craig, et al., cause

companies from class actions “to enforce or collect any business license tax” (id.), but not other companies subject to the same business license taxes.

4) The statute’s classifications are not germane to the purpose of the law. HB 209’s classifications are deemed necessary for “telecommunications business license tax simplification,” but the law does nothing to eliminate preexisting variations in telephone tax rates (*see, infra.*). Further, if the goal is business license tax simplification, it is not fostered by excluding other businesses and utilities similarly situated. Concerned about the “economic well being of the state,” HB 209 shortens the statute of limitations to three years for actions involving “the alleged nonpayment or underpayment of [a telecommunications] business license tax” (92.086.12, RSMo),<sup>17</sup> and it authorizes a telephone company “to pass through to its retail customers all or part of [a telecommunications] business license tax” (92.086.13, RSMo).<sup>18</sup> Again, if the concern is the “economic

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no. 04CC-000649, currently pending in the Circuit Court of St. Louis County, wherein AT&T Wireless and others have filed suit against fifteen different municipalities to recover business license taxes allegedly paid under protest.

<sup>17</sup> The current statute of limitations is at least five (5) years. See Kansas City v. Standard Home Improvement Co., Inc., 512 S.W.2d 915, 918 (Mo.App.K.C. 1974).

<sup>18</sup> Such a “pass through” purports to make the citizenry, as opposed to the telephone company, the business license taxpayer. It cannot be squared with HB 209’s definition of a “business license tax,” which is a tax upon businesses, not individuals, “for

well being of the *state*,” it is not alleviated by starving municipalities of tax revenues, foisting taxes upon the citizenry, and excluding similarly situated businesses from such benefits.

5) The statute’s classifications are based on existing circumstances only [i.e., closed-ended]. HB 209 exempts certain municipalities from having to adjust their business license tax rates. 92.086.10, RSMo. The exemptions are based upon, *inter alia*, dates that have passed (“prior to November 4, 1980”), preexisting ordinance language (“had an ordinance imposing a business license tax on telecommunications companies which specifically included the words ‘wireless’, ‘cell phones’, or ‘mobile phones’”), and pending litigation (“had taken affirmative action to collect such tax”). In doing so, HB 209 confers benefits and privileges upon select municipalities that no other city could hope to enjoy.<sup>19</sup> The classifications do not permit a municipality’s status to change, *i.e.*, to come within such classifications in the future, but rather grant exemptions based on unchanging, historical facts.

Being “special” on its face or in its practical operation, HB 209 violates Article III,

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the privilege of doing business within the borders of [a] municipality.” 92.077(1), RSMo.

<sup>19</sup> The City of Jefferson City, Missouri would qualify for exemption under 92.086.10(1), RSMo. The City of Clayton, Missouri would qualify for exemption under 92.086.10(2), RSMo. However, there are over 200 Missouri cities and municipalities with telephone license tax ordinances that would not qualify for either exemption.

Section 40 of the Missouri Constitution, because it arbitrarily “regulat[es] the affairs of...cities” and grants “special right[s], privilege[s] or immunit[ies]” to corporations, “where a general law can be made applicable.” MO. CONST. art III, §§ 40(21), 40(28) and 40(30).

In the following decisions, the Missouri Supreme Court found legislation containing an arbitrary tax, business or municipal classification – the same infirmities collectively appearing in HB209 – to be invalid “special legislation”: (i) State ex rel. Ashby v. Cairo Bridge & Terminal Co., 100 S.W.2d 441, 444 (Mo. 1936) (statute imposing penalty on four of ten classes of public utility companies for failure to file property statements, required by law to be filed by all such companies, held unconstitutional); (ii) Laclede Power & Light Co. v. City of St. Louis, 182 S.W.2d 70, 73 (Mo. banc 1944) (city ordinance imposing a license tax on the supplying of electricity and exempting from payment thereof persons who had theretofore accepted specified ordinances and had paid and should continue to pay previously imposed franchise rental, where only one company could ever qualify for exemption, violates constitutional provision prohibiting adoption of “local” or “special laws” where a general law can be made applicable); (iii) State, on Inf. of Taylor v. Currency Services, 218 S.W.2d 600, 604 (Mo. banc 1949) (the statutory provision that no corporation, other than banking corporation, railroad express company, trans-atlantic steamship company, or telegraph or telephone company, shall possess power to transmit money by draft, traveler’s check, money order or otherwise, is unconstitutional as granting special rights and privileges to special group of corporations and making arbitrary and unreasonable classification not based on licensing, inspection, regulation, financial responsibility, or business methods of favored companies); (iv) Planned Ind. Expansion Authority v. Southwestern Bell Tel.

Co., 612 S.W.2d 772, 776-77 (Mo. banc 1981) (statutory amendment giving telephone utility, but not other utilities, a vested property interest in public land under which it had placed its conduits violated the constitutional ban on local or special laws); (v) State ex rel. Public Defender Comm. v. County Court of Greene County, 667 S.W.2d 409, 413 (Mo. banc 1984) (since statute exempting Greene County, i.e., the Thirty-First Judicial Circuit, from operation of statute governing maintenance of public defender's office was special on its face, it could be presumed invalid, as violative of constitutional ban on special legislation); (vi) School Dist. of Riverview Gardens v. St. Louis County, 816 S.W.2d 219, 222 (Mo. banc 1991) (provisions of ad valorem tax rate adjustment statute that purported to treat political subdivisions in two counties differently than political subdivisions in other counties for purposes of rate adjustment following reassessment violated the provision of the Missouri Constitution prohibiting local or special laws when general law could be made applicable); (vii) O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99 (Mo. banc 1993) (act that could apply to only one county, authorizing counties to establish boundary commissions, was unconstitutional); (viii) Harris v. Missouri Gaming Commission, 869 S.W.2d 58, 65-66 (Mo. banc 1994) (statute exempting specifically described boats and others located between two bridges along Mississippi River from regulations covering riverboat gambling was facially special law, for purposes of constitutional prohibition against such laws, and was presumptively unconstitutional), as modified on denial of rehearing; and (ix) Tillis v. City of Branson, 945 S.W.2d 447, 449 (Mo. banc 1997) (the requirement that a city be in a county bordering Arkansas in order to qualify for tourism tax is a closed-ended classification, thus, the statute is a facially special law, and its unconstitutionality is presumed).

Individual analysis of these decisions is not necessary. To review the list is to

understand and to state the problem. HB 209's classifications and exemptions are invidious, arbitrary, and lacking in common sense. They cannot be justified on the basis of historic, economic or legal distinctions between the affected businesses and municipalities. To correct these infirmities would require a general law extending HB 209's benefits (*e.g.*, tax amnesty, a “cap” on prospective taxes, etc.) to similarly situated businesses, and an open-ended exemption affording municipalities relief from the bill's prospective tax ceiling. Neither safeguard – both of which are necessary to level the playing field for businesses and municipalities in the state – is present here.

**F. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it directs an outcome in pending cases, forecloses appellate review, and impedes municipal tax collection in violation of MO. CONST. art. II, § 1, which prohibits one branch of government from impermissibly interfering with another's performance, or from assuming power that more properly is entrusted to another branch.**

**Standard:** Ordinary rules of statutory construction apply to the interpretation of the constitution, though “applied more broadly because of the permanent nature of constitutional provisions.” Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). “If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid.” State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the

requirement that the challenging party prove unconstitutionality 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.” Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

The Missouri Constitution provides: “[t]he powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in instances in this constitution expressly directed or permitted.” MO. CONST. art. II, § 1. “This provision has appeared in the Missouri Constitution in substantially the same form since 1820.” Mo. Coalition for the Environment v. Joint Comm. On Admin. Rules (JCAR), 948 S.W.2d 125, 132 (Mo. banc 1997), as modified on denial of rehearing.

The Missouri Supreme Court “has consistently held that the doctrine of separation of powers, as set forth in Missouri’s constitution, is ‘vital to our form of government,’ [citations omitted], because it ‘prevent[s] the abuses that can flow from centralization of power.’ [citations omitted].” Id. Although frequently invoked to maintain the institutional integrity of government, the doctrine also serves to protect the rights and liberties of individuals. See, e.g., Mistretta v. United States, 488 U.S. 361, 380, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (noting that the Separation of Powers Clause is “essential to the preservation of liberty”); Rhodes v. Bell, 130 S.W. 465, 467-68 (Mo. 1910) (“[t]he purpose which the people had in view in keeping separate the different departments of government is well known to have had its origin in the jealousy of the framers of our state and federal governments and the great solicitude to keep them separate in order to

preserve the liberty of the people”).

“There are two broad categories of acts that violate the constitutional mandate of separation of powers. ‘One branch may interfere impermissibly with the other’s performance of its constitutionally assigned [power]...[citations omitted]. Alternatively, the doctrine [of separation of powers] may be violated when one branch assumes a [power]...that more properly is entrusted to another. [citations omitted].” State Auditor v. Joint Committee on Legislative Research (JCLR), 956 S.W.2d 228 (Mo. banc 1997), as modified on denial of rehearing, quoting I.N.S. v. Chadha, 462 U.S. 919, 963, 103 S.Ct. 2764, 2790-91, 77 L.Ed.2d 317 (1983) (Powell, J., concurring).

(i) **Encroachment Upon Judicial Branch**

Contravening JCLR and Chadha, HB 209 impermissibly encroaches upon the judiciary in one or more of the following respects: (i) it singles out specific litigation for legislative treatment;<sup>20</sup> (ii) it does not afford courts the opportunity to use their

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<sup>20</sup> HB 209 reads in part: “If any municipality, prior to July 1, 2006, has brought litigation...” 92.089.2, RSMo. The lawsuits to which this provision applies are: (i) City of University City, Missouri, et al. v. AT&T Wireless, et al., cause no. 01-CC-004454, formerly pending in the Circuit Court of St. Louis County; (ii) Cities of Wellston and Winchester, Missouri v. SBC Communications, Inc., et al., cause no. 044-02645, formerly pending in the Circuit Court of St. Louis City; (iii) City of Jefferson, et al., v. Cingular Wireless, LLC, et al., cause no. 04-4099-CV-C-NKL, currently stayed in the U.S. District Court for the Western District of Missouri; (iv) City of St. Louis v. Sprint Spectrum, L.P., cause no. 034-02912A, formerly pending in the Circuit Court of St. Louis City; (v) City

adjudicative skills, or to meaningfully exercise their judgment and discretion;<sup>21</sup> (iii) a judicial proceeding is not allowed to take place, because it directs a particular outcome in

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of Springfield v. Sprint Spectrum, L.P., cause no. 104CC-5647, formerly pending in the

Circuit Court of Greene County; and (vi) State of Missouri, et al., v. SBC

Communications, Inc., et al, cause no. 4:05-CV-01770, currently stayed in the U.S.

District Court for the Eastern District of Missouri.

<sup>21</sup> HB 209 gives a court the power to grant immunity where the evidence demonstrates that a telephone company possessed a “good faith belief” it was not subject to taxation, but then qualifies that phrase with the word “subjective.” 92.089.2, RSMo. “Subjective” has several commonly understood meanings, including “proceeding from or taking place within an individual’s mind such as to be unaffected by the external world,” “existing only in the mind; illusory,” and “existing only within the experiencer’s mind and incapable of external verification.” The American Heritage Dictionary (2<sup>nd</sup> ed. 1982). Thus, HB 209 purports to afford a role for judicial discretion and judgment, but then takes it away through use of the word “subjective.” Any telecommunications company possessing such a “subjective” good faith belief “shall not be liable to a municipality for, the payment of the disputed amount of business license taxes...” 92.089.2, RSMo.

pending cases;<sup>22</sup> (iv) it attempts to define a constitutional provision;<sup>23</sup> and (v) it determines what the law is and applies it to cases.<sup>24</sup>

Given these qualities, HB 209 is clearly “adjudicative” in nature and it forces courts to engage in a charade of the judicial process. Alone, or in combination, such attributes have been found to violate the doctrine of separation of powers in related contexts. See, e.g., Unwired Telecom Corp. v. Parish of Calcasieu, 903 So.2d 392, 406 (La. 2005) (by passing law defining “retail sale,” “sale at retail,” “sales price,” and “use” so as to make providers of cellular and wireless communications devices exempt from sales

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<sup>22</sup> HB 209 states that “[i]f any municipality, prior to July 1, 2006, has brought litigation..., it shall immediately dismiss such lawsuit without prejudice...” 92.089.2, RSMo.

<sup>23</sup> HB 209 contains the following sentence: “The general assembly...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...are full and adequate consideration...as the term ‘consideration’ is used in Article III, Section 39(5) of the Missouri Constitution...” 92.089.1, RSMo.

<sup>24</sup> HB 209 provides that a defendant’s “subjective good faith belief” in its innocence shall satisfy pre-existing law and suffice for immunity from and dismissal of lawsuits. 92.089.1, RSMo.

and use tax, in response to case holding to the contrary, legislature “clearly assumed a function more properly entrusted to the judicial branch of government”); Federal Express Corp. v. Skelton, 578 S.W.2d 1, 7-8 (Ark. banc 1979) (act retroactively exempting railroad parts from use tax violated separation of powers, as being “a clear attempt by the 1975 General Assembly to interpret a law enacted by the 1949 General Assembly after this Court has interpreted and applied that law”; the legislature “does not have the power or authority to retrospectively abrogate judicial pronouncements of the courts of this State by a legislative interpretation of the law”); Roth v. Yackley, 396 N.E.2d 520, 522 (Ill. 1979) (legislature’s declaration that amendatory act applied to events occurring before its effective date was an assumption of the role of a court in contravention of the principle of separation of powers; “it is the function of the judiciary to determine what the law is and to apply statutes to cases”); Harris v. Commissioners of Allegany County, 100 A. 733, 735-36 (Md.App. 1917) (act violated separation of powers principles, where although “in the form of a law, [it was] clearly in effect a legislative decree or judgment in favor of petitioner against the county commissioners of Allegany county, and in the nature of judicial action”); Ark. Op. Atty. Gen. No. 2003-025, 2003 WL 1347746, at \*5 (Ark.A.G. 2003) (act of Arkansas legislature purporting to forgive gross receipts taxes previously incurred by truck and semitrailer owners would violate doctrine of separation of powers). See also State ex rel. Dawson v. Falkenhainer, 15 S.W.2d 342, 343 (Mo. banc 1929) (“[t]o the courts is given authority to construe the Constitution”).

As the Missouri Supreme Court has noted: “the constitution assigns the General Assembly the single power and sole responsibility to make, amend and repeal laws for Missouri and to have the necessary power to accomplish its law-making responsibility.”

State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d at 230.<sup>25</sup> Within these parameters, the legislature can reasonably limit common law causes of action and restrict or expand the causes of action that it creates. See Fust v. Attorney General for the State of Missouri, 947 S.W.2d 424, 430-31 (Mo. banc 1997), citing Simpson v. Kilcher, 749 S.W.2d 386, 391 (Mo. banc 1988). Further, no one disputes that the general assembly can “amend statutes prospectively if it believes that a judicial interpretation [is] at odds with its intent...” See Roth v. Yackley, 396 N.E.2d at 522. However, none of these powers can adequately explain HB 209, the provisions and effects of which differ in kind and degree from all other bills passed by the Missouri legislature in recent (or even distant) memory.

First, HB 209 does not expressly repeal the underlying license tax ordinances. The Maryland Heights Municipal Code, for example, reads in part:

“There is hereby levied and the city shall collect a license tax of five and one-half (5 ½) percent on the gross receipts of companies engaged in the business of

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<sup>25</sup> Conversely, judicial power has been described as “the power of a court to make and enter a final judgment with respect to the rights of persons or property upon a defined issue presented by adversary parties.” People v. Sturman, 132 P.2d 504, 508 (Cal.App. 1942), as amended on denial of rehearing. See also Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174, 2179, 135 L.Ed.2d 606 (1996) (“It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm...”)

supplying or furnishing electricity, electrical power, electrical service, gas, gas service, water, water service, telegraph...or exchange telephone service, within the boundaries of the city.”

Maryland Heights Municipal Code, Section 13-127. Presumably, with the exception of the words “exchange telephone service,” this Code provision remains in force and effect following the enactment of HB 209. Similarly, a review of Florissant Code Sec. 14-602 reveals that:

“Every person engaged in the business of supplying or furnishing electricity, electrical power, electrical service, furnishing gas or gas service, furnishing water or water service or furnishing telephone or telegraph service in the city shall pay to the city a license or occupational tax of three (3) percent of the gross receipts derived from such business within the city.”

Florissant Code Sec. 14-602 (Code 1980, § 14-73; Ord. 5356, 6-22-92; Ord. 5925, 2-10-97; Ord. 5968, 5-27-97). Because Florissant’s license tax rate does not exceed the 5% “cap,” there is no indication that HB 209 intended to repeal Florissant Code Sec. 14-602.

Such a conclusion is buttressed by the language of 92.083.2, RSMo, which reads: “Nothing in this section shall have the effect of repealing any existing ordinance imposing a business license tax on a telecommunications company; provided that a city with an ordinance in effect prior to August 28, 2005, complies with the provisions of section 92.086.” Thus, in many respects, and with the exception of the 5% “cap” [which is prospective only], HB 209 does not alter or repeal existing law, but merely elevates the language embodied in local codes and ordinances to a higher level (*i.e.*, a state statute).

Second, without expressly repealing prior law, HB 209 then proceeds to declare that certain conduct satisfies prior ordinances or else it requires a court to interpret the

ordinances in a specified way. This is the clear import of 92.089.2, RSMo, which allows for lawsuit immunity and dismissal based on the subjective desires and wishes of a telephone company. Consequently, a defendant could have violated Florissant Code Sec. 14-602 above (*i.e.*, broken the law), yet still prevail in court so long as it complied with the “subjective good faith requirements” of 92.089.2, RSMo. In such circumstances, there is little difference between HB 209 entering judgment in favor of defendants, or a court doing so, since both involve the application of law.<sup>26</sup> Such a result-directed outcome has constituted a separation of powers violation as far back as the mid-nineteenth century. See United States v. Klein, 80 U.S. 128, 20 L.Ed. 519 (1871).<sup>27</sup>

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<sup>26</sup> It is important to remember that, in passing HB 209, the general assembly is seeking to extinguish an “indebtedness, liability or obligation” protected by constitutional mandate. The taxes at issue are constitutionally protected funds. See, e.g., Graham Paper Co. v. Gehner, 59 S.W.2d 49, 52 (Mo. banc 1933). Further, the SBC Defendants have ignored the exclusive remedy available to them for disputing such taxes. See, e.g., Metts v. City of Pine Lawn, 84 S.W.3d 106, 109 (Mo.App.E.D. 2002). Accordingly, given the posture of these cases, the general assembly is not merely changing a statute or restricting a cause of action, but, rather, it is undoing built-in Constitutional safeguards, ignoring the prior construction of statutes (*e.g.*, 139.031, RSMo) and ordinances, and permanently diminishing the role of the judiciary.

<sup>27</sup> Following the Civil War, Congress enacted the Abandoned and Captured Property Act, granting proceeds from the sale of property seized in the southern states to

Third, in granting lawsuit immunity, HB 209 targets a discreet and identifiable group of litigants, *i.e.*, the plaintiff municipalities and defendant carriers in pending lawsuits. By specifically referring to such lawsuits in HB 209, the general assembly again violates separation of powers principles by applying law to individual litigants,

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the original owners of that property so long as they had not given aid or comfort to the insurrection. The Supreme Court, in an earlier case, found that receipt of a Presidential pardon was sufficient proof of loyalty under the Act for purposes of recovery. Because the landowner in Klein had received such a pardon, the Court of Claims awarded recovery. Pending the government's appeal of this decision, Congress responded with legislation providing that a Presidential pardon could not be offered in the Court of Claims as evidence that the recipient was entitled to a recovery, that acceptance of such a pardon was to be taken as conclusive evidence that the recipient had given aid and comfort to the insurrection, and that upon proof that the claimant had accepted such a pardon, the jurisdiction of the Court of Claims and of the Supreme Court on appeal would end. Upon review, the Supreme Court found this legislative mandate to violate the separation of powers, because Congress had prescribed a "rule of decision" in a pending case. United States v. Klein, 80 U.S. 128, 146-47, 20 L.Ed. 519 (1871). More specifically, because Congress had "prescribe[d] a rule for the decision of a cause in a particular way," it had "passed the limit which separates the legislative from the judicial power," thus, the statutory provision was unconstitutional. Id.

rather than making it. In I.N.S. v. Chadha, where the Supreme Court found a legislative veto that overturned an INS decision suspending the deportation of an alien to be unconstitutional, Justice Powell noted that such legislative action was “clearly adjudicatory,” because:

[t]he House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches. Even if the House did not make a *de novo* determination, but simply reviewed the Immigration and Naturalization Service’s findings, it still assumed a function ordinarily entrusted to the federal courts...[citations omitted]...Where, as here, Congress has exercised a power ‘that cannot possibly be regarded as merely in aid of the legislative function of Congress,’ [citations omitted], the decisions of this Court have held that Congress impermissibly assumed a function that the Constitution entrusted to another branch...[citations omitted].

I.N.S. v. Chadha, 462 U.S. at 964-66 (Powell, J., concurring). The fact that HB 209 is not a law of general application, *e.g.*, because it has little effect beyond the lawsuits mentioned, amplifies its “adjudicative” qualities. As Justice Powell warned in such circumstances: “[t]he only effective constraint on Congress’ power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to ‘the tyranny of a shifting majority.’” I.N.S. v. Chadha, 462 U.S. at 966 (Powell, J., concurring). By singling out individual litigants for unfavorable treatment, the dangers envisioned by Justice Powell have come to pass in the form of HB 209.

(ii) **Encroachment Upon Executive Branch**

In addition to encroaching upon the judiciary, HB 209 impermissibly interferes with executive branch performance.

For example, the collection of taxes, whether at the state or local level, is an executive branch function. The Missouri Constitution classifies the department of revenue as an “executive department” and states that it is responsible for “collect[ing] all taxes and fees payable to the state...” Further, the department of revenue is “in charge of the director of revenue,” and the director of revenue is “appointed by the governor” MO. CONST. art IV, § 22 [Executive Department]; 32.010, RSMo [Executive Branch]. Thus, when HB 209 transfers power to “collect, administer and distribute” local license taxes – from the municipalities to the director of revenue (see 92.086.3, RSMo) – it acknowledges that such tax collection was an executive function previously performed by the municipalities.

Once acknowledged, HB 209 then proceeds to discharge collection actions brought by municipalities in the courts below. Thus, HB 209 both assumes executive power and interferes with it, *i.e.*, it interferes with the municipal collection of taxes and assumes control over the enforcement actions by dismissing them. Such legislative encroachment is prohibited. As Judge Price noted in JCAR, “Article II, § 1 strictly confines the power of the legislature to enacting laws and does not permit the legislature to execute laws already enacted.” Mo. Coalition for the Environment v. Joint Comm. On Admin. Rules (JCAR), 948 S.W.2d at 133. See also Buckley v. Valeo, 424 U.S. 1, 138, 96 S.Ct. 612, 691, 46 L.Ed.2d 659 (1976) (“[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the [executive branch], and not to the Congress, that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed’”).

**G. To the extent HB 209 bars this appeal and/or the underlying claims, it**

**is unconstitutional because it substantially impairs municipal rights in violation of MO. CONST. art. I, § 13, which prohibits the general assembly from enacting any law retrospective in its operation.**

**Standard:** Ordinary rules of statutory construction apply to the interpretation of the constitution, though “applied more broadly because of the permanent nature of constitutional provisions.” Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). “If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid.” State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality 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.” Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

HB 209's retrospective aspects are problematic from a constitutional perspective. It is this legislative quality that sustains many of plaintiffs' constitutional challenges, and that is most responsible for giving one the sense that something is wrong with HB 209. Whether it is nullifying the effect of prior tax ordinances, forgiving a past indebtedness, impairing rights acquired under existing law, or giving a different construction to previous events, the practical effect of HB 209 is to take property away from municipalities and to transfer it to favored businesses – solely through means of legislative fiat. The language of HB 209 admits of no other construction. Thus, distilled to its essence, plaintiffs' concern with HB 209 is that it is harsh, oppressive, unreasonable

and unfair.<sup>28</sup>

The Missouri Constitution expressly addresses the subject of retrospective laws and states that no law “retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.” MO. CONST. art. I, § 13. This does not mean that no statute relating to past transactions can be passed, “but rather that none can be allowed to operate retrospectively so as to affect such past transactions to the substantial prejudice of the parties interested. A law must not give to something already done a different effect from that which it had when it transpired.” Willhite v. Rathburn, 61 S.W.2d 708, 711 (Mo. 1933).

A “retrospective law” is one that “takes away or impairs vested or substantial rights acquired under existing laws, or imposes new obligations, duties, or disabilities with

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<sup>28</sup> For this reason, retrospective laws are oftentimes challenged, not because they are backward-looking, but because they offend the Fourteenth Amendment to the U.S. Constitution guaranteeing due process of law. See, e.g., Winther v. Village of Weippe, 430 P.2d 689, 695 (Idaho 1967) (“The facts in the instant case are indicative of a plan or scheme designed to eliminate respondents’ business under color of municipal authority attempted to be exercised not only retroactively, but in an unreasonable, arbitrary and discriminatory manner. To permit this would be a departure from fundamental concepts of constitutional law as well as repugnant to the basic principles of ‘fair play,’ contrary to the United States Constitution, Fourteenth Amendment, and Idaho’s Constitution, Art. I, s 13, guaranteeing due process of law.”)

respect to past transactions.” Mendelsohn v. State Bd. of Registration, 3 S.W.3d 783, 785-86 (Mo. banc 1999). The distinction drawn is that “[s]ubstantive laws – relating to rights and duties that give rise to a cause of action – may not apply retrospectively,” whereas, “[p]rocedural laws – relating to the machinery for process in the causes of action – may apply retrospectively.” Mendelsohn v. State Bd. of Registration, 3 S.W.3d at 786. In making a determination as to whether a law is substantive or procedural, “notions of justice and fair play in a particular case are always germane.” State ex rel. St. Louis-San Francisco Railway v. Buder, 515 S.W.2d 409, 411 (Mo. banc 1974).

By its terms, HB 209 is intended to apply retrospectively, or else it operates retrospectively in terms of its practical effect. Such a conclusion derives from the fact that: (i) HB 209 forgives a matured indebtedness to the substantial prejudice of municipalities; (ii) HB 209 grants immunity for prior bad acts occurring “up to and including July 1, 2006” (92.089.2, RSMo); (iii) HB 209 eliminates all remedies available for past transgressions (*i.e.*, it affects more than the “machinery” of litigation)<sup>29</sup>; (iv) HB 209 permits a current belief in one’s innocence to satisfy pre-existing law (*i.e.*, it gives something done a different effect from that which it had); and (v) HB 209 alters history by denying that certain transactions ever took place (*e.g.*, the generation of gross receipts). Being retrospective in operation, HB 209 violates art. 1, § 13 of the Missouri Constitution by altering or impairing the liabilities and obligations imposed by plaintiffs’

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<sup>29</sup> See, e.g., Koch v. Missouri-Lincoln Trust Co., 181 S.W. 44, 48-49 (Mo. 1915) (“the Legislature is powerless...to deny all remedy or so to condition and restrict the remedy as materially to impair” a vested right).

license tax ordinances. See, e.g., Graham Paper Co. v. Gehner, 59 S.W.2d 49, 52 (Mo. banc 1933) (“an inchoate tax, though not due or yet payable, is...an obligation or liability... within the protection of the restriction against retrospective laws...”); First Nat. Bank of St. Joseph v. Buchanan County, 205 S.W.2d 726, 730-31 (Mo. 1947) (Bank Tax Act could not operate to supplant or supersede city’s earlier tax; to the extent that it purports to operate prior to its effective date, “the act clearly falls within the prohibition” of Article 1, Section 13); Ernie Patti Oldsmobile, Inc. v. Boykins, 803 S.W.2d 106, 108 (Mo.App.E.D. 1990) (“[c]learly, retrospective repeal of the ordinance in question would impair the City’s ‘vested right’ to collect the license fee”), mtn. for rehearing and/or

transfer to Supreme Court denied.<sup>30</sup>

Unfortunately, the Missouri Supreme Court has stated that “the retrospective law prohibition was intended to protect citizens and not the state, [thus] the legislature may constitutionally pass retrospective laws that waive the rights of the state.” Savannah R-III School Dist. v. Public School Retirement System of Missouri, 950 S.W.2d 854, 858 (Mo. banc 1997), rehearing denied. Because the complaining party in Savannah Schools was a

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<sup>30</sup> See also Burns v. Labor & Ind. Relations Comm., 845 S.W.2d 553, 557 (Mo. banc 1993) (amended statute applying new test for determining whether individual is an employee, for employment security tax purposes, is clearly substantive and does not apply retrospectively); Liberty Mutual Ins. Co. v. Garffie, 939 S.W.2d 484, 486-87 (Mo.App.E.D. 1997) (amended statute reducing employer’s subrogation rights did not apply retroactively to claimant’s case; such amendment impaired employer’s vested rights under existing law which allowed full subrogation rights), mtn. for rehearing and/or to transfer to Supreme Court denied; State ex rel. Western Outdoor Advertising Co. v. State Highway and Transp. Comm. of State of Missouri, 813 S.W.2d 360, 363 (Mo.App.W.D. 1991) (decision of State Highway and Transportation Commission requiring outdoor advertiser to remove sign on ground that it had lost its nonconforming status improperly affected advertiser’s substantive right to take remedial action that was afforded at time notice of original violation was given; attempted retrospective application of subsequent regulation, which prohibited remedial action by outdoor advertisers, was ex post facto).

school district – *i.e.*, an “instrumentalit[y] of the state” or a “creature[] of the legislature” – the Court found that the general assembly could “waive or impair the vested rights of school districts without violating the retrospective law prohibition.” Id.<sup>31</sup>

The same conclusion should not, however, be reached here: although plaintiffs are

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<sup>31</sup> “The controversy in Savannah R-III School District v. Public School Retirement System centered on the retrospective enactment by the Missouri legislature of a law precluding numerous school districts from recovering refunds of payments illegally collected by the Missouri Public School Retirement System. The Missouri legislature used retrospective legislation to eliminate the school districts’ right to recovery. Despite a clear constitutional prohibition against retrospective laws in Article 1, section 13 of the Missouri Constitution, the retroactive law at issue in Savannah R-III School District withstood constitutional challenge. The Missouri Supreme Court upheld the seemingly unconstitutional retrospective law by means of a broad assertion that the legislature may waive the rights of school districts at will. This conclusion may surprise many communities that feel they have a direct interest at the local level in the operation of their school districts and in the preservation of school district funds. The Savannah R-III School District case illustrates the power of distant government to tread upon the rights which belong, at least in part, to local communities.” Turner, Retrospective Lawmaking In Missouri: Can School Districts Assert Any Constitutional Right Against The State?, 63 Mo.L.Rev. 833, 833 (Summer 1998).

political subdivisions of the state, the vested rights of municipalities and cities are specifically singled out for protection in the Missouri Constitution; further, the underlying litigation is not an intramural fight between “two statutory instrumentalities of government,” as in Savannah, but rather an attempt to protect and advance local interests. Cf. Savannah R-III School Dist. v. Public School Retirement System of Missouri, 950 S.W.2d at 861 (Robertson, J., dissenting) (“Of course, one could argue that municipal corporations are state instrumentalities, too. If one follows the majority, municipalities cannot challenge the legislature’s enactment of laws retrospective in operation, either. But do we really want to say that? I think not.”); Planned Ind. Expansion Authority of City of St. Louis v. Southwestern Bell Telephone Company, 612 S.W.2d 772, 776 (Mo. banc 1981) (“The City’s counterclaim [raising constitutional challenges] is an action for a declaratory judgment which is regulated by Rule 87...For such purposes, the City is declared to be a ‘person’ by Rule 87.05 and it may properly seek a declaration as to [the statute]...”; City’s retrospective law challenge upheld).<sup>32</sup>

HB 209 clearly constitutes a prohibited, retrospective law. HB 209 so impairs municipal rights, so alters legal history, that it permits no other conclusion. As the Missouri Supreme Court emphasized: “[i]t is best to keep in mind that the underlying

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<sup>32</sup> See also Arsenal Credit Union v. Giles, 715 S.W.2d 918, 921 (Mo. banc 1986) (“Arguments...that local government units are ‘mere arms of the state’ with no independent right to attack statutes that affect them – have been expressly rejected in favor of a standing doctrine concerned primarily with ‘sufficient controversy between the parties’ regarding matters which ‘directly affect them.’”).

repugnance to the retrospective application of laws is that an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to a different set of effects which alter the rights and liabilities of the parties thereto.” State ex rel. St. Louis-San Francisco Railway v. Buder, 515 S.W.2d at 411. Much like the statute in Buder, no such reasons are discernable here: HB 209's erroneous suppositions about “the economic well being of the state” hardly suffice to justify this oppressive and unfair piece of legislation.<sup>33</sup>

**H. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it provides no legally fixed standards for determining what is prohibited and what is not in a particular case, and, thus, is void for vagueness.**

**Standard:** Ordinary rules of statutory construction apply to the interpretation of

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<sup>33</sup> Aside from the fallacies and inconsistencies noted earlier (see pages 63-66, *infra.*), HB 209 makes no attempt to explain how a lawsuit pending against corporations, wherein no money has changed hands, impairs “the economic well being of the state.” Not only does HB 209 evidence a distrust of the judicial system, but its unstated premise is that any lawsuit brought against any company constitutes a threat to the State of Missouri. In effect, HB 209 places the profits and concerns of business interests on the same footing as state interests, blurring and equating the two to the point where the statement by GM President Charles E. Wilson over fifty years ago – “What’s good for the country is good for General Motors, and vice versa” – is more true than ever before.

the constitution, though “applied more broadly because of the permanent nature of constitutional provisions.” Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). “If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid.” State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality 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.” Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

The standard for determining whether a statute is void for vagueness is “whether the terms or words used are of ‘common usage and are understandable by persons of ordinary intelligence.’” Bd. of Educ. of the City of St. Louis v. State of Missouri, 47 S.W.3d 366, 369 (Mo. banc 2001). When statutory terms “are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, the statute is void.” Id. A statute that interferes with constitutionally protected rights – such as the various rights afforded municipalities in the Missouri Constitution – is held to a more stringent test for vagueness than other enactments. See, e.g., Geaneas v. Willets, 715 F.Supp. 334, 337-38 (M.D.Fla. 1989) (“enactments which interfere with constitutionally protected conduct should be held to a more stringent test for vagueness than other enactments”), affirmed 911 F.2d 579 (11<sup>th</sup> Cir. 1990).

HB 209 purports to give a court power to grant immunity where the evidence demonstrates that a telephone company possessed a “subjective good faith belief” that it was not subject to taxation. 92.089.2, RSMo. A telephone company possessing such a subjective good faith belief “shall not be liable to a municipality for, the payment of the

disputed amount of business license taxes...” Id. The phrase – “subjective good faith belief” – is not defined anywhere in the statute. See State of Tennessee v. Thomas, 635 S.W.2d 114, 116 (Tenn. 1982) (“[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined”).

The word “subjective,” as noted earlier, has several commonly accepted meanings, including “proceeding from or taking place within an individual’s mind such as to be unaffected by the external world,” “existing only in the mind; illusory,” and “existing only within the experiencer’s mind and incapable of external verification.” The American Heritage Dictionary (2<sup>nd</sup> ed. 1982). The Cities do not mean to suggest that the word “subjective” is unclear. Indeed, it is understood all too well. Rather, the Cities’ concern is that HB 209’s application – being subjective – is idiosyncratic to each telephone company, and it is incapable of verification or challenge by a court or municipality. Stated differently, to the extent HB 209 allows for lawsuit immunity based on the personal wishes and desires of the SBC defendants, it is free of external constraints and incapable of coherent application. A good faith standard based upon one’s subjective belief is no standard at all: it is arbitrary, meaningless, and illusory.

In addition to being “subjective,” HB 209 is vague because of the looseness of 92.089.2, RSMo. It is difficult to know whether the “subjective good faith belief” requirement applies to lawsuit immunity only, or to lawsuit dismissal as well. Within the space of two sentences, HB 209 states that a telephone company’s “subjective good faith belief” in its innocence shall entitle it to back-tax immunity, prospective tax immunity, and a release from liability. In the next sentence, HB 209 directs municipalities to immediately dismiss their lawsuits against such telephone companies without prejudice. Thus, does a telephone company need to first qualify for the “release from liability”

before a municipality can be forced to dismiss its lawsuit?<sup>34</sup> Further, what is the significance of the words “without prejudice” in this section? Why force a municipality to dismiss its lawsuit, and then re-file it, if a telephone company is imbued with immunity up to and including July 1, 2006?

The best example of vagueness is gleaned from the Act’s effect during the period August 28, 2005 (HB 209’s effective date) - July 1, 2006. Between those dates, exactly what is Missouri’s tax policy with respect to telephone companies? If understood correctly, a telephone company can pay a municipal license tax if it wants to during this period, but need not if it doesn’t want to, depending upon its “subjective good faith belief” as to whether such taxes are owed. 92.086.1, 92.086.2, 92.086.3, 92.086.4, 92.086.9, 92.089.2, RSMo. Thus, Missouri’s tax scheme for wireless and wireline telephone companies is whatever each carrier thought it was (before August 28, 2005) and whatever each carrier thinks it should be (from August 28, 2005 through July 1, 2006). Obviously, a tax system based on such unchecked discretion, *i.e.*, what each taxpayer thinks it was or

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<sup>34</sup> In another section of the bill, lawsuit immunity and lawsuit dismissal are discussed in the conjunctive insofar as “consideration” is concerned. See 92.089.1, RSMo.

is, cannot be allowed to stand.<sup>35</sup>

Because there is no way to apply HB 209 without getting an absurd result, its provisions are constitutionally void for vagueness.<sup>36</sup>

**I. To the extent HB 209 bars this appeal and/or the underlying claims, it**

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<sup>35</sup> The concern about “subjectivity” in taxation underlies a number of plaintiffs’ constitutional challenges, whether based on tax uniformity, special laws, or other constitutional grounds. The arguments made in this section are specifically incorporated by reference in all other sections of this brief wherein the constitutionality of HB 209 is challenged.

<sup>36</sup> See, e.g., Bd. of Educ. of the City of St. Louis v. State of Missouri, 47 S.W.3d 366, 371 (Mo. banc 2001) (school board’s challenge to statute on ground of vagueness upheld, where the terms of statute on election of school board members “are of such uncertain and contradictory meaning that this Court is unable to discern with reasonable certainty what was intended”); City of Waynesboro v. Keiser, 191 S.E.2d 196, 199 (Va. 1972) (portion of 1968 amendment to statute permitting adjustments in assessment of real estate taxes “if the court in its discretion finds the ends of justice would be met by making an adjustment” was vague and overly broad and unconstitutional); People v. Lee, 144 Misc.2d 11, 543 N.Y.S.2d 613, 615 (County Ct. 1989) (criminal statute prohibiting “wasting” of oil was unconstitutionally vague since term “waste” was “fraught with subjectivity and widely-varying connotations”).

**is unconstitutional because it arbitrarily and unreasonably classifies for purposes of taxation in violation of MO. CONST. art. X, § 3, which requires that taxes be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.**

“Exemptions from taxation are a renunciation of sovereignty, must be strictly construed and generally are sustained only upon the grounds of public policy. They should serve a public, as distinguished from a private, interest. Such is the basis of equal and uniform taxation.” Judge Conkling, writing in State ex rel. Transport Manufacturing & Equipment Co. v. Bates, 224 S.W.2d 996, 1000 (Mo. banc 1949), rehearing denied.

**Standard:** Ordinary rules of statutory construction apply to the interpretation of the constitution, though “applied more broadly because of the permanent nature of constitutional provisions.” Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). “If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid.” State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality 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.” Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

The Missouri Constitution provides that “[t]axes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.” MO. CONST. art. X, § 3. The word “uniform,” for purposes of this section, refers to “the measure, gauge or rate of

the tax,” whereas the words “same class of subjects” refer to “the classification of the subjects of taxation for...purposes of the tax.” City of Cape Girardeau v. Fred A. Groves Motor Co., 142 S.W.2d 1040, 1043 (Mo. 1940), overruled on other grounds. The uniformity must correspond to the territorial limits of the taxing district: “If the tax is a state tax, it must be uniform throughout the state. If the tax is a county tax, it must be uniform throughout the county, etc.” Dalton v. Metropolitan St. Louis Sewer Dist., 275 S.W.2d 225, 233 (Mo. banc 1955), rehearing denied. Thus, a “tax is uniform when it operates with the same force and effect in every place where the subject of it is found.” City of Cape Girardeau v. Fred A. Groves Motor Co., 142 S.W.2d at 1042.

Undoubtedly, absolute or perfect uniformity in taxation is not possible. Nevertheless, courts should strive to act in accordance with Article X, § 3 and to achieve equality and uniformity. As Judge Conkling explained:

“With wide discretion the General Assembly may make classifications for taxation purposes, but it is uniformly held that persons or property to be taxed may not be classified ‘without reason or necessity.’ There is no precise yardstick as to reasonableness of classification...Taxation is not an exact science and tax acts are not to be condemned merely because unavoidable inequalities may result. But the classification cannot be ‘palpably arbitrary.’ And while the General Assembly may enact statutes applicable to and classifying certain persons or property for taxation purposes yet such classification must include all persons or objects naturally falling within the class. Constitutional class taxation must include within the established class all who belong in it and must exclude all who do not belong in it. *All in each natural class must be taxed or exempted alike. A natural class may not be split. The Legislature may not arbitrarily designate for taxation a portion*

*only of a separate class and thus exclude a portion which reasonably should be included and taxed.* The tax imposed must apply alike to all naturally and reasonably within the classification set up by the statute. ‘The demands of the organic laws are satisfied if all similarly situated are included and none are omitted whose relationship to the subject-matter cannot *by reason* be distinguished from that of those included.’”

State ex rel. Transport Manufacturing & Equipment Co. v. Bates, 224 S.W.2d 996, 1000 (Mo. banc 1949) (emphasis added), rehearing denied. See also City of Cape Girardeau v. Fred A. Groves Motor Co., 142 S.W.2d at 1045 (“Broadly put, constitutional class legislation must include all who belong and exclude all who do not belong to the class. Legislative departments... may not split a natural class and arbitrarily designate the dissevered factions of the original unit as distinct classes and enact different rules for the government of each. ‘This would be a mere arbitrary classification, without any basis of reason on which to rest, and would resemble a classification of men by the color of their hair or other individual peculiarities, something not competent for the legislature to do.’”).

For the reasons discussed earlier, the general assembly’s tax classifications and exemptions do not apply uniformly to the same class of subjects. Under HB 209, direct competitors are treated differently for purposes of tax amnesty (*i.e.*, wireless and wireline carriers that failed to pay taxes are granted forgiveness to the exclusion of wireless and wireline carriers that did). Similarly, businesses forming a natural class are split for purposes of benefits (tax forgiveness, prospective cap, shortened statute of limitations, class action protection, etc.), depending upon whether they offer telephone, gas, water or electric services. Further, HB 209’s tax exemptions do not correspond to the territorial limits of the taxing district, because two municipalities – Jefferson City and Clayton – can

evade its provisions, whereas a 5% cap operates everywhere else in the State.

Such distinctions cannot be justified by reason, history or business practices and differ little from a prohibited classification based on the color of a person's hair. While the general assembly is given latitude in making tax classifications, the Missouri Supreme Court has not hesitated to strike down tax schemes under Article X, § 3, like this one, which discriminate against taxpayers forced to pay, or who have paid, the full measure of their taxes. See, e.g., City of St. Louis v. Spiegel, 2 S.W. 839, 840 (Mo. 1887) ("Under the provisions of [the challenged ordinance], an owner of a meat-shop in the [new city limits] may, for the consideration of \$50, not only sell meat in his stationary meat-shop, but may also sell meat in the [new city limits] from his ambulatory meat-shop on wheels, while the owner of a meat-shop in the [old city limits], though paying the same amount of license tax, has to content himself with making his sales at one place. If this is not discrimination, what is it?"); City of Kansas City v. Grush, 52 S.W. 286, 288 (Mo. 1899) ("Nor is there any reason why a merchant who deals altogether in produce should be required to pay \$50 for the privilege of carrying on his business, in addition to his ad valorem tax, while his neighbor, who deals in groceries, hardware, or dry goods, is wholly exempt from a license tax. Both are merchants, and neither are subject to more burdens than the other."); City of Washington v. Washington Oil Co., 145 S.W.2d 366, 367 (Mo. 1940); State ex rel. Transport Manufacturing & Equipment Co. v. Bates, 224 S.W.2d 996, 1000 (Mo. banc 1949) ("Is there any rational basis whatever for splitting buses into two classes, taxing smaller ones and exempting larger ones seating ten passengers or more? We have carefully...examined the Act for some indication of reasonable or public purpose in writing in the instant exemption, but none is found therein."); Southwestern Bell Tel. Co. v. M. E. Morris, 345 S.W.2d 62, 69 (Mo. banc

1961) (“Under the Sales Tax Act, locally purchased tangible personal property used or consumed by telephone companies, railroad and other public utilities,...in producing their services is subject to the sales tax...The [statutory] provisions now under examination would exempt from the use tax like property used for the same purposes, if purchased out of state. In so discriminating against locally purchased tangible personal property..., this exemption is...unconstitutional and void...”); Drey v. State Tax Commission, 345 S.W.2d 228, 237 (Mo. 1961) (“It seems hardly necessary to add that all wild timberlands must be assessed on an equal and comparable basis with all lands in the county whether rural or urban, farm land or timberland, improved or unimproved; that town lots, farm lands and wild timberlands may not be classified separately and assessed at different rates..., and that the constitutional requirements are not met by the assessment of all wild timberlands in the county on an equal, comparable and reasonably uniform basis while intentionally, designedly and systematically applying different rates to other entire classes of real property.”); Airway Drive-In Theatre Co. v. City of St. Ann, 354 S.W.2d 858, 861-62 (Mo. banc 1962) (“[W]e find it difficult to justify a distinction between moving picture shows held indoors and moving picture shows held outdoors in what is called a drive-in theater. The product sold by these highly competitive businesses is precisely the same and is dispensed for the same purpose...This unreasonable discrimination in the tax imposed on one subclassification of the statutory class of moving picture shows to the substantial tax advantage of actual or potential competitors with no reasonable justification for the different treatment clearly constitutes an abuse of the taxing power.”).<sup>37</sup>

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<sup>37</sup> See also 56 Am.Jur.2d Municipal Corporations § 756 (“It has been held that the

If these classifications are allowed to stand, one easily can foresee a line forming in Jefferson City during the next legislative session, as lobbyists for gas, water and electric companies – indeed, all businesses – seek similar license tax caps, immunities, and benefits. Extended to other industries, such caps and benefits would prevent municipalities from offering many of the services that citizens have a right to expect. HB 209 not only works a fraud upon businesses and individuals that pay their taxes, but its costs will hit ordinary citizens the hardest in the years to come.

**J. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it arbitrarily classifies for purposes of taxation in violation of CONST. art. I, § 2 and MO. CONST. art. I, § 2, which guarantee equal protection of the law.**

**Standard:** Ordinary rules of statutory construction apply to the interpretation of the constitution, though “applied more broadly because of the permanent nature of constitutional provisions.” Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). “If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid.” State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality do not apply “where, without the necessity for extraneous evidence, it appears from the provisions of the act  

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remission, release, or compromise of a valid claim for taxes, authorized by the legislature, violates a constitutional requirement that taxes be uniform upon the same class of subjects.”)

itself that it transgresses some constitutional provision.” Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

“A tax unconstitutionally denies equal protection if it imposes a charge on one class and exempts another class when the exemption is not ‘based on a difference reasonably related to the purpose of the law.’” City of St. Louis v. Western Union Telegraph Co., 760 S.W.2d 577, 583 (Mo.App.E.D. 1988).<sup>38</sup> To the extent HB 209 exempts select businesses from taxation, arbitrarily classifies for purposes of taxation, or otherwise discriminates against those who paid taxes, it denies equal protection of the law under the United States and Missouri Constitutions. See, e.g., City of St. Louis v. Western Union Telegraph Co., 760 S.W.2d at 583-584 (city ordinance which exempted telephone companies providing telegraph services from a tax imposed on telegraph services, but did not exempt telegraph companies, violated equal protection); State ex rel. Hostetter v. Hunt, 9 N.E.2d 676, 682 (Ohio 1937) (a statute under which non-delinquent taxpayers are obliged to pay taxes on a certain kind of property for certain years, while delinquent taxpayers owning the same kind of property during the same years are released from such obligations, violates the equal protection clause of the Constitution); Armco Steel Corp. v. Dept. of Treasury, 358 N.W.2d 839, 844 (Mich. 1984) (“case law in other jurisdictions has held it unconstitutional to benefit or prefer those who do not pay their taxes promptly over those who do” [collecting cases]); State of Kansas v. Parrish, 891

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<sup>38</sup> Because the issues and analysis overlap, the Cities’ arguments with respect to Article X, § 3 (tax uniformity) and Article III, § 40 (special laws) are incorporated by reference herein, and *vice versa*.

P.2d 445, 457 (Kan. 1995) (“[The challenged statute] is an unreasonable grant of a tax amnesty or ‘window of opportunity’ based solely on a characteristic or status of the taxpayer rather than upon appropriate classification of the property. Taxpayers are divided into two classes, those who honestly reported their property for taxation and those who, for whatever reason, did not report their property for taxation or underreported the property if returned. The latter group are granted freedom from taxation and statutory penalties, while the former group is not. Such discrimination, when judged against the taxation guidelines, is arbitrary and lacks the rational basis necessary to be constitutional.”).

**K. To the extent HB 209 bars this appeal and/or the underlying claims, it is unconstitutional because it is both over-inclusive and under-inclusive in violation of the single subject and clear title requirements of MO. CONST. art. III, § 23.**

**Standard:** Ordinary rules of statutory construction apply to the interpretation of the constitution, though “applied more broadly because of the permanent nature of constitutional provisions.” Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). “If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid.” State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality 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.” Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

The Missouri Constitution states that “no bill shall contain more than one subject

which shall clearly be expressed in its title...” MO. CONST. art. III, § 23. This language imposes two requirements. First, all provisions of the bill must fairly relate to the same subject. Second, the title of the bill must fairly embrace the subject matter covered by the act. These limitations serve to “facilitate orderly procedure, avoid surprise, and prevent ‘log rolling,’ in which several matters that would not individually command a majority vote are rounded up into a single bill to ensure passage.” Stroh Brewery Co. v. State of Missouri, 954 S.W.2d 323, 326 (Mo. banc 1997).

HB 209's title reads: “AN ACT to amend Chapters 71, 92, and 227, RSMo., by adding thereto eighteen new sections relating to assessment and collection of various taxes on telecommunications companies.” The title is affirmatively misleading. It gives a reader the mistaken impression that HB 209 pertains exclusively to taxes on telecommunications companies, without alerting the reader to chapter 227's provisions specifying the manner in which utilities in highway right-of-ways may be constructed or relocated. Consequently, HB 209's title is under-inclusive. See, e.g., National Solid Waste Mgmt. Assoc. v. Director of Dept. of Natural Resources, 964 S.W.2d 818, 821 (Mo.banc 1998), as modified on denial of rehearing.

In addition, HB 209 contains more than one subject, because it joins two unrelated acts: (i) the Municipal Telecommunications Business License Tax Simplification Act, with an effective date of August 28, 2005, which amends chapters 71 and 92, RSMo, and regulates the municipal collection of business license taxes on telecommunications companies, and (ii) the State Highway Utility Relocation Act, with an effective date of January 1, 2006, which amends chapter 227, RSMo, and governs the relocation of electric, telephone, telegraph, fiberoptic, and cable television utility facilities. As a result, HB 209's disparate provisions cannot be said to “fairly relate” to the same subject. See,

e.g., Hammerschmidt v. Boone County, 877 S.W.2d 98, 103 (Mo. banc 1994).

For one or both of these reasons, HB 209 violates the requirements imposed by MO. CONST. art. III, § 23.

- L. Because the invalid provisions are so essentially connected with the remainder of the Act, they are not severable and those portions of HB 209 purporting to amend chapters 71 and 92, RSMo, are void in their entirety.**

“The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.” § 1.140, RSMo.

“The test of the right to uphold a law, some portions of which may be invalid, is whether or not in so doing, after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left, which the Legislature would have enacted if it had known that the excised portions were invalid.” Labor’s Educ. And Political Club Ind. v. Danforth, 561 S.W.2d 339, 350 (Mo. banc 1977), rehearings denied, quoting from State ex rel. Audrain County v. Hackmann, 205 S.W. 12, 14 (Mo. banc 1918).

In contrast to the typical “severability” clause, which seeks to uphold an enactment in the event that a portion is found to be unconstitutional (see § 1.140, RSMo), HB 209

contains a reverse severability clause. It provides, *inter alia*: “All provisions of sections 92.074 to 92.089 are so essentially and inseparably connected with, and so dependent upon, each other that no such provision would be enacted without all others. If a court of competent jurisdiction enters a final judgment on the merits that is not subject to appeal and that declares any provision or part of sections 92.974<sup>39</sup> to 92.089 unconstitutional or unenforceable then sections 92.074 to 92.089, in their collective entirety, are invalid and shall have no legal effect as of the date of such judgment.” 92.092, RSMo.

This suggests recognition of possible constitutional infirmities, and it is a clear manifestation of legislative intent in the event of such a finding. Thus, if any portion of HB 209 is found to be invalid on one of the grounds herein, then the amendments to sections 92.074 to 92.089 are void in their entirety. See also State ex rel. Transport Manufacturing & Equip. Co. v. Bates, 224 S.W.2d 996, 1001 (Mo. banc 1949) (Where an “exemption or excepting proviso of a taxing statute is found to be unconstitutional, the substantive provisions which it qualifies cannot stand. The courts have no power by construction to extend the scope of a taxing statute and make it applicable to those to whom the General Assembly never intended it should apply, thus taxing those whom the Legislature said should not be taxed.”), rehearing denied.

That leaves 71.675, RSMo, which is treated separately from the Municipal Telecommunications Business License Tax Simplification Act and is protected by its own “severability” clause. See 92.089, RSMo. 71.675, RSMo, reads in part: “Notwithstanding any other provision of law to the contrary, no city or town shall bring any action in federal or state court in this state as a representative member of a class to enforce or

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<sup>39</sup> This is likely a drafting error. Presumably, “92.974” should read “92.074.”

collect any business license tax imposed on a telecommunications company.” 71.675.1, RSMo. In the absence of words expressing a contrary legislative intent, this provision is prospective only and does not affect the instant case, but rather lawsuits filed on or after HB 209's effective date. However, it is arbitrary and unfair in the extreme: not only does 71.675, RSMo, deny cities the right to pursue class actions enjoyed by citizens, businesses and counties, and shield telephone companies – alone – from municipal class actions, but it impairs municipal access to federal courts and it contravenes Mo. S. Ct. Rule 52.08 and Fed. R. Civ. P. 23. In light of this conflict, the Missouri Constitution and the Supreme Court Rules control over 71.675, RSMo. See, e.g., Clark v. Austin, 101 S.W.2d 977, 988 and 995 (Mo. banc 1937) (“Neither the granted or inherent powers of the General Assembly can be taken away by the courts, nor can the like powers of our constitutional courts be usurped or destroyed by the General Assembly.”) (Ellison, C.J., separate opinion); In Re Constitutionality Of Section 251.18, Wisconsin Statutes, 236 N.W. 717, 720 (Wis. 1931) (“[T]he power to regulate procedure, at the time of the adoption of the Constitution, was considered to be essentially a judicial power, or at least not a strictly legislative power...”); Zavaleta v. Zavaleta, 358 N.E.2d 13, 16 (Ill.App.1st Dist. 1976) (“Where a statute conflicts with a supreme court rule on a matter of procedure, the supreme court rule controls.”), rehearing denied.<sup>40</sup>

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<sup>40</sup> See also MO. CONST. art. III, § 40(4), (6) and (30), which forbids the passage of local or special laws (i) “regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before the courts,” (ii) “for limitation of civil actions,” and (iii) “where a general law can be made applicable.”

Being invalid and self-contained, 71.675, RSMo, falls alongside the Municipal Telecommunications Business License Tax Simplification Act. It cannot be saved by a “severability” clause that is no broader in scope than the void provision.

**V CONCLUSION**

For the foregoing reasons, Plaintiffs-Appellants, the Cities of Winchester and Wellston, Missouri, request that this Court reverse the trial court’s order, dated August 8, 2005, and remand this matter to the Circuit Court of St. Louis City for further proceedings thereon. If this Court reaches the constitutionality of HB 209, the Cities ask that those portions of the Act purporting to amend chapters 71 and 92, RSMo, be declared unconstitutional and void in their entirety.

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**RULE 84.06(c) CERTIFICATION**

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2002 and contains 28,511 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent via First Class Mail, postage pre-paid, this 26<sup>th</sup> day of January, 2006, addressed to the following:

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**No. 87207**

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**In the  
Supreme Court of Missouri**

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CITIES OF WELLSTON and )  
WINCHESTER, MISSOURI, et al., )  
on behalf of themselves and all )  
others similarly situated, )  
 )  
Plaintiffs-Appellants, )  
 )  
v. )  
 )

On Appeal from the Circuit  
Court of St. Louis City,  
State of Missouri  
  
No. 044-02645

SBC COMMUNICATIONS, INC., )  
et al., )  
 )  
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