

No. SC87207

IN THE SUPREME COURT OF MISSOURI

CITIES OF WELLSTON AND WINCHESTER, MISSOURI,

Appellants,

v.

SBC COMMUNICATIONS INC., SOUTHWESTERN BELL COMMUNICATIONS
SERVICES, INC., AND SOUTHWESTERN BELL TELEPHONE, L.P. f/k/a
SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondents.

On Appeal from the Circuit Court of the City of St. Louis

No. 044-02645

The Honorable David L. Dowd, Circuit Judge

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STATEMENT OF FACTS

The cities of Wellston and Winchester (“the Cities”) filed this putative class action against SBC¹ seeking allegedly unpaid business license taxes on gross receipts from providing telephone services “within” their city limits. Am.Pet.R6-17; R39-40.² In their suit, the Cities requested a declaration that **all** SBC services are taxable (not just local telephone service), an accounting, back taxes, interest, and penalties. Am.Pet.R41-42.

On August 9, 2005, the trial court dismissed the Cities’ action, finding they lacked authority to bring suit because state law requires that tax collection actions such as this be brought by city collectors at the relation of the state. TrialCt.J.R353-59 (citing §§94.150, 94.310 RSMo.2000).

¹ Collectively AT&T Inc. f/k/a SBC Communications Inc., a holding company, Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, a local telephone service provider, and SBC Long Distance, LLC f/k/a SBC Communications Services, Inc., a long-distance telephone service provider.

² Cites are as follows: Record on Appeal-R_; Appellants’ Brief-App.Br._; Appellants’ Appendix-App.Appx._; Respondents’ Appendix-Resp.Appx._; and Amicus Brief-Am.Br._.

On August 28, 2005, Missouri House Bill 209 (“HB209”) took effect.

Resp.Appx.A1-16. The core subject of HB209 was the Telecommunications Tax Act (“TTA”).³ The TTA has two basic components.

First, the TTA establishes a consistent Missouri telecommunications license tax policy, which applies equally to wireless and conventional telecommunications companies. It imposes a uniform tax base on gross receipts for telecommunications license taxes—the same base as that for sales taxes under RSMo. Ch.144. §92.086.4. It also requires the Director of Revenue to collect and administer those taxes on behalf of municipalities. §92.086.3.

Second, the TTA sought to relieve Missouri’s economy and Missouri companies and consumers from the burden of existing license tax litigation.⁴ It requires

³ Formally, the Municipal Telecommunications Business License Tax Simplification Act, §§92.074-.098. References to the statutes comprised in HB209 are to RSMo.(Supp.2005). HB209 also includes the State Highway Utility Relocation Act, §§227.241-.249, and a class action prohibition, §71.675. Resp.Appx.A1-16.

⁴ When HB209 was enacted, at least seven similar actions were pending on behalf of over 1200 Missouri municipalities against SBC and wireless telecommunications companies. See App.Br.77 n.20 (citing five of these cases). *City of University City, Mo., et al. v. AT&T Wireless Services, Inc., et al.*, No. 01-CC-004454, which the Cities list, includes a consolidated case, *St. Louis County, Mo., et al. v. AT&T Wireless Services, Inc., et al.*, 04CC-002512 (St. Louis County Circuit Court filed June 15, 2004, consolidated into No.

municipalities that brought license tax collection suits against telecommunications companies anytime before July 1, 2006, to immediately dismiss those suits without prejudice. §92.089.2. There is no question but that this requirement includes this action.

The TTA further provides that telecommunications companies that had a “subjective good faith belief” that they were not subject to license tax ordinances are entitled to “full immunity from, and shall not be liable to” municipalities for the payment of disputed license taxes through July 1, 2006. §92.089.2. The TTA extends the same immunity to telecommunications companies that had a subjective good faith belief that certain revenue categories were not subject to license tax ordinances. §92.089.2.

The General Assembly specifically found that the existing telecommunications license tax litigation was detrimental to the economic well being of Missouri. §92.089.1. It further found that resolving the litigation, and establishing uniform rules, coupled with cost savings and future revenues, provided consideration for the TTA’s immunity and dismissal provisions. §92.089.1.

The TTA does not direct a fact-finder to make a finding that any particular telecommunications company had the required subjective good faith belief to qualify for immunity. §92.089.2. The TTA does not prevent municipalities from refiling any action

01-CC-004454). Additionally, the Cities fail to reference *City of Manchester, Mo., et al. v. Southwestern Bell Telephone L.P., et al.*, 4:04-CV-1308-HEA (E.D.Mo. removed Sept. 24, 2004) (pending on appeal in the United States Court of Appeals, Eighth Circuit, No. 05-2641).

dismissed under its terms. §92.089.2. And it does not direct any court to vacate or dismiss any final judgment finding that a telecommunications company owed license taxes to any municipality. §92.089.2.

HB209 also codifies existing law prohibiting municipal tax collection class actions, but expressly permits municipalities to prospectively bring actions in their own names to collect license taxes on telecommunications companies. §71.675.1.

When HB209 became effective, the Cities' petition had already been dismissed. The Cities nonetheless appealed. Resp.Appx.A17. SBC moved to dismiss the appeal under the TTA's dismissal provision. Resp.Appx.A20-26. The Cities responded by challenging the constitutionality of HB209, including its provisions relating to uniform telecommunications license taxes, its dismissal and immunity provisions, and its class action prohibition. Resp.Appx.A27-40. Deferring to the exclusive jurisdiction of the Supreme Court of Missouri over cases implicating the Missouri Constitution, the appellate court transferred this appeal upon SBC's motion. Resp.Appx.A47-48.

ARGUMENT

This appeal presents two fundamental questions. Is changing statewide tax policy the province of the General Assembly or the class action bar? And, making such changes, can the General Assembly defer speculative back tax claims brought by municipalities, which derive their very existence and all of their powers from the General Assembly? Invalidating the TTA would effectively revoke the General Assembly's plenary authority over municipal taxation and, at least with respect to the

telecommunications industry, position municipalities to assume that authority through litigation.

For decades, Missouri’s municipal telecommunications license taxes have been strictly limited to gross receipts from the provision of traditional local telephone service.⁵ Under this established policy, SBC Missouri has paid hundreds of millions of dollars to Missouri municipalities—including the Cities without complaint, until recently. *See generally* Resp.Appx.A49-56.

With the recent increase in the use of wireless telecommunications in Missouri, customers began migrating from conventional telephones to wireless phones. As a result, revenues from conventional local telephone services—like those SBC provides—decreased. Missouri municipal license tax revenues decreased accordingly. Apparently responding to this decline, some municipalities filed lawsuits against SBC and wireless companies. Although SBC paid taxes for decades on only local telephone services, these municipalities now ask Missouri courts to reinterpret existing ordinances to reach long-distance revenues. These lawsuits seek an unspecified amount of “back taxes,” presumably hundreds of millions of dollars. If successful, most of what would be

⁵ Multiple reasons support that these ordinances’ reaching only local telephone service. First, these ordinances purport to tax telephone service “within the city,” which numerous courts have interpreted as meaning only local telephone service. Second, at the time most Missouri municipal license tax ordinances were enacted, taxing the long-distance services the Cities now seek to tax would have violated the federal Commerce Clause.

recovered through this litigation would ultimately be passed through to Missouri consumers, by virtue of mandatory tariffs or simple economic reality.

The General Assembly recognized that a decline in license tax revenues adversely impacted municipalities across the state. It also recognized that efforts to address this revenue decline through costly litigation adversely affected Missouri consumers, Missouri's telecommunications industry, and—because of its heavy dependence upon that industry—the Missouri economy. To balance these interests, the General Assembly enacted the TTA, eliminating the potential for both municipal and industry abuse, and establishing a prospective tax policy addressing profound changes within the telecommunications industry.

The TTA represents a compromise between the needs of Missouri municipalities and Missouri telecommunications companies. Increased taxes on telecommunications companies would affect not only the telecommunications industry, but the state as whole, which relies extensively on this industry. In exchange for requiring municipalities to carry a heavier burden in pursuing their back tax claims, the TTA expands their tax base by permitting them to tax intrastate long-distance toll revenue and wireless revenue, in addition to the local telephone revenues they taxed previously. The TTA also allows municipalities to pursue back tax claims individually, relieves them of their tax collection burdens, and establishes a uniform telecommunications tax policy throughout the state.

The Cities challenge the TTA under numerous provisions of the Missouri Constitution, including the prohibitions against extinguishing an indebtedness owed political subdivisions without consideration, granting public funds for private purpose,

special laws, and separation of powers. But the TTA does not violate these—or any other—provisions of the constitution.

Because the Cities seek an unspecified, unliquidated sum from the defendants, and also because their speculative claims are subject to substantial defenses not yet considered by any court, the Cities' claims do not arise out of an indebtedness owed them. Moreover, the TTA's prospective tax base confers considerable benefit on municipalities. And, its standards governing collection actions based on pre-TTA tax base disputes advance public purposes. The act employs only reasonable classifications related to its purpose of addressing issues unique to the telecommunications industry, and thus is not a special law. Finally, because the Cities are not coordinate branches to the General Assembly, but rather subordinate governmental entities, not one of the TTA's provisions impermissibly violates separation of powers based on impairing municipal rights.

Because the Cities challenge the constitutionality of HB209, transfer by the Court of Appeals was proper based on this Court's exclusive jurisdiction. But the underlying issue on appeal to this Court is moot because, among its other requirements, the TTA mandates dismissal of the Cities' lawsuit. And even if this Court reaches the underlying issue of whether the Cities had legal authority to bring this collection action in the first place, it should affirm the trial court's dismissal under the exclusive tax collection procedures properly established by the General Assembly.

A. This Court Has Exclusive Jurisdiction Because The Cities Have Challenged The TTA's Constitutionality (Responding To Appellants' Point B).

Despite their having challenged the TTA's constitutionality, the Cities argue that this Court does not have jurisdiction over this appeal. Whenever "the validity of a statute is involved," however, this Court clearly has exclusive jurisdiction. *State ex rel. Union Elec. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 164 (Mo.banc 1985).

The Cities attempt to evade this Court's exclusive jurisdiction by arguing that the TTA does not apply to this suit. The TTA, however, requires the "immediate" dismissal of any lawsuit brought by any municipality "prior to July 1, 2006...for the nonpayment by a telecommunications company of municipal business license taxes." §92.089.2. Because this is an action to collect telecommunications license taxes, the TTA applies, and the Cities must dismiss their appeal. By challenging the TTA's constitutionality, the Cities forced the appellate court to transfer. *See Union Elec.*, 687 S.W.2d at 165 (holding that where any issue involves a statute's constitutionality, the appellate court is "without power to decide" the appeal).

Alternatively, the Cities argue that transfer was improper because (1) the appellate court did not consider whether the TTA applies, (2) the appellate court did not resolve certain factual issues, and (3) the trial court did not consider the TTA when it dismissed their claims, nineteen days before the act took effect. App.Br.37-39. But the transfer order itself belies the Cities' contention that the appellate court did not consider whether the TTA applies. *See Resp.Appx.A47-48* (recognizing first that the Cities brought a collection action against SBC and later that the act requires dismissal of such actions).

Moreover, there were no factual issues for the appellate court to address. While the Cities argue that SBC’s immunity under the TTA should have been considered before transfer, SBC’s immunity is irrelevant to the dismissal requirement of the act. *See* Part B.8.b *infra* (discussing independent dismissal and immunity provisions). *Accord* App.Br.53 (stating that “in addition” to its immunity provision, the TTA “calls for the dismissal of pending lawsuits brought by municipalities”). And, even if the TTA required a finding of subjective good faith, this would not militate against transfer because once a statute’s constitutional validity is challenged, exclusive jurisdiction vests in this Court and the appellate court is without authority to decide some issues and transfer others. *Union Elec.*, 687 S.W.2d at 165.

Finally, that the trial court failed to consider an act not then in effect does not preclude the appellate court—or this Court—from considering that act’s application. “When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.” *Plaut v. Spendthrift Farm*, 514 U.S. 211, 227 (1995). *See also Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys.*, 950 S.W.2d 854, 857 (Mo.banc 1997) (citing *Plaut* approvingly and upholding law requiring dismissal of pending litigation).

B. The Cities Cannot Meet Their Extremely Heavy Burden To Prove HB209 Unconstitutional.

A party challenging the constitutionality of a statute “bears an extremely heavy burden,” and must show that the statute “plainly and palpably affronts fundamental law

embodied” in the constitution. *Etling v. Westport Heating & Cooling Servs.*, 92 S.W.3d 771, 773 (Mo.banc 2003) (quotations and citations omitted).⁶

Moreover, to carry this “extremely heavy burden,” a constitutional challenge must overcome two presumptions Missouri courts have established in favor of constitutionality. First, a statute is presumed constitutional and will not be found unconstitutional “unless it clearly and undoubtedly contravenes the constitution.” *Adams v. Children’s Mercy Hosp.*, 832 S.W.2d 898, 903 (Mo.banc 1992). Second, “[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.” *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo.banc 1991) (quotations omitted). Importantly, “[i]t is not the Court’s province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature’s determination.” *Id.* (quotations omitted).

The Cities argue that these presumptions do not apply ““where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision.”” *See App.Br.45* (quoting *Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 n.2 (Mo.banc 1992)). This exception, however, applies only in those rare instances where a statute’s violation of a particular constitutional provision is readily and clearly apparent. In the only two decisions invoking this

⁶ The standard set forth in this section applies to each of the Cities’ constitutional challenges unless SBC specifically designates a different standard.

exception, the statutes at issue imposed ad valorem taxes based on factors other than property value, directly contravening article X, §4(b)'s express requirement.⁷ See generally *McKay Buick, Inc. v. Love*, 569 S.W.2d 740 (Mo.banc 1978); *McKay Buick, Inc. v. Spradling*, 529 S.W.2d 394 (Mo.banc 1975). It is impossible to reconcile the “readily and clearly apparent” unconstitutionality of HB209 with the municipalities’ and their amici’s over 600 pages of briefing. There is no exception here to the strong presumption of HB209’s constitutionality, and the Cities cannot satisfy their “extremely heavy” burden required to overcome this presumption.

1. The TTA Does Not Extinguish An Indebtedness, Liability, Or Obligation Due The Cities Without Consideration Under Article III, §39(5) (Responding To Appellants’ Point D).

The Cities argue that the dismissal and immunity provisions of the TTA violate the constitution’s anti-extinguishment provision by taking away their right to the back taxes they contend are owed. A statute violates this provision, however, only if (1) a political subdivision is owed an indebtedness, liability, or obligation (2) which the statute releases or extinguishes (3) without consideration. MO.CONST. art.III, §39(5). None of these requirements are met here. First, the Cities’ claims are not a constitutionally protected “indebtedness, liability, or obligation” because they seek an unliquidated amount, their right to which is in doubt. Second, the TTA does not “extinguish” these speculative claims because it does not foreclose the Cities’ right to collect, but merely

⁷ The *Witte* decision itself did not even apply this rarely invoked exception.

requires them to dismiss their lawsuit “without prejudice,” and, upon refile after July 1, 2006, establishes a new standard for courts to apply when the Cities proceed. Third, even if the Cities’ speculative claims were protected and had been extinguished, their challenge would fail because the TTA provides consideration to municipalities by, among other things, allowing them to tax telecommunications prospectively on an expanded and certain base.

a. The Cities’ claims are not protected.

In *Beatty v. State Tax Commission*, this Court’s only decision interpreting the anti-extinguishment provision in the last fifty years, it was argued that a mid-year statutory change reclassifying apartments to tax them at a lower rate extinguished an indebtedness, liability, or obligation due a county. 912 S.W.2d 492, 494, 497-98 (Mo.banc 1995). The tax at issue, however, was not yet “fixed as a sum certain” because the rate and base had not been finally established. *Id.* at 497. Seizing on the speculative nature of this tax, the *Beatty* Court rejected the challenge and held that a political subdivision’s anticipated tax revenues are not constitutionally protected until an amount is both liquidated and certain. *Id.* at 498 (“Because the amount of the tax is uncertain until not later than September 20, no obligation, liability or indebtedness within the meaning of article III, §39(5), exists until that date.”). The Cities’ claims do not meet either requirement, as they do not seek any specific amount and their right to collect is doubtful.

i. The Cities do not seek a liquidated sum.

The Cities have not audited SBC, issued an assessment, or specified an amount in their petition. Am.Pet.R33-44. Nor have they estimated any alleged deficiency. *See*

§144.250.4 RSMo.(Supp.2004) (director of revenue must estimate delinquent taxpayer's gross receipts); §143.611.2 RSMo.2000 (same as to income); §§94.150, 94.310 RSMo.2000 (third- and fourth-class cities enforce taxes "under the same rules and regulations...[as the] state and county"). Because the amount they seek is unliquidated, their claims are not constitutionally protected. *Cf. State ex rel. Carmichael v. Jones*, 41 So.2d 280, 285 (Ala.1949) (even where political subdivision sought exact amount, this amount was unprotected from extinguishment because a "fixed" assessment "was the purpose of the suit"); *State ex rel. S. Real Estate & Fin. Co. v. City of St. Louis*, 115 S.W.2d 513, 514 (Mo.App.1938) ("[u]ntil the amount of the tax was finally fixed and determined so that not only could relator be required to pay it but the city to accept it, there was no tax due the city from relator").

While the Cities argue, first, that even unliquidated amounts are constitutionally protected and, second, that their claims are liquidated in any event, both arguments fail. Initially, the cases they rely on to support their first argument actually involved sums certain. *See App.Br.58-59* (citing *Graham Paper v. Gehner*, 59 S.W.2d 49, 50 (Mo.banc 1933) ("It was agreed that...the tax increase would be \$1,635.20. This is the amount in dispute.");⁸ *First Nat'l Bank v. Buchanan County*, 205 S.W.2d 726, 728 (Mo.1947) ("The ordinance was approved April 29, 1946, and levies a tax on all the banks totalling

⁸ Thus *Graham's* reference to the tax there as "inchoate" or "unmatured" simply meant that these liquidated, undisputed amounts were "not due or yet payable." 59 S.W.2d at 52.

\$28,902.25.”)). Even though the Cities seek to tax all SBC receipts at a given rate, moreover, their claims are still unliquidated because the tax base is disputed, i.e., there has been no determination as to what receipts are attributable to telephone service provided “within” the Cities under their ordinances. *See infra* pp. 34-36 (discussing tax base dispute). *See also State ex rel. Ford Motor Co. v. Gehner*, 27 S.W.2d 1, 3 (Mo.banc 1930) (holding that corporate income taxes like those in *Graham* were not a sum certain even after the taxpayer earned income because the tax assessor had not finally calculated the tax base and “[i]n no sense does the statute itself determine the amount of the taxes”).

ii. The Cities’ right to collect is uncertain.

The Cities also do not have a constitutionally protected right to collect the taxes they seek because their claims are disputed. All SBC would have to establish to render the Cities’ claims speculative is that its defenses are colorable. SBC more than meets this standard. Its substantial defenses cast grave doubt upon the Cities’ right to collect. Thus, the Cities’ anticipated tax revenues are by definition “uncertain.” *Beatty*, 912 S.W.2d at 498. *Accord Cole v. Burton*, 232 S.W.2d 838, 840 (Ky.App.1950) (taxes sought were unprotected under anti-extinguishment provision where genuinely disputed and only an interlocutory judgment supported tax’s validity).⁹

⁹ The Cities’ amicus analogizes SBC’s defenses to the existence of defenses in the pre-judgment interest context. NLC/IMLA Am.Br.18. But the principle in that context is that defenses, once rejected, do not deprive the plaintiff of interest to which he is entitled.

The Cities' ordinances tax only receipts derived from supplying telephone service "within the city." WINCHESTER, MO., MUN. CODE Ch.640 (R45-46); WELLSTON, MO., CODE OF ORDINANCES §13-131 (1980) (R52). Numerous courts, including this one, have held that the term "within the city," when used in reference to telephone services, refers only to local telephone services. The Court reached this precise question in *Home Telephone Co. v. City of Carthage*, 139 S.W. 547, 549 (Mo.banc 1911). At issue was whether a city was authorized to regulate rates for long-distance service under an enabling statute permitting cities to regulate rates for telephone services "within" the city. *Id.* This Court held that the city was only permitted to regulate rates for local telephone service because only local service occurred "within the city." Therefore, the Court reasoned, the city could not regulate long-distance service, since such service was not "within the city." *Id. Accord City of Vermillion v. N.W. Tel. Exch.*, 189 F. 289, 290 (8th Cir.1911) (ordinance permitting telephone business "within the city" allowed only local telephone service). *See also Town of Alexandria v. Clark County*, 231 S.W.2d 622, 623-24 (Mo.1950) (holding that "within" means "completely within" and not partially or "substantially within").

In short, the tax base here is not all SBC services, as the Cities allege, but only local service, on which SBC already pays. The additional services the Cities seek to tax—long-distance and "access service," meaning "services and facilities provided for

The question here is whether SBC's substantial defenses are relevant where no court has ever considered them, much less rejected them.

the origination or termination of any interstate or foreign telecommunication,” *GTE S.W. Inc. v. Taxation & Revenue Dep’t*, 830 P.2d 162, 164 (N.M.App.1992) (citing 47 C.F.R. §69.2(b) (1990))—are long-distance services, not local telephone services, and thus are not included in the tax base. See Am.Pet.R41-42.

That access charges are not included in the tax base is further evidenced by numerous decisions throughout the country. See, e.g., *GTE Sprint Commc’ns v. Dep’t of Treasury*, 445 N.W.2d 476, 478-79 (Mich.App.1989) (access charges are not included in tax base for use tax on local telephone service); *City of Dallas v. GTE S.W.*, 980 S.W.2d 928, 934 (Tex.App.1998) (access charges are not included in tax base for franchise tax on “telecommunications service within the city”).

In addition to the plain meaning of their ordinances reaching only local telephone services revenue, the Cities cannot have intended to tax the long-distance revenues at issue here. Wellston’s ordinance has existed since at least 1972, and Winchester’s since at least 1961. Resp.Appx.A57, A58. At that time, taxing interstate services would have violated the federal Commerce Clause. See generally *Cooney v. Mountain States Tel. & Tel.*, 294 U.S. 384, 393-94 (1935); *N.J. Bell Tel. Co. v. Bd. of Taxes & Assessment*, 280 U.S. 338, 346 (1930). This interpretation of the Commerce Clause did not change until 1977, when the Supreme Court decided *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Courts presume that legislation is intended to be constitutional when enacted. *Ellis v. Dep’t of Pub. Health & Welfare*, 277 S.W.2d 331, 337-38 (Mo.App.1955). Applying this presumption, the Cities could not have intended to tax interstate services when they enacted their license tax ordinances. See *GTE S.W.*, 830

P.2d at 169 (applying 1969 Commerce Clause jurisprudence to interpret tax ordinance enacted in 1969); *Ill. Bell Tel. Co. v. Allphin*, 443 N.E.2d 580, 582-83 (Ill.1982) (applying 1945 Commerce Clause jurisprudence to interpret tax statute enacted in 1945).¹⁰

The Cities' only argument that SBC's defenses are not colorable is that SBC failed to pay under protest and thus waived all defenses. App.Br.62. But SBC had no reason to believe it owed the taxes the Cities seek, and the Cities cannot rely on their lawsuit to counter that good-faith belief and simultaneously eliminate SBC's right to defend against these taxes. The case relied on by the Cities to argue otherwise, *Metts v. City of Pinelawn*, 84 S.W.3d 106 (Mo.App.2002), is inapposite. *Metts* did not concern a taxing entity suing a taxpayer, as occurred here, nor did it address when a taxpayer defendant may raise affirmative defenses. Rather, *Metts* involved a taxpayer suing a taxing authority for affirmative relief, and its holding was limited to the statutory procedures taxpayers must follow in such situations.

¹⁰ The Cities' attempt to tax access charges is also unconstitutional because this service did not exist until 1983, three years after the enactment of the Hancock Amendment. *See In re MTS & WATS*, 93 F.C.C.2d 241 (1983); *In re Filing by S.W. Bell*, Mo.PSC Order Nos. TR-83-253 & TR-83-288 (Dec. 20, 1983). The Cities have not alleged that they complied with Hancock's requirement to either obtain a vote of the people for the new tax or reduce their levy to offset a broadened base. *See* MO.CONST. art.X, §22. *See generally* Am.Pet.R33-44.

If the Cities' suit were permitted to proceed, SBC would prevail on its substantial defenses. SBC, however, need not establish substantial defenses to render the Cities' claims uncertain, but merely colorable ones. Because its defenses undoubtedly meet this standard, SBC does not owe the Cities anything with certainty, and the anti-extinguishment provision does not apply.

iii. The Cities cannot distinguish *Beatty*'s certainty standard.

The Cities attempt to distinguish *Beatty* solely because it involved property taxes. They argue that *Graham* controls instead because it involved corporate income taxes. App.Br.55 n.10. But the *Beatty* Court, fully briefed on *Graham*, suggested no such distinction. And, even if it had, a license tax is not a corporate income tax. See *Carter Carburetor Corp. v. City of St. Louis*, 203 S.W.2d 438, 440 (Mo.banc 1947) (holding that city earnings tax was "obviously...not a license tax," but rather "a species of income or excise tax").

Contrary to the Cities' assertion, moreover, *Graham* does not establish that the taxable event is relevant here. See App.Br.54-55 (citing *May Dep't Stores v. Dir. of Revenue*, 1986 WL 23204, at *15 (Mo.A.H.C.1986), to argue that SBC's receipt of revenues is the taxable event). The anti-extinguishment provision does not prohibit extinguishing uncertain claims alleged to be owed after the taxable event. Rather, it bars extinguishing liquidated and certain claims, *Beatty*, 912 S.W.2d at 497-98, regardless of the taxable event. See *Graham*, 59 S.W.2d at 52 (provision extends to taxes "though not due or yet payable").

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

b. Nothing has been extinguished.

The TTA permits municipalities to sue after July 1, 2006, for any license taxes allegedly unpaid before that date, subject only to subjective good faith immunity. §92.089.2. Delaying or even making more difficult the Cities’ ability to sue is not an absolute deprivation of any right. Absent an absolute deprivation, there is no release or extinguishment. *See* BLACK’S LAW DICTIONARY 1289 (6th ed.1990) (“release” means “[g]iving up or abandoning of claim or right”); *id.* at 584 (“extinguishment” means “[t]he destruction or cancellation of a right, power, contract, or estate,” which “connotes the end of a thing”). Resp.Appx.A62, A61. Thus, even if an indebtedness existed here, the TTA still would not violate the anti-extinguishment provision.

c. The TTA provides consideration.

Missouri’s anti-extinguishment provision is “unique...in its inclusion of the words ‘without consideration,’ which were added by the Constitution of 1945.” App.Br.53. By qualifying the previous categorical prohibition, Missourians conferred on the General Assembly greater authority to extinguish indebtedness than (1) existed (and exists) in

states without such qualifying language, and (2) had previously existed in Missouri.¹¹ Because no Missouri court has addressed the meaning of “without consideration” in the anti-extinguishment provision, this Court must look to definitions commonly in use at the time of its adoption. *Akin v. Gaming Comm’n*, 956 S.W.2d 261, 263 (Mo.banc 1997). In 1945, “consideration” was defined as “something given in payment; a reward, remuneration.” OXFORD ENGLISH DICTIONARY 858-59 (1933, reprinted in 1961). Resp.Appx.A65-66.

Initially, any consideration owed must be for an existing debt. While the Cities assert that the General Assembly gave away future tax revenues without consideration, App.Br.66, they are not entitled to consideration for prospective changes in their taxation powers. MO.CONST. art.III, §39(5) (protecting indebtedness, liability, or obligation already “due” political subdivisions). *See also infra* pp. 88-91 (discussing General Assembly’s plenary control over municipal taxation).

¹¹ The Cities contend that “without consideration” is equivalent to Arkansas’s requirement that no liability be discharged “save by payment into the public treasury.” App.Br.53 n.9 (citing ARK.CONST. art.XII, §12). But Arkansas’s provision predates Missouri’s 1945 adoption of “without consideration.” *See Tapley v. Futrell*, 62 S.W.2d 32 (Ark.1933). Either Missourians were unaware of the Arkansas provision in 1945, in which case “without consideration” has an independent meaning, or else they affirmatively decided not to require “payment into the public treasury.”

With respect to any extinguishment of an existing debt, the Cities rely on contract cases to argue SBC has not provided the necessary consideration. App.Br.61. But contract cases involve an exchange of consideration between promisor and promisee. The legislative process contemplates no such exchange. Rather, the General Assembly takes something of value and gives something in return. Thus, the General Assembly, not SBC, must comply with any consideration requirement.

The Cities' argument that consideration fails where SBC merely promises to fulfill its existing obligations by paying future taxes is thus misdirected. App.Br.66. "There can be no doubt that the power to tax" can "be delegated to or taken away from the city in whole or in part, within the wisdom of the Legislature." *Kansas City v. J.I. Case Threshing Mach.*, 87 S.W.2d 195, 198 (Mo.banc 1935). *See also* MO.CONST. art.X, §1 ("The taxing power may be exercised by...political subdivisions under power granted to them by the general assembly...."). By granting municipalities continued permission to tax telecommunications companies, the General Assembly provided substantial consideration. Thus, while the Cities incorrectly assert that they would be denied consideration if a single carrier discontinued business within their territorial limits, App.Br.65, the General Assembly's grant of authority to collect any tax, over time, from any carrier, constitutes consideration here. In any case, that a carrier might stop operating is speculative, and the notion that this would cost municipalities revenues—as opposed to consumers securing services from a (taxable) competitor—is unsupportable.

The Cities themselves recognize the General Assembly's power over municipal taxation when they argue that their future tax revenues are uncertain because there is no

guarantee that the TTA will “not be modified by subsequent legislation.” App.Br.65. But, just as there is no guarantee that the TTA will govern in perpetuity, there was no such guarantee for the taxation scheme preceding it.¹² Thus, the Cities’ contention that the TTA does not provide consideration because it reduces their future tax revenues rests on their unsupported expectation that they could always tax telecommunications services. An expectation, however, does not rise to a constitutionally protected interest. *Beatty*, 912 S.W.2d at 497. Because the General Assembly’s discretion to withdraw municipal authority to tax telecommunications is unfettered, municipalities’ prospective right to tax telecommunications is ample consideration under the anti-extinguishment provision. The Cities’ unsubstantiated assertion that they will suffer future monetary loss, moreover, even relative to their expectations, is insufficient to meet their heavy burden. *Cf. Sommer v. City of St. Louis*, 631 S.W.2d 676, 680 (Mo.App.1982) (taxpayer lacked standing to challenge constitutionality where “net loss of revenue to the City [was] a possible result,” but court could not “conclude that such a loss [was] a necessary result”).

¹² Consideration need not be dollar for dollar. But even if the General Assembly must permit taxation for some future period to confer the constitutionally-required consideration, the Cities may not assert a challenge based on its failure to do so until such a hypothetical (and unlikely) event occurs. *Cf. State ex rel. Danforth v. State Envtl. Improvement Auth.*, 518 S.W.2d 68, 74 (Mo.banc 1975) (“Resolution of questions which might arise if relator’s fears are true can await such a possibility.”).

The TTA also provides consideration by resolving substantial tax base uncertainty. *See* §92.083.1(1) (defining taxable services under RSMo. Ch.144’s regulations). Because the base no longer depends on individualized ordinances, municipalities will save in collection costs arising from disputes such as this. And the TTA increases efficiency. Where municipalities previously responded individually to evolving technology, the state can now simply update Ch.144’s sales-tax regulations, thereby amending with certainty the base under all ordinances. *Accord* MO-NATO Am.Br.6 (“The ability of regulatory language to keep up with ever changing technology is not a new problem....”). The TTA also increases efficiency by delegating collection to the state rather than individual municipalities. §92.086.3.

The TTA further confers consideration by expanding municipal tax bases. Among other things, the TTA permits municipalities to tax wireless and intrastate long-distance revenues, which were previously not included in the tax base. While the TTA requires that municipal tax rates be proportionately decreased to avoid violating Hancock, the tax base now includes revenue streams that are increasing every year (unlike the pre-existing scheme, which relied on ever-decreasing local traditional telephone revenues). Over time, this change will result in substantial increased revenues to municipalities.¹³

¹³ The TTA’s prospective provisions amend the municipal tax base; they do not direct new activity. Thus the amicus’s passing suggestion that the act constitutes an unfunded mandate in violation of article X, §16 fails. *NACA/FTCR Am.Br.7*. An unfunded mandate occurs only where a political subdivision must undertake expanded

Because the Cities have received sufficient consideration, whether the TTA also benefits SBC is irrelevant. Even assuming the Cities’ disputed claims constituted an indebtedness, the anti-extinguishment provision requires only that the Cities receive some benefit in exchange for an extinguishment. It does not require that no one else benefit. Indeed, a private party always benefits to some degree when this provision is implicated, as someone must have owed the subject debt. Regardless, the relative benefits to telecommunications companies and municipalities is telling. The TTA resolves uncertain litigation in telecommunications companies’ favor subject to a finding of good faith. This is a contingent benefit—these companies **might** be better off, but only if subjective good faith is found in the future and a court would have rejected the companies’ substantial defenses to the Cities’ speculative claims in the TTA’s absence. The Cities, on the other hand, are **certainly** better off than if the General Assembly had denied them all power to tax telecommunications going forward.

d. The Cities’ position threatens efficient and fair tax collection.

The Cities’ anti-extinguishment argument is premised on the concept that tax liability, once attached, “cannot be compromised or reduced.” App.Br.56. If the Cities’ position were adopted by this Court, no tax collector could ever compromise a contested tax claim, regardless of the merits of the tax claim, the amount the taxpayer was willing

governmental activities without a corresponding increase in state funding.

MO.CONST. art.X, §16; *County of Jefferson v. Quiktrip Corp.*, 912 S.W.2d 487, 491 (Mo.banc 1995).

to pay as a compromise, the cost of pursuing the tax claim, or the assets of the taxpayer. This principle would also render existing tax compromise statutes unconstitutional. *See, e.g.,* §32.375 RSMo.(Supp.2004) (director of revenue may abate disputed sales tax if taxpayer reasonably believed no tax was owed); §32.378 RSMo.(Supp.2004) (director may compromise taxes where there is doubt as to liability or where compromise would promote efficiency). Further, prohibiting settlement of disputed tax claims—pursuant to statute or otherwise—would be detrimental to all involved. The most efficient method for resolving tax disputes would be foreclosed, and taxing entities would be forced to devote greater resources to collection. And, lacking the resources to pursue all claims to a final judgment, their tax receipts would likely decrease. Residents of these taxing entities would likewise suffer as their governments spent more to collect less, resulting in either an increase of their own tax burdens or a loss of valuable government services. As for taxpayers, they would be required either to capitulate completely to back tax claims, regardless of merit, or litigate to the end, often spending more in fees than the amount claimed.

The Cities’ position is inconsistent with Missouri statutes and contrary to the best interests of taxing entities and taxpayers alike. This Court should, therefore, reject the Cities’ argument that their speculative claims are entitled to any protection under the constitution’s anti-extinguishment provision.

2. The TTA Does Not Grant Public Money For Private Purpose Under Article III, §38(a) (Responding To Appellants' Point C).

The Cities argue that the Telecommunications Tax Act violates the constitutional prohibition against granting public money for a private purpose because it extinguishes tax debts for private gain. But, no public money is at issue because the Cities' claims are speculative. Even assuming a grant of public money, the TTA serves valid public purposes by helping Missouri's economy.

a. The TTA does not grant public money.

The Cities' argument relies on the incorrect assumption that the TTA's immunity provision extinguishes back tax obligations, thereby "granting public money." As discussed in Part B.1.b, *supra*, however, the TTA does not extinguish any back tax claims. Beginning July 1, 2006, the Cities may reinstate this collection action, subject only to the TTA's immunity provision. §92.089.2. Because the immunity provision extinguishes no debt, the TTA does not grant public funds.

Even assuming the TTA extinguished the Cities' right to pursue these claims, moreover, public funds are not involved because these claims are speculative. The Cities characterize their winning this lawsuit as a foregone conclusion, treating the taxes they seek as money "in the bank." *See* App.Br.46 (arguing that the TTA grants public funds because tax revenues, once collected, are public funds, citing *Champ v. Poelker*, 755 S.W.2d 382, 388 (Mo.App.1988)). But the Cities have not won their lawsuits, and therefore have not collected any taxes. Recovery here is by no means certain, and there is

no “public money” until a final judgment is entered declaring the Cities entitled to the taxes they seek. Accordingly, the TTA does not impact public funds.

The Cities note that tax abatements and tax credits, which by definition forgive liquidated tax burdens, constitute public money. *See* App.Br.47 (citing *Curchin v. Mo. Indus. Dev. Bd.*, 722 S.W.2d 930, 933 (Mo.banc 1987) (tax credits, directly reimbursing bondholders for liquidated, undisputed claims constituted public funds)). The TTA, however, does not abate any tax or grant any tax credit because the Cities’ claims are unliquidated, uncertain, and genuinely contested. *Cf. Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 789 (1973) (cited in App.Br.47 n.5) (defining tax credit as forgiving a “predetermined amount” of tax liability).¹⁴

The Cities’ own case illustrates this point. Relying on *Sommer v. City of St. Louis*, a taxpayer standing case, they argue that there is no distinction between tax abatements and direct public fund expenditures. *See* App.Br.48 n.5 (citing 631 S.W.2d 676 (Mo.App.1982)). The Cities presumably rely on *Sommer* because the taxpayer standing analysis is analogous to the Court’s analysis of whether an act grants public money. Both

¹⁴ Because no municipality has obtained a final judgment on unpaid telecommunications license taxes, the General Assembly correctly noted that no claims have been determined valid or liquidated. §92.089.1. In any case, if a liquidated, final judgment existed, this would at most support an “as-applied” challenge, which would not support striking down HB209. *See, e.g., W.B. v. M.G.R.*, 955 S.W.2d 935, 937 (Mo.banc 1997).

consider whether public funds have been expended for an unconstitutional purpose. *See Curchin*, 722 S.W.2d at 932; *Sommer*, 631 S.W.2d at 679.

Sommer itself defeats the Cities' argument. It states that whether a tax abatement constitutes an expenditure of public funds depends on "whether a loss of revenue to the city 'arises as a **necessary conclusion.**'" *Id.* at 680 (emphasis added). Where a court "can conclude from the record that a net loss of revenue to the city is a **possible result**" of the unconstitutional "expenditure" alleged, but "cannot conclude that such a loss is a **necessary result,**" there has been no "expenditure of public funds" for purposes of taxpayer standing. *Id.* (emphasis added). Likewise, there has been no "grant of public money." And the Court's concern with certainty extends to any determination of unconstitutionality. A statute is not invalid unless it "clearly and undoubtedly contravenes some constitutional provision." *Ams. United v. Rogers*, 538 S.W.2d 711, 716 (Mo.banc 1976). Here, it is not a "necessary result" that the TTA will deprive the Cities of revenue nor does the TTA "unquestionably run afoul of some constitutional prohibition," as there is no certainty that an actual tax liability exists, much less that it would be extinguished by the act. *Id.* at 721 (quotation omitted).

b. The TTA serves a public purpose.

"If a grant serves a public purpose, then it does not violate the constitutional prohibition against granting public monies to private entities." *Fust v. Attorney Gen.*, 947 S.W.2d 424, 429 (Mo.banc 1997). Even assuming the TTA granted public funds, it

serves a public purpose. The Cities' argument to the contrary ignores the many public benefits the TTA confers on Missouri and its residents.¹⁵

“The determination of what constitutes a public purpose is primarily for the legislative department, and...will not be overturned unless it is found to be arbitrary and unreasonable.” *Id.* at 430. Courts also consider whether a statute’s “primary effect” advances a non-arbitrary public purpose. *Curchin*, 722 S.W.2d at 934. If it does, there is no violation.

So long as the TTA’s primary effect is public, whether private benefits are also advanced is irrelevant. *Id.* Even a statute’s relieving a private party’s preexisting financial obligation does not vitiate its otherwise valid public purpose. *See Brawley v. McNary*, 811 S.W.2d 363, 367-68 (Mo. banc 1991) (holding that partially relieving developer of preexisting obligation to pay for flood control measures served a public purpose, and thus did not violate §38(a) analogue for political subdivisions). Private interests, moreover, need not be advanced equally. “If it were essential...that all members of the public or all members of any class should derive from it the same or like benefits or advantages, then it would be entirely impossible to describe a public enterprise in aid of which public funds might be set apart.” *Jasper County Farm Bureau v. Jasper County*, 286 S.W. 381, 383 (Mo.1926) (interpreting §38(a)’s predecessor).

¹⁵ In contending that the TTA serves no public purpose, the Cities offer arguments identical to those made in support of their retrospective, tax uniformity, and equal protection challenges. SBC responds in Parts B.3, B.5, and B.6, respectively.

The Cities' argument that the TTA primarily advances private interests is incorrect. The General Assembly has declared that the TTA serves public purposes by ending "costly litigation" and advancing the "economic well being of the state."

§92.089.1. Achieving these ends is clearly the TTA's primary effect.

The TTA directly promotes Missouri's economy, a non-arbitrary public purpose. *Burks v. City of Licking*, 980 S.W.2d 109, 114 (Mo.App.1998). The TTA advances this purpose by responding to widespread and costly collection actions seeking an unspecified amount in back taxes and penalties, potentially over a billion dollars, for gross receipts from services that had never before been included in the municipal tax base. Ending such costly and widespread litigation alone serves a valid public purpose. *Cf. State ex rel. Nixon v. Jones*, 108 S.W.3d 187, 192 n.6 (Mo.App.2003) (recognizing that by enacting Incarceration Reimbursement Act, the "legislature apparently sought to conserve judicial resources").

These lawsuits, moreover, threaten to reduce telecommunications investment in Missouri, thereby impairing the state's economic development. Where lawsuits threaten to expand taxation beyond clear statutory language, "it is an exercise in futility for either the executive or legislative branches to spend tax money attempting to attract business and industry to our state of Missouri." *Bally's LeMan's Family Fun Ctrs., Inc. v. Dir. of Revenue*, 745 S.W.2d 683, 686-87 (Mo.banc 1988) (Welliver, J., dissenting). "Business is no more attracted to taxation without representation than were the original American colonists." *Id.* at 687. *See also* App.Br.48-49 (quoting Judge Welliver's opinion in *Curchin*, 722 S.W.2d at 934-35).

“[T]he importance of telecommunications service to future economic development and business retention in [local Missouri] communities, including deployment of emerging communications technologies which foster economic opportunities needed by these communities” only heightens the public purpose served by the TTA. MO-NATOA Am.Br.13. *See also Halbruegger v. City of St. Louis*, 262 S.W. 379, 381 (Mo.banc 1924) (such modern conditions inform whether a tax serves a public purpose). Any benefits inuring to an industry central to the state’s economy also inure to the state’s benefit. *Jasper County*, 286 S.W. at 383 (“it is a matter of common knowledge that...prosperity of the state springing from [agriculture] contributes to the growth and importance of every other industry in the state”).

The TTA also advances Missouri’s economic well being and that of its citizens by controlling telephone rates, thereby ensuring accessibility to this essential service. §307.400.4 RSMo.(Supp.2004) (“the term ‘essential utility services’ means electric, gas, water, telephone and sewer services”); §392.248.1 RSMo.2000 (establishing Universal Service Board to ensure affordable rates for “essential local telecommunications services throughout the state”); 6 U.S.C.A §121(d)(5) (West 2005) (describing telecommunications as part of the “critical infrastructure of the United States”). *See Jasper County*, 286 S.W. at 384 (in deciding whether a grant of public money to a private industry “is for a public purpose within the meaning of the Constitution, the public policy of the state as has found expression in legislative enactments” other than the challenged statute is “entitled to weighty consideration”). *See also State ex rel. McKittrick v. S.W. Bell Tel. Co.*, 92 S.W.2d 612, 614 (Mo.banc 1936) (“The General Assembly no doubt

considered that the benefit to the general public arising from the promotion of the extension of [telephone] service justified the granting of the privilege of the use of the highways.”).

The Cities’ argument that the TTA advances only private interests overlooks the critical fact that if their back tax claims succeeded, consumer telephone rates would skyrocket under SBC Missouri’s mandatory tariff:

There shall be added to the customer’s bill or charge, as a part of the rate for service, a surcharge equal to the pro rata share of any franchise, occupation, business, license, excise, privilege or other similar tax, fee or charge (hereafter called “tax”) now or hereafter imposed....

[A]ny subsequent increase, decrease, imposition or determination of liability for such taxes, fees or charges as described above shall be applied...to the customer’s bill or charge on each individual billing date.

SBC Missouri’s Tariff §17.11 (emphasis added). Resp.Appx.A67. This rate increase would occur for customers even in the absence of a tariff requirement because “a utility’s subscribers will always provide the money for payment of all taxes—the utility has no other source of revenue.” *State ex rel. City of W. Plains v. Pub. Serv. Comm’n*, 310 S.W.2d 925, 934 (Mo.banc 1958).

The General Assembly’s concern with the possibility of its citizens being ultimately responsible for potentially a billion dollars in back taxes serves an obvious public purpose. *See Hunter Ave. Prop., L.P. v. Union Elec.*, 895 S.W.2d 146, 154-55 (Mo.App.1995) (where utility’s tariff permitted line construction costs to be passed

through to consumers, the cost savings of aboveground lines justified municipal action). Just as important, controlling utility rates is a quintessentially legislative function. *See Shepherd v. City of Wentzville*, 645 S.W.2d 130, 133 (Mo.App.1982) (“The basic precepts enunciated by all jurisdictions are that the function of fixing rates...is a legislative function not a judicial function.”).

c. Lobbying efforts are irrelevant to the TTA’s constitutionality.

The Cities’ arguments regarding corporate lobbying involved in the TTA’s passage have no bearing on any constitutional question presented here, including whether the act serves a public purpose. *See* App.Br.49-51; NACA/FTCR Am.Br.9-12.

“[L]obbying is an essential and important function in the legislative process. If such efforts could or should be considered by courts as a factor in considering the constitutionality of a statute, few statutes would pass constitutional muster.” *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 835 (Mo.banc 1991). As important, “the right of citizens to petition the legislature in the form of lobbying is one of the most fundamental rights guaranteed by the free speech provision of the first amendment. It would indeed be ironic if the exercise of this fundamental first amendment right should somehow be considered a factor in causing the resulting legislation to be declared unconstitutional under some other provision of the constitution.” *Id.*¹⁶

¹⁶ The Cities also ignore that Missouri municipalities lobbied for the TTA’s passage. *See* Resp.Appx.A69-73 (testimony of N. Nickolaus, representing Missouri Municipal League,

3. The TTA Is Not Impermissibly Retrospective Under Article I, §13 Because The Cities Have No Vested Rights Impaired by the Act (Responding To Appellants' Point G).

Political subdivisions are not protected by the Missouri Constitution's prohibition against retrospective laws. And, because municipalities are political subdivisions, with no powers independent of the state, they cannot credibly argue that this settled legal rule should not apply. Finally, even if the prohibition against retrospective laws protected the Cities, they have no vested rights impaired by the TTA.

a. Municipalities are unprotected against retrospective laws.

As the Cities themselves recognize, they are unprotected against retrospective laws. *See Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys.*, 950 S.W.2d 854, 858 (Mo.banc 1997) ("Because the retrospective law prohibition was intended to protect citizens and not the state, the legislature may constitutionally pass retrospective laws that waive the rights of the state."); App.Br.91 (describing this Court's holding in *Savannah* as "unfortunate[]").¹⁷ *Accord Graham Paper v. Gehner*, 59 S.W.2d 49, 51-52 (Mo.banc _____ in reference to HB209). The legislation reflects a series of compromises, many of which were sought by members of the Missouri Municipal League.

¹⁷ *Savannah's* retrospective analysis focused entirely on political subdivisions not being persons. 950 S.W.2d at 858. That the case involved intra-governmental litigation was germane only to the Court's analysis of separation of powers and special laws. *Id.* at 859, 860. *See* App.Br.92-93.

1933) (prohibition against retrospective laws is inapplicable to cities). *Cf. State ex rel. Kemper v. St. Louis, Kansas City, & N. Ry.*, 9 Mo.App. 532, 1881 WL 175, at *3 (1881), *aff'd*, 79 Mo. 420 (1883) (holding that legislature could retrospectively extinguish municipal tax lawfully levied and assessed). The retrospective prohibition does not apply to the state and its subdivisions because it is in the Missouri Constitution's Bill of Rights. *See* MO.CONST. art.I, §13. Courts uniformly hold that Bill of Rights' protections do not extend to the state. *See, e.g., City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F.Supp.2d 882, 884 (E.D.Penn.2000), *aff'd*, 277 F.3d 415 (3d Cir.2002) (state Bill of Rights do not protect cities); *Worker's Comp. Comm'n v. Bridge City*, 900 S.W.2d 411, 414 (Tex.App.1995) (same); *James v. Nashua Sch. Dist.*, 720 F.Supp. 1053, 1059-60 (D.N.H.1989) (same). Thus, neither the Cities nor any third party may challenge the retrospective application of a statute allegedly impairing municipal rights. *See State ex rel. Meyer v. Cobb*, 467 S.W.2d 854, 856 (Mo.1971) (respondent judges could not defend mandamus by arguing that requested action would retrospectively impair a political subdivision's rights because it was "not claimed that...their personal interests or rights would be adversely affected" but rather the subdivision's, to which "the constitutional provision relied on is wholly inapplicable").

The Cities nonetheless argue that because "the vested rights of municipalities and cities are specifically singled out for protection in the Missouri Constitution," this Court should overturn its long-standing precedent that municipalities are not protected against retrospective laws. App.Br.92. Accepting this argument would render superfluous the constitution's anti-extinguishment provision, article III, §39(5), which expressly protects

political subdivisions from infringement on an indebtedness, liability, or obligation already incurred, and create confusion regarding §39(5)'s "without consideration" language, as article I, §13 permits no such exception. *See Savannah*, 950 S.W.2d at 859 (refusing to interpret separation of powers provision so as to make retrospective provision redundant). *See also Graham*, 59 S.W.2d at 52 (equating article I, §13's protection of citizens to article III, §39(5)'s protection of municipalities).

b. The Cities' speculative claims do not confer vested rights.

Even assuming the Cities were protected against retrospective laws, the TTA is not retrospective. "[A] law is not retrospective in its operation...unless it impairs some vested right." *Fisher v. Reorganized Sch. Dist. No. R-V*, 567 S.W.2d 647, 649 (Mo.banc 1978). A "vested right" is "one which is absolute, complete, and unconditional, to the exercise of which no obstacle exists, and which is immediate and perfect in itself and not dependent upon a contingency." *State ex rel. Wayne County v. Hackmann*, 199 S.W. 990, 991 (Mo.banc 1917) (internal citations omitted). If the "purported right...[is] contingent upon the happening of an uncertain event," that right has not vested. *M&P Enters. v. Transam. Fin. Servs.*, 944 S.W.2d 154, 160 (Mo.banc 1997). *See La-Z-Boy Chair Co. v. Dir. of Econ. Dev.*, 983 S.W.2d 523, 525 (Mo.banc 1999) ("vested' means fixed, accrued, settled or absolute").

The Cities have no vested right to recover the taxes they seek; thus, even if the TTA absolutely barred their collection actions, it would be permissible. As discussed in Parts B.1.a and B.2.a, *supra*, the Cities have an unliquidated, uncertain, and unestimated

tax claim, subject to substantial defenses.¹⁸ They have no immediate and perfect right, because their recovery is uncertain and contingent on a judgment in their favor. *See Scott v. Dep't of Pub. Safety*, 792 F.Supp. 666, 670 (E.D.Mo.1992) (retrospective application permissible where it impacts a right claimed, but not finally secured). A mere belief that one has been injured, and a hope to recover an unknown amount in the future, is not constitutionally protected.

c. The TTA's immunity provision affects only procedural matters.

Supposing the retrospective prohibition applied to municipalities and that the Cities' claims were certain, the TTA still impacts no vested rights because "[a] litigant has no vested rights in matters of procedure." *Mendelsohn v. Bd. of Registration*, 3 S.W.3d 783, 786 (Mo.banc 1999). *See also Burns v. LIRC*, 845 S.W.2d 553, 557 (Mo.banc 1993) ("[O]ne of the exceptions to [article I, §13] is that where a statute is procedural only and does not affect substantive rights, it may be retroactive."); *State v. Thomaston*, 726 S.W.2d 448, 460 (Mo.App.1987) (distinguishing prohibited retrospective laws, i.e., ones that impact substantive, vested rights, from permissible retroactive laws, i.e., ones that impact only procedure).

¹⁸ For this reason, the Cities' reliance on *First National Bank v. Buchanan County* is misplaced. App.Br.90. The amount there was liquidated. 205 S.W.2d 726, 728 (Mo.1947). Further, the *First National Bank* Court held that a retrospective tax on income already earned and taxed by a city impermissibly impaired **taxpayer's** vested right, and thus the case did not extend §13's protection to municipalities. *Id.* at 730-31.

Because the TTA’s immunity provision affects only procedural matters, it is merely retroactive, not retrospective. The Cities’ belief that the provision is substantive, and thus impermissibly retrospective, is based on the faulty premise that it completely bars their back tax claims. *See App.Br.89-90* (arguing that the act’s immunity provision “forgives a matured indebtedness;” “grants immunity for prior bad acts;” “eliminates all remedies;” “permits a current belief...to satisfy pre-existing law;” and “den[ies] that certain transactions ever took place”). The TTA does not bar these claims. Rather, its immunity provision simply changes the available remedy by requiring a fact-finder to first determine whether a telecommunications company lacked subjective good faith that it paid all taxes owed. This Court has long held that the General Assembly has “control over the remedies which it offers to suitors in its courts....[I]t may abolish old remedies and substitute new.” *Koch v. Mo.-Lincoln Trust Co.*, 181 S.W. 44, 49 (Mo.1915). *See also State ex rel. Sweezer v. Green*, 232 S.W.2d 897, 902 (Mo.banc 1950) (retrospective prohibition does not bar the state from “forgiving any offense” or “enacting new legislation...which lessens the penalty for offenses theretofore committed”), *overruled on other grounds, State ex rel. North v. Kirtley*, 327 S.W.2d 166 (Mo.banc 1959).

The TTA’s immunity provision is analogous to the procedural statute at issue in *American Family Mutual Insurance v. Fehling*. The court there held permissible a law greatly reducing, and potentially even abolishing, the Department of Social Services’ (“DSS”) pre-existing lien rights. 970 S.W.2d 844 (Mo.App.1998). The new statute eliminated the DSS’s absolute right to recover medical expenses paid on behalf of injured persons, instead adopting a multi-factor test to govern recovery. Because the DSS was

not foreclosed from all possibility of recovery, the court held that this change was procedural, not substantive—and thus could be applied retroactively. *Id.* at 846, 851. Similarly here, the TTA’s immunity provision does not foreclose all possibility of the Cities’ recovery.

The *Fehling* court alternatively held that even if the statute there was substantive, its retrospective application was permissible, irrespective of the lack of clear legislative intent that it apply retrospectively. It reasoned that “the legislature may constitutionally impair the state’s vested or substantive rights,” regardless of the constitution or the ordinary presumption that substantive laws apply only prospectively, absent clear legislative intent to the contrary. 970 S.W.2d at 852. While one case has criticized this alternative holding, it did so only with regard to *Fehling*’s implicit holding that the settled common-law presumption respecting substantive laws was inapplicable to the state. *Wellner v. Dir. of Revenue*, 16 S.W.3d 352, 355 (Mo.App.2000). Because the TTA expressly applies to pending cases, whether this presumption applies to the state is irrelevant here. But, assuming the presumption regarding prospectivity applies even where only state rights are impacted, the Cities’ reliance on *Planned Industrial Expansion Authority v. Southwestern Bell Telephone Co.* (“*PIE*”), and *Ernie Patti Oldsmobile, Inc. v. Boykins*, is misplaced because neither case involved clear legislative intent that the statute apply retrospectively to overcome that presumption, as exists here. App.Br.90, 93. *See PIE*, 612 S.W.2d 772, 774 (Mo.banc 1981) (statute granted permanent easement only where there was continued use, and thus was not intended to apply based on previous use); *Ernie Patti*, 803 S.W.2d 106, 108 (Mo.App.1990) (“there

is also substantial evidence to suggest that the legislature intended the ‘City Sales Tax Act’ to be applied prospectively” only).

Distilled to its essence, the Cities’ argument that the TTA is impermissibly retrospective stems from their belief that the act is unfair. But whether a statute is fair has never been relevant to a court’s analysis of constitutional questions, nor reason for a court to extend a constitutional protection never before available. *See Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 835 (Mo.banc 1991) (arguments that a statute is “unwise or unfair” “must be addressed to the legislature”).

4. The TTA Is Not A Special Law, And Thus Does Not Violate Article III, §40, Because Its Classifications Are Reasonable (Responding To Appellants’ Point E).

The Cities argue that the TTA is a special law because it (1) applies to telecommunications companies but not other utilities; (2) purportedly treats telecommunications companies that have paid license taxes differently from those that have not; (3) bars collection class actions against telecommunications companies;¹⁹ (4)

¹⁹ This third challenge attacks §71.675.1, HB209’s prohibition against telecommunications collection class actions. App.Br.70. Because §71.675.1’s constitutionality does not affect the TTA’s validity, and further because the Cities argue §71.675.1 again later in their brief, *see* App.Br.110-11, SBC responds to this challenge in Part B.10, *infra*.

classifies in ways supposedly not germane to its purpose; and (5) exempts municipalities meeting certain criteria from three provisions.

The Cities have not properly raised any of these special laws challenges. After stating in conclusory fashion that the TTA violates article III, §40(30)'s special laws prohibition, the Cities assert five supposed infirmities without offering a single case. App.Br.68-72. They then string cite nine cases without explaining how these cases support their challenges, much less relating them to any supposed infirmities. App.Br.72-74. According to the Cities, “[i]ndividual analysis of these decisions is not necessary.” App.Br.74. Missouri courts disagree. *See Massage Therapy Training Inst. v. Bd. of Therapeutic Massage*, 65 S.W.3d 601, 609 (Mo.App.2002) (parties cannot maintain constitutional challenges where they do “not support[] their claims of unconstitutionality...with relevant authority or argument beyond conclusions”). *See also Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo.banc 1989) (“A party asserting the unconstitutionality of a statute or ordinance bears the burden of supporting that contention by at least relating his argument to the statute or ordinance and issue at hand.”).

Without any explanation, the Cities additionally state, “Being ‘special’ on its face or in its practical operation, HB209 violates Article III, 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).” App.Br.72. Not only do the Cities fail to connect any of the supposed statutory infirmities they raise or the

authority they cite to these constitutional provisions, but they do not cite even a single case addressing a §40(21) challenge.

a. The TTA reasonably applies only to telecommunications companies.

“[A] law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis.” *Ross v. Kansas City Gen. Hosp. & Med. Ctr.*, 608 S.W.2d 397, 400 (Mo.banc 1980). Even if the Cities had properly raised their special laws challenges, the challenges fail because every classification in the TTA is reasonable and treats similarly-situated entities the same.

The Cities argue that the TTA is infirm because it applies to telecommunications companies but not other utilities. App.Br.69. A law applying to a single industry, however, is not special so long as the “classification is made on a reasonable basis.” *Ross*, 608 S.W.2d at 400. Thus, this Court routinely upholds single industry legislation. *See, e.g., Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 831-32 (Mo.banc 1992) (upholding statute applying only to design professionals); *City of Springfield v. Stevens*, 216 S.W.2d 450, 455 (Mo.banc 1949) (upholding ordinance prohibiting liquor only as to taxicab drivers, but not operators of other commercial transport vehicles). *Accord Laclede Power & Light v. City of St. Louis*, 182 S.W.2d 70, 73 (Mo.banc 1944) (invalidating ordinance applying license tax to only one power company, but approving tax applying solely to power companies) (cited in App.Br.72-73). The TTA’s classification of telecommunications companies is plainly reasonable for three reasons.

First, the Cities’ own ordinances employ the same classification. *See* WINCHESTER, MO., MUN. CODE Ch.640 (applying license tax on telephone service) (R45-

46); WELLSTON, MO., CODE OF ORDINANCES §13-131 (1980) (same) (R52). If the TTA violates special laws, the Cities' ordinances are necessarily invalid too. *Hunter Ave. Prop., L.P. v. Union Elec.*, 895 S.W.2d 146, 152 (Mo.App.1995) (applying §40 to ordinances).²⁰ The existence of these ordinances, moreover, as well as numerous state and federal statutes directed only to telecommunications companies, evidence the reasonableness of the TTA's classification. *See Menorah Med. Ctr. v. Health & Educ. Facilities Auth.*, 584 S.W.2d 73 (Mo.banc 1979) ("The reasonableness of the distinction...is supported by noting that similar distinctions are common in our law...."). *See also* §67.1842.1(4) RSMo.(Supp.2004) (prohibiting municipalities from requiring telecommunications franchises); Ch.392 RSMo. (applying to telephone and telegraph companies); 47 U.S.C.A. §§201 *et seq.* (West 2001) (applying to telecommunications companies).

Second, rapid technological changes have revolutionized the telecommunications industry in a way not true of other utilities. A primary purpose of the TTA is to resolve tax base uncertainty arising from these changes. Because similar legislation is

²⁰ Not only do most municipalities tax telecommunications companies in separate ordinances, but many tax them at an unfavorable rate relative to other companies. *Compare, e.g.,* SPRINGFIELD, MO., CITY CODE §§70-452 (2000) (taxing telecommunications companies' gross receipts at 6%) *with* 70-81 (taxing most other companies' gross receipts on a bracketed scale and at a rate of less than 0.05%). Resp.Appx.A74-76, A77-89.

unnecessary for other utilities, telecommunications companies represent a reasonable classification.

Third, in a related point, the telecommunications tax base uncertainty has led to numerous municipal collection actions. The TTA addresses these actions. Municipalities are not filing putative class actions seeking hundreds of millions of dollars from gas, electric, or water companies. As such, there is no apparent need for comparable legislation injecting tax base certainty into other utilities' license tax ordinances.

For these reasons, the Cities' reliance on *Planned Industrial Expansion Authority v. Southwestern Bell Telephone Co.* ("PIE") is misplaced. App.Br.72-73 (citing 612 S.W.2d 772, 776-77 (Mo.banc 1981)). In *PIE*, this Court held that a statute giving only telephone companies a permanent easement after a right-of-way was sold or abandoned was special legislation because gas, water, and electric companies likewise used the right-of-way. In other words, utilities who were similarly situated to telephone companies for the law's purpose did not get the advantage of the law. Likewise, *Ashby v. Cairo Bridge & Terminal Co.* does not support the Cities' position. App.Br.72 (citing 100 S.W.2d 441, 444 (Mo.1936)). There, eight kinds of utilities were similarly situated for purposes of a tax penalty because they were all taxed under the same ordinance. Because the ordinance imposing the penalty applied to only four of those utilities, it was held impermissibly special. Here, other utilities are not similarly situated to telecommunications companies. They have not undergone rapid technological changes making the tax base uncertain, were not singled out by municipal class actions seeking hundreds of millions of dollars, and were not told that the interpretation given to decades' old taxing ordinances was

being changed. Thus, the TTA's applying to only telecommunications companies does not render it special legislation.

b. The TTA reasonably permits municipalities to retain license tax overpayments.

The Cities' next special laws challenge is based on the TTA's supposed differential treatment of telecommunications companies that paid all license taxes claimed and those that did not. App.Br.70. A single case disposes of this argument. In *Savannah R-III School District v. Public School Retirement System*, this Court rejected a special laws challenge to a statute that permitted the state retirement system to retain overpayments made by some school districts because that classification was "rationally related to several legitimate governmental objectives." 950 S.W.2d 854, 860 (Mo.banc 1997).

First, the legislative enactment may have been an equitable response to those teachers who detrimentally relied on their school district contributions by retiring or planning for their retirement. Second, some excess contributions will already have been distributed....To require the retirement system to refund such contribution to school districts would result in an unplanned and inequitable depletion of the retirement fund to the detriment of all teachers covered under the plan.

Id. As in *Savannah*, allowing the Cities to retain tax revenues already received rather than issuing unplanned and unbudgeted refunds is an equitable response to any differential payments by telecommunications companies.

c. The TTA's classifications reflect its purposes.

The Cities next argue that the TTA's classifications are not germane to its purposes because the act (1) continues preexisting tax rate variations; (2) applies only to telecommunications companies; (3) shortens limitations from five years to three; and (4) authorizes tax pass-throughs. App.Br.70-71. Their assertions fail for a myriad of reasons.

Initially, the Cities' second contention merely restates their earlier argument that the TTA is impermissibly special because it treats telecommunications companies differently than other utilities. This argument is contrary to settled law and merits no further attention. Because the Cities' other three assertions are not premised on any arbitrary classification, i.e., they do not allege that any similarly-situated entities were excluded from any TTA provision, the constitutional prohibition against special laws is not implicated.

No supposition could transform the Cities' non-uniform tax rate argument into a special laws challenge based on an arbitrary classification. The Cities' contention, furthermore, misunderstands both the TTA's purpose and the crux of the underlying dispute. They complain that because the TTA does not eliminate pre-existing rate variations, the act does not advance its purpose of making municipal taxation more certain. But the uncertainty here is not regarding tax rates. Rather, the disagreement centers around the tax base, and it is this uncertainty that the TTA resolves. An act need not address a non-existent problem to pass constitutional muster.

As for the statute of limitations and pass-through provisions, the Cities' argument would fail even supposing that they meant to assert that these provision are arbitrary because they apply only to telecommunications companies. Contrary to the Cities' assertion, §92.086.12 does not shorten the applicable limitations period. It provides the same three-year statute of limitations for the alleged nonpayment of telecommunications license taxes that applied before the TTA's passage. The Cities have always been required to assess any alleged tax deficiency. *See* Part C.3 *infra* (municipalities must assess because they must collect in the same manner as the state, which is statutorily required to assess, and because common law requires assessment even in the absence of a statute). This assessment cannot be issued more than three years after the allegedly unpaid taxes were due. *See* §143.711.1 RSMo.2000 (income tax); §144.220.3 RSMo.2000 (sales tax); §145.711.1 RSMo.2000 (estate tax). This limitations period, which applies to all municipal license taxes, was properly codified by the General Assembly as to telecommunications companies. *Branson Props. USA v. Dir. of Revenue*, 110 S.W.3d 824, 826-27 (Mo.banc 2003) (recognizing that legislature had codified the Court's previous interpretation of a tax statute).

The Cities' objection to the TTA's permissive pass-through provision, §92.086.13, is equally misguided. App.Br.71 n.18. Initially, the provision is not unique. Other utilities are also required to pass through license taxes. *See, e.g., State ex rel. Hotel Cont'l v. Burton*, 334 S.W.2d 75, 77,82 (Mo.1960) (power companies). This Court, moreover, has rejected the Cities' contention that a pass-through authorization converts a license tax levied against a telecommunications company "into one against the

subscribers to the telephone service.” *State ex rel. City of W. Plains v. Pub. Serv. Comm’n*, 310 S.W.2d 925, 934 (Mo.banc 1958). “The utility remains the party taxed and the utility still pays the tax—the only effect...is to permit the utility to collect the money with which to pay the tax from the tax beneficiaries rather than from all subscribers.” *Id.* *Accord Hotel Cont’l*, 334 S.W.2d at 83 (a utility’s passing through its license taxes “does not purport to, and by its operation could not, change the incidence of...[a] gross receipts tax”).

Passing through municipal taxes also advances fundamental fairness. Without permission to pass through directly, a telecommunications company would be forced to distribute tax costs indirectly on a statewide, rather than local, basis. *City of W. Plains*, 310 S.W.2d at 934 (“It must be apparent that a utility’s subscribers will always provide the money for payment of all taxes—the utility has no other source of revenue—the only question is which subscribers should pay which tax.”). Residents of municipalities with no license tax or low license tax rates would be forced to subsidize taxes imposed by other municipalities.²¹ As the PSC has observed and this Court has approved, such a result is manifestly unjust:

²¹ While pass-throughs are the fairest method to allocate license taxes, they do create their own concerns. The Cities’ taxing the new services they seek in this lawsuit would, given pass-throughs, effectively raise taxes on their residents in the form of telephone rates. This increased burden, however, would be obscured at the bottom of a phone bill. Pass-through provisions are fair, but responsible city officials should not use them to do

The commission found that...treating license and occupation taxes as an operational expense reflected in and paid by collections from systemwide rates was unjustly discriminatory as to those subscribers who did not reside in a municipality which levied such a tax or who resided in a municipality which levied a proportionately smaller tax....The commission also found that by passing such taxes to the respective consumer beneficiaries for payment, the existing unjust discrimination would be eliminated.

Id. at 929. The General Assembly’s permitting telecommunications companies to equitably accomplish what would otherwise, by necessity, be inequitable does not render the TTA unconstitutional as a special law.

d. The TTA reasonably excludes certain Missouri municipalities from some of its provisions.

The Cities challenge the scope of the TTA’s exemption of certain Missouri municipalities (the “carve-out cities”) from its dismissal, immunity, and maximum rate provisions. App.Br.71 (citing §92.086.10). This challenge arises under article III, §40(30), which prohibits legislation by special law where a general law could be made applicable. The inquiry is two-fold: “First, is the law a special or local law? Second, if so, is...the permission granted by the statute so unique to the persons, places, or things classified by the law that a law of general applicability could not achieve the same

indirectly what they cannot do directly—i.e., increase taxes on residents without their consent—or what they could only do at considerable political cost.

result?” *Sch. Dist. of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 221 (Mo.banc 1991). *See also Ross*, 608 S.W.2d at 400 (“Subsection 30 provides that when a general law can be made applicable, the legislature shall not pass any local or special law. For it to apply, it must first be found that the legislation under attack is a local or special law.”).

i. The TTA is not a special law because it exempts a reasonable class.

A statute applying to a class on “a reasonable basis” is a general law. *State ex rel. Wagner v. St. Louis County Port Auth.*, 604 S.W.2d 592, 603 (Mo.banc 1980). This Court has thus found permissible a “class composed only of cities and counties next to waterways,” characterizing the law as general, despite class membership depending on an immutable characteristic. *Id.* (“[T]he distinction made...is reasonable and not arbitrary. The Act therefore is not a special or local law within the meaning of art.III, §40.”).

As in *Wagner*, the TTA exempts certain municipalities “on a reasonable basis,” specifically those that taxed wireless revenues pre-Hancock Amendment or consistent with Hancock’s requirements. §92.086.10. Indeed, the carve-out cities represent an even more reasonable class than that in *Wagner* because they are exempted based on affirmative action rather than a geographical characteristic. Not one of the Cities’ cases involved an exemption based on the exempted entity’s affirmative action, and thus not one suggests the TTA’s exclusion is irrational. “[E]xceptions founded on reason may be made in enacting a general statute or ordinance without infringing the constitutional inhibition against special legislation.” *State v. Scullin-Gallagher Iron & Steel*, 186 S.W. 1007, 1008 (Mo.1916).

ii. A general law would not have sufficed.

A facially special exemption survives constitutional challenge where “some characteristic of the excluded item provides a reasonable basis for excluding it, considering the purpose of the enactment.” *State v. Gilley*, 785 S.W.2d 538, 540 (Mo.banc 1990) (citing *State ex rel. Pub. Defender Comm’n v. County Court of Greene County*, 667 S.W.2d 409, 412-13 (Mo.banc 1984) (holding that where an exemption rendering the statute facially special is at issue, the burden shifts and “it is proper to consider whether the defending party has offered any rationale whereby the [exempted entities] may be distinguished”)). Accord *State ex rel. Bunker Res. Recycling & Reclamation v. Mehan*, 782 S.W.2d 381, 385 (Mo.banc 1990).

The purpose of the TTA is to effect a compromise between municipalities and telecommunications companies. Before the TTA, most municipalities attempting to tax wireless revenues—which did not exist pre-Hancock—failed to comply with Hancock’s requirement that a rate reduction accompany a tax base expansion. See MO.CONST. art.X, §22. In exchange for imposing an additional standard on collection actions, the General Assembly exercised its sole authority to expand the prospective tax base to include wireless revenues. See *St. Charles County v. Dir. of Revenue*, 961 S.W.2d 44, 49 (Mo.banc 1998) (the Hancock requirement applies only where “action is taken by a political subdivision,” and does not extend to the state and state agencies). Effecting this compromise is a valid legislative purpose. See *State ex rel. Jackson County v. Pub. Serv. Comm’n*, 532 S.W.2d 20, 33 (Mo.banc 1975) (“[T]he Act as now written constitutes a fair legislative compromise for both the utility and consumers.”). Exempting the carve-

out cities from certain compromise provisions is reasonable because those cities could have collected wireless revenues pre-TTA without violating Hancock.

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

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

These unique circumstances—certain municipalities taxing wireless revenues in compliance with Hancock, while others ignored Hancock’s requirements—also substantially justify the TTA. *See Hunter Ave. Prop., L.P. v. Union Elec.*, 895 S.W.2d 146, 154-55 (Mo.App.1995) (approving special legislation benefiting only a single utility company as substantially justified where it was based on “a unique set of circumstances which [was] unlikely to arise again in the near future”).

5. The Cities Cannot Assert A Uniformity Challenge Under Article X, §3, And If They Could, Their Challenge Would Fail (Responding To Appellants’ Point I).

a. The Cities have waived and lack standing to assert their challenge.

To have standing, a party must show that it is “sufficiently affected...to justify consideration by the court,” and that the challenged statute violates its rights and not those of some third party. *Wahl v. Braun*, 980 S.W.2d 322, 325 (Mo.App.1998).

The Cities challenge three supposedly non-uniform classifications. They argue that the TTA discriminates against (1) telecommunications companies that paid all taxes alleged due, (2) non-telecommunications utilities, and (3) telecommunications companies paying taxes in municipalities not exempted from the TTA’s maximum-rate provision. App.Br.101-02. Because none of these challenges implicate the Cities’ own rights, the Cities lack standing to pursue them.

The Cities additionally lack standing because they are not persons. Article X, §3 “is a recognition of the principle of equality and uniformity of taxation required by the equal protection clause...which imposes a limitation upon all powers of the state which

can touch the **individual**..., including among them that of taxation.” *State ex rel. Dalton v. Metro. St. Louis Sewer Dist.*, 275 S.W.2d 225, 234 (Mo.banc 1955) (emphasis added) (citations omitted). *See also* Part B.6, *infra* (discussing the Cities’ lack of standing under equal protection).

The Cities, moreover, have waived any uniformity challenge by failing to articulate how or why their alleged classifications are unreasonable. Instead, they simply assert that these classifications “differ little from a prohibited classification based on the color of a person’s hair.” App.Br.102. This disingenuous comparison cannot satisfy the Cities’ heavy burden, particularly given that the mere existence of tax classifications is insufficient to show non-uniformity. *See Walters v. City of St. Louis*, 259 S.W.2d 377, 386 (Mo.banc 1953).

b. The TTA does not violate uniformity principles.

Should this Court find the Cities have standing and have not waived their uniformity challenge, their arguments fail on the merits. They assert that the TTA discriminates by: (1) treating competitors differently as to tax amnesty; (2) splitting a natural class of businesses; and (3) exempting certain municipalities from some provisions. App.Br.101-02.

Two important principles guide courts considering whether a tax is “uniform upon the same class or subclass of subjects.” MO.CONST. art.X, §3. First, a tax is presumed uniform. *Vill. of Beverly Hills v. Schulter*, 130 S.W.2d 532, 535 (Mo.1939). Second, the constitutional provision does not require absolute uniformity, but only that the same

category of subjects, as reasonably classified by the General Assembly, be taxed uniformly. *State ex rel. Jones v. Nolte*, 165 S.W.2d 632, 636 (Mo.banc 1942).

The General Assembly exercises its broadest classification authority when enacting tax statutes. *Id.*; *Walters*, 259 S.W.2d at 386. Thus, “any substantial and reasonable basis of classification is allowable and a classification will be held valid if not palpably arbitrary.” *Kansas City v. John Deere Co.*, 577 S.W.2d 633, 634 (Mo.banc 1979) (quotations omitted). Because it is impossible to prevent disparate impact, a tax classification violates uniformity principles only if it amounts to invidious discrimination. *Pipe Fabricators, Inc. v. Dir. of Revenue*, 654 S.W.2d 74, 77 (Mo.banc 1983). Classifications that reasonably relate to a law’s purpose do not constitute such discrimination. *Union Elec. v. Mexico Plastic Co.*, 973 S.W.2d 170, 173 (Mo.App.1998).

i. The TTA applies uniformly to telecommunications companies.

The Cities’ argument that the TTA discriminates against tax-paying competitors by granting immunity to telecommunications companies that failed to pay alleged back taxes misses the mark. The TTA’s immunity standard is not whether a company paid all municipal tax claims, but whether it failed to pay based on a subjective good faith belief. *See* §92.089.2. Because the TTA applies the same good-faith standard to all telecommunications companies, it applies uniformly.²² And whether this immunity

²² As discussed in Part B.4.b and this section, the TTA is competitively neutral. Thus, the amicus’s reliance on the Federal Telecommunications Act, 47 U.S.C.A. §253 (West 2001), is misplaced. *See* MO-NATO Am.Br.11-12.

standard in fact applies to a given company is irrelevant to the even-handed nature of the standard. Companies that paid taxes without protest obviously did not possess any subjective good faith belief that these taxes were not owed.

And any tax overpayments are irrelevant to the TTA's constitutionality. According to the Cities, a uniform tax rate applied pre-TTA to all telecommunications companies, but some overpaid. That the TTA does not require refunds does not render the tax rate non-uniform. First, it does not violate uniformity to classify taxpayers according to whether they observed statutory procedures for obtaining a refund. *See Lane v. Lensmeyer*, No. 62084, 2004 WL 1098947, at *18-19 (Mo.App. May 18, 2004), *aff'd on other grounds*, 158 S.W.3d 218 (Mo.banc 2005) (affirming denial of class certification in refund action, rejecting argument that this would impermissibly result in some taxpayers paying at a lower effective rate than those who had paid but could not pursue refunds). If it did, Missouri's entire tax protest scheme would be invalid. Second, the state has a legitimate interest in not requiring refunds, and classifications permitting political subdivisions to retain taxes are not irrational. *See Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys.*, 950 S.W.2d 854, 860 (Mo.banc 1997). Finally, where any differing rate arises from the affirmative action of one of the taxpayers, this does not violate uniformity. *See Mid-Am. Tel. Co. v. Tax Comm'n*, 652 S.W.2d 674, 681 (Mo.banc 1983) (holding that where appellants chose to conduct business so as not to qualify for a tax deduction, they could not succeed on a uniformity challenge because they "put themselves in that position").

The TTA's failure to require refunds is not only permissible, but if it were otherwise any reduction in back taxes would be unconstitutional. If a lower effective tax alone rendered taxes non-uniform, tax compromises would necessarily run afoul of uniformity principles. Like the Cities' challenges under article III, §39(5), this Court should reject such an extreme interpretation of this constitutional provision.

ii. The TTA rationally applies only to telecommunications companies.

Contrary to their prior assertion that telecommunications companies represent a natural class impermissibly subclassified by the TTA, the Cities next urge that the natural class here is all utilities. They argue that the TTA, which seeks to resolve telecommunications license tax uncertainty, should apply to water, gas, and electric companies alike.

Initially, this would invalidate the Cities' own telecommunications license tax ordinances, as their ordinances are directed only to telecommunications companies, and not to electric, gas, or other utilities. More important, the TTA's application to telecommunications companies is rational and reasonably related to its purposes. As discussed more fully *supra* Part B.4.a, only telecommunications companies are engaged in an industry-wide dispute with municipalities regarding the scope of license taxes, and only this industry required legislative intervention to bring certainty to the taxing process.

iii. The TTA applies equally within taxing districts.

The Cities correctly recognize that uniformity principles require taxes to be uniform throughout the taxing entity's territorial limits, but fail to follow this principle to its logical conclusion. The taxing entity under the TTA is the individual municipality.

See, e.g., §92.074 (act’s title is “Municipal Telecommunications Business License Tax Simplification Act”); §92.077(1) (defining “business license tax” as a tax “assessed by a municipality on a telecommunications company”). License taxes are uniform according to these municipalities’ territorial limits, just as before. §92.086.6. That different municipalities might have different tax rates is neither relevant nor determinative. If the constitution required license tax rates to be uniform statewide rather than city-wide, then the scheme preceding the TTA would also be unconstitutional. Because this is the scheme that would remain if the Court invalidated the TTA under the uniformity provision, sustaining the Cities’ challenge would result in a constitutionally-created void, leaving no municipal telecommunications license tax ordinance intact. Indeed, because rates vary by municipality for all businesses, all license tax ordinances would fall.

That the TTA perpetuates uniform tax rates city-wide also disposes of the Cities’ argument that the carve-out provision is constitutionally infirm. The constitution requires that taxes be uniform upon the same class of subjects within the taxing entity’s territorial limits. Under the TTA, telecommunications companies are taxed at uniform rates within the territorial limits of the carve-out cities, just as they are taxed at uniform rates within the territorial limits of other municipalities.

Given the carve-out cities’ unique relationship to Hancock and the TTA’s purpose as compromise legislation, excluding them from the rate adjustment and cap is rational and reasonably related to the TTA’s purposes.

6. The Cities Cannot Assert An Equal Protection Challenge Under Article I, §2, And If They Could, Such a Challenge Would Fail (Responding To Appellants' Point J).

As with uniformity, this Court need not consider the Cities' equal protection challenge. First, their point relied on fails to allege any improper classification or discrimination, as is required to preserve an equal protection challenge. *See* App.Br.104 (stating the TTA "is unconstitutional because it arbitrarily classifies for purposes of taxation in violation of CONST. art.I, §2 [sic] and MO.CONST. art.I, §2, which guarantee equal protection of the law"). Faced with similarly inadequate points relied on, courts have refused to consider equal protection challenges because they are not required "to sweep, sieve or scour through the corridors of...labyrinthine brief[s] and argument to find what lies moldering therein." *Dae v. City of St. Louis*, 596 S.W.2d 454, 456 (Mo.App.1980) (refusing to consider equal protection challenge based on deficient point relied on that did not specifically allege any improper classification or discrimination). And in their point relied on, the Cities refer only to Missouri's constitution. Yet, buried in the middle of their argument is a reference to the federal equal protection clause. Arguments not fairly encompassed by the point relied on are not preserved for appellate review. *See St. Louis Teachers Ass'n v. Bd. of Educ.*, 456 S.W.2d 16, 18 (Mo.1970).

Second, a party must state facts showing a violation to raise a constitutional question. *Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo.banc 1989). The Cities have not met this standard. The only fact they allege in support of their equal protection argument is that "[t]o 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.” App.Br.105. The Cities then string cite four cases without explaining how these cases support their challenge. Parties must support constitutional challenges with more than mere conclusions. *See Massage Therapy Training Inst. v. Bd. of Therapeutic Massage*, 65 S.W.3d 601, 609 (Mo.App.2002).

Third, even if this Court finds that the Cities properly raised equal protection, they lack standing to assert it. Both the state and federal equal protection clauses inure to the benefit of “persons.” MO.CONST. art.I, §2; U.S.CONST. amend.XIV, §1. Because municipalities are not “persons,” they lack standing to assert equal protection violations under both constitutions. *City of Chesterfield v. Dir. of Revenue*, 811 S.W.2d 375, 377 (Mo.banc 1991). Finally, to the extent the Cities assert third-party equal protection claims, they lack standing for this additional reason. *Wahl v. Braun*, 980 S.W.2d 322, 325 (Mo.App.1998).

Aside from their waiver and lack of standing, the Cities’ arguments fail on the merits. Government action that neither creates a suspect classification nor impinges on a fundamental right will be upheld unless the challenging party proves that it is not rationally related to a legitimate state interest.²³ *Adams v. Children’s Mercy Hosp.*, 832 S.W.2d 898, 903 (Mo.banc 1992). Under rational-basis review, courts will not question a

²³ The Cities do not and cannot allege that the TTA creates a suspect classification or impinges on a fundamental right.

classification that advances a legitimate objective. *Powell v. Am. Motors Corp.*, 834 S.W.2d 184, 191 (Mo.banc 1992). This objective need not be compelling, nor must the General Assembly choose the best, wisest, or most efficient means to achieve it. *Winston v. Reorganized Sch. Dist. R-2*, 636 S.W.2d 324, 328 (Mo.banc 1982)

In conclusory fashion, the Cities allege that the TTA denies equal protection by (1) exempting select businesses from taxation, (2) arbitrarily classifying for taxation purposes, and (3) discriminating against companies that paid taxes. App.Br.105. The act's classifications, however, are rationally related to legitimate government interests. The TTA applies the same tax rate and base to every telecommunications company within each taxing municipality and establishes certainty in the only industry engaged in rampant license tax litigation. This certainty will eliminate variations in telecommunications companies' tax payments based on their differing interpretations of ordinances, and municipalities' corresponding individualized enforcement. For the same reasons the Cities' special laws and uniformity challenges fail, their equal protection challenge also fails. *See Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 832 (Mo.banc 1991) (equating standards); *State ex rel. Jones v. Nolte*, 165 S.W.2d 632, 636 (Mo.banc 1942) (same).

7. The TTA Does Not Violate Separation Of Powers, Article II, §1, Because It Does Not Impermissibly Interfere With Non-Legislative Functions (Responding To Appellants' Point F).

Separation of powers exists "to protect the liberty and security of the governed." *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys.*, 950 S.W.2d 854, 859 (Mo.banc 1997).

Missouri courts thus do not apply this principle to “protect turf claimed by judges,” nor to protect political subdivisions. *Id.*

The Cities’ separation of powers challenge misconstrues both the TTA and the General Assembly’s taxation powers. Contrary to the Cities’ argument, the TTA does not direct judicial action, interpret prior law, or impact any final judgment.²⁴ Rather, it amends the applicable tax scheme. And because the General Assembly’s control over tax collection is plenary, the TTA’s dismissal requirement does not impermissibly infringe on any executive powers.

a. The TTA does not impermissibly infringe on the judiciary.

Separation of powers prohibits the legislature from interfering with the judiciary in three ways: “First, ...[the legislature] cannot prescribe rules of decision to the Judicial Department of the government in cases pending before it. Second, [it] cannot vest review

²⁴ Thus the Cities’ cases are distinguishable. See App.Br.79-80 (citing *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So.2d 392, 406 (La.2005) (invalidating statute that nullified a pre-existing final judgment of state supreme court); *Fed. Express Corp. v. Skelton*, 578 S.W.2d 1, 7-8 (Ark.banc 1979) (invalidating statute that both interpreted prior law and nullified pre-existing final judgment); *Roth v. Yackley*, 396 N.E.2d 520, 522 (Ill.1979) (same); *Harris v. Comm’rs of Allegany County*, 100 A. 733, 735-36 (Md.1917) (invalidating statute that declared rule of decision in pending case); *Ark. Op. Atty. Gen. No. 2003-025*, 2003 WL 1347746, at *4 (2003) (opining that proposed statute purporting to interpret pre-existing statute would violate separation of powers)).

of the decisions of...courts in officials of the Executive Branch. Third, [it] cannot command...courts to retroactively open final judgments.”²⁵ *City of Chicago v. Dep’t of Treasury*, 423 F.3d 777, 783 (7th Cir.2005) (collecting U.S. Supreme Court decisions) (quotations omitted). While the Cities allege that the TTA impermissibly infringes on the judiciary, a review of two seminal separation of powers cases—this Court’s *Savannah* decision and *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992)—shows otherwise.

In *Savannah*, school districts argued that a newly amended statute, characterized by this Court as “an apparent attempt to put to rest...pending litigation,” violated separation of powers. 950 S.W.2d at 857. These districts had previously sued the state retirement system seeking a refund of certain contributions. The trial court ruled in the retirement system’s favor, but the appellate court reversed and remanded, holding that the school districts were owed a refund. *Id.* While the case was pending on remand, the General Assembly amended the retirement system statutes to establish required future contributions, deem that all previous payments and non-payments were in compliance, and provide that no refunds would be given. *Id.*

²⁵ This Court routinely looks to federal separation of powers decisions. *See, e.g., Savannah*, 950 S.W.2d at 858 (citing *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995)); *State Auditor v. JCLR*, 956 S.W.2d 228, 231 (Mo.banc 1997) (citing *INS v. Chadha*, 462 U.S. 919 (1983)).

The retirement system immediately moved to dismiss under the amended statutes, and the school districts—like the Cities here—responded by raising separation of powers. *Id.* at 857-58. This Court rejected the districts’ challenge. While the appellate court had ruled that the system was not entitled to certain contributions it had collected, which the amended statutes allowed it to keep, this Court reasoned that the amended statutes did not abrogate that judgment. *Id.* at 858-59. Rather, the amendments merely declared that no refunds were available. *Id.* at 859. As such, there was no separation of powers violation. *Id.* The Court further held that it is “the citizens’ rights” that are protected from “impingement of the judicial function by the legislature,” and that as statutory instrumentalities of the legislature, the school districts were not protected by article II, §1. *Id.*

In *Robertson*, the United States Supreme Court considered a separation of powers challenge to a statute expressly resolving existing litigation. At issue was a Bureau of Land Management (“BLM”) timber plan. The Audubon Society sued BLM, alleging that the plan violated federal law by permitting foresting that would endanger the spotted owl. 503 U.S. at 431-33. In direct response to this ongoing litigation, Congress amended the relevant statute to establish new standards governing timber management plans. The amendment expressly provided that BLM’s future compliance satisfied “the statutory requirements that are the basis for [the pending lawsuits].” *Id.* at 433-35, 435 n.2 (quoting Dep’t of the Interior & Related Agencies Appropriations Act, Pub.L.No.101-121 §318(b)(6)(A), 103 Stat. 701, 747 (1989)). The Supreme Court held that the statute did not violate separation of powers because it “did not instruct a court in how to apply pre-

existing legal standards to a pending case, but rather amended the statute.” RICHARD H. FALLON, JR., ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 368 n.21 (4th ed.1996) (citing 503 U.S. at 438-39).

In *Savannah*, this Court held that the General Assembly could bar school districts from recovering money to which an appellate court had already determined them entitled, deem statutory compliance, and end pending litigation. And in *Robertson*, the United States Supreme Court held that Congress could amend applicable law, expressly single out a pending lawsuit in legislation, and declare that the amendment resolved the lawsuit.

The TTA does not reach as far as either of these statutes. It does not categorically bar municipalities from recovering sums claimed, as was held permissible in *Savannah*. Nor does the act purport to finally resolve the Cities’ claims, as was held permissible in *Robertson*. Rather, the act permits municipalities to bring collection actions in the future, but amends applicable law by interposing an additional standard whereby telecommunications companies are entitled to immunity from such actions if a fact-finder determines that they believed in good faith that the alleged back taxes were not owed. *See* §92.089.2.

The Cities’ argument that the TTA—which amends the entire municipal telecommunications license tax scheme—does not repeal their individual ordinances is irrelevant. App.Br.81-84. Missouri courts must apply law as it exists at the time of judgment; as the above authorities make clear, that a law was passed mid-suit is immaterial. Thus, the Cities’ argument that the TTA infringes on the judiciary by determining what the law is and applying that law to pending cases fails. App.Br.78-79

n.24, 82-84. Altering “the relevant underlying law” by definition does not do this. *Miller v. French*, 530 U.S. 327, 347-49 (2000) (holding that 1995 Prison Reform Act, which “altered the relevant underlying law,” stayed injunction entered in 1988 without violating separation of powers). And the Cities’ argument that the TTA violates separation of powers because the General Assembly did not directly repeal their ordinances is illogical. Rather than amending 220 municipal ordinances, the General Assembly enacted a comprehensive series of state statutes. It is without serious debate that the TTA trumps municipal ordinances. *City of Dellwood v. Twyford*, 912 S.W.2d 58, 59 (Mo.banc 1995).

Ignoring *Savannah* and *Robertson* altogether, the Cities rely instead on *United States v. Klein*, 80 U.S. 128 (1871). App.Br.84 n.27. But *Klein* is inapposite here. In *Klein*, a prior Supreme Court ruling established that presidential pardons were relevant evidence supporting former Confederates’ recovery of seized property. 80 U.S. at 131-32. Congress then enacted a statute deeming such pardons conclusive evidence of guilt and requiring courts to immediately dismiss all property recovery actions brought by pardoned individuals. *Id.* at 133-34.

The *Klein* statute is distinguishable from the TTA for at least four reasons. First, the statute there overruled a final decision of the Supreme Court, invading the province of the judiciary. Here, no final judgment exists.²⁶ Second, the statute vetoed a presidential

²⁶ A final judgment for separation of powers purposes means that either the court of last resort has ruled, or the time to appeal a judgment by an inferior court has expired. *Plaut*, 514 U.S. at 226-27 (cited approvingly in *Savannah*, 950 S.W.2d at 859).

pardon, encroaching on the executive branch. The TTA does not infringe on any executive functions, as discussed *infra*. Third, subsequent Supreme Court decisions have limited *Klein*'s scope, holding its separation of powers principles have no application when the legislature amends applicable law. *See Plaut*, 514 U.S. at 218 (*Klein* has no application "when Congress amend[s] applicable law") (quotations omitted); *Savannah*, 950 S.W.2d at 858 ("if a court has not yet finally adjudicated an issue in a pending case, even a retroactive amendment to the governing law does not constitute a separation of powers violation"). *See also City of Chicago*, 423 F.3d at 783-84 (rejecting plaintiff's *Klein* analysis because appropriations bill barring courts from granting FOIA request at the center of pending litigation merely amended "underlying substantive law"). Since the TTA amends underlying law, *Klein* does not apply.

Finally, unlike the statute in *Klein*, the TTA does not establish conclusive proof as to anything. The General Assembly has always been permitted to establish immunity standards. *See, e.g.,* §44.023.5 RSMo.(Supp.2004) (establishing immunity standards for individuals and corporations for actions taken in performance of volunteer work). Because the TTA's immunity standard leaves it entirely to the fact-finder to decide what evidence is relevant to subjective good faith, as well as to weigh that evidence, the General Assembly has acted permissibly. *Cf. City of St. Louis v. Cook*, 221 S.W.2d 468, 469-70 (Mo.1949) ("Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government.") (quotations omitted).

The Cities' other arguments are as futile. Initially, the TTA does not single out specific litigation for legislative treatment. *See* App.Br.77 n.20, 85-86. While the act requires municipalities to immediately dismiss pending telecommunications collection actions without prejudice, this requirement extends to litigation brought anytime before July 1, 2006. §92.089.2. *See also id.* (applying immunity standard to future actions seeking taxes allegedly underpaid through July 1, 2006). Even if it did, moreover, *Savannah* and *Robertson* firmly establish that this is permissible. Further, the TTA's dismissal requirement does not direct an outcome in a pending case, *see* App.Br.77-78 n.22, as the act commands municipalities, not courts, to dismiss.

Finally, the TTA does not impede courts' adjudicative skill by establishing a subjective good faith immunity standard. App.Br.77-78 n.21. The Cities' argument is related to their void-for-vagueness challenge, which alleges that the immunity standard is "incapable of verification." App.Br.96. As discussed in Part B.8, *infra*, courts are routinely tasked with determining subjective good faith and regularly uphold statutes incorporating subjective standards. The TTA charges courts with the threshold duty to determine subjective good faith before permitting a telecommunications collection action to proceed. Requiring courts to engage in additional analysis in no way deprives them of their proper role.²⁷

²⁷ The Cities also argue that the TTA violates separation of powers because the General Assembly declared that the act confers consideration. App.Br.78-79 n.23. But, as with the legislature's defining public purpose in accordance with article III, §38(a), *Fust v.*

b. The TTA does not impermissibly infringe on the executive.

The Cities argue that the TTA’s requirement that they dismiss these collection actions infringes on their executive powers. But, they forget that “it is well settled that a municipal corporation has no powers which are not derived from and subordinate to the state....” *Kansas City v. J.I. Case Threshing Mach.*, 87 S.W.2d 195, 198 (Mo.banc 1935). See also *State ex rel. Cole v. Nigro*, 471 S.W.2d 933, 937 (Mo.banc 1971) (a “city...is not a sovereign entity but is a subordinate governmental instrumentality of the State”); *State ex rel. Otto v. Kansas City*, 276 S.W. 389, 395 (Mo.banc 1925) (“status of a city is subordinate in the scheme of state government”). This subordination is particularly pronounced in the tax context.

Nor can such cities say to the state:...We hold the purse strings. These municipal corporations are subordinate to the sovereign power of the state, and whilst they do, in a sense, hold the purse strings, they so do by the consent of the state. Without the authority of the sovereign, they would not even have a purse, much less the strings of one. The power which gave them the purse can limit the use of it. The power which placed upon that purse the strings can loosen the strings.

State ex rel. Reynolds v. Jost, 175 S.W. 591, 594 (Mo.banc 1915).

Attorney General, 947 S.W.2d 424, 430 (Mo.banc 1997), it is ultimately for this Court to determine if constitutional requirements are satisfied, giving the General Assembly’s declaration whatever weight it is due.

Separation of powers principles prevent impermissible encroachment by one branch of government on a co-ordinate, not subordinate, branch of government. *State Auditor v. JCLR*, 956 S.W.2d 228, 233 (Mo.banc 1997) (separation of powers doctrine guards against impermissible interference with co-equal, coordinate branch). *Accord Morss v. Forbes*, 132 A.2d 1, 19 (N.J.1957) (“The doctrine...has little applicability where the competing governmental functions are on entirely different levels of government.”). Thus where the function allegedly infringed upon is exercised by “a local official,” “[t]here is no equality in stature or dignity with the Legislature.” *Id.* (holding that county prosecutor could never be protected from legislative encroachment).

Applying this rule, this Court has forcefully rejected that subordinate municipal officials are protected from encroachment by a branch of state government:

The argument is that the board of aldermen of the City of St. Louis constitutes a coordinate branch of government, the same as the General Assembly, and “should be accorded a similar status although it rules only a City”; that under the doctrine of separation of powers the legislative branch is removed from “judicial interference or supervision.”...[But] [t]he City of St. Louis is not a coordinate branch of the state government...Its board of aldermen does not stand on an equality with the General Assembly as an essential part of the legislative department of this state.

State ex rel. Dalton v. Harris, 363 S.W.2d 580, 583-84 (Mo.1962). *See also id.* at 584 (the constitution does not “vest[] any part of the legislative power in the board of aldermen of the City of St. Louis”). Municipalities are no more protected from the

legislature than from the judiciary and, as such, the General Assembly is always free to take away municipal authority, without violating separation of powers. *Cf. State ex rel. N. Mo. C. R.R. v. Linn County Court*, 44 Mo. 504, 1869 WL 4932, at *3 (1869) (“the Legislature [has] control of the subordinate municipal organizations, and the power to enlarge or abridge their powers at pleasure”). Indeed, if the rule were otherwise, the General Assembly would have no incentive ever to grant municipal powers.

Regardless, even if the Cities were protected from legislative encroachment, the General Assembly did not infringe on any municipal executive powers here but merely exercised its own legislative power over taxation. “Sec. 1, Art.X of our Constitution broadly confides the *whole taxing power* to the Legislature, which necessarily includes the collection of taxes.” *Henry v. Manzella*, 201 S.W.2d 457, 459 (Mo.banc 1947) (quotations omitted). Thus, “[s]tatutes for levying taxes and providing the means of enforcement are within the **unquestioned** power of the legislature.” *Id.* (emphasis added). *Accord Birmingham Drainage Dist. v. Chicago, B.&Q.R.*, 202 S.W. 404, 407 (Mo.1917) (legislature may determine the manner in which taxes may be levied and collected by the city). *See also City of Belmont v. Tax Comm’n*, 860 So.2d 289, 306-07 (Miss.2003) (upholding statute abating municipal collection actions against separation of powers challenge because “matters involving the collection...of the taxpayers’ monies” are vested in the legislature).

Even the Department of Revenue, an executive department to which the TTA transfers collection powers and upon which the Cities rely to argue that their executive powers are at issue, is subject to the General Assembly’s plenary control when exercising

its tax collection functions. *See* MO.CONST. art.IV, §22 (“The department shall collect all taxes...**as provided by law.**”) (emphasis added). Thus, the constitution itself confirms that the manner in which taxes are to be collected—even where a coordinate branch rather than a subordinate municipality is involved—is wholly within the province of the General Assembly.

8. The Cities Cannot Argue That The TTA Is Impermissibly Vague And, Regardless, It Can Be Understood By Persons Of Common Intelligence (Responding To Appellants’ Point H).

a. The Cities have waived and lack standing to assert that the TTA is vague.

The Cities argue that the TTA is void because (1) the “subjective good faith” standard is vague, (2) it is unclear whether this standard applies to immunity and/or dismissal, and (3) it is uncertain what Missouri’s tax policy is between August 28, 2005, the TTA’s effective date, and July 1, 2006.

The Cities have waived these arguments by failing to reference any constitutional provision. *Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo.banc 1989) (party must “designate specifically the constitutional provision claimed to have been violated”). Any void-for-vagueness challenge would necessarily have been based on the Missouri and/or federal due process clauses. *U-Haul Co. v. City of St. Louis*, 855 S.W.2d 424, 426 (Mo.App.1993) (“The ‘void-for-vagueness’ constitutional attack arises from the requirements of due process of both the United States and Missouri constitutions.”).

Because these provisions afford the Cities no protection, they lack standing to even raise

this challenge. *City of Chesterfield v. Dir. of Revenue*, 811 S.W.2d 375, 377 (Mo.banc 1991) (“municipalities...are not ‘persons’ within the protection of the due process...clause[]”). *See also* MO.CONST. art.I, §2; U.S.CONST. amend.XIV, §1.

b. The Cities’ vagueness challenge fails because persons of common intelligence can understand the TTA.

Even if they could assert it, the Cities’ challenge that the TTA’s “subjective good faith” standard is vague lacks merit. *See* §92.089.2. When addressing a vagueness challenge, courts consider “whether the terms or words used are of common usage and are understandable by persons of ordinary intelligence.” *Bd. of Educ. v. State*, 47 S.W.3d 366, 369 (Mo.banc 2001) (quotations omitted). *Accord* App.Br.95 (quoting same standard). “Subjective good faith” is “understandable by persons of ordinary intelligence.” *Bd. of Educ.*, 47 S.W.3d at 369. “Subjective” means “substantial” or “real,” and “good faith” means a “belief that one’s conduct is not unconscionable or that known circumstances do not require further investigation: absence of fraud, deceit, collusion, or gross negligence.” WEBSTER’S THIRD NEW INT’L DICTIONARY 978, 2275 (1986). *Resp.Appx.A93-94, A92*. That the TTA itself does not specifically define “subjective good faith” is neither fatal, nor in the least bit unusual. *See Conagra Poultry v. Dir. of Revenue*, 862 S.W.2d 915, 918 (Mo.banc 1993) (“Neither statute nor case law defines ‘good faith’ in §32.200. The phrase is generally understood, however, to convey the sense of ‘[h]onesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry.’”) (quoting BLACK’S LAW DICTIONARY 193 (6th ed.1990)).

The notion that this standard is unconstitutional because it is “incapable of verification,” moreover, is belied by caselaw. App.Br.96. This Court has routinely determined whether a party had a state of mind that the Court has, directly or indirectly, equated with subjective good faith. *See, e.g., Conagra Poultry*, 862 S.W.2d at 919 n.2 (taxpayer owed no penalties based on “good faith (albeit erroneous) belief that it was not subject to tax”); *In re Duncan*, 844 S.W.2d 443, 444 (Mo.banc 1992) (holding that a “willful” failure to pay taxes is negated by “a good faith misunderstanding of the law or a good faith belief that one is not violating the law—even if objectively unreasonable or irrational”); *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 447 n.3 (Mo.banc 1986) (considering whether good faith supported official immunity, and contrasting standard to the “objective standard found in numerous federal cases”).

“Subjective good faith” is also not impermissibly vague merely because it requires individualized application. *U-Haul*, 855 S.W.2d at 427 (case-by-case application does not render statute void for vagueness). Missouri courts routinely uphold statutes incorporating standards unique to the individual. *E.g., State v. Brown*, 140 S.W.3d 51, 54 (Mo.banc 2004) (“reasonable cause to suspect”); *Harris v. Hunt*, 122 S.W.3d 683, 689 (Mo.App.2003) (“good moral character”). *See also Conagra Poultry*, 862 S.W.2d at 919 (“good faith belief that no tax is due must necessarily be determined on a case by case basis”).

In any case, the Cities actually concede that the meaning of “subjective good faith” is clear, and that they are simply dissatisfied with the standard’s inclusion in the TTA. App.Br.96 (“The Cities do not mean to suggest that the word ‘subjective’ is

unclear. Indeed, it is understood all too well.”). Such dissatisfaction does not rise to the level of a constitutional challenge.

The Cities next argue that the act’s reference to “without prejudice” and the supposedly unclear relationship between its immunity and dismissal provisions render the TTA vague. App.Br.97. They are wrong on both counts. A person of common intelligence can understand “without prejudice,” and Missouri courts regularly apply this standard. *See, e.g.*, §510.130 RSMo.2000 (allowing plaintiff to dismiss “without prejudice” before the action is finally submitted to the jury or court).

The TTA’s immunity and dismissal provisions, moreover, are clear in their meaning and application. The dismissal provision does not reference either immunity or “subjective good faith,” and the immunity provision—alone referring to “subjective good faith”—does not mention dismissal. §92.089.2. The dismissal provision requires dismissal “without prejudice,” while the immunity provision mandates dismissal with prejudice (company “shall not be liable”). *Id.* Where a statute’s meaning is clear, courts must apply it as written. *Brinkmann v. Common Sch. Dist. No. 27*, 238 S.W.2d 1, 6 (Mo.App.1951) (courts must “apply the law as written” and leave to the legislature “the matter of determining questions of legislative policy”). And if the TTA’s meaning were not immediately apparent, this Court would interpret, not invalidate, it. *See Ochoa v. Ochoa*, 71 S.W.3d 593, 595 (Mo.banc 2002) (this Court interprets statutes as a question of law).

Finally, the TTA does not allow SBC to refuse to pay any taxes between August 28, 2005 (HB209’s effective date) and July 1, 2006 (date new taxation scheme begins),

and thus is not impermissibly vague on this ground. *See* App.Br.97-98. More than half-way through that period, SBC continues to pay exactly as it did before the TTA. More fundamentally, the act grants neither unfettered discretion nor impunity. The immunity provision applies in exactly the same manner to amounts at issue between August 28, 2005, and July 1, 2006, as it does to amounts at issue before August 28, 2005. If SBC, or any other telecommunications company, discontinued existing payments under the Cities' ordinances, it could not prevail on subjective good faith.

“Subjective good faith,” “without prejudice,” and the TTA as a whole have clear meanings. The Cities' distrust in Missouri courts' ability to understand and apply the law as written is unfounded.

9. HB209 Contains A Clear Title And Encompasses A Single Subject In Accordance With Article III, §23 (Responding To Appellants' Point K).

The Cities argue that HB209 violates the constitutional mandate that legislation contain only one subject, clearly expressed in its title, because it does not indicate in its title that it addresses utility rights-of-way, which are not sufficiently related to telecommunications license taxes. Constitutional attacks based on §23's clear-title and single-subject requirements are particularly unlikely to succeed. *See Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo.banc 1994). “[T]his Court interprets procedural limitations liberally and will uphold the constitutionality of a statute against such an attack unless the act clearly and undoubtedly violates the constitutional limitation.” *Id.* *See also Stroh Brewery Co. v. State*, 954 S.W.2d 323, 326 (Mo.banc 1997) (“The use of these procedural limitations to attack the constitutionality of statutes is not favored.”).

The Cities cannot establish that HB209 “clearly and undoubtedly” contravenes the constitution’s clear-title and single-subject requirements. Even if they could, this Court would merely be required to sever and invalidate the State Highway Utility Relocation Act, §§227.241-.249 (the “Utility Act”), addressing utility rights-of-way.

a. HB209 satisfies the clear-title and single-subject requirements.

The clear-title mandate requires only that an act’s “title should indicate in a general way the kind of legislation that was being enacted.” *Fust v. Attorney Gen.*, 947 S.W.2d 424, 429 (Mo.banc 1997). HB209’s title states that it is “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, with an effective date for certain sections.” The title’s explicit reference to Ch.227, “State Highway System,” which deals extensively with rights-of-way, alone defeats the notion that it is underinclusive in referencing only telecommunications taxes. *Compare Nat’l Solid Waste Mgmt. v. Dir. of Dep’t of Natural Res.*, 964 S.W.2d 818, 821 (Mo.banc 1998) (sustaining clear-title challenge where title stated that act related to solid waste management but failed to reference statutory section concerning hazardous waste).

The Cities’ single-subject challenge similarly fails. The single-subject requirement ensures that legislators and the public are “fairly apprised” of an act’s subject matter. *Hammerschmidt*, 877 S.W.2d at 102. Even where “in the abstract there seems to be no connection at all between” certain statutory provisions and an act’s purpose, *City of St. Charles v. State*, 165 S.W.3d 149, 151-52 (Mo.banc 2005), an act satisfies the single-subject requirement if, upon closer examination, “all provisions of the

bill fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose.” *Stroh Brewery*, 954 S.W.2d at 327. Utility rights-of-way are naturally connected to the “assessment and collection of various taxes on telecommunications companies,” as expressed in the act’s title, because telecommunications companies’ rights-of-way directly impact their statewide investment, and, accordingly, their taxable Missouri gross receipts. *See St. Charles*, 165 S.W.3d at 151-52 (rejecting single-subject challenge where act related to emergency services and tax increment financing, because the financing provisions discouraged flood plain development, and thus potentially the need for emergency services in these areas). Rights-of-way and telecommunications taxes are further connected in that several municipalities link the imposition of license taxes with a utility’s use of rights-of-way. *See, e.g.,* SPRINGFIELD, MO., CITY CODE §§100-1.1.5(2000) (license tax compensates for right to occupy portions of Springfield’s rights-of-way); 100-4.1.1(b)(i)(C)(2000) (providing that compensation for Springfield’s rights-of-way is directly linked to amount company pays in license taxes). *See* Resp.Appx.A95-97, A98-101.²⁸ Given these connections, HB209 fairly encompasses a single subject.

b. The remedy for the alleged violation is severing and striking the Utility Act.

²⁸ While these ordinances demonstrate the natural connection between rights-of-way and license taxes, SBC denies that such ordinances are permissible.

“All statutes should be upheld to the fullest extent possible.” *Gen. Motors Corp. v. Dir. of Revenue*, 981 S.W.2d 561, 568 (Mo.banc 1998). Applying this standard, courts sever and invalidate only provisions not clearly expressed in an act’s title. *Nat’l Solid Waste*, 964 S.W.2d at 819. Similarly, where an act violates the single-subject rule, courts “will sever that portion of the bill containing the additional subject(s) and permit the bill to stand with its primary, core subject intact.” *Hammerschmidt*, 877 S.W.2d at 103. *See also* §1.140 RSMo.2000 (“The provisions of every statute are severable.”).

HB209’s title specifies that its provisions relate to the “assessment and collection of various taxes on telecommunications companies”; thus, if HB209 violates the clear-title requirement, the Utility Act must be severed and invalidated, leaving the TTA and the class action prohibition intact. Not only does HB209’s title expressly reference the TTA’s purpose, but it underscores that telecommunications license taxes are HB209’s “core subject.” *Hammerschmidt*, 877 S.W.2d at 103 (“In determining the original, controlling purpose of the bill for purposes of determining severance issues, a title that ‘clearly’ expresses the bill’s single subject is exceedingly important.”). HB209’s legislative history further demonstrates its central subject. Early versions included only the TTA and §71.675, the class action prohibition, both relating to telecommunications license taxes. *See generally* <http://www.house.mo.gov/bills051/bills/hb209.htm> (showing each version of HB209’s bill text). *See SSM Cardinal Glennon Children’s Hosp. v. State*, 68 S.W.3d 412, 418 (Mo.banc 2002) (holding that an “examination of the bill’s passage” informs the inquiry into its original purpose, and thus what portion of the bill survives a single-subject violation).

Thus, even if HB209 violated the clear-title or single-subject requirements, the remedy would be severing and striking the Utility Act, not invalidating the entire bill.

10. HB209’s Prohibition Against Telecommunications Collection Class Actions Does Not Create Arbitrary Distinctions Or Impair Substantive Rights (Responding To Appellants’ Points E And L).

The Cities’ arguments that this Court should strike down §71.675.1, which bars municipalities from bringing telecommunications collection class actions, fall into two general categories. First, they contend that the statute is a special law because it precludes telecommunications collection class actions but not other collection class actions; bars municipalities from pursuing class relief but not private citizens from pursuing refund class actions; and applies to cities and towns, but not counties.

App.Br.70, 110. Second, they contend that the statute impairs their access to federal courts and their purported right to avail themselves of federal and state class action procedures. App.Br.110.

Initially, the Cities have failed to properly raise these arguments. As with their other special laws challenges, they do not cite a single case in support. *See* App.Br.70, 110. *See also* Part B.4, *supra*. And their court access and class action procedure arguments identify no constitutional provision that might be implicated. *See Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo.banc 1989) (parties must designate specific constitutional provision and support alleged violation).

a. HB209's class action prohibition is not a special law.

Even if HB209's class action prohibition treated telecommunications companies differently than other companies for purposes of collection actions, this would not violate article III, §40. *See* Part B.4.a, *supra*. But the class action prohibition does not create any such differential treatment.

Municipalities cannot pursue collection class actions against **any** company, wholly independent from HB209. Missouri courts have consistently held that where a statute is strictly construed, its failure to expressly permit class actions necessarily precludes them. *E.g.*, *State ex rel. Ellsworth Freight Lines v. Tax Comm'n*, 651 S.W.2d 130, 132 (Mo.banc 1983) (taxpayer refund class action prohibited because statute was strictly construed and silent as to class actions); *Charles v. Spradling*, 524 S.W.2d 820, 823-24 (Mo.banc 1975) (same); *State ex rel. Lohman v. Brown*, 936 S.W.2d 607, 610 (Mo.App.1997) (same). Courts strictly construed the statutes in these cases because they waived sovereign immunity. *See, e.g.*, *Charles*, 524 S.W.2d at 823; *Lohman*, 936 S.W.2d at 610.

Likewise, courts strictly construe municipal tax statutes based on at least two canons. First, "tax statutes are to be strictly construed in favor of the taxpayer and against the taxing authority." *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo.banc 1988). Second, "any doubt" as to municipal power "should be construed against the grant of power." *State ex rel. St. Louis Hous. Auth. v. Gaertner*, 695 S.W.2d 460, 462 (Mo.banc 1985).

Sections 94.150 and 94.310, governing tax collection by the Cities, do not expressly authorize class actions. *See* §§94.150, 94.310 RSMo.2000. Because these statutes are strictly construed, their silence speaks volumes. “Without such a provision [expressly authorizing class actions], strictly construing the statute, it cannot be said that the legislature has...permitt[ed] such a procedure.” *Lane v. Lensmeyer*, No. 62084, 2004 WL 1098947, at *17 (Mo.App. May 18, 2004) (citing *Charles*, 524 S.W.2d at 823), *aff’d on other grounds*, 158 S.W.3d 218 (Mo.banc 2005). Municipalities have never been permitted to bring collection class actions.²⁹ HB209’s class action prohibition merely reinforces this inability as to telecommunications companies. *Cf. Branson Props. USA v. Dir. of Revenue*, 110 S.W.3d 824, 826-27 (Mo.banc 2003) (recognizing General Assembly had codified the Court’s previous holdings interpreting tax statute).

Nor is HB209’s class action prohibition special because it bars municipal collection class actions, but not citizens’ refund class actions. First, the Cities’ argument to the contrary is based on a faulty premise. As discussed above, taxpayers cannot bring tax refund class actions. And the Cities incorrectly suggest otherwise by footnoting a tax refund action filed by several wireless companies. *See App.Br.70 n.16* (citing *AT&T*

²⁹ This prohibition applies to counties for precisely the same reasons. But even if it did not, HB209’s class action prohibition still would not be impermissibly special because it did not create this differential treatment. Treating cities and counties differently, moreover, is non-arbitrary. *See, e.g.*, Title VII RSMo. (governing municipalities, but not counties).

Wireless PCS, LLC, et al. v. Jeremy Craig et al., No. 04CC-000649 (St. Louis County Circuit Court filed Feb. 13, 2004)). *See* Resp.Appx.A102-168. That lawsuit is not a class action; it was brought by individual taxpayers against individual collectors.

Second, even if citizens could bring refund class actions, this distinction would be rational. Municipalities and their collectors cannot delegate collection responsibilities to a class representative. “[W]henever, by legislative enactment, power is confided to a particular person...to perform specified acts, especially acts relating to the exercise of the important power of taxation, such legislative enactment...must be strictly observed; and **such power, in order to its validity, must be exercised and exercised only by [that] person....**” *Noll v. Morgan*, 82 Mo.App. 112, 1899 WL 2092, at *3 (1889) (emphasis added). No such concerns regarding the exclusive entrustment of governmental powers exist in the tax refund context.³⁰

b. HB209’s class action prohibition does not impair substantive rights.

While the Cities argue that the class action prohibition “impairs municipal access to federal courts,” *see* App.Br.110, the statute’s plain terms permit municipalities to bring collection actions in federal court. §71.675.1.

³⁰ Not only do these exclusive entrustment issues further support municipalities’ being unable to bring collection class actions, independent of any prohibition in HB209, but they offer an additional rationale in support of strictly construing §§94.150 and 94.310 RSMo.2000.

The Cities' assertion that the class action prohibition "contravenes" FED.R.CIV.P. 23 and MO.SUP.CT.R. 52.08 is equally futile. *See* App.Br. 110. The Cities inexplicably cite *Clark v. Austin*, 101 S.W.2d 977, 988, 995 (Mo.banc 1937) (Ellison, C.J., concurring), their only Missouri case, for this point. App.Br.110. In *Clark*, a separation of powers case, the Court held that "[t]he practice of law is so intimately connected with...the administration of justice that the right to define and regulate such practice logically and naturally belongs to the judicial department." 101 S.W.2d at 981. *Clark* is not even remotely on point. Prescribing municipal tax collection procedures has always been recognized as a legislative, not judicial, function. *Kansas City v. Field*, 226 S.W. 27, 32-33 (Mo.1920).

HB209 codifies a substantive legal rule barring municipalities from bringing collection class actions. Rules 23 and 52.08 merely articulate class action procedures. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims"); *Charles*, 524 S.W.2d at 824 ("Rule 52.08 is procedural rather than substantive").

States, therefore, may bar class actions on state claims in federal court without contravening Rule 23. *Leider v. Ralfe*, 387 F.Supp.2d 283, 290 (S.D.N.Y.2005) ("Rule 23...governs the manner of determining whether class certification is appropriate in federal courts [whereas] [state law] establishes a bar to certain claims being considered for class action treatment on a threshold level.") (quotations omitted). *See also id.* at 291 (holding that it would offend comity "to allow plaintiffs to recover on a class-wide basis

in federal court when they are unable to do the same in state court”); *Lang v. Windsor Mount Joy Mut. Ins.*, 493 F.Supp. 97, 99 (E.D.Penn.1980) (where state law denied entity class treatment, entity could not “use Rule 23.2 to accomplish otherwise”).

Missouri’s class action procedures are likewise not offended. “Rule 52.08 is procedural rather than substantive; and despite the desirability of actions under the rule in certain circumstances,...it may not be interpreted to permit” class actions where they are barred as a matter of law. *Charles*, 524 S.W.2d at 824.

c. Even if unconstitutional, the class action prohibition would not invalidate the TTA.

“The provisions of every statute are severable.” §1.140 RSMo.2000. In addition to §1.140’s statutory presumption of severability, HB209 itself provides that the class action prohibition is severable from the Telecommunications Tax Act: “The provisions of section 71.675, RSMo, are severable from the provisions of sections 92.074 to 92.092....If any portion of section 71.675, RSMo, is declared unconstitutional..., sections 92.074 to 92.092 and its applicability to any person or circumstance shall remain valid and enforceable.” §92.098. Thus, even if HB209’s class action prohibition were unconstitutional, the TTA’s validity would not be affected.

C. The TTA Moots The Cities’ Appeal, And Dismissal Was Proper Because The Cities Lack Authority To Sue And They Failed to Notice and Assess (Responding To Appellants’ Points A And B).

1. The TTA Moots The Cities’ Appeal.

As discussed above, HB209 is constitutional. And, because it requires the Cities to immediately dismiss, this appeal is mooted. §92.089.2. When, pending an appeal, “an event occurs which renders it impossible for this court...to grant [plaintiff] any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.” *Kalbfell v. Wood*, 92 S.W. 230, 234 (Mo.banc 1906). To avoid this, the Cities argue that two inapplicable exceptions to the mootness doctrine and one non-existent constitutional infirmity permit this Court to ignore the act. App.Br.40 n.4, 41-45.

The Cities first assert that whether they have statutory authority to sue—the underlying issue on appeal—is “capable of repetition yet evading review” because the TTA does not resolve this issue. The act, however, does exactly that: “Notwithstanding any other provision of law to the contrary...[a] city or town may, **individually**...bring an action...to enforce or collect any business license tax imposed on a telecommunications company.” §71.675.1 (emphasis added).³¹ Because the Cities may now bring

³¹ This fact alone moots the Cities’ 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.” App.Br.39 (citing *Mootness on Appeal in the Supreme Court*, 83 HARV.L.REV. 1672, 1679 (1970)).

telecommunications collection actions, whether they could do so before the TTA is not an issue capable of repetition. And whether they may bring collection actions against other utilities is irrelevant. App.Br.42-43. The TTA would not require dismissal of such a suit, and therefore, the issue would not evade review.

The Cities next ask this Court to ignore the TTA’s dismissal requirement on public interest grounds. But under Missouri law, a “public interest” exception to mootness exists only if the issue will recur and evade future appellate review. *City of Manchester v. Ryan*, 180 S.W.3d 19, 22 (Mo.App.2005).

The Cities’ contention that the TTA impermissibly impedes appellate review is similarly misplaced. Dismissal will not necessarily leave the trial court order unreviewed. The Cities could request that this Court vacate that order. *See State ex rel. Chastain v. Kansas City*, 968 S.W.2d 232, 243 (Mo.App.1998) (“[T]he normal practice should be to vacate the judgment when one or more parties requests such action in a case moot on appeal.”). And even if they did not, both this Court and the United States Supreme Court have repeatedly held that the legislature may enact a law impacting pending litigation; separation of powers is only implicated when the legislative act contravenes a final judgment.³² *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys.*, 950 S.W.2d 854, 857 (Mo.banc 1997); *Plaut v. Spendthrift Farm*, 514 U.S. 211, 227 (1995).

³² A final judgment in this context means either that the court of last resort has ruled, or the time to appeal a judgment has expired. *Plaut*, 514 U.S. at 226-27.

Because no court has entered a final judgment on the Cities' back tax claims, the TTA does not impermissibly preclude appellate review.

The TTA is a constitutional exercise of the General Assembly's broad powers over taxation and municipalities, and thus it moots the underlying issue of whether the Cities had statutory authority to sue.

2. The Trial Court Properly Dismissed Because The Cities Lack Authority To Bring This Action.

Even if the Cities' lawsuit were not moot, the trial court properly dismissed their collection action because they lacked authority to bring it. Whether the trial court properly dismissed is reviewed de novo. *Vogt v. Emmons*, 158 S.W.3d 243, 247 (Mo.App.2005). The trial court's dismissal here was based on its construction of Missouri tax statutes, which provide the exclusive avenue for municipal collection actions. *State ex rel. George v. Dix*, 141 S.W. 445, 447 (Mo.App.1911). The Cities' failure to comply with applicable tax statutes compelled dismissal.

Wellston, a third-class city, levies license taxes under §94.110 RSMo.2000. According to §94.150 RSMo.2000:

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,...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.**

(Emphasis added). Section 94.150 expressly mandates that only city collectors, at the relation of the state, may bring collection actions.

The Cities argue that this statutory requirement applies only to collections of “ad valorem property taxes,” citing a single Missouri appellate decision, decided almost twenty years before §94.150’s enactment. *See* App.Br.31 (relying on *State ex rel. Bloebaum v. Broeker*, 11 S.W.2d 81 (Mo.App.1928)). But §94.150’s plain text and history, as well as recent caselaw, clearly demonstrate that its requirements apply to **all** collection actions.

Bloebaum considered whether a statute ousting public officials for failing to pay “city taxes” extended to license fees. The court held that it did not because (1) other statutes at the time defined licenses as fees, not taxes; (2) the term “city tax” appeared only in property tax statutes; and (3) the imposition and collection of license fees were governed by different statutes than other taxes. 11 S.W.2d at 83.

Subsequent legislative action has abrogated all three bases for *Bloebaum*’s holding. Missouri statutes now define licenses as taxes, not fees. *E.g.*, §136.076.2 RSMo.(Supp.2004) (“tax” includes “business license, gross receipts or any other taxes payable by the taxpayer on account of its activities...in...[a] political subdivision”). And, since its 1949 enactment, §94.150 explicitly governs license tax collection. §94.150 RSMo.2000 (governing “enforcement of **all taxes** authorized by sections 94.010 to 94.180”) (emphasis added). Finally, “city taxes” now routinely refers to all manner of taxes. *See, e.g.*, §94.510.3 RSMo.2000 (referring to municipal sales tax as “city tax”). *Accord Erb Indus. Equip. v. City of Cape Girardeau*, 845 S.W.2d 551, 553 (Mo.banc

1993) (referring to automobile dealer license tax as “city tax”); *Gen. Motors Corp. v. Kansas City*, 895 S.W.2d 59, 61 (Mo.App.1995) (referring to license tax as a “city tax”).³³ Because §94.150 applies to license taxes, Wellston must follow its mandate directing that only city collectors may bring collection actions.

Winchester, a fourth-class city, which levies license taxes under §94.270 RSMo.(Supp.2004), also lacks statutory authority to sue here. “The enforcement of all taxes authorized by sections 94.190 to 94.330 **shall be made in the same manner as is**

³³ The Cities pluck two out-of-context paragraphs from 53 C.J.S. *Licenses* §106 and 9 MCQUILLIN MUN. CORP. §26.98, arguing that municipalities may collect license taxes as ordinary debts. App.Br.31. But these same treatises recognize this as only a default rule. Where a statute “prescribes an adequate method of collection [of license taxes]...this method is held exclusive.” 9 EUGENE MCQUILLIN, MCQUILLIN MUN. CORP. §26.98 (3d ed. 2005). *See also* 53 C.J.S. *Licenses* §106 (2005) (“statutory provisions govern...the collection of license, occupation, and privilege taxes”). *See also City of Carondelet ex rel. Reuter v. Picot*, 38 Mo. 125, 1866 WL 4243, at *3 (1866) (“The levying of taxes is a matter solely of statutory creation, and no means can be resorted to, to coerce their payment, other than those pointed out in the statute.”). Missouri statutes clearly prescribe an adequate collection method here.

provided by law for the collection and enforcement of the payment of state and county taxes....” §94.310 RSMo.2000 (emphasis added).

Rather than engrafting language onto §94.310, as the Cities suggest, the trial court, following this Court’s lead, looked to Missouri’s tax collection statutes and recognized that both state and county collections must be brought state ex rel. the county collector, Attorney General, or Director of Revenue. *See App.Appx.12 n.2* (citing §§141.091, 151.230, 148.430 RSMo.2000). It properly concluded that fourth-class cities must therefore do the same, even where no predicate state tax exists. *See Kirkwood Drug v. City of Kirkwood*, 387 S.W.2d 550, 554 (Mo.1985) (holding that municipalities may audit license tax remittances because §94.150 requires cities to enforce taxes in the same manner as the state and county, which have audit rights, referencing Missouri statutes’ income, intangible, cigarette, sales, use, merchants’, and manufacturers’ tax collection procedures), *overruled on other grounds by Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 911 (Mo.banc 1997).

The trial court’s dismissal enforced express statutes, and is consistent with established caselaw. *See State ex rel. Begeman v. Robyn*, 6 S.W. 243, 244 (Mo.1887) (recognizing that collection actions must be “brought in the name of the state at the relation and to the use of the...collector,” and that a “delinquent tax could not be enforced in any other way”); *Pollard v. Atwood*, 79 Mo.App. 193, 1899 WL 1890, at *2 (1899) (holding that tax collections brought by city were “necessarily dismissed” because “the statute requires that they must be instituted in the name of the State ex rel. the Collector of the City, and not in the name of the city”); *Jefferson City v. Edwards*, 37

Mo.App. 617, 1889 WL 1939, at *2 (1889) (affirming trial court’s refusal to consider third-class city’s evidence in collection action because city “was not the proper party to sue” since it was not “authorized by law to bring the action”). Where, as here, the General Assembly confers tax enforcement power on a specific person, the “legislative enactment is mandatory in nature and must be strictly observed.” *Noll v. Morgan*, 82 Mo.App. 112, 1899 WL 2092, at *3 (1899). “This doctrine is recognized everywhere, and disputed nowhere.” *Id.*

The Cities cite no authority expressly permitting third- or fourth-class cities to bring collection actions in their own names. Instead, they offer several cases where the issue was never raised. Indeed, the two main cases upon which they rely involved charter cities, where the issue could not have been raised. *See* App.Br.32-33 (citing *City of St. Charles v. Union Elec.*, 185 S.W.2d 297 (Mo.App.1945); *City of St. Louis v. United Rys. Co.*, 174 S.W. 78 (Mo.banc 1914)). Charter cities are not subject to the statutes governing third- and fourth-class cities. *See City of Jefferson v. Cingular Wireless, LLC*, No. 04-4099-CV-C-NKL, 2005 WL 1384062, at *6 (W.D.Mo. June 9, 2005) (§§94.150 and 94.310’s requirement that city collectors bring collection actions state ex rel. is inapplicable to charter cities, which are governed by different statutes). Thus, while the allegations in those cases may not have “differ[ed] in any material respect” from the Cities’ allegations here, App.Br.32, the governing statutes differed greatly.

But regardless in whose name a particular collection action not before this Court was brought, governing Missouri statutes expressly provide that the Cities lack authority

to sue here.³⁴ “A municipal corporation possesses and can exercise only those powers granted by the legislature. Thus, where the legislature has authorized a city to exercise a power and prescribed its exercise, the right to exercise the power given in any other manner is necessarily denied.” *City of Hamilton v. Pub. Water Supply Dist.*, 849 S.W.2d 96, 103-04 (Mo.App.1993) (quotations omitted).³⁵ Accordingly, the trial court properly dismissed.

³⁴ The Cities argue that because they seek a declaration, Missouri’s statutory requirements are inapplicable. Not one of the cases they cite, however, involved a declaratory action brought by a city regarding a tax ordinance. In any case, this action is plainly one to enforce license taxes, governed by §§94.150 and 94.310 RSMo.2000. *See* Am.Pet.R39 (alleging “Defendants owe Plaintiffs license taxes, interest and penalties”); Am.Pet.R42 (requesting that the court “[e]nter judgment in favor of each Plaintiff and against each Defendant for the license tax, interest and penalty due”). If municipalities could avoid statutory collection requirements merely by adding claims for declaratory relief, those requirements would be illusory.

³⁵ The trial court properly rejected the Cities’ argument that their failure to follow §§94.150 and 94.310’s requirements could be cured by amendment. App.Appx.14. Amendment here would require substituting a party, and no circumstances permitting substitution are present. *See* MO.SUP.CT.R. 52.13.

3. The Trial Court Properly Dismissed Because The Cities Failed To Notice And Assess.

Even if this Court finds the Cities had statutory authority to sue, dismissal was appropriate because this action is premature. This Court must affirm a dismissal for failure to state a claim if it can be sustained on any ground identified in the motion to dismiss. *Lueckenotte v. Lueckenotte*, 34 S.W.3d 387, 391 (Mo.banc 2001). Missouri statutes and common law required the Cities to notice and assess taxpayers **before** instituting a tax collection action. They have failed to do so, or allege that they have done so.

The Cities must enforce their taxes under the same rules and regulations as state and county taxes. §§94.150, 94.310 RSMo.2000. Missouri tax statutes evidence a consistent theme—notice and assessment must precede a collection action. *See, e.g.*, Chs.66, 140, 144 RSMo. This Court, moreover, has held that notice and assessment are necessary even where not required by statute. *See State ex rel. Wilson v. First Nat’l Bank*, 79 S.W. 943, 947 (Mo.banc 1903) (dismissing suit for lack of assessment because “[a] valid assessment has always been held an essential prerequisite to the lawful exercise of the power of taxation”). *Accord State ex rel. Halferty v. Kansas City Power & Light*, 145 S.W.2d 116, 120 (Mo.1940) (dismissing municipal collection action because “there can be no lawful collection of a tax until there is a lawful assessment” and noting “[t]his principle is well settled and needs no further citation of authorities”); *State ex rel. Zeigenhein v. Spencer*, 21 S.W. 837, 838 (Mo.1893) (dismissing collection action for failure to notice and assess, where the statute at issue was silent as to this requirement

because “the omission is immaterial, since the law will imply that notice was intended”).

Because the Cities plead no facts demonstrating that they gave proper notice and assessment prior to instituting this action, this Court should affirm the trial court’s dismissal.

CONCLUSION

For the foregoing reasons, SBC respectfully requests that this Court uphold HB209 as constitutional and decline to reach the trial court’s order, mooted by the act. If this Court reaches the trial court’s order, SBC requests that it affirm, as the Cities lack authority to sue here and failed to notice and assess before instituting their collection action.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rules 55.03 and 84.06, is proportionately double-spaced, using Times New Roman, 13 point type, and contains 27,017 words, excluding the cover, the certificate of service, the certificate of compliance required by Rule 84.06(c), signature block and appendix.

I also certify that the computer diskettes that I am providing have been scanned for viruses and have been found to be virus-free.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondents' Brief was couriered, this 13th day of March, 2006, to the following:

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APPENDIX