No. 87208

In the
Supreme Court of Missouri

CITY OF UNIVERSITY CITY, MISSOURI, et al., on behalf of themselves and all others similarly situated,	)	On Appeal from the Circuit Court of St. Louis County, State of Missouri
Plaintiffs-Appellants,	)	No. 01-CC-004454
v.	)	Honorable Bernhardt Drumm, Judge Presiding
AT&T WIRELESS SERVICES, INC., et al.,	)	
Defendants-Respondents.	)	

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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I. HB 209's CLASSIFICATIONS ARE BASED ON IMMUTABLE CHARACTERISTICS AND NO "SUBSTANTIAL JUSTIFICATION" EXISTS FOR ITS BUSINESS, MUNICIPAL AND TAX DISTINCTIONS UNDER ARTICLE III, § 40.

A. Standing

Defendants argue that Plaintiffs lack standing to raise a "special law" challenge, because they have not been directly affected by HB 209 in the same manner as utilities and businesses that have paid the license taxes. (Resp. Br. at 63-64.) However, "[a]rguments...that local government units are 'mere arms of the state' with no independent right to attack statutes that affect them – have been expressly rejected in favor of a standing doctrine concerned primarily with 'sufficient controversy between the parties' regarding matters which 'directly affect them.'" Arsenal Credit Union v. Giles, 715 S.W.2d 918, 921 (Mo. banc 1986).[1] Here, the Municipalities have been "directly affected" by HB 209, because their telephone license taxes have been "capped", their back-tax claims have been extinguished, and they have been treated differently than Jefferson City and Clayton in both of these regards.

Alternatively, absent municipal standing, the Carriers do not suggest that a citizen, taxpayer and government official – like Mayor Winham – would lack standing to raise a "special legislation" challenge (see Resp.Br. at 63-75), nor can they in this instance. The fact that HB 209 (i) decreases the tax base retroactively, (ii) increases the individual burden for city services, and (iii) requires the

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[1] See also Connecticut Light and Power Co. v. City of Norwalk, 425 A.2d 576, 579 (Conn. 1979); Seattle School Dist. No. 1 v. State of Washington, 585 P.2d 71, 82 (Wash. banc 1978).

department of revenue to spend ***public*** money to "collect, administer, and distribute telecommunications business license tax revenues," to "publish a list," to "furnish any municipality with information it requests," and to "forecast whether a shortfall or excess in municipal revenues for each municipality is likely to occur" (92.086.1, 92.086.3, 92.086.5, 92.086.7, 92.086.11, RSMo) [R-800 to R-801], provides the requisite interest or nexus to get the "special legislation" challenge before the Supreme Court. O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 98 (Mo. banc 1993).[2]

Finally, Defendants urge this Court not to proceed, because "[i]f HB 209 violates special laws, the ordinances are equally invalid," and they cite the "St. Joseph City Code at §§ 27-305 and 27-306 (imposing 7% tax on telephone companies but a tax of 6 ½% or less on gas, water and electric companies)." (Resp.Br. at 65.) The Carriers' argument is disingenuous, because it suggests that all other ordinances make such distinctions, when, in fact, they do not. See Blue Spring's Municipal Code § 645.020 (5% across-the-board) [R-827]; Chesterfield Ordinance No. 123 (same) [R-840]; Ellisville Municipal Code § 25-71.1 (7% across-the-board) [R-853]; Ferguson Code §§ 42-41 to 52-45 (6% across-the-

2 See also Ste Genevieve School Dist. R-II v. Board of Aldermen, 66 S.W.3d 6, 10-11 (Mo. banc 2002); Shillito v. City of Spartanburg, 51 S.E.2d 95, 99 (S.C. 1948).

board) [R-862 to R-864]; Florissant Code § 14-602 (3% across-the-board) [R-870]; Independence City Code § 19-49 (7 ½ % across-the-board) [R-898]; and other examples too numerous to mention. Moreover, it raises an issue not briefed, argued or ruled upon in the court below to divert this Court's attention from the matter at hand: the scope of St. Joseph's taxing power has absolutely nothing to do with the constitutionality of HB 209, which this Court has been asked to decide.

B. Arbitrary And Unconstitutional Business Classifications

There can be little doubt that HB 209 creates tax disparities between natural classes (the telephone industry vs. the gas, water and electric industries), within natural classes (those telephone companies that paid taxes vs. those telephone companies that did not), and between Missouri municipalities (Jefferson City and Clayton vs. all other municipalities, as discussed infra.). To the extent that any of these distinctions are based on immutable characteristics, such as the municipal classifications (see 92.086.10 and 92.089.2, RSMo), the law is closed-ended and "facially special". See, e.g., Harris v. Missouri Gaming Commission, 869 S.W.2d 58, 65 (Mo. banc 1994). The unconstitutionality of such a special law is presumed, thus, the parties defending HB 209 must demonstrate a "substantial justification" for their special treatment. Id.

The Carriers attempt to meet their burden by suggesting that the general assembly had a "rational basis" for these classifications, because only telephone companies have been subjected to "costly and time-consuming litigation...[N]o

analogous litigation involving other industries exists." (Resp.Br. at 65.)[3] The reason these lawsuits are confined to the telephone industry, however, is that other businesses have paid their license taxes. If litigation costs constitute a "substantial

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3 Defendants' reliance on the "rational basis" standard to justify HB 209's disparate treatment of telephone companies (vs. all other businesses) is incorrect. If the exemptions afforded Jefferson City and Clayton are based on immutable characteristics, as discussed infra., it necessarily follows that the tax treatment of telephone companies (vs. all other businesses) is based on immutable characteristics. Because Jefferson City and Clayton alone qualify for exemptions under HB 209, geography determines the tax rate that telephone companies are required to pay in the State, depending upon whether they operate within Jefferson City and Clayton (unlimited tax rate) or without (5% cap). Geographic location is an immutable characteristic. Harris v. Missouri Gaming Commission, 869 S.W.2d at 65.

Once a statute is found to be "facially special," as here, it is presumed to be invalid. Thus, it no longer suffices to show that HB 209 bears a "rational" relation to a legitimate legislative purpose; rather, a "substantial justification" is required. See School District of Riverview Gardens v. St. Louis County, 816 S.W.2d 219, 222 (Mo. banc 1991); O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99 (Mo. banc 1993); Tillis v. City of Branson, 945 S.W.2d 447 (Mo. banc 1997).

justification" for disparate treatment, such reasoning could be extended to all tax collection suits and would render the municipal safeguards in Article III, §39(5) meaningless. Undoubtedly, the general assembly has the power to treat businesses differently, but such distinctions traditionally are based on historic or economic differences between them, and not on whether they did or did not pay taxes. There is simply no authority for the proposition that pending litigation, as opposed to business practices and methods, provides a "substantial" basis for classifying private companies under Article III, § 40.

Accordingly, the Carriers devote much effort to attempting to distinguish the myriad cases prohibiting legislative discrimination:

(i) *within the telecommunications industry*, e.g., City of St. Louis v. Western Union Telegraph Co., 760 S.W.2d 577, 583-584 (Mo.App.E.D. 1988);

(ii) *between similarly-situated businesses*, e.g., State ex rel. Ashby v. Cairo Bridge & Terminal Co., 100 S.W.2d 441, 444 (Mo. 1936); Laclede Power & Light Co. v. City of St. Louis, 182 S.W.2d 70, 73 (Mo. banc 1944); State, on Inf. of Taylor v. Currency Services, 218 S.W.2d 600, 604 (Mo. banc 1949); Planned Ind. Expansion Authority v. Southwestern Bell Tel. Co., 612 S.W.2d 772, 776-77 (Mo. banc 1981); or

(iii) *based on taxpayer characteristics*, e.g., State ex rel. Hostetter v.

Hunt, 9 N.E.2d 676, 682 (Ohio 1937); Armco Steel Corp. v. Dept. of Treasury, 358 N.W.2d 839, 844 (Mich. 1984); State of Kansas v. Parrish, 891 P.2d 445, 457 (Kan. 1995);

but offer little in the way of support for their own position. Indeed, the Carriers cite only four cases – United Fuel Gas Co. v. Battle, 167 S.E.2d 890 (W.V. 1969); Ross v. Kansas City General Hosp., 608 S.W.2d 397 (Mo. banc 1980); Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822 (Mo. banc 1992); and Savannah R-III School Dist. v. Public School Retirement System, 950 S.W.2d 854 (Mo. banc 1997) – all of which concerned legislation markedly different than HB 209:

(i) United Fuel, a West Virginia case, upheld legislation that imposed different tax rates on public gas utilities and non-utility gas companies. The Court justified the distinction on the basis of the unique duties imposed by law upon such entities – public vs. private. United Fuel, 167 S.E.2d at 905-906 ("The differences in the rights and duties of a public utility and a nonutility justify the separate classification in which each is included"). Thus, the statute treated all public businesses and non-public businesses similarly, unlike HB 209.

(ii) Ross upheld a statute of limitations that required actions for malpractice to be brought within two years of the negligent act, except where the negligence involved leaving a foreign object in a

person's body. In doing so, the Court applied a "rational basis" standard (Ross, 608 S.W.2d at 399-400), which is not applicable here. Moreover, the Court noted that the statute "applies uniformly throughout the state" (id.), which HB 209 plainly does not do.

(iii) Blaske involved an equal protection claim challenging different statutes of limitations for architects and materialmen. The Court found that a "rational basis" existed to distinguish architects from materialmen due to the unique and complex problems that architects face in every project, contrasted with materialmen who typically produce standardized products. Blaske, 821 S.W.2d at 830-32. The Court did not justify the special treatment on the basis of pending litigation, as here, but rather took pains to delineate differences in business practices and methods. [Significantly, this Court has declined to extend Blaske's analysis to tax cases. See Sneary v. Director of Revenue, 865 S.W.2d 342, 347 (Mo. banc 1993) ("Blaske does not address the issue at bar. Whether a rational basis exists to distinguish between architects and materialmen in setting different statutes of limitations involves considerations altogether inapplicable to [a] sales tax statute.").]

(iv) Like Blaske and Ross, the Court in Savannah applied a "rational basis" test to uphold legislation that mooted a lawsuit and treated

> school districts that made overpayments to a retirement system differently from those that did not. The Court concluded that, *inter alia*, "the legislature may have determined that it was in the public's interest to end the expenditure of time, money and energy on intra-governmental litigation and to refocus the school districts on educating youth..." Savannah, 950 S.W.2d at 860. In contrast, HB 209 does not serve a legitimate public purpose, but rather seeks to curb the expenses of delinquent telephone companies, none of whom perform any function of government; Savannah does not stand for the proposition that pending litigation provides a "substantial justification" for treating *private* companies differently for *tax* purposes.

The Carriers' burden in this instance is not to suggest a conceivable reason, or even a rational reason, for HB 209's distinctions, because its unconstitutionality is presumed. Only a "substantial justification" will suffice. Mistaking their burden, the Carriers assert a "rational" basis for the legislation, thus failing in their duty as a matter of law. Compounding this error, they offer a justification – that pending litigation provides a legitimate basis for classifying private businesses under Article III, § 40 – unsupported by precedent. There's a good reason for this: no court has ever held that curbing the litigation expenses of private tax delinquents is befitting constitutional recognition.

C. Arbitrary And Unconstitutional Municipal Classifications

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

Only two municipalities qualify, or will ever qualify, for such exemptions – Jefferson City and Clayton, Missouri. Although the Carriers maintain that the Municipalities have "ma[de] no showing that the class of cities exempt from H.B. 209 is...closed-ended" (Resp. Br. at 73 n. 32.), Defendants admitted as much in the court below: "It is undisputed that [the foregoing] exceptions are applicable to the City of Clayton and Jefferson City respectively." (See Defendant Sprint's Reply Suggestions In Support Of Its Motion For Judgment On The Pleadings Or To Dismiss Plaintiff's Petition, at p. 43, filed September 19, 2005 [Springfield Record on Appeal at R.495, in Appeal No. 87238].) Given HB 209's prerequisites, there is no way for other municipalities to qualify for these exemptions in the future.

Defendants hardly disagree: they do not bother to explain how other cities might qualify; instead, they simply justify such discrimination on the basis of Hancock. (Resp.Br. at 75) (HB 209 "[e]xclud[es] Hancock-compliant municipalities from the legislation").[4] Further, they suggest that "by excusing Hancock-complaint municipalities from certain H.B. 209 provisions, the General Assembly promoted the policies underlying the amendment, thereby satisfying the

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4 The Cities reject Defendants' assertion that they are not in compliance with the Hancock Amendment. It is premised on the faulty assumption that "wireless service" is a "new type of property, not previously taxed," (Resp.Br. at 33), which has the effect of broadening the tax base. But "wireless service," as the term denotes, is not "property." It is merely a change in the method of delivery of an existing, taxable service – "telephone service". If Defendants' analysis is accepted, every technological advancement – call waiting, caller ID, tele-conferencing , video conferencing, etc. – will necessitate a Hancock-vote of the people, even though it falls within the broad definition of "telephone service."

Moreover, Defendants' argument misapprehends the nature of a license tax: it is not an *ad valorem* tax on "property," but rather a tax imposed for the privilege of engaging in "telephone service," with "gross receipts" being the means to calculate the tax owed. See Kansas City v. Graybar Elec. Co., 485 S.W.2d 38, 41 (Mo. Banc 1972).

substantial justification requirement." (Id.)[5] But, the Carriers' justification is imagined and it appears nowhere in the text of HB 209. Further, it is contradictory: whereas before the justification for disparate treatment was pending litigation, now it is based on Hancock compliance. There is no need for such creative lawyering or shifting justifications, because the general assembly has spoken:

> HB 209 is necessary because "costly litigation which have or may be filed by Missouri municipalities against telecommunications companies, concerning the application of certain business license taxes to certain telecommunications companies, and to certain revenues of those telecommunications companies,...is detrimental to the economic well being of the state..."

92.089.1, RSMo. Given the general assembly's goal, i.e., eliminating costly litigation against telephone companies, it is readily apparent that no "substantial justification" exists for carving-out Jefferson City and Clayton. This is self-evident from the fact that Jefferson City continues to pursue telephone tax litigation today. See City of Jefferson, et al., v. Cingular Wireless, LLC, et al.,

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[5] Significantly, in this portion of their Brief, the Carriers do reference the "substantial justification" standard, thus, acknowledging that the municipal classifications are "closed-ended," otherwise a "rational basis" would have sufficed.

cause no. 04-4099-CV-C-NKL, currently pending in the U.S. District Court for the Western District of Missouri. Thus, the statutory exemptions do not advance the legislative goal, but actively undermine it; they are irrational and unfounded under even the most lenient standard.

HB 209 purports to grant a special class of private enterprise – the telephone industry – immunity from the payment of back-taxes, a defense based on its "subjective good faith belief," relief from pending litigation, and a lowered tax rate. No other business or delinquent taxpayer receives such favorable treatment. Further, the statute does not apply uniformly throughout the State, but rather discriminates on the basis of geography. Citizens fortunate enough to live in Jefferson City and Clayton can set their own tax rates, but other municipal denizens cannot. And, all of this is justified on the basis of the economic well-being of the State, even though it is in the best interest of the sovereign and its citizens to recover delinquent taxes.

The overwhelming weight of authority rejects such arbitrary and disparate legislative classifications on numerous constitutional grounds, including the prohibition against special laws. The few cases cited by Defendants do not compel a different result. The Carriers' own self-interest cannot serve to "substantially justify" this flawed piece of legislation under any accepted constitutional theory.

II. THE GENERAL ASSEMBLY HAS DIRECTED A RESULT UNDER EXISTING LAW AND ASSUMED EXECUTIVE BRANCH

AUTHORITY, THEREBY CONTRAVENING THE DOCTRINE OF SEPARATION OF POWERS (ARTICLE II, § 1).

A. Standing

Citing Savannah, the Carriers argue that the Municipalities lack standing to assert a separation of powers violation under Article II, § 1 (Resp.Br. at 76-77), even though the Court reached the merits of the school districts' constitutional challenge in that case, thereby contradicting Defendants' underlying premise. See Savannah R-III School Dist., 950 S.W.2d at 858. See also City of Austin v. Quick, 930 S.W.2d 678, 684 (Tex.App. 1996). It is unnecessary to resolve the issue of municipal standing here, however, because a taxpayer – like Mayor Winham – possesses standing to invoke the protections afforded by Article II, § 1. See Mo. Coalition for the Environment v. Joint Committee on Administrative Rules (JCAR), 948 S.W.2d 125, 132 (Mo. banc 1997).

B. Judicial Encroachment

Defendants have stated that "a legislature…violates separation of powers principles when it directs the court to reach a specific result and make certain factual findings in pending cases without repealing or amending the statutes underlying the litigation." (See Defendants' Response In Opposition To Plaintiffs' Motion For Partial Summary Judgment Pertaining To The Constitutionality of H.B. 209, at p. 62, filed August 31, 2005, in City of Jefferson, et al., v. Cingular Wireless, LLC, et al., cause no. 04-4099-CV-C-NKL, currently

pending in the U.S. District Court for the Western District of Missouri .) Plaintiffs do not disagree with this assertion, because it accurately describes HB 209's constitutional infirmities.

Admittedly, HB 209 does not use the words "judgment shall be entered for AT&T Wireless in cause no. 01-CC-004454," but it is drafted in such a way as to foreclose any meaningful judicial role and to lead -- inexorably -- to its desired outcome:

> First, it references pending litigation, that is, a discreet and identifiable group of litigants (92.089.2, RSMo);
>
> Second, it restrains judges from using their adjudicative skills, by crafting a defense -- a "subjective good faith belief" in one's innocence – that is incapable of challenge or verification (92.089.2, RSMo);
>
> Third, it declares that certain conduct satisfies prior ordinances or else it requires judges to interpret the ordinances in a specified way, such that a defendant could have broken the law, yet still prevail, so long as it believed in its own innocence (92.089.2, RSMo);
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> Fourth, for good measure, it directs a particular outcome in pending cases by compelling Plaintiffs to dismiss their lawsuits [because directing the courts to do so would have been too obvious a constitutional transgression]

(92.089.2, RSMo);[6] and

Fifth, in the event the law is challenged, it substitutes its judgment for that of the judiciary in finding the bill to be constitutional (92.089.1, RSMo).

The foregoing provisions are plainly an attempt by the general assembly to mandate a certain outcome without having to expressly tell a particular judge what to do. That HB 209 directs a specific result is evident from its terms, because one cannot conceive of a situation where the municipalities win or the carriers lose within these parameters. As such, HB 209 differs from the statute in Savannah, which did not direct the dismissal of pending lawsuits or otherwise attempt to impose a rule of decision on the judiciary.

Similarly, Savannah is distinguishable because the legislature amended the statute on which the school districts' claims were based in that instance. See Savannah, 950 S.W.2d at 857. In contrast, HB 209 does not expressly repeal or amend the underlying municipal ordinances, but rather provides that "[n]othing in this section shall have the effect of repealing any existing ordinance imposing a

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[6] The fact that Plaintiffs happen to be municipalities, or political subdivisions of the State, is of no consequence and the oft-quoted phrase – that the State's power over its cities is "plenary" – is untrue. The general assembly is bound by the limits placed on it by the Missouri Constitution and the State's municipalities are singled-out -- by name -- as deserving of its protections.

business license tax on a telecommunications company; provided that a city with an ordinance in effect prior to August 28, 2005, complies with the provisions of section 92.086 [e.g., the 5% cap]." 92.083.2, RSMo. Obviously, with this provision, the general assembly sought to leave in place the numerous ordinances imposing license tax rates of 5% or below. Combined with the fact that HB 209's definitions and "cap" do not take hold until "on or after July 1, 2006," e.g., 92.083.1, 92.086.4, and 92.086.9, RSMo, it follows that the ordinances remain in effect following HB 209, at least until July 1, 2006, and possibly after that date (assuming they are compliant with section 92.086). Thus, the governing laws – the license tax ordinances -- have not been expressly repealed or amended by the challenged statute. Defendants simply have been determined by the general assembly to be entitled to judgment thereon.[7]

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[7] The enabling statutes have not been repealed or amended either. For example, section 94.270 currently provides, in pertinent part, that the "mayor and board of aldermen shall have power and authority to regulate and to license and to levy and collect a license tax on…telephone companies…" (94.270.1, RSMo.) HB 209 does not expressly amend Chapter 94, nor does it make reference to Chapter 94 in its title, and "[a]mendments by implication are not favored." See LeSage v. Dirt Cheap Cigarettes, 102 S.W.3d 1, 4 (Mo. Banc 2003).

Although Defendants suggest that 92.080, RSMo, refutes this argument (Resp.Br.

Despite the foregoing, Defendants suggest that the results of municipal litigation against gun manufacturers make clear that "several other states have addressed similar challenges and, recognizing the principles articulated in Plaut, upheld the constitutionality of similar laws." (Resp.Br. at 80). See Mayor of Detroit v. Arms Tech., Inc., 669 N.W.2d 845 (Mich.App. 2003); Sturm, Ruger & Co., Inc. v. City of Atlanta, 560 S.E.2d 525 (Ga.App. 2002); Morial v. Smith & Wesson Corp., 785 So.2d 1 (La. 2001). However, to paraphrase Sneary, whether municipalities are permitted to maintain tort suits against gun manufacturers involves considerations altogether inapplicable to this Court's analysis of a tax statute.

Sturm, Ruger and Morial add little to the separation of powers discussion. In Sturm, Ruger, the appellate court dismissed the city's negligence claim after finding that the State had preempted the field of gun regulation; thus, the city could not do indirectly what it was prohibited from doing directly, namely, evade the regulatory preemption by initiating a lawsuit against the gun industry. Sturm, Ruger, 560 S.E.2d at 529-30. In addition, the court upheld a statute barring tort claims against the gun industry in the face of special and retrospective law challenges, finding that the legislation operated uniformly on all governmental

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at 84), its circular logic simply leads one back to the provisions above and to the conclusions drawn therefrom.

units and that the city had no "vested right" to pursue the litigation. Sturm, Ruger, 560 S.E.2d at 531. Finally, the court rejected the city's separation of powers argument, without much discussion, because the city failed to cite any authority in support of its position. Sturm, Ruger, 560 S.E.2d at 532. (A similar analysis can be found in Morial where the court upheld the challenged statute on the basis of the State's police power.)[8]

Although Mayor of Detroit is more apt, it is equally unavailing. In Mayor of Detroit, the court of appeals ***found*** municipal standing to raise a separation of powers challenge, but rejected the challenge because the "clarifying" statute barring the city's nuisance claim (again, in a preempted field) did not reopen a final judgment and merely specified the law to be applied in relevant cases. Mayor of Detroit, 669 S.W.2d at 858-59.

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[8] Interestingly, the Morial court's resolution of the city's "special law" challenge lends further support to Plaintiffs' position. In rejecting the challenge, the court noted that the statute "is not a special law since it affects all the local governing units of the state without granting privileges to some while denying them to others. [The statute] is clearly a general law as it operates equally throughout the state upon all political subdivisions wishing to file suit against the gun industry." Morial, 785 So.2d at 18. With this description, the Morial court has crystallized the differences between a general law and HB 209.

Mayor of Detroit cannot be considered without reference to Hyundai Merchant Marine v. United States, 888 F.Supp. 543 (D.C.N.Y. 1995), cited therein, and to which its analysis is heavily-indebted. Hyundai acknowledges that a separation of powers violation occurs not only when the legislature reopens a final judgment, but also "when Congress enacts legislation that prescribes a rule of decision to the judicial branch in cases pending before it without changing the underlying substantive or procedural law." Hyundai, 888 F.Supp at 548. In the latter case, "Congress has unconstitutionally exceeded its permitted role if it has instructed the courts to make specific findings of fact or *directed results under old law*…" Hyundai, 888 F.Supp at 549 (emphasis added). Thus, the Hyundai court upheld the statute before it, because "Congress [had] not instructed the courts to reach a particular decision on the merits of any claim." Id.

In contrast, HB 209 does not amend applicable law, but rather compels a judgment for Defendants while leaving the governing law untouched. Consequently, the general assembly has exceeded its permitted role by "directing a result under old law," thereby preventing the courts from performing their assigned duties.

C. Executive Encroachment

According to Defendants, it is Plaintiffs' contention that by transferring tax collection authority from the Municipalities to the Director of Revenue, HB 209 interferes with executive branch performance. (Resp.Br at 82.) No such argument

has been made. Instead, Plaintiffs simply noted that tax collection is an executive branch function, whether performed by municipalities or the Director of Revenue, as evidenced by the fact that the Missouri Constitution classifies the department of revenue as an "executive department." MO CONST. art. IV, § 22. See also 32.010, RSMo.

As stated in JCAR, "Article II, § 1 strictly confines the power of the legislature to enacting laws and does not permit the legislature to execute laws already enacted." Mo. Coalition for the Environment v. Joint Comm. on Admin. Rules, 948 S.W2d 125, 133 (Mo. banc 1997). Here, the general assembly has gone beyond its assigned role and ventured into the area of enforcement by mandating the dismissal of collection actions brought by the executive branch.

There is no provision in the Missouri Constitution that permits the legislature to prosecute delinquent taxpayers. Directing the Municipalities to dismiss their tax collection suits is no different than directing the Director of Revenue to do so. HB 209 goes beyond establishing the manner in which taxes are to be collected, which is unquestionably the legislature's right, to actually making the decision whether to prosecute. Cf. U.S. v. Nixon, 418 U.S. 683, 693 (1974) (the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case").

III. HB 209 IMPAIRS A VESTED RIGHT TO COLLECT OVERDUE AND UNPAID LICENSE TAXES, THEREBY VIOLATING THE

PROHIBITION AGAINST RETROSPECTIVE LAWS (ARTICLE I, § 13)

The Carriers insist that the constitution's prohibition of retrospective laws: 1) does not protect municipal corporations; 2) would render meaningless the constitution's "anti-extinguishment ban" (article III, § 39(5)) if applied to strike down HB 209; and 3) is not implicated because the Cities have no "vested right" to overdue, unpaid taxes; They also contend that the joinder of a taxpayer does not affect the article I, § 13 analysis. None of the arguments have merit.

A. This Court Has Held That Article I, § 13's Prohibition Of Retrospective Laws *Does Protect* Municipalities

Defendants dismiss this Court's decision in Planned Indus. Expansion Auth. v. Southwestern Bell Tel. Co., 612 S.W.2d 772 (Mo. 1981) (hereinafter "PIE"), on the rationale that "whether Article I, § 13 extends to state instrumentalities was neither briefed by the parties nor addressed by the Court …." (Resp.Br. at 58.) Defendants therefore ignore entirely the Court's holding in PIE that a municipality may challenge a statute as unconstitutionally retrospective in violation of article I, § 13. Id. at 776. In PIE, Southwestern Bell challenged the city's right to seek a declaratory judgment that a statute violated Art. I, § 13. Id. This Court held the city had standing to raise a section 13 constitutional challenge to the retrospectivity of the statute. Id. The Court went on to strike down the statute in that case as "a law retrospective in its operation." Id.

The sole argument Defendants advance in support of their contention that municipalities are not protected by section 13 is based upon Savannah R-III School Dist. v. Public School Ret. Sys., 950 S.W.2d 854, 858 (1997). In Savannah, however, the Court held only that the constitutional ban on retrospective laws does not apply to ***school districts***. The Court said absolutely nothing about the applicability of section 13 to municipalities. The Court held that a school district, as an instrumentality of the State, could not challenge legislation as unconstitutionally retrospective. The Court reasoned that "[s]chool districts are bodies corporate, instrumentalities of the state" and that "the legislature may constitutionally pass retrospective laws that waive the rights of the state." Id. at 858.

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

A municipality, unlike like a school district, is not a merely an "instrumentality" of the State. As this Court has recognized there are crucial differences between school districts on the one hand, and municipalities on the other. "It has been said a school district is in no sense a municipal corporation with diversified powers, but is a quasi public corporation, 'the arm and instrumentality of the state for one single and noble purpose, *viz*., to educate the children of the

district.'" Kansas City v. School Dist. of Kansas City, 201 S.W.2d 930, 933 (1947).

Municipalities, charged with the "grave responsibilities" of local self-government, id. at 934, are corporate bodies of citizens, and citizens are who "the retrospective law prohibition was intended to protect." Savannah, 950 S.W.2d at 858.

> Municipal corporations are the result of a voluntary association of the inhabitants sanctioned by the State primarily for the purpose of local self-government subordinate to the State and at the same time constituting, ***although secondary***, an effective instrumentality for the administration of governmental affairs.

State ex rel. Audrain County, 197 S.W.2d 301, 303 (1946) (emphasis added). As this Court recognized in PIE, that which affects a municipality inescapably affects its citizenry as well. PIE, 612 S.W.2d at 776 ("it cannot be argued tenably that the effect of permanently fixing property rights in the vast majority of the hundreds of miles of streets lying within the City does not result in a 'substantial prejudice' to the City or its many citizens").

The retrospective extinguishment of gross receipt taxes would compel municipalities to cut back vital services they provide ***to their citizens*** or to raise other taxes or fees ***on their citizens***. Whichever means municipalities choose to deal with the loss of revenue, those harmed are the cities' inhabitants – citizens –

who are the intended beneficiaries of section 13's prohibition of retrospective legislation. These are compelling reasons for continuing to recognize the right of municipalities to challenge legislation "retrospective in its operation."

Alternatively, should the Court wish to abandon the distinction between school districts and municipalities created by the Savannah and PIE decisions, the better approach would be to overrule Savannah. As the Court itself recognized in Savannah, the outcome of the retrospectivity "claim would be different had any one of the named parties been a teacher." Savannah, 950 S.W.2d at 858. Thus the outcome of Savannah on the section 13 retrospectivity claim turned strictly on the fact that the school districts themselves pursued the litigation rather than the teachers who would have been beneficiaries of the litigation had it been successful. That is indeed a slender reed upon which to base the outcome of a constitutional challenge to a statute, and it is one which makes no sense as applied to a municipality which is "a voluntary association" of citizens who clearly are protected by article I, § 13.

In his dissent in Savannah, Judge Robertson anticipated the holding there would eventually lead to the very constitutional dispute this case now presents under article I, § 13:

> Of course, one could argue that municipal corporations are state instrumentalities, too. If one follows the majority, municipalities cannot challenge the legislature's enactment of laws retrospective in operation,

> either. But do we really want to say that? I think not. Local governments exist as much to insulate citizens from distant government as to carry out the state's duties. Charter cities authorized by the constitution have all powers that the state does not deny them by law. But based on the majority's prose, there is no logical firewall that prohibits the majority's holding from extending to cities and counties.

950 S.W.2d at 860-61. For these and other reasons discussed more fully in Judge Robertson's dissent, should the Court wish to eliminate the distinction between a school district's and a municipality's standing to challenge legislation as unconstitutionally retrospective, the sounder approach is to overrule Savannah. Either way, the Court should affirm the continued vitality of PIE with respect to municipalities.

B. Any Overlap Between Article I, § 13 And Article III, § 39(5) Does Not Render Either Provision "Meaningless"

Defendants also contend that because article III, § 39(5) protects municipalities, article I, § 13 should be held not to protect municipalities because that "would render Article III, § 39(5) meaningless." (Resp.Br. at 59.) That peculiar proposition – that separate provisions of the constitution cannot protect the same rights or prohibit the same governmental overreaching – is not the law. It has long been recognized that separate constitutional provisions may protect the same interests. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (striking down

miscegenation statutes as violative of both due process and equal protection clauses).

The only possible way these two constitutional provisions could be interpreted so that section 13 would render section 39(5) "meaningless" is if section 13 were interpreted so broadly as to render unconstitutional a statute which extinguishes a municipality's "indebtedness, liability or obligation," even though it provided adequate consideration for doing so. The Cities have never advocated such an interpretation of the constitution and, for good measure, hereby disavow without reservation any such contention.

Defendants have contended that HB 209 does not violate article III, § 39(5) because it does not extinguish any "indebtedness, liability or obligation" of the municipalities. (Resp.Br. at 45.) Even if that were true, and it is not, there would be no logical reason why HB 209 could not still be considered unconstitutionally "retrospective in its operation" in violation of section 13. Such a holding would in no respect make section 39(5) either redundant or meaningless. Defendants' argument should therefore be rejected as unsupported by law or logic.

C. Because HB 209 Alters The Substantive Elements Of The Cities' Already Accrued Causes Of Action, It Impermissibly Interferes With The Cities' "Vested Rights"

Defendants next contend that HB 209 does not violate section 13's proscription against retrospective laws because HB 209 "does not infringe upon a

vested right." (Resp.Br. at 62.) They are wrong.

> Procedural law prescribes a method of enforcing rights or obtaining redress for their invasion; substantive law creates, defines and regulates rights; the distinction between substantive law and procedural law is that ***substantive law relates to the rights and duties giving rise to the cause of action***, while procedural law is the machinery used for carrying on the suit.

Wilkes v. Missouri Highway Comm'n, 762 S.W.2d 27, 28 (Mo. 1989) (emphasis added). HB 209 rewrites the "substantive law relat[ing] to the rights and duties giving rise to the cause of action" at issue here.

It is a universally accepted principle that once a cause of action accrues, it is a "vested right" beyond the authority of a legislature to disturb. Keeran v. Myers, 172 S.W.3d 466, 470 (Mo. Ct. App. 2005) (statute which "effectively cut off Grandmother's right to sue and took away a right which she was granted under [a law] which was in effect at the time she filed her petition … was substantive in nature"). In re S.L.J., 3 S.W.3d 902, 906 (Mo. Ct. App. 1999) (statute which "effectively create[d] new grounds for termination of [parental rights] … substantively changed the law, and we are precluded from applying the amendment retroactively"). See Womach v. City of St. Joseph, 100 S.W. 443, 446 (Mo. 1907) (recognizing a "chose in action" as "any right to damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract" and as property which cannot be deprived without due process). See also

Note, Rights as Property, 104 COLUM. L. REV. 1315 (2004); Laitos, Legislative Retroactivity, 52 WASH. U. J. URB. & CONTEMP. L. 81 (1997).

Section 92.089.2 purports to require the "immediate dismiss[al]" of all lawsuits instituted prior to July 1, 2006, to recover unpaid business license taxes from companies that failed to pay the taxes on revenue generated from the provision of wireless telephone service. Even if a city may file a new suit beginning July 1, 2006, under section 92.086.12, it will only be able to seek back taxes from July 1, 2003 forward. As discussed elsewhere, some Cities have claims for taxes owed prior to July 1, 2003, and as far back as 1997. HB 209 thus eliminates claims for those years in their entirety. By eliminating a city's right to sue for those unpaid back taxes, HB 209 alters "the rights … giving rise to the cause of action," it is not merely procedural, and it deprives the Cities of "vested rights." HB 209 is therefore unconstitutional.

HB 209 does not stop there, however. Section 92.089.2 also grants absolute immunity to any wireless company which failed to pay business license taxes "based on a subjective good faith belief" that providing wireless telephone service was not taxable under business license tax ordinances. Thus, in any case in which that immunity defense succeeds, it would completely defeat a city's claim for business license taxes through July 1, 2006.

HB 209's "immunity ***and release of liability***" (section 92.089.2 (emphasis added)) modifies more than just procedural matters; it modifies the Carriers'

"duties giving rise to the cause of action" and is indistinguishable in any meaningful respect from the statute at issue in Doe v. Roman Catholic Diocese, 862 S.W.2d 338 (Mo. 1993). In Doe, this Court struck down as unconstitutionally retrospective a 1990 childhood sexual abuse statute which authorized causes of action that would have been barred under statutes of limitation applicable prior to the enactment of the statute: "once the original statute of limitation expires and bars the plaintiff's action, the defendant has acquired a vested right to be free from suit, a right that is substantive in nature, and therefore, article I, section 13, prohibits the legislative revival of the cause of action." Id. at 341.

HB 209 purports to alter the elements of the Cities' already accrued causes of action for unpaid business license taxes. Accordingly, HB 209 violates article I, § 13.

D. Mayor Winham's Protected Right Under Article I, § 13 Is What Gives Her Standing To Challenge HB 209

Defendants argue on the one hand that the Cities have no right to the protections of article I, § 13 because those rights belong to citizens. Yet, on the other hand, they argue that a citizen of a city who has taxpayer ***standing*** to raise the retrospectivity claim has no right protected by section 13 because the "taxpayer could not sue the Wireless Companies in his or her individual capacity to recover the payments allegedly owed." (Resp.Br. at 61) ("any vested right in the back tax payments belongs only to the municipality"). That circular reasoning is flawed.

The very authority Defendants cite defeats their argument. In Ste. Genevieve Sch. Dist. R-I v. Board of Aldermen, 66 S.W.3d 6, 11 (Mo. 2002), this Court held that "Missouri courts allow taxpayer standing so that ordinary citizens have the ability to make their government officials conform to the dictates of the law when spending public money." Because the challenged ordinance "cost[] the district and the city future tax revenue, the taxpayer has standing to seek a declaratory judgment." Id. That, in turn, is because a "proof of illegal and unconstitutional expenditure of such public funds is sufficient to show private pecuniary injury, because of the taxpayer's equitable ownership of such funds and his liability to replenish any deficiency resulting from the misappropriation." Berghorn v. Reorganized Sch. Dist., 260 S.W.2d 573, 581 (1953).

Taxpayers therefore ***do*** have protected rights under section 13 and their standing derives from the injury to those rights. It is Defendants, not the Cities, who "have confused the question of 'standing'" with the question of "who has a protected vested right under Article I, § 13." (Resp.Br. at 60, 61.)

In the present case, HB 209 will cost Winchester "future tax revenue." Mayor Winham, a Winchester taxpayer, accordingly has both standing to challenge HB 209, and she has a right to make the general assembly, when giving away municipal revenues, conform to the dictates of article I, § 13.

IV. ADDITIONAL CONSIDERATIONS

Due to the space limitations imposed by Supreme Court Rule 84.06(b),

Plaintiffs are unable to respond to the numerous constitutional and statutory construction arguments set forth in Respondents' Brief. By failing to do so, Plaintiffs do not mean to legitimize those arguments in any respect. Plaintiffs stand on the authority and arguments in their opening Brief, and fully support the public aid and corporate debt discussions in the Reply Brief of Plaintiffs-Appellants, submitted in Wellston Appeal No. 87207, all of which apply with equal force herein.

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RULE 84.06(c) CERTIFICATION

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2002 and contains 7,743 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is

Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith.

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CERTIFICATE OF SERVICE

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