

**IN THE
SUPREME COURT OF MISSOURI**

NO. SC87208

CITY OF UNIVERSITY CITY, MISSOURI, et al.,

Plaintiffs-Appellants,

vs.

AT&T WIRELESS SERVICES, INC., et al.,

Defendants-Respondents

Appeal from the Circuit Court of St. Louis County, Missouri

Cause No. 01-CC-004454

The Honorable Bernhardt Drumm, Judge

**BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES
AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-RESPONDENTS**

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STATEMENT OF INTEREST OF AMICUS CURIAE

AND SUMMARY OF ARGUMENT

Amicus Curiae National Conference of State Legislatures (“NCSL”) submits this brief in support of the right of the state legislature to make policy decisions and therefore in support of the trial court judgment. NCSL is a bipartisan organization that serves the legislators and staff of the various state legislatures.

NCSL’s interest in this case is in promoting judicial deference to the public policy determinations and findings of fact made by the state legislature. It is important for this case, as well as other cases, that courts allow the duly-elected representatives of the people to resolve complex issues of public policy. In House Bill 209, the Missouri general assembly made specific findings of fact as well as policy declarations. This Court should defer to those findings and policy decisions. This Court has long recognized that “when the constitutionality of a statute turned upon a question of fact, the prior finding of the Legislature was treated as prima facie true.” City Trust Co. v. Crockett, 274 S.W. 802, 808 (Mo. 1925), quoting State ex rel. Kelly v. Hackmann, 205 S.W. 161 (Mo. 1918). Similarly, the United States Supreme Court has noted: “States are not required to convince the courts of the correctness of their legislative judgments.” Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 464 (1981).

Among the issues raised in this case is whether H.B. 209 violates the Missouri constitutional provision against extinguishment of a debt due to a municipality “without consideration.” Article III, §39(5) of the Missouri Constitution. Assuming *arguendo* that there was such a debt that was extinguished, this Court should defer to the legislative

finding that H.B. 209 provided consideration. Courts should not sit as a super-legislature to second-guess factual findings and policy declarations of the branch of government that by design and the electoral process is most reflective of the will of the people.¹

ARGUMENT

I. IT IS WITHIN THE PROVINCE OF THE LEGISLATURE TO SET THE PUBLIC POLICY OF THE STATE.

It has long been recognized that “it is within the province of the legislature to declare the public policy, and it has broad discretion to determine what the public interests require and what measures are necessary for their protection.” Williams v. Arkansas, 217 U.S. 59 (1910); see also Hodgson v. Minnesota, 497 U.S. 417, 490 (1990) (“Our decision was based upon the well-accepted premise that we must defer to a reasonable judgment by the state legislature when it determines what is sound public policy”). As the Missouri Supreme Court has aptly stated:

¹ There are four related cases pending before this Court addressing the constitutionality of H.B. 209 that have been consolidated for oral argument only: Cities of Wellston and Winchester, Missouri, v. SBC Communications, Inc., et al., No. SC87207; City of University City, et al. v. AT&T Wireless Services, Inc., et al., No. SC87208; City of Springfield v. Sprint Spectrum, L.P., No. SC87238; City of St. Louis v. Sprint Spectrum, L.P., No. SC87400. NCSL is filing *amicus* briefs in all four cases that are virtually identical but for the cover page. References to “the cities” herein means the plaintiffs in all four cases, including St. Louis County.

[I]f [] changes [in the law] are to be effected[,] such changes should be made by the legislature, the law-enacting branch of government, rather than by the judiciary, the law-interpreting branch. (internal citation omitted)

* * *

Obviously, the general assembly is not only better equipped than this court to investigate and develop the facts pertinent to a determination of this phase of public policy but also has greater authority to deal with the particular problem and at the same time the related ones.

Brawner v. Brawner, 327 S.W.2d 808, 812-13 (Mo. banc 1959). Thus, this Court has held that “[w]hen the legislature, acting within its constitutional orbit, has declared the public policy of the state, such declared policy is sacred ground which we may not invade.” State ex rel. Reser v. Rush, 562 S.W.2d 365, 369 (Mo. banc 1978) (citing State ex inf. Dalton v. Miles Laboratories, 282 S.W.2d 564, 574 (Mo. banc 1955)).

The legislature, rather than the judiciary, determines public policy, due in large part to the fact that legislators are elected by, and directly responsible to, the citizens of the state. See Menorah Medical Center v. Health & Educational Facilities Authority, 584 S.W.2d 73, 89 (Mo. banc 1979) (“Formulation of policy is a legislature’s primary responsibility, entrusted to it by the electorate . . .”). If citizens feel that legislators’ decisions are not in accordance with their interests, citizens are armed with the power to vote those officials out of office.

Among the three branches of government, the legislative branch is uniquely equipped to address issues like those underlying the enactment of H.B. 209—complicated disputes among numerous constituencies in which factual, legal, economic and political issues may collide. The legislature also has the benefit of considering all issues in their entirety, rather than being limited to the issues raised by parties involved in litigation. Policy choices are more likely to strike a fairer and more effective balance between competing interests when they are based on a broad perspective and ample information. See Timothy D. Lytton, Lawsuits Against the Gun Industry: A Comparative Institutional Analysis, 32 Conn. L. Rev. 1247, 1271 (2000). While judicial decisions often have policy implications, it is the legislative function to set policy and the judicial function to adjudicate disputes regarding those policies. The wisdom of legislative policies is not for the courts to review: “States are not required to convince the courts of the correctness of their legislative judgments.” Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 464 (1981).

This Court has recognized the information-gathering abilities of the legislature: “[R]epresentative assemblies . . . have vast fact and opinion gathering and synthesizing powers unavailable to courts . . . Assuming change is appropriate, this issue demands a comprehensive resolution which courts cannot provide.” Cruzan v. Harmon, 760 S.W.2d 408, 426 (Mo. banc 1988).

The legislature is uniquely competent to reflect the popular will and its policy decisions deserve deference.

II. H.B. 209 DOES NOT ENCROACH ON THE EXECUTIVE POWER OF MUNICIPALITIES TO TAX, AS MUNICIPALITIES ARE MERE CREATURES OF THE STATE WITH NO INHERENT POWERS.

The cities complain that H.B. 209 encroaches on their power to tax and ability to enforce their tax ordinances, by “mandating dismissal” of this lawsuit and by “forbidding audits and new enforcement actions.” (St. Louis County Brief at 72-73; St. Louis City Brief at 96). This contention ignores the fundamental principle underlying our political culture for over a century: municipal corporations exist for the benefit of the state, and their governmental functions may be taken away in whole or in part, within the wisdom of the legislature. Since the early 1900s, the United States Supreme Court has recognized that municipalities do not have any rights under the federal Constitution to challenge a state legislature’s enactments:

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or

authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907). Thus, courts have long held that “[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.” Williams v. Baltimore, 289 U.S. 35, 40 (1933); see also, Trenton v. New Jersey, 262 U.S. 182 (1923). In fact, not only can the state alter municipalities’ boundaries or structure at any time, but the state could abolish its cities entirely if it so chose. Worcester v. Street Ry. Co., 196 U.S. 539, 548 (1905) (“The Legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the state.”).

The Missouri Supreme Court has likewise stated that its cities are not sovereigns, but creatures of the legislature whose only powers are those expressly granted by or necessarily implied from statute. See Kansas City v. J. I. Case Threshing Mach., 87 S.W.2d 195, 198 (Mo. banc 1935) (“[I]t is well settled that a municipal corporation has no powers which are not derived from and subordinate to the State....”); 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) (“[S]tatus of a city is subordinate in the scheme of state government.”). The State may withdraw any powers and privileges it has conferred upon a municipality. State ex rel. Brentwood Sch. Dist. v. State Tax Comm’n, 589 S.W.2d 613, 615 (Mo. banc 1979).

The general assembly’s authority is plenary, unless restricted by a constitutional provision. Not only is there no constitutional provision granting to a municipal entity any independent authority to levy or collect taxes, but Article X, §1 of the Missouri Constitution broadly delegates the whole taxing power to the Legislature:

[t]he taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes.

Mo. Const. Art. X, §1; Henry v. Manzella, 201 S.W.2d 457, 459 (Mo. banc 1947). The cities have no inherent power to levy and collect taxes, but derive that power only from legislation:

[t]he taxing power belongs alone to sovereignty. *No such power inheres in municipal corporations. This principle is universally recognized.* Therefore as municipal corporations have no inherent power of taxation, consequently they possess only such power in respect thereto which has been granted to them by the Constitution or the statutes. . . .

Id. (emphasis added) (citing 6 McQuillin Municipal Corporations (2 Ed.), §2523, at 275). Quite fittingly, this Court stated in State ex rel. Reynolds v. Jost, 175 S.W. 591, 594 (Mo. banc 1915):

[C]ities [cannot] 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.

Therefore, it is without question that H.B. 209 does not encroach upon any municipal executive function.

III. THIS COURT SHOULD DEFER TO THE FACT-FINDING OF THE GENERAL ASSEMBLY IN ENACTING H.B. 209.

The cities assert that H.B. 209 violates the Missouri constitutional provision limiting the state’s power to extinguish debts to counties or municipal corporations. But that limitation only applies when the extinguishment is done “without consideration.” This Court should defer to the legislative finding that there was adequate consideration in H.B. 209.

The constitutional provision on which the cities rely reads:

The general assembly shall not have power:

* * *

(5) To release or extinguish or to authorize the releasing, in whole or in part, *without consideration*, the indebtedness, liability or obligation of any corporation or individual due this state or any county or municipal corporation.

Mo. Const. Art. III, §39(5) (emphasis added).

Assuming *arguendo* that a debt existed and an extinguishment occurred, the issue becomes whether or not there was consideration. On that issue, this Court is not writing on a blank slate. In H.B. 209, the general assembly specifically stated that it “finds and declares it to be the policy of the state of Missouri” that there has been “costly litigation” that is “detrimental to the economic well-being of the state” RSMo. §92.089.1. The general assembly further found, among other things, that “the resolution of such uncertain litigation, the uniformity, and the administrative convenience and cost saving to

municipalities resulting from, and the revenues which will or may accrue to municipalities in the future as a result of the enactment of Sections 92.074 and 92.098 *are full and adequate consideration*” within the meaning of Section 39(5) of Article III of the Constitution. RSMo. §92.089.1 (emphasis added).

The general assembly’s fact-finding is entitled to deference by the judiciary. As noted in Section I, above, the general assembly has unique information-gathering abilities. Legislators have access to many constituents who in this case, like many others, have competing interests and desires. The general assembly expressly made a factual finding that there was “full and adequate consideration” given to the municipalities. RSMo. §92.089.1. Making that factual finding was a proper legislative function. Indeed, this Court has acknowledged that fact-finding is not solely a judicial function: “[W]hen the constitutionality of a statute turned upon a question of fact, the prior finding of the Legislature was treated as prima facie true.” City Trust Co. v. Crockett, 274 S.W. 802, 808 (Mo. 1925), quoting State ex rel. Kelly v. Hackmann, 205 S.W. 161 (Mo. 1918).

This Court should at least treat the general assembly’s finding as “prima facie true” and affirm the trial court judgment.

IV. H.B. 209 DOES NOT USURP THE JUDICIAL FUNCTION.

“Unlike the Congress of the United States, which has only that power delegated by the United States Constitution, the legislative power of Missouri’s general assembly, under Article III, Section 1 of the Missouri Constitution, is plenary, unless, of course, it is limited by some other provision of the Constitution.” Liberty Oil Co. v. Dir. of Revenue, 813 S.W.2d 296, 297 (Mo. banc 1991). Thus, the general assembly has all the legislative

power of the state not denied it by the Constitution. Any constitutional limitation, therefore, must be strictly construed in favor of the power of the general assembly. Brown v. Morris, 290 S.W.2d 160, 166 (Mo. banc 1956).

While the separation of powers is one of the distinct features of our system of government, “an unyielding separation of powers was neither contemplated nor enacted.” See Jesse H. Choper, Judicial Review and the National Political Process 60-63, 128 (1980). The legislative power is intertwined in the three separate branches of the government. Erin Rahne Kidwell, The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review, 62 Alb. L. Rev. 91, 132 (1998).

Under the doctrine of separation of powers, a legislature can amend the law to abrogate a pending claim at any time prior to a court’s entry of a final, non-appealable order without encroaching on the judicial function. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) (“It is true . . . that Congress can always revise the judgments of Article III courts in one sense: [w]hen 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 . . .”) The Missouri Supreme Court has recognized that:

A final judicial decision resolving an issue is the last word of the judicial department with regard to a particular case or controversy.

The separation of powers principle prevents the legislature from declaring that the law applicable in a specific case is something different than what the courts have finally decided. However, *if a*

court has not yet finally adjudicated an issue in a pending case, even a retroactive amendment to the governing law does not constitute a separation of powers violation.

Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys., 950 S.W.2d 854, 857 (Mo. banc 1997) (emphasis added); see also Hon. Charles B. Blackmar, Judicial Activism, 42 St. Louis L.J. 753, 762 (1998) (“The legislature has the power to change any rule established by the case law. The courts, in the meantime, may establish rules for the resolution of civil controversies.”).

H.B. 209 changes the substantive law governing telecommunications business license taxes by amending both the enabling statutes and municipal ordinances, but does not alter any final, non-appealable order in this case. See RSMo. §92.080 (amending inconsistent enabling statutes); RSMo. §92.083 (redefining terms in municipal ordinances to have same meanings as set forth in H.B. 209).

H.B. 209 is not the first legislative enactment to extinguish, constitutionally, a pending lawsuit. See Savannah R-III Sch. Dist. v. Public Sch. Ret. Sys. of Mo., 950 S.W.2d 854, 860 (Mo. banc 1997) (upholding a law that effectively ended litigation brought by a school district, stating “[t]he legislature may have determined it was in the public’s interest to end the expenditure of time, money and energy on intra-governmental litigation and to refocus the school districts on educating youth”); Detroit v. Arms Tech., Inc., 669 N.W.2d 845 (Mich. Ct. App. 2003) (holding that law eliminating retroactive liability to municipality does not violate due process, separation of powers or title-object clause); Sturm, Ruger & Co., Inc. v. Atlanta, 560 S.E.2d 525 (Ga. Ct. App.

2002) (holding that the retroactive application of a law eliminating retroactive liability to municipality, and extinguishing existing lawsuit, does not violate the due process, equal protection, contract or bill of attainder clause of either the federal or state constitutions); Morial v. Smith & Wesson Corp., 785 So. 2d 1 (La. 2001), *cert. denied*, 534 U.S. 9 (2001) (holding that law eliminating retroactive liability to municipality does not violate due process, equal protection, separation of powers, municipality's home rule powers or prohibition against bills of attainder, impairment of contracts or local or special laws); see also St. Louis v. Cernicek, 145 S.W.3d 37 (Mo. App. E.D. 2004) (Court upheld a statute that eliminated retroactive liability of, and extinguished then-existing lawsuits against, gun manufacturers and distributors, but refused to address constitutional arguments of the city because the city failed to timely raise, and thereby waived, any constitutional challenge). Moreover, H.B. 209 does not direct *the Court* to dismiss Cities' lawsuits, but, instead, requires *the cities* to voluntarily dismiss their lawsuits without prejudice.

Thus, H.B. 209 does not remove or alter the Court's jurisdiction in these cases and therefore does not violate separation of powers.

CONCLUSION

Given the obvious delicacy of entering the policymaking arena, this Court should defer to the legislature's determinations in enacting H.B. 209. As Justice Frankfurter so eloquently stated in Dennis v. United States, 341 U.S. 494, 539-40 (1951) (Frankfurter, J., concurring), "we are not legislators, [and] direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment." Justice Stevens echoed the same sentiment in the landmark Chevron decision: "Judges . . . are not part of either political branch of the Government." Therefore, "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984) reh'g denied, 468 U.S. 1227 (1984).

The Missouri Supreme Court has likewise recognized the importance of giving deference to the Missouri general assembly's determinations of public policy. Budding v. SSM Healthcare Sys., 19 S.W.3d 678, 682 (Mo. 2000) ("[W]hen the legislature has spoken on the subject, the courts must defer to its determinations of public policy.") "The responsibility and right for resolving [] competing interests rests with the legislature. Our deference to that power requires that we do not routinely brand the legislature's policy choices arbitrary and unreasonable." W.B. v. M.G.R., 955 S.W.2d 935, 939 (Mo. banc 1997). As Judge Limbaugh recognized in Board of Education v. City of St. Louis, "deference due the General Assembly requires that doubt be resolved against nullifying its action if it is possible to do so by any reasonable construction of that

action or by any reasonable construction of the Constitution.” 879 S.W.2d 530, 532-33 (Mo. banc 1994) (quoting Liberty Oil Co. v. Dir. of Revenue, 813 S.W.2d 296, 297 (Mo. banc 1991)). “Questions such as this properly belong to the legislature which is peculiarly adapted to weigh and evaluate the considerations. The courts cannot rewrite the statutes the legislature in its wisdom has enacted no matter how much such rewriting is desired by a particular group.” Gross v. Merchants-Produce Bank, 390 S.W.2d 591, 600 (Mo. App. W.D. 1965).

The NCSL urges the Court to recognize the appropriate policy-making role of the legislative branch and affirm the trial court’s ruling.

Respectfully submitted,

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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 2000 and contains no more than _____ words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 27,900 limit in the Rule). The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

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