

**BrIN THE
SUPREME COURT OF MISSOURI**

No. SC 87208

**ST. LOUIS COUNTY, MISSOURI, *et al.*,
Plaintiffs/Appellants**

v.

**AT&T WIRELESS SERVICES, INC., *et al.*,
Defendants/ Respondents**

Consolidated into

**CITY OF UNIVERSITY CITY, MISSOURI, *et al.*,
Plaintiffs/Appellants**

v.

**AT&T WIRELESS SERVICES, INC., *et al.*,
Defendants/ Respondents**

**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
CAUSE NO. 01-CC-004454
DIVISION NO. 4
HONORABLE BERNHARDT DRUMM**

Reply Brief of Appellants St. Louis County, Missouri, *et al.*

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ARGUMENT

I. HB 209 violates Mo. Const. Art. III, §39(5) by releasing, without consideration, a corporate indebtedness, liability or obligation due a municipality or county.

This following argument largely follows the corresponding argument in the City of Wellston Reply Brief in case no. SC87207 (hereafter “the Wellston Reply Brief”) with permission.

A. Indebtedness, Liability or Obligation

Totally misunderstanding *Beatty v. State Tax Commission*, 912 S.W. 2d 492 (Mo. banc 1995), the Defendants-Respondents (hereinafter, the “Carriers”) contend that Article III, § 39(5) does not apply because the Plaintiffs-Appellants (hereinafter, the “Municipalities”) do not seek a liquidated sum and their right to collect is uncertain. Nearly all of their arguments rest on this flawed premise: because the tax does not satisfy *Beatty*’s “fixed...sum certain” standard, it cannot qualify as a protected “indebtedness, liability or obligation” within the meaning of Article III, § 39(5). By contrast, the general assembly did not believe that these tax obligations were beyond the scope of constitutional safeguards, because it proffered “consideration... for the immunity and dismissal of lawsuits...” 92.089.1, RSMo. The Municipalities agree with the general assembly that these are constitutionally-protected debts, liabilities or obligations,

otherwise no “consideration” would have been required. Thus, a *Beatty* analysis is unnecessary.

The Carriers are confused about *Beatty*’s analysis that, *in a real estate tax context*, a levy and assessment are required so that the amount of tax due can be ascertained. “Levy and assessment” do not apply to municipal license taxes. Notably, the Carriers cannot cite a single case in their 114 page brief holding that municipal license taxes require a “levy and assessment,” except for their irrelevant citation to state sales tax and income tax procedures.¹

¹ Section 144.250.4, RSMo (requiring the director of revenue to estimate and assess the amount of state sales taxes owed when a delinquent fails to file a return) and section 143.611.2, RSMo (the same with respect to state income taxes) have no relevance to counties or to the County’s license tax. To paraphrase the arguments of the amici:

In this litigation, the Carriers themselves have controlled when their tax liability will be calculated through their refusal to report the amount of their gross receipts. That, however, does not mean that the amounts are not now ascertainable. The actual amount of the Carriers’ gross receipts is a matter of historical fact, even though the Carriers have kept that information secret. Thus, the precise amount of the tax liability of each defendant is “fixed as a sum certain”; it should not matter that the defendants themselves are the only ones who presently know what those amounts are.

This is understandable. Unlike real estate taxes, there is no comparable two-stage process with respect to license taxes, which typically are due each month and at a previously specified rate. The amount of taxes due has been, and will continue to be, ascertainable through mere mathematical calculation.

Thus, these taxes “vest” – immediately and always – each time “telephone service” occurs in a given municipality. *Compare Ernie Patti Oldsmobile, Inc. v. Boykins*, 803 S.W.2d 106, 108 (Mo.App.E.D. 1990), mtn. for rehearing and/or transfer to Supreme Court denied, (“[c]learly, retrospective repeal of the ordinance in question would impair the City’s ‘vested right’ to collect the license fee”).

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

The Carriers’ argument makes sense only if they persuade this Court to insert the word “adjudicated” into Article III, § 39(5), meaning there would be no protection for municipalities in the absence of an “adjudicated indebtedness, liability or obligation.” Such a judicial amendment of fundamental law would encourage scofflaws to devise creative “disputes” for avoiding the payment of taxes. Once challenged, taxes would not become “due” or “fixed” or “certain” until all administrative and legal remedies had been exhausted, nor would penalties and interest begin to run until there had been such a final adjudication. Needless to say, such a limitation does not comport with Article III,

§39(5)'s "very broad and comprehensive" language," *Graham Paper Co. v. Gehner*, 59 S.W.2d at 52, but, rather, it seeks to undermine it.²

B. Consideration

Nowhere in their brief do the Carriers dispute the Municipalities' contention that the Carriers earn substantial income from wireless telephone service, but refuse to report it and to pay taxes on it. The Carriers' position is akin to the wage earner who earns a \$100,000 annual salary, but then decides, unilaterally, that he will not pay income taxes on it. Ignoring demand letters and audit requests, the wage earner waits for collection efforts to begin and then thwarts a speedy resolution by resorting to removal petitions, motions to dismiss, motions for summary judgment, multiple writs and appeals, discovery objections and protective orders, until such time as the general assembly is able to create a tax exemption to rescue the wage earner from their tax delinquency. According to the wage earner, this scenario creates no constitutional impediment under Article III, § 39(5), because the taxing authority is better-off without his tax payment: its

² *See also State v. Youngstown Mining Co*, 121 So. 550, 552(Ala. 1929) (“[I]f the view contended for by the receiver for the denial of the right of the state to collect past-due and accrued excise...taxes [prevailed], the provision[] of...the Constitution...denying the right of rescission or release of obligation or liability held by the state against persons, associations, or corporations, would not be observed.”)

“costly” litigation has ended and future tax streams will more than make up for any potential loss in revenue.

Once more, the underlying premise is flawed. The Carriers contend that the “consideration” required by Article III, § 39(5) flows from the compromise of disputed litigation. They reason that the Municipalities have gained much, because the Carriers waived a valid defense, which only three wireless carriers asserted below, to the effect that wireless telephone service did not occur “within the city” as required by some municipal ordinances (thus, no taxes are owed on such “gross receipts”). Even if this argument had merit, and it does not,³ what defenses justify the Carriers’ failure to pay

³ See, e.g., *AT&T Communications of the Mountain States, Inc. v. Department of Revenue*, 778 P.2d 677, 681-84 (Colo. banc 1989) (“The issue before this court is whether the sale of local telephone exchange network access services used in connection with interstate telephone calls is subject to sales tax under section 39-26-104(1)(c), 16B C.R.S. (1982), which taxes ‘all intrastate telephone and telegraph service.’ ...Evidence presented at trial in this case showed that access services and long distance calls are not one indivisible product, as ATTCOM contends, but are separate, identifiable, and quantifiable services...Other telecommunications cases consistently have held that the interstate nature of telecommunications does not necessarily mean that its component parts are indivisible and exempt from state taxation.” *Held*: “We conclude that access

“gross receipt” taxes on income earned “within the cities.” No defenses are asserted in the Carriers’ Brief, thus, the record is silent on the “consideration” for these lost revenue streams.

More fundamentally, how can it be said that the Carriers have “waived a valid defense” to these claims? HB 209's telecommunications tax uses terms largely identical to those above – “doing business within the borders of [a] municipality” (92.077(1), RSMo) – which “border” language is currently found in the ordinances of Blue Springs and Maryland Heights, among others. U.City Appx. A4; U.City Appx. A100. Since the Carriers failed to pay license taxes on wireless telephone revenues in the past, can we now trust the Carriers – on faith – to do so under this language in the future? If not, then what “valid defense” has been waived and what have these cities gained? Simply put, the fact that the Carriers are not required to forego their stated defenses is further confirmation that HB 209's “consideration” is illusory.

services are intrastate telephone services within the meaning of the Colorado sales tax law...”)

Perhaps realizing this, the Carriers suggest other benefits to off-set the Municipalities' loss in revenue – the additional revenues resulting from H.B. 209. Resp. Br. At 53. Going forward, the Carriers may or may not comply with existing tax law (depending upon whether they choose to waive their “defenses”), and if they do, it will be at an arbitrary and reduced rate. It follows, *ipso facto*, that no consideration flows to the Municipalities under HB 209 – either from the general assembly or the Carriers – because they possess no rights, benefits or privileges beyond that which they had at the outset. *See, e.g., State ex rel. Kansas City v. State Highway Commission*, 163 S.W.2d 948, 953 (Mo. banc 1942) (If “we examine the contract before us carefully it will appear that the commission gave up no privileges, powers or immunities and assumed no obligations except those which were imposed upon it in any event by the statute. The mere promise to do that which the statute required it to do in any event could not constitute a consideration.”).

There is no authority for the proposition that a tax due, owing and paid in 2007 can suffice for non-payment of the same tax due and owing in 1993. Moreover, to rest legal “consideration” on such a tenuous thread, namely, a carrier’s promise to pay in the future, is fraught with peril. What if a carrier stops doing business in St. Louis County in the future? What if a carrier’s customer base does not increase or remain constant in the

future, but rather decreases? What if HB 209 is repealed next year?⁴ Indeed, the most “speculative” aspect of HB 209 is the notion that these Municipalities will receive tax dollars twenty, ten or even one year from now.

A promise to pay taxes in the future is meaningless for purposes of federal statutes. *See, e.g.,* Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3708, at 250-251 (3rd ed.) (anticipated, future tax revenues cannot be utilized to satisfy amount-in-controversy required for federal jurisdiction, because “it cannot be assumed...that [the business] will continue to be subject to the tax, or that the taxing statute will remain in effect and not be modified by legislation”), citing *Healy v. Ratta*, 292 U.S. 263, 270-271 (1934). There is no principled reason for applying a lesser, watered-down standard to the Missouri Constitution.

II. HB 209 violates Mo. Const. Art. III, §38(a) by using public monies to aid private enterprise.

⁴ *See, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133, 3 L.Ed. 162 (1810) (“one legislature is competent to repeal any act which a former legislature was competent to pass; and...one legislature cannot abridge the powers of a succeeding legislature.”); *SC Testing Technology, Inc. v. Dept. of Environmental Protection*, 688 A.2d 421, 425 (Me. 1996) (“The Legislature may not enact a law that purports to bind a future Legislature.”); H.L.A. Hart, *The Concept of Law* 146-47 (Oxford University Press 1961) (same).

This following argument largely follows the corresponding argument in the Wellston Reply Brief with permission.

The Carriers assert that Mo. Const. art. III, §38(a) does not apply because the amounts due the Municipalities are “unliquidated” and “uncertain,” thus, no public funds are involved. (Resp.Br. at 35-36.) Continuing this theme, they argue that there is no ‘public money’ until the taxes are collected and the money is paid into the treasury. *Id.* However, Article III, § 38(a) does not impose a “vested right” or “fixed sum certain” requirement. It simply states: “the general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation...” Mo. Const. art. III, §38(a). The prohibition focuses on the nature of the aid and on the character of the recipient; its application does not depend on funds having entered the public treasury, as Section 38(a)’s “public credit” language plainly attests.

The Carriers’ *Beatty* analysis spills-over to this section, but there is no precedent for linking the definition of “public money” to the concept of “fixed sums” or “vested rights.” Instead, the “public funds” analysis is much more pragmatic: it recognizes that foregoing the collection of a tax – via tax amnesties, tax credits, tax forgiveness, tax exemptions or tax subsidies – depletes the local treasury and results in public aid to the recipient. *See Curchin v. Missouri Industrial Development Board*, 722 S.W.2d 930, 933 (Mo. banc 1987) (“This tax credit is as much a grant of public money or property and is as much a drain on the state’s coffers as would be an outright payment by the state to the

bondholder upon default. There is no difference between the state granting a tax credit and foregoing the collection of the tax and the state making an outright payment to the bondholder from revenues already collected...The allowance of such a tax credit constitutes a grant of public money or property within Article III, Section 38(a) of the Missouri Constitution.”); *Opinion of the Justices to the Senate*, 401 Mass. 1202, 514 N.E.2d 353, 355 (Mass. 1987) (“tax subsidies...are the practical equivalent of direct government grants”); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J. dissenting) (“[o]ur opinions have long recognized – in First Amendment contexts as elsewhere – the reality that tax exemptions, credits and deductions are ‘a form of subsidy that is administered through the tax system’”); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 791 (1973) (money available through tax credit is charge made against state treasury; tax credit is “designed to yield a predetermined amount of tax ‘forgiveness’ in exchange for performing a certain act the state desires to encourage”); *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 861 n. 5 (1995) (“the large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies”); *Sommer v. City of St. Louis*, 631 S.W.2d 676, 680 (Mo.App.E.D. 1982) (“tax abatement does not differ significantly from an expenditure of public funds, since in either case the conduct complained of could result in the treasury’s containing less money than it ought to”).

Here, a select portion of the telephone industry has been granted back-tax forgiveness and prospective tax relief enjoyed by no other businesses – hardware stores, service stations, electric companies, clothing manufacturers, gas utilities, and other telephone companies – operating in local jurisdictions. The idea that similarly-situated companies can be relieved of a tax paid by all other businesses, and not qualify as public aid recipients, is incongruous. If the Carriers’ position is adopted, constitutional analysis will turn on whether the taxes have been paid, collected or adjudicated (i.e., whether they have entered the public treasury), a simplistic approach rejected by the courts above and by Article III, §38(a) itself.

Alternatively, the Carriers argue that even if “public funds” are involved, an exception exists for aid that serves a public, as opposed to a private, purpose. No “public purpose” language appears in Article III, § 38(a), although courts here and elsewhere have made such “public purpose” allowances. *See, e.g., Fust v. Attorney Gen.*, 947 S.W.2d 424, 429 (Mo. banc 1997) (“[i]f a grant serves a public purpose, then it does not violate the constitutional prohibition against granting public monies to private entities”).

The “determination of what constitutes a public purpose is primarily for the legislative department,” *Menorah Med. Ctr. v. Health & Educ. Facilities Auth.*, 584 S.W.2d 73, 78 (Mo. banc 1979), however, courts retain power – in the discharge of their duties – to review an expenditure to see if it serves a public or private purpose. A public purpose is not presumed from the mere passage of a legislative enactment, and “the stated purpose of the legislature, as pronounced in [the statute], is not dispositive.” *Curchin v.*

Missouri Industrial Development Board, 722 S.W.2d 930, 934 (Mo. banc 1987). Where the legislature’s judgment is found to be arbitrary and unreasonable, its determination will be overturned. *Menorah Med. Ctr.*, 584 S.W.2d at 78 (“arbitrary and unreasonable” standard).

Here, the general assembly has offered as HB 209's purpose the following:

The general assembly finds and declares it to be the policy of the state of Missouri that costly litigation which have or may be filed by Missouri municipalities against telecommunications companies, concerning the application of certain business license taxes to certain telecommunications companies, and to certain revenues of those telecommunications companies, as set forth below, is detrimental to the economic well-being of the state, and the claims of the municipal governments regarding such business licenses have neither been determined to be valid nor liquidated.

92.089.1, RSMo. The general assembly should be taken at its word: curbing the litigation expenses of out-of-state businesses, in tax collection suits where no money has changed hands, constitutes the “public purpose” behind HB 209.

Defraying the expenses of these litigants can *never* be considered a proper public purpose, because the Carriers perform no function of government. *See, e.g., Wright v. City of Danville*, 675 N.E.2d 110 (Ill. 1996) (“[d]efraying the costs of purely private litigation has *always* been outside the bounds of a proper public purpose”) (emphasis added).

Realizing this infirmity, the Carriers conjure other reasons for the general assembly's action, such as conserving judicial resources and promoting the expansion of telecommunications services, none of which are mentioned in HB 209. (Resp.Br. at 39-41.)

This Court's only duty is to apply Article III, § 38(a), while giving due regard to the language chosen by the people, its historical context, and the evils sought to be curbed.⁵ In the performance of this duty, the Court will not, in any sense, be usurping the role of the legislature, changing the tax structure or increasing the tax burden. It simply will be declaring and enforcing the law, i.e., the Constitution, and the law is made by the people.

III. HB 209 violates Mo. Const. art. I, § 13 because it is a law that is retrospective in its operation.

Plaintiffs hereby adopt and incorporate by reference the retrospective law argument of the University City Reply Brief.

⁵ See, e.g., *United States v. Butler*, 297 U.S. 1, 62-63 (1936) (“When an act of Congress [or in this case, the general assembly] is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, – to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”).

IV. HB 209 violates the separation of powers principles set forth in Mo.

Const. art. II, § 1.

Contrary to the Carriers' arguments, the Municipalities and the individual Plaintiffs have standing to invoke the separation of powers doctrine and have demonstrated, in their initial briefs before this Court, that HB 209 violates art. II, §1 of the Missouri Constitution by attempting to control the executive and judicial branches without amending or repealing the previously enacted substantive laws that confer taxing powers on the Municipalities.

1. Standing

The Carriers cite *Savannah R-III School Dist. v. Public School Retirement System of Missouri*, 950 S.W.2d 854, 858 (Mo. banc 1997), rehearing denied, for the proposition that statutory instrumentalities of government lack standing to invoke the separation of powers doctrine. *Savannah* does not stand for that proposition. On the contrary, by reaching the merits of the school district's judicial encroachment argument, this Court necessarily recognized that statutory instrumentalities of government do have standing to invoke the separation of powers doctrine. *Id.* at 858-859.

The Carriers do not dispute that the individual Plaintiffs have standing to invoke the separation of powers doctrine. In *State Auditor v. Joint Committee on Legislative Research*, 956 S.W. 2d 228, 231 (Mo. banc 1997), this Court implicitly recognized that Margaret Kelly, the State Auditor, had standing to assert an executive encroachment argument under Mo. Const. art. II, § 1. Likewise, Plaintiffs Leung, Winham and

Redington have standing as public officials to assert that HB 209 encroaches on powers granted to them as members of the executive branch. Moreover, as resident taxpayers who are adversely affected by HB 209, Plaintiffs Leung and Winham have standing to assert both executive encroachment and judicial encroachment arguments.

Unless Plaintiffs are permitted to assert the separation of powers doctrine, there is little likelihood that anyone will. Plaintiffs are in the best position to represent the citizens who look to this Court to protect the integrity of their state government. *See Federal Express Corp. v. Skelton*, 578 S.W.2d 1, 6 (Ark. banc 1979) (“we hold that a public official may question the constitutionality of a legislative enactment where public interests or public rights are involved”); Albus, *Taxpayer Standing In Missouri*, 54 J.Mo.B. 199, 202 (July-August 1998) (“public officials, to the extent they are elected, can claim they better represent all Missouri taxpayers, indeed all citizens, when it comes to deciding what illegal acts should be pursued”).

For these reasons, Plaintiffs have standing to complain of the violation of art. II, §1 of the Missouri Constitution.

2. Judicial Encroachment

The Carriers argue that HB 209 does not interfere with judicial decision making because it does not contravene a final judgment. The Carriers fail to acknowledge that the rule they rely on is only one of three sets of circumstances where legislation encroaches on judicial power in a manner that the constitution forbids. *City of Chicago v. United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms*,

423 F. 3d 777, 783 (7th Cir. 2005), citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995).

First, as explained in *United States v. Klein*, 13 Wall. 128, 80 U.S. 128

(1871), Congress cannot “prescribe rules of decision to the Judicial

Department of the government in cases pending before it.” *Id.* at 146.

Second, “Congress cannot vest review of the decisions of art. III courts in officials of the Executive Branch.” *Plaut*, 514 U.S. at 218 (citing

Hayburn’s Case, 2 U.S. 408 (1792)). Third, Congress cannot command

federal courts to retroactively open final judgments. *Plaut*, 514 U.S. at

219.

Id.

Even though the federal constitution does not mandate separation of powers as emphatically as art. II, § 1 Mo. Const, it is sometimes useful to refer to US Supreme Court cases for helpful analysis. *See, e.g., Savannah*, 950 S.W.2d at 858, citing *Plaut*.

In their initial briefs before this Court, the Municipalities explained why HB 209 encroaches on the judicial department in the same manner as the legislation struck down in *Klein*, i.e. by attempting to prescribe a rule of decision to the judicial department in cases pending before it, without amending or repealing the previously enacted laws that confer taxing powers on the Municipalities.

The Carriers argue that later decisions have held that *Klein’s* prohibition does not take hold when Congress amends applicable law. *See Plaut*, 514 U.S. at 218. Perhaps

so. But unlike the statute at issue in *Plaut*, HB 209 does not amend the laws on which the pending lawsuits are based. For example, 94.270, RSMo, provides in pertinent part: “The mayor and board of alderman shall have power and authority to regulate and to license and to levy and collect a license tax on...telephone companies...” , *Id.*, and 66.300 RSMo provides in pertinent part: “The county council ... is hereby authorized to impose a license tax whereby every public utility engaged in the business of supplying or furnishing . . . exchange telephone service . . . shall pay to the county. . . an amount not in excess of five percent of the gross receipts derived from such business . . .”, *Id.* HB 209 does not expressly⁶ amend 94.270 or 66.300, nor does the title to the bill make any reference to chapters 94 or 66. The Carriers argue that Section 92.080 amends prior law, but HB209 is clear that its amendments to substantive law are prospective. Section 92.080 provides:

Notwithstanding any provisions of this chapter or chapter 66, 80, or 94, RSMo., or the provisions of any municipal charter, after August 28, 2005, no municipality may impose any business license tax, tower tax, or antennae tax on a telecommunications company except as specified in sections 92.074 to 92.098.

⁶ Amendments by implication are not favored. *LeSage v. Dirt Cheap Cigarettes and Beer, Inc.*, 102 S.W.3d 1,4 (Mo. banc 2003).

Section 92.080 does not amend chapter 66, 80, or 94. On the contrary, it recognizes that the Municipalities may continue to impose license taxes as specified in sections 92.074 to 92.098. Section 92.083.2 provides: “Nothing in this section shall have the effect of repealing any existing ordinance imposing a business license tax on a telecommunications company; provided that a city with an ordinance in effect prior to August 28, 2005, complies with the provisions of section 92.086.” Insofar as the definitions and formula in HB 209 may affect the calculation of the tax, the new definitions and formula do not take effect until July 1, 2006. §92.086.6. Consequently, the Municipalities’ license tax ordinances and the statutes that authorize them remain in full force and effect following the enactment of HB 209.

The Carriers’ reliance on *Savannah*, 950 S.W.2d 854, is misplaced. In *Savannah*, unlike HB 209, the Legislature amended the statutes on which the lawsuits were based. Moreover, unlike HB 209, the statute at issue in *Savannah* did not mandate the dismissal of pending lawsuits or otherwise attempt to prescribe a rule of decision to the judicial department. *Savannah*, 950 S.W. 2d at 859.

The Carriers argue that HB 209 does not direct any court to dismiss the Municipalities’ lawsuits – it requires the Municipalities to voluntarily dismiss their lawsuits without prejudice. The Carriers are attempting the same argument rejected by the Court in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), where the Court held that a statutory directive binds both the executive officials who administer the statute and the judges who apply it in particular cases – even if (as is usually the case) Congress

fails to preface its directive with an empty phrase like “Congress . . . directs that.” *Id.* at 439. Consequently, the lawsuit dismissal provision of HB 209 is, in fact, a directive to the judges who apply it, and prescribes a rule of decision to the judicial department.

The cases from other jurisdictions cited by the Carriers relating to firearms legislation are not analogous to this case because, on their facts, they do not present the array of constitutional infirmities demonstrated in this case, despite any allegations of the parties in those cases to the contrary. *See, e.g., Sturm, Ruger, and Co., Inc. v. City of Atlanta*, 560 S.E.2d 525, 531 (Ga. 2002) (finding no claim that the statute did not operate uniformly across entities affected); *Mayor of Detroit v. Arms Technology, Inc.*, 669 N.W.2d 845, 860-61 (Mich. Ct. App. 2003) (finding a broad and inclusive statutory title). Furthermore, the firearms legislation cases involved a field of state law (gun regulation) that was *completely* and *expressly* preempted by the state legislature, thus prohibiting any local government interference in the field – without so much as reaching the issue of the overwhelming imperative of the Second Amendment of the United States Constitution. *See, e.g., Sturm*, 560 S.E.2d at 529; *Morial v. Smith & Wesson Corp.*, 785 So.2d 1, 15 (La. 2001) (holding that the plaintiffs’ suit was an attempt to undermine the state’s police power); *see also* U.S. CONST. amend. II.

The Carriers do not deny that the Municipalities have authority to pass and enforce local license taxes. When the legislature seeks to limit that right, it must do so within the confines of constitutional mandates. *See Morial*, 785 So.2d at 9 (holding that the legislature is free, *within constitutional confines*, to pass legislation) (emphasis added);

and at 13 (holding that a home rule municipal government possesses powers within its jurisdiction as broad as that of the state – except when limited by laws *permitted by the constitution*) (emphasis added).

HB 209 attempts to prescribe a rule of decision to the judicial department. It does so without amending the statutes on which the Municipalities’ lawsuits are based, but instead by nakedly ordering the Municipalities to dismiss their suits under the unchanged statutes. *See Klein*, 80 U.S. at 146; and *Plaut*, 514 U.S. at 218. This violates art. II, §1 of the Missouri Constitution.

3. Executive Encroachment

The Carriers’ entire argument is based on the false premise that HB 209 amends or repeals chapters 66, 80 and 94 RSMo, which confer taxing power on the Municipalities, along with implied power to collect the taxes so authorized. As previously discussed, HB 209 does not amend or repeal chapters 66, 80 or 94. Plaintiffs’ statutory basis for their prior levies and attempts to collect levied taxes is untouched by HB 209.

The Carriers distort the argument at p. 90 of the U. City Brief. Plaintiffs have never argued that the transfer of power from the Municipalities to the Director of Revenue encroaches upon the executive branch. Instead, as discussed at p. 90 of the U. City Brief, the collection of taxes is an executive function, whether performed by the Municipalities or by the Director of Revenue. HB 209 both assumes executive power and interferes with it by mandating dismissal of collection actions brought by the executive branch. As Judge Price noted in *Mo. Coalition for the Environment v. Joint*

Comm. On Admin. Rules (JCAR), 948 S.W.2d 125 (Mo. banc 1997), “Article II, § 1 strictly confines the power of the legislature to enacting laws and does not permit the legislature to execute laws already enacted.” *Id.* at 133; *see also Buckley v. Valeo*, 424 U.S. 1 (1976) (“[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the [executive branch], and not to the Congress, that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed’”). This legislative interference is encroachment prohibited by Mo. Const. art. II, § 1, which decrees:

The powers of government shall be divided into three distinct departments—the legislative executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Mo. Const. art. II, §1 (emphasis added).

There is no provision in the Missouri Constitution that expressly directs or permits the legislature to collect taxes or to prosecute delinquent taxpayers. Directing the Municipalities to dismiss a tax collection action is no different than directing the Director of Revenue to do so. Because the legislature may not grant itself power the unconstitutionally impinges upon the executive function of collecting taxes, HB 209 violates the separation of powers provisions in Mo. Const. art. II, § 1. *See JCAR* at 128;

State Auditor v. Joint Committee on Legislative Research, 956 S.W. 2d 228, 233 (Mo. banc 1997) (“it is not the business of the legislative branch to operate executive agencies.”); *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”).

V. HB 209 is a special law that violates Mo. Const. art. III, § 40.

In support of this argument, Plaintiffs hereby adopt and incorporate by reference the special law argument of the University City Reply Brief and Section VI of this Brief.

VI. HB 209 violates the tax uniformity requirement of Mo. Const. art. X, §

3.

1. Standing

As an initial matter, Defendants argue that Plaintiffs lack standing on uniformity and equal protection issues because the Municipalities’ assertions rest on a perceived distinction that may arise between certain companies that paid the Municipalities’ gross receipts taxes and those that did not.

The Carriers are attempting the same argument rejected by this Court in *Arsenal Credit Union v. Giles*, 715 S.W. 2d 918 (Mo. 1986), where the credit union argued that the city officials lacked standing to challenge the constitutionality of the questioned statute because they were not aggrieved or injured parties. *Arsenal Credit Union*, 715 S.W.2d at 919. The Supreme Court of Missouri addressed the issue of standing and stated “[i]t has been aptly stated that for standing sufficient to attack the constitutionality of a statute a party must demonstrate he is ‘adversely affected by the statute in question. .

..’” *Id.* at 920. The Court also stated that the “rationale of the standing requirement” is to insure that there is “sufficient controversy between the parties” such that the case will “be adequately presented to the court.” *Id.* (internal quotations omitted).

In this case, Plaintiffs, which include resident taxpayers and local taxing officials, have demonstrated that Plaintiffs will be adversely affected by the statute in question through, *inter alia*, the tax rate cap, the dismissal provision, the immunity given to telephone companies for back-tax liability, and the resulting increase to the tax burden on resident taxpayers. In addition, there is clearly “sufficient controversy between the parties that the case will be adequately presented to the court” to satisfy the “primary objective” of the standing doctrine. *See id.* at 920. For these reasons, Plaintiffs have standing to challenge the constitutionality of HB 209, including raising tax uniformity, special law and equal protection claims under the Missouri Constitution.

2. Uniformity

In their initial briefs before this Court, Plaintiffs explained why the General Assembly’s tax classifications and exemptions do not apply uniformly to the same class of subjects and are not reasonable. The Carriers have failed to rebut those arguments, which show that HB 209 invades and destroys the potential of the tax base without being based on differences reasonably related to the purposes of the law, which is taxation for revenue. *See Southwestern Bell Tel. Co. v. Morris*, 345 S.W.2d 62, 68 (Mo. banc 1961).

The Carriers argue that the General Assembly could reasonably treat non-paying companies having a subjective good faith belief that the ordinances were inapplicable to

them differently from entities who paid without protest. As discussed in the University City Reply Brief, the classification is not reasonable and ultimately confers a retroactive benefit to telephone companies based on characteristics of the taxpayer, namely their subjective belief as to whether or how much of a municipality's gross receipts tax they owed.

The Carriers cite *Mid-America Television Company v. State Tax Commission of Missouri*, 652 S.W.2d 674 (Mo. banc 1983), in support of their contention that those carriers who chose to pay the Municipalities' gross receipts taxes did so of their own "free act"; that they too could have chosen not to pay the tax; and that such does not create a uniformity issue. *Mid-America Television* is distinguishable from this case. First, *Mid-America Television* dealt with income taxes, consolidated returns, and deductions for federal income taxes. *Id.* In addition, the Court recognized that the change in the statutes in question was unrelated to the amount of the federal income tax deduction but dealt with "the procedural difficulties encountered under the former statute as to the taxable year in which the federal income tax deduction will be allowed in cases where the federal income tax arises from a past taxable year." *Id.* at 678 (emphasis added). Whereas in this case, the change in the statute is not simply to remedy "procedural difficulties," but creates a classification of telephone companies who will be granted immunity from past-due taxes and does not apply uniformly to all telephone companies. Moreover, *Mid-America Television* upheld a classification that worked to the disadvantage of corporate taxpayers. *Id.* at 681. In contrast, the classification at issue in

this case creates an *ex post facto* tax exemption for telephone companies who failed to pay their taxes without being based on differences reasonably related to the purposes of the law.

The preferential treatment of private telephone companies who refused to pay their taxes, even after the Eastern District ruled in *City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo.App.E.D. 1999), that Southwestern Bell Mobile Systems, who is also one of the defendants in this case, fell within the class of telephone companies under § 94.270 RSMo, is not in the public interest and violates the tax uniformity mandate of Article X, section 3. See *State ex rel. Transp. Mfg. & Equip. Co. v. Bates*, 224 S.W.2d 996, 1000 (Mo. banc 1949).

VII. HB 209 violates the Equal Protection Clause of Mo. Const. art. I, § 2.

In support of this argument, Plaintiffs hereby adopt and incorporate by reference the equal protection argument of the University City Reply Brief and Section VI of this brief.

VIII. Even if HB 209 was constitutional, Defendants are not entitled to judgment as a matter of law because their assertion of “subjective good faith immunity” and other defenses is not sufficient to overcome the facts alleged in Plaintiffs’ amended petition.

The Carriers’ fail to recognize that Section 92.089.2 RSMo., which directs certain municipalities to dismiss their suits without prejudice, provides no basis for the trial court’s judgment dismissing this case with prejudice. The only conceivable basis for

dismissing this suit with prejudice is the subjective good faith immunity provision, which turns on what each defendant subjectively believed. The facts alleged in the amended petition show that, even after St. Louis County informed the Carriers of their license tax ordinances and demanded compliance therewith, the Carriers refused to pay, claiming that “commercial mobile radio service” is not “telephone service”, LF 74 at ¶¶52-53, notwithstanding the decision in *City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo.App.E.D. 1999), finding such a belief to be disingenuous. Contrary to the Carriers’ arguments, the facts alleged are sufficient to withstand the Carriers’ motion for judgment on the pleadings.

CONCLUSION

The judgment and amended judgment in favor of Defendants should be reversed.

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CERTIFICATE OF COMPLIANCE

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 7,376 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

Cynthia L. Hoemann

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I hereby certify that one copy of this brief and a 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief were mailed, postage prepaid, this 27th day of March, 2006 to:

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