

IN THE SUPREME COURT OF MISSOURI

Case No. SC87238

**CITY OF SPRINGFIELD,
Plaintiff-Appellant,**

v.

**SPRINT SPECTRUM, L.P.,
Defendant-Respondent.**

**Appeal from the Circuit Court of Greene County, Missouri
Thirty-First Judicial Circuit, The Honorable J. Miles Sweeney, Presiding Judge
Case No. 104CC5647**

BRIEF OF APPELLANT CITY OF SPRINGFIELD

(ORAL ARGUMENT REQUESTED)

**LOWTHER JOHNSON
Attorneys at Law, LLC**

John W. Housley
Missouri Bar Number 28708
Angela K. Drake
Missouri Bar Number 35237
Kansas Bar Number 18661
Nicole D. Lindsey
Missouri Bar Number 53492
Florida Bar Number 165174
901 St. Louis, 20th Floor
Springfield, Missouri 65806
(417) 866-7777 – Telephone
(417) 866-1752 – Facsimile
Attorneys for Appellant City of Springfield

TABLE OF CONTENTS

TABLE OF AUTHORITIES 7

JURISDICTIONAL STATEMENT 19

STATEMENT OF FACTS 19

POINTS RELIED ON 27

ARGUMENT 35

STANDARD OF REVIEW 35

I. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article III, § 38(a) of the Missouri Constitution in that it gratuitously extinguishes a corporate tax debt thereby using public monies to aid private enterprise. 36

A. The forgiven tax liabilities constitute a grant of “public money” within the meaning of § 38(a). 39

B. Respondents, not the public, are the recipients of this public aid. 43

1. Section 92.089.1 is counterfactual as it relates to “costly litigation” and the representation that Springfield’s claims have not been determined to be “valid”. 45

2. The immunity and dismissal provisions are arbitrary. 47

II. The trial court erred in granting Sprint’s motion for judgment on the

pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article III, § 39(5) of the Missouri Constitution in that it gratuitously extinguishes a corporate tax debt thereby releasing a corporate indebtedness, liability or obligation due a municipality. 50

A. The gross receipt taxes due to Springfield constitute a matured “indebtedness” as well as a “liability or obligation” under Article III, § 39(5) of the Missouri Constitution. 51

B. The General Assembly’s release of Respondent’s tax liabilities is without consideration. 56

1. “The resolution of uncertain litigation” is not “consideration” in this case. 58

2. “Uniformity and administrative convenience” are not “consideration” in this case. 65

III. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article III, § 40 of the Missouri Constitution in that it constitutes a special law because it regulates the affairs of the City, grants exclusive corporate privileges and arbitrarily creates closed-ended classifications without any reasonable basis, and to the extent it has legitimate purposes, these could be accomplished by other general laws. 70

A.	<u>The statute’s classification of exempt cities is based on immutable historic facts which prevents for all time other cities from entering the class identified in the legislation which creates an impermissible “closed ended” special law in contravention of Article III, § 40(30).</u>	72
B.	<u>The statute does not apply to all members of the same class.</u>	77
C.	<u>The statute’s classifications are arbitrary and unreasonable.</u>	80
D.	<u>The statute’s classifications are not germane to the purpose of the law.</u>	80
E.	<u>The statute constitutes a special law where a general law can be made applicable.</u>	82
IV.	<u>The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates the prohibition against retrospective laws under Article I, § 13 of the Missouri Constitution in that §§ 92.089.1 and 92.089.2 of HB 209 recharacterize past due taxes which had already matured as not liquidated; grant immunity for prior bad acts; and require the City to dismiss its lawsuit to collect past due taxes, all to the substantial prejudice of the City.</u>	84
A.	<u>Section 92.089.1 recharacterizes past due taxes which had already</u>	

matured as not liquidated and forgives a matured indebtedness to the substantial prejudice of the City. 86

B. Section 92.089.2 grants immunity to telecommunications companies for prior bad acts based upon “subjective good faith belief” up to and including July 1, 2006, and eliminates Springfield’s vested right to collect taxes. 88

C. Section 92.089.2 requires the City to dismiss its lawsuit to collect unpaid taxes to the substantial prejudice of the City. 90

V. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209, which purports to require dismissal of this suit to collect municipal business license taxes, violates the tax uniformity requirement of Article X, § 3 of the Missouri Constitution in that it arbitrarily and unreasonably creates two separate tax rates for those who timely paid, and for those who did not pay, resulting in non-uniformity of taxation of subjects which fall within the same class or category. 95

VI. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article I, § 2 of the Missouri Constitution in that its exemption of certain businesses from tax liability arbitrarily classifies for purposes of

	<u>taxation and discriminates against those who paid taxes.</u>	101
VII.	<u>The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding that Sprint is immune from any past tax liability because the question of “good faith” is incapable of resolution on a motion for judgment on the pleadings or to dismiss in that Sprint does not possess a good faith belief sufficient to qualify for lawsuit immunity and dismissal under HB 209.</u>	104
VIII.	<u>The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article II, § 1 of the Missouri Constitution, which prohibits one branch of government from impermissibly interfering with another’s performance, or from assuming power that more properly is entrusted to another branch, in that it directs an outcome in pending cases, forecloses appellate review, and impedes municipal tax collection.</u>	107
	A. <u>Encroachment Upon Judicial Branch.</u>	108
	B. <u>Encroachment Upon Executive Branch.</u>	114
IX.	<u>The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates the single subject and clear title requirements of Article III, § 23 of the Missouri Constitution in that it is both under-inclusive and</u>	

	<u>contains two unrelated subjects.</u>	115
X.	<u>The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because those portions of HB 209 purporting to amend Mo. Rev. Stat. Chapters 71 and 92 are void in their entirety in that said invalid provisions are so essentially connected with the remainder of the Act they are not severable.</u>	117
	CONCLUSION	119
	CERTIFICATE OF SERVICE	123
	CERTIFICATE OF COMPLIANCE	124

TABLE OF AUTHORITIES

Constitutional and Statutory Provisions

4 U.S.C. §§ 116-126	19, 27, 40
4 U.S.C. § 116(a)	20
4 U.S.C. § 117	27, 61
4 U.S.C. § 122	27, 61
Mo. CONST. art. I, § 2	<i>passim</i>
Mo. CONST. art. I, § 13	<i>passim</i>
Mo. CONST. art. II, § 1	<i>passim</i>
Mo. CONST. art. III, § 23	5, 33, 116, 117
Mo. CONST. art. III, § 38(a)	<i>passim</i>
Mo. CONST. art. III, § 39(5)	<i>passim</i>
Mo. CONST. art. III, § 40(21)	82
Mo. CONST. art. III, § 40(28)	82
Mo. CONST. art. III, § 40(30)	<i>passim</i>
Mo. CONST. art. IV, § 22	33, 114
Mo. CONST. art. V, § 3	19
Mo. CONST. art. VI, § 1	30, 93
Mo. CONST. art. VI, § 15	30, 94
Mo. CONST. art. VI, § 16	30, 94
Mo. CONST. art. VI, § 19	20

MO. CONST. art. X, § 3	<i>passim</i>
MO. CONST. art. X, §§ 16 through 22	32, 106
MO. REV. STAT. § 1.140	34, 118
MO. REV. STAT. § 32.010	33, 104
MO. REV. STAT. § 32.375	32, 104
MO. REV. STAT. § 71.675.1	29, 80
MO. REV. STAT. § 82.010	20
MO. REV. STAT. § 92.077(1)	29, 81
MO. REV. STAT. § 92.083.1(1)	26, 28, 68
MO. REV. STAT. § 92.083.2	33
MO. REV. STAT. § 92.086.6	<i>passim</i>
MO. REV. STAT. § 92.086.9	26, 29, 65, 73
MO. REV. STAT. § 92.086.10	<i>passim</i>
MO. REV. STAT. § 92.086.10(1)	<i>passim</i>
MO. REV. STAT. § 92.086.10(2)	<i>passim</i>
MO. REV. STAT. § 92.086.13	29, 81, 82
MO. REV. STAT. § 92.089	29, 31, 78, 97
MO. REV. STAT. § 92.089.1	<i>passim</i>
MO. REV. STAT. § 92.089.2	<i>passim</i>
MO. REV. STAT. § 92.092	34, 118
MO. REV. STAT. § 94.270	31, 99

MO. REV. STAT. § 136.076	27, 45
MO. REV. STAT. § 139.031	28, 30, 64, 90
MO. REV. STAT. Ch. 77-82	30, 94
CITY OF JEFFERSON, MO., ORDINANCE 9485, §§ 16-68 and 16-71 (Aug. 18, 1980)	74
SPRINGFIELD, MO., CITY CHARTER, § 1.3	20
SPRINGFIELD, MO., CITY CHARTER, § 2.16(1)	20
SPRINGFIELD, MO., CITY CHARTER, § 7.2(1)	20
SPRINGFIELD, MO., CODE § 20-146 (1968) (G.O. No. 1047, § 2; G.O. No. § 1762 (Jan. 2, 1968)) (recodified June 2, 2003, pursuant to MO. REV. STAT. § 71.943)	21
SPRINGFIELD, MO., ORDINANCE 3395	68

Cases

<i>508 Chestnut, Inc. v. City of St. Louis</i> , 389 S.W.2d 823 (Mo. 1965)	95
<i>Airway Drive-In Theatre Co. v. City of St. Ann</i> , 354 S.W.2d 858 (Mo. banc 1962) .	49, 100
<i>Allied Stores of Ohio v. Bowers</i> , 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1959) . .	101
<i>Anderson v. City of Joplin</i> , 646 S.W.2d 727 (Mo. 1983)	81
<i>Ark. Op. Atty. Gen. No. 2003-025</i> , 2003 WL 1347746, at *5 (Ark. A.G. 2003)	54, 111
<i>Arkansas Writers' Project, Inc. v. Ragland</i> , 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987)	41
<i>Armco Steel Corp. v. Dept. of Treasury</i> , 358 N.W.2d 839 (Mich. 1984)	31, 103

<i>Asmus v. Pacific Bell</i> , 999 P.2d 71 (Cal. 2000)	66
<i>AT&T Communications of the Mountain States, Inc. v. State of Colorado</i> , 778 P.2d 677 (Colo. 1989)	68
<i>Beatty v. State Tax Commission</i> , 912 S.W.2d 492 (Mo. banc 1995)	53
<i>Blandford Land Clearing Corp. v. National Union Fire Ins. Co. of Pittsburgh</i> , 698 N.Y.S.2d 237 (Sup. Ct. N.Y. 1999)	70
<i>Buckley v. Valeo</i> , 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)	115
<i>Campanelli v. AT&T Wireless Services, Inc.</i> , 706 N.E.2d 1267 (Ohio 1999)	77
<i>Champ v. Poelker</i> , 755 S.W.2d 383 (Mo. Ct. App. E.D. 1988)	27, 39
<i>Cheek v. United States</i> , 498 U.S. 192, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991) ...	32, 107
<i>City of Bridgeton v. Northwest Chrysler-Plymouth, Inc.</i> , 37 S.W.3d 867 (Mo. Ct. App. E.D. 2001)	29, 81, 89
<i>City of Cape Girardeau v. Fred A. Groves Motor Co.</i> , 142 S.W.2d 1040 (Mo. 1940) <i>passim</i>	
<i>City of Dubuque v. Illinois Central R. Co.</i> , 39 Iowa 56, 1874 WL 416 (Iowa 1874) ..	55, 56
<i>City of Kansas City v. Grush</i> , 52 S.W. 286 (Mo. 1899)	99
<i>City of Louisville v. Louisville Ry. Co</i> , 63 S.W. 14 (Ky. App. 1901)	52
<i>City of Springfield v. Clouse</i> , 206 S.W.2d 539 (Mo. banc 1947)	115
<i>City of Springfield v. Smith</i> , 19 S.W.2d 1 (Mo. banc 1929)	71, 72
<i>City of St. Louis v. Spiegel</i> , 2 S.W. 839 (Mo. 1887)	99
<i>City of St. Louis v. Western Union Telegraph Co.</i> , 760 S.W.2d 577 (Mo. Ct. App. E.D. 1988)	31, 101, 102

<i>City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.</i> , 14 S.W.3d 54 (Mo. Ct. App. E.D. 2000)	<i>passim</i>
<i>City of Washington v. Washington Oil Co.</i> , 145 S.W.2d 366 (Mo. 1940)	100
<i>City of Webster Groves v. Smith</i> , 102 S.W.2d 618 (Mo. 1937)	43
<i>Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered by Delinquent Tax Liens</i> , 517 S.W.2d 49 (Mo. 1974)	78
<i>Commerce Bank, N.A. v. Blasdel</i> , 141 S.W.3d 434 (Mo. Ct. App. W.D. 2004)	35
<i>Committee for Public Education & Religious Liberty v. Nyquist</i> , 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973)	41
<i>Community Public Service Company v. James</i> , 167 S.W.2d 588 (Tex. Ct. App. 1943) ...	52
<i>Curchin v. Missouri Indus. Dev. Bd.</i> , 722 S.W.2d 930 (Mo. banc 1987)	<i>passim</i>
<i>Dalton v. Metropolitan St. Louis Sewer Dist.</i> , 275 S.W.2d 225 (Mo. banc 1955)	95
<i>Daniel v. Snowdown Ass'n.</i> , 513 So.2d 946 (Miss. 1987)	59
<i>Daniels v. Sones</i> , 147 So.2d 626 (Miss. 1962)	52
<i>Doe v. Roman Catholic Diocese of Jefferson City</i> , 862 S.W.2d 338 (Mo. 1993) .	30, 85, 91
<i>Drey v. State Tax Comm'n</i> , 345 S.W.2d 228 (Mo. 1961)	100
<i>Dunne v. Kansas City Cable Ry. Co.</i> , 32 S.W. 641 (Mo. 1895)	79
<i>Ernie Patti Oldsmobile, Inc. v. Boykins</i> , 803 S.W.2d 106 (Mo. Ct. App. E.D. 1990)	87
<i>Farm Bureau Town & Country Ins. v. Angoff</i> , 909 S.W.2d 348 (Mo. banc 1995)	35
<i>Federal Express Corp. v. Skelton</i> , 578 S.W.2d 1 (Ark. banc 1979)	54, 111
<i>First Nat. Bank of St. Joseph v. Buchanan County</i> , 205 S.W.2d 726 (Mo. 1947)	52, 87

<i>Fisher v. Reorganized Sch. Dist. No. R-V of Grundy County</i> , 567 S.W.2d 647 (Mo. banc 1978)	85
<i>Foland Jewelry Brokers, Inc. v. City of Warren</i> , 532 N.W.2d 920 (Mich. Ct. App. 1995)	63
<i>Fontenot v. Hurwitz-Mintz Furniture Co.</i> , 7 So.2d 712 (La. 1942)	52
<i>Fust v. Attorney General for the State of Missouri</i> , 947 S.W.2d 424 (Mo. banc 1997)	27, 44, 112
<i>Grace v. Missouri Gaming Commission</i> , 51 S.W.3d 891 (Mo. Ct. App. W.D. 2001)	32, 106
<i>Graham Paper Co. v. Gehner</i> , 59 S.W.2d 49 (Mo. banc 1933)	<i>passim</i>
<i>H & B Masonry Co., Inc. v. Davis</i> , 32 S.W.3d 120 (Mo. Ct. App. E.D. 2000)	35
<i>Hammerschmidt v. Boone County</i> , 877 S.W.2d 98 (Mo. banc 1994)	34, 117
<i>Harris v. Missouri Gaming Commission</i> , 869 S.W.2d 58 (Mo. banc 1994)	<i>passim</i>
<i>Healy v. Ratta</i> , 292 U.S. 263, 54 S. Ct. 700, 78 L. Ed. 1248 (1934)	69
<i>Henry v. Tinsley</i> , 218 S.W.2d 771 (Mo. Ct. App. Spr. 1949)	106
<i>I.N.S. v. Chadha</i> , 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983)	33, 108, 112, 113
<i>In re Commonwealth Trust Co. of Pittsburgh</i> , 54 A.2d 649 (Pa. 1947)	65
<i>Ivester v. State ex rel Gillum</i> , 83 P.2d 193 (Okla. 1938)	52
<i>James McKeever v. Director of Revenue</i> , 1980 WL 5130, at *4 (Mo. Admin. Hrg. Com. 1980)	54
<i>Kansas City v. Standard Home Improvement Co., Inc.</i> , 512 S.W.2d 915 (Mo. Ct. App. 1974)	82
<i>Kilmer v. Mun</i> , 17 S.W.3d 545 (Mo. 2000)	27, 49

<i>Marbury v. Madison</i> , 5 U.S. 137 (1803)	58
<i>McKaig v. Kansas City</i> , 256 S.W.2d 815 (Mo. banc 1953)	71
<i>Mendelsohn v. State Bd. of Registration for the Healing Arts</i> , 3 S.W.3d 783 (Mo. banc 1999)	30, 87
<i>Metts v. City of Pine Lawn</i> , 84 S.W.3d 106 (Mo. Ct. App. E.D. 2002)	28, 64, 90
<i>Missouri Coalition for the Environment v. Joint Committee on Administrative Rules</i> , 948 S.W.2d 125 (Mo. banc 1997)	58, 108, 115
<i>Missouri Pacific R.R. Co. v. Kirkpatrick</i> , 652 S.W.2d 128 (Mo. banc 1983)	102
<i>National Solid Waste Mgmt. Ass'n v. Director of Dept. of Natural Resources</i> , 964 S.W.2d 818 (Mo. banc 1998)	34, 116
<i>New Orleans v. Clark</i> , 95 U.S. 644 (1877)	93
<i>Norberg v. Montgomery</i> , 173 S.W.2d 387 (Mo. banc 1943)	94
<i>O'Reilly v. City of Hazelwood</i> , 850 S.W.2d 96 (Mo. banc 1993)	83
<i>Ollivier et al. v. City of Houston</i> , 54 S.W. 943 (Tex. 1900)	52
<i>Opinion of the Justices to the Senate</i> , 514 N.E.2d 353, 355 (Mass. 1987)	41
<i>Pierre Chouteau Condominiums v. State Tax Commission</i> , 662 S.W.2d 513 (Mo. banc 1984)	
<i>Planned Industrial Expansion Auth. of the City of St. Louis v. Southwestern Bell Telephone Co.</i> , 612 S.W.2d 772 (Mo. 1981)	29, 79, 83
<i>Pogue v. Swink</i> , 261 S.W.2d 40 (Mo. 1953)	36
<i>Radloff v. Penny</i> , 225 S.W.2d 498 (Mo. Ct. App. Stl. 1949)	105
<i>Reals v. Courson</i> , 164 S.W.2d 306 (Mo. 1942)	71, 72

<i>Rhodes v. City of Hartford</i> , 513 A.2d 124 (Conn. 1986)	63
<i>Robinson v. Benefit Ass'n of Railway Employees</i> , 183 S.W.2d 407 (Mo. Ct. App. 1944) .	59
<i>Rosenberger v. Rector & Visitors</i> , 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)	41
<i>Roth v. Yackley</i> , 396 N.E.2d 520 (Ill. 1979)	112
<i>Savannah R-III Sch. Dist. v. Public Sch. Ret.</i> , 950 S.W.2d 854 (Mo. banc 1997)	
.....	30, 91, 92, 93
<i>School Dist. of Riverview Gardens v. St. Louis County</i> , 816 S.W.2d 219 (Mo. banc 1991)	
.....	75, 83
<i>Simpson v. Kilcher</i> , 749 S.W.2d 386 (Mo. banc 1988)	112
<i>Sloan v. Calvert</i> , 497 S.W.2d 125 (Tex. Ct. App. 1973)	52
<i>Smith v. Shaw</i> , 159 S.W.3d 830 (Mo. banc 2005)	35
<i>Smith v. State</i> , 420 S.W.2d 204 (Tex. Ct. App. 1967)	52
<i>Sommer v. City of St. Louis</i> , 631 S.W.2d 676 (Mo. Ct. App. E.D. 1982)	40
<i>Southwestern Bell Tel. Co. v. Morris</i> , 345 S.W.2d 62 (Mo. banc. 1961)	31, 98, 100
<i>State v. Bolen</i> , 643 S.W.2d 806 (Mo. 1983)	36
<i>State v. Pioneer Oil & Refining Co., et al</i> , 292 S.W. 869 (Tex. Ct. App. 1927)	52
<i>State Auditor v. Joint Committee on Legislative Research (JCLR)</i> , 956 S.W.2d 228 (Mo. banc 1997)	33, 108, 112
<i>State ex rel. Bd. of Control of St. Louis School and Museum of Fine Arts v. City of St. Louis</i> , 115 S.W. 534 (Mo. 1908)	38
<i>State ex rel. City of Blue Springs v. Rice</i> , 853 S.W.2d 918 (Mo. banc. 1993)	71, 75

<i>State ex rel. Dawson v. Falkenhainer</i> , 15 S.W.2d 342 (Mo. banc 1929)	58
<i>State ex rel. Garth v. Switzler</i> , 45 S.W. 245 (Mo. banc 1898)	99
<i>State ex rel. Hostetter v. Hunt</i> , 9 N.E.2d 676 (Ohio 1937)	31, 102
<i>State ex rel. Kansas City v. State Highway Commission</i> , 163 S.W.3d 948 (Mo. banc 1942)	28, 58, 66, 69
<i>State ex rel. Nixon v. American Tobacco Co.</i> , 34 S.W.2d 122 (Mo. banc 2000)	35
<i>State ex rel. Public Defender Comm. v. County Court of Greene County</i> , 667 S.W.2d 409 (Mo. banc 1984)	83
<i>State ex rel. St. Louis Police Relief Ass'n. v. Igoe</i> , 107 S.W.2d 929 (Mo. 1937)	39
<i>State ex rel. St. Louis-San Francisco Railway v. Buder</i> , 515 S.W.2d 409 (Mo. 1974)	94
<i>State ex rel. Stephan v. Parrish</i> , 891 P.2d 445 (Kan. 1995)	31, 97, 103
<i>State ex rel. Transport Manufacturing & Equip. Co. v. Bates</i> , 224 S.W.2d 996 (Mo. banc 1949)	<i>passim</i>
<i>State ex rel. Upchurch v. Blunt</i> , 810 S.W.2d 515 (Mo. 1991)	36
<i>State on Information of Dalton v. Dearing</i> , 263 S.W.2d 381 (Mo. 1954)	36
<i>Stroh Brewery Co. v. State of Missouri</i> , 954 S.W.2d 323 (Mo. banc 1997)	33, 116
<i>Swartz v. Mann</i> , 160 S.W.3d 411 (Mo. Ct. App. W.D. 2005)	32, 105
<i>Sweeny v. Sweeny Inv. Co.</i> , 90 P.2d 716 (Wash. 1939)	60
<i>The May Dept. Stores Co. v. Director of Revenue</i> , 1986 WL 23204, at *15 (Mo. Adm. Hrg. Comm. 1986)	28, 53
<i>Thompson v. Committee on Legislative Research</i> , 932 S.W.2d 392, 395 n.4 (Mo. banc 1996)	55

<i>Tillis v. City of Branson</i> , 945 S.W.2d 447 (Mo. banc 1997)	<i>passim</i>
<i>Treadway v. State of Missouri</i> , 988 S.W.2d 508 (Mo. banc 1999)	73
<i>United C.O.D. v. State</i> , 150 S.W.3d 311 (Mo. 2004)	36
<i>United States v. Hanson</i> , 2 F.3d 942 (9th Cir. 1993)	107
<i>United States v. Klein</i> , 80 U.S. 128, 20 L. Ed. 519 (1871)	33, 113, 114
<i>United States v. Simkanin</i> , 420 F.3d 397 (5th Cir. 2005)	107
<i>Unwired Telecom Corp. v. Parish of Calcasieu</i> , 903 So.2d 392 (La. 2005)	33, 58, 111
<i>Werner v. Riebe</i> , 296 N.W. 422 (N.D. 1941)	52
<i>Willhite v. Rathburn</i> , 61 S.W.2d 708 (Mo. 1933)	86
<i>Wise v. Crump</i> , 978 S.W.2d 1 (Mo. Ct. App. E.D. 1998)	70
<i>Witte v. Director of Revenue</i> , 829 S.W.2d 436 (Mo. banc 1992)	36
<i>Zipper v. Health Midwest</i> , 978 S.W.2d 398 (Mo. Ct. App. W.D. 1998)	70

Other Secondary Sources

American Law Institute, Restatement of the Law of Contracts § 75	58
3 Williston on Contracts § 7:45 (4 th ed. 2004)	106
H.R. Conf. Rep. No. 106-719, <i>reprinted in</i> U.S. Cong. Ad. News, 2000, at 509	20
Morgan Jindrich, <i>Group Wants Truth in Cell Phone Billing: Wireless firms bill clients \$937 million for ‘federal recovery fees’</i> (Apr. 13, 2004), available at http://www.publicintegrity.org/telecom/report.aspx?aid=250&sid=200	81

State Constitutional Limitations on Public Industrial Financing: an Historical and

<i>Economic Approach</i> , 111 U. Pa. L. Rev. 265, 280-281 (Jan. 1963)	37
The American Heritage Dictionary (2 nd ed. 1982)	110
THE FEDERALIST, NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961)	119
THE FEDERALIST, NO. 78	121
Turner, <i>Retrospective Lawmaking In Missouri: Can School Districts Assert Any Constitutional Right Against The State?</i> , 63 Mo.L.Rev. 833, 833 (Summer 1998) .	92
<i>Wireless Telecommunications Sourcing and Privacy Act: Hearing on H.R. 3489 Before the House Comm. On the Judiciary</i> , 106th Cong. 8 (2000)	61, 62
Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE, § 3708, at 250-251 (3 rd ed.)	69

JURISDICTIONAL STATEMENT

This is an appeal from the Judgment of the Circuit Court of Greene County, Missouri, the Honorable J. Miles Sweeney, granting Sprint Spectrum, L.P.’s motion for judgment on the pleadings or to dismiss finding House Bill No. 209 (hereinafter “HB 209”) constitutional, that Sprint Spectrum, L.P., was immune from back tax liability, and that the City of Springfield’s case seeking unpaid taxes should be dismissed with prejudice. A001-A002; L.F. 718-719. Appellant contends that HB 209, which amended Chapters 71, 92, and 227 of the Missouri Revised Statutes, and is titled, in part, the Municipal Telecommunications Business License Tax Simplification Act, effective as of August 28, 2005, is unconstitutional under the Missouri Constitution. On November 2, 2005, the Missouri Court of Appeals, Southern District, transferred this case to the Missouri Supreme Court for disposition of the City of Springfield’s constitutional challenges to HB 209. Pursuant to Article V, § 3 of the Missouri Constitution, the Missouri Supreme Court has exclusive appellate jurisdiction of all cases involving the validity of a statute.

STATEMENT OF FACTS

Various municipalities impose a tax upon utilities – such as water, gas, electric and telephone companies – doing business within their boundaries. License taxes constitute a large part of each jurisdiction’s revenue and budget. L.F. 15. In 2000, Congress passed the Mobile Telecommunications Sourcing Act (hereinafter the “MTSA”), 4 U.S.C. §§ 116-126, which recognized that state and local tax administrators often “levy taxes on the consumption of wireless services that occur within their respective jurisdictions.” H.R.

Conf. Rep. No. 106-719, *reprinted in* U.S. Cong. Ad. News, 2000, at 509. Such taxes, charges and fees may take the form of a “fixed charge for each customer or [may be] measured by gross amounts charged to customers for mobile telecommunications services. . . .” 4 U.S.C. § 116(a). The MTSA was designed to simplify the application of these local laws on mobile telephone services. L.F. 12, 386.

Plaintiff-Appellant City of Springfield, Missouri (hereinafter “Springfield” or the “City”) is a lawfully existing Missouri municipal corporation and since March 17, 1953, has been a constitutional charter city within the meaning of Article VI, Section 19 of the Missouri Constitution and § 82.010 Mo. Rev. Stat. L.F. 166. Springfield is empowered to tax gross receipts of merchants doing business within the city by the Missouri Constitution, § 82.010 Mo. Rev. Stat., and § 2.16(1) of its City Charter, which provides for the assessment, levy and collection of taxes. L.F. 7-8, 190. Section 1.3 of the City Charter delineates the powers of the City of Springfield, which include, *inter alia*, the power to collect taxes, and, § 7.2(1) thereof delegates the authority to conduct civil suits to enforce all ordinances to the Springfield City Attorney. L.F. 212-213; 447.

The first license tax relating to telephone companies in Springfield was enacted in 1946. L.F. 163. Springfield’s current gross receipts ordinance, which is denominated as a license tax for telephone companies, provides as follows:

Every person engaged in the business of supplying telephones, and telecommunications and telephonic service, and telecommunications services, within the city shall pay as a license tax a sum equal to six percent of the gross receipts from

such business.

Springfield, Mo., Code § 20-146 (1968) (G.O. No. 1047, § 2; G.O. No. § 1762 (Jan. 2, 1968)) (recodified June 2, 2003, pursuant to Mo. Rev. Stat. § 71.943); A012-A013; L.F. 163, 187. There is no mandatory “pass on” of a city’s gross receipts taxes to consumers because it is a tax on the merchant, not the consumer. L.F. 6, ¶ 6.

Defendant-Respondent Sprint Spectrum, L.P., (hereinafter “Sprint”) provides wireless service in the Springfield area and generates revenue therefrom. L.F. 11, 23, 26. It has paid local sales tax in Springfield since the year 2004, as has another Sprint entity known as Sprint Communications. L.F. 11, 23. Sprint has failed to pay gross receipts taxes to Springfield, but has paid, and continues to pay, gross receipt taxes to the City of Jefferson, Missouri. L.F. 11-12, 23, 26, 163. Certain wireless companies operating in Springfield, such as T-Mobile USA, Inc., have paid Springfield gross receipts taxes pursuant to the City’s ordinance. L.F. 5, 14, 163.

Southwestern Bell Telephone, L.P., (hereinafter “SBC”) has paid gross receipts taxes to the City of Springfield for many years relating to its telephone service. L.F. 309. Companies that provide wireless telephone services, like Sprint, are competitors of SBC’s telephone service. As John R. Sondag, Executive Director for External Affairs for SBC, testified at his deposition on April 25, 2005:

- 13 Q. (By Ms. Drake) I’m asking you as a person
14 who’s worked for the phone company for 27 years, do
15 you consider wireless carriers to be competitors?

16 A. You know, I would say in general, wireless
17 carriers are competitors.

L.F. 319. Although SBC and Springfield disagree on the issue of which revenue streams must be included in the base for the gross receipts taxes, SBC has routinely demanded of Springfield that the gross receipts ordinance be applied to all of its competitors who provide similar services, which includes the wireless telephone companies. L.F. 309-316, 319. For example, a May 5, 2004, letter from Mr. Sondag states:

- “I would anticipate that any affiliate of SBC Missouri from which the City seeks GRTs would want to know the extent to which the City is collecting such GRTs from each of its competitors operating in Springfield.” L.F. 309.
- “In addition, we trust that if the City intends to apply this new interpretation to SBC Missouri, it also intends to apply this same interpretation to every other telecommunications carrier operating in Springfield.” L.F. 312.
- “In addition, if the City intends to pursue this issue further, SBC Missouri is very concerned whether the City’s new interpretation of the gross receipts ordinance is being applied equally to all telecommunications companies operating within the City of Springfield.” L.F. 313.

During his deposition Mr. Sondag also stated: “if you’re going to interpret this differently, you need to inform everybody so I wanted to make sure that those folks who were competing against me, the ones I named in a previous answer, that they are treated the same way, and that you don’t apply this to me, and not to my competitors, whoever they may be.”

L.F. 319.

Similarly, in a letter dated September 30, 1991, from Mark Walker, Area Manager Community Relations for Southwestern Bell Telephone, to the City Manager of Springfield, Mr. Walker stated:

- “So that our customers are not disadvantaged, there should be equal application of the tax to all providers of similar services and any expanded application of the tax should apply to all providers simultaneously.” L.F. 334.
- “We assume that if the City does pursue a retroactive application of its revised interpretation that it will seek such an application as to all providers of such services.” L.F. 335.

In a manual titled “Gross Receipts Tax Resource Binder (Missouri)” (L.F. 322-370) with “Gross Receipts Tax Q’s & A’s”, which were provided to SBC Community Relations Managers, SBC provided the following questions/answers:

- Q. Should other companies pay a form of GRTs when they offer comparable services to Southwestern Bell services?
- A. Yes. When other telecommunications providers offer similar services to SWBT, those companies should also pay a GRT. If that doesn’t occur, Southwestern Bell can be at a competitive disadvantage in which customers will select a competitor’s service which has a greater effect of reducing the city’s tax receipts. In those communities passing an updated ordinance, we’d like to see language that applies GRTs to

all similar services and providers included in the bill.

Q. I understand your actions are also motivated by communities who are questioning how you applied the tax. Is that true?

A. We've had some discussions with a few Missouri communities about GRT. We're talking with those officials about the very same issues, including what services are part of GRTs and that the tax should be applied consistently to all telecommunications companies providing similar services. L.F. 352.

Springfield made demand upon Sprint, other wireless carriers doing business in the City of Springfield and SBC for payment of gross receipts taxes. L.F. 14-15. Springfield has made demand several times. L.F. 10-11.

Springfield and the City of Jefferson filed suit against SBC, Sprint, and the other non-paying wireless carriers doing business in Springfield and the City of Jefferson in the United States District Court for the Western District of Missouri on May 12, 2004 – *City of Jefferson, et al. v. Cingular Wireless, LLC, et al.*, Case No. 04-4099-CV-C-NKL. Based on the fact that one of the entities in Sprint's partnership structure, UCOM, Inc., is a Missouri corporation, Springfield voluntarily dismissed Sprint Spectrum, L.P., from the District Court case and filed the underlying action in Greene County Circuit Court on December 3, 2004, again seeking to collect delinquent gross receipts taxes. L.F. 5-16.

On June 9, 2005, United States District Judge Nanette K. Laughrey granted partial summary judgment in favor of Springfield and the City of Jefferson, finding that the Cities'

gross receipts tax ordinances “are enforceable and . . . apply to mobile telephone services just as they apply to land line telephone services.” A014-A030; L.F. 216-232. Judge Laughrey noted the Court’s “conclusion is consistent with other courts which have considered the same or analogous issues” citing the decision of the Missouri Court of Appeals for the Eastern District in *City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo. Ct. App. E.D. 2000) (“The services [defendant] provided clearly fell within the definition or genus of a telephone company.”). A014-A030; L.F. 216-232.

On July 14, 2005, Governor Matt Blunt signed HB 209, which is an Act whose title states its purpose is “[t]o amend chapters 71, 92, and 227, RSMo, by adding thereto eighteen new sections relating to assessment and collection of various taxes on telecommunications companies, with an effective date for certain sections.” A031-A046; L.F. 266-281. HB 209 was initially introduced in the House of Representatives by Representative Shannon Cooper on January 12, 2005. L.F. 283-289. HB 209 went through several versions, which are included in the Legal File, as are the fiscal notes for HB 209 by the Committee on Legislative Research, Oversight Division, dated May 18, 2005. L.F. 291-298, 300-307. As enacted, HB 209 includes provisions that:

- restrict the percentage amount of tax a municipality may impose upon a telephone company, i.e. Springfield’s gross receipts tax of 6% on gross receipts is reduced to 5% (MO. REV. STAT. § 92.086.9);
- constrict the base of the revenues upon which the tax is to be applied, i.e. from a gross receipts base to a narrower sales tax base (MO. REV. STAT. §§ 92.083.1(1);

92.086.6);

- provide tax “immunity” for telephone companies where such companies have “subjective good faith” that they were not a telephone company or did not have telephone revenue (MO. REV. STAT. § 92.089.2); and
- call for dismissal of pending litigation (MO. REV. STAT. § 92.089.2).

In this case, Sprint moved to dismiss or, alternatively, for judgment on the pleadings, relying upon the dismissal provisions in HB 209. L.F. 46-50. Springfield opposed Sprint’s motion and moved for partial summary judgment contending that HB 209 was unconstitutional in numerous regards. L.F. 67-158. On September 29, 2005, the Honorable J. Miles Sweeney ruled that HB 209 was constitutional, Sprint was immune from back tax liability, and the case should be dismissed with prejudice. A001-A002; L.F. 714-715. Springfield timely filed its Notice of Appeal on October 18, 2005. L.F. 716-717.

POINTS RELIED ON

I. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article III, § 38(a) of the Missouri Constitution in that it gratuitously extinguishes a corporate tax debt thereby using public monies to aid private enterprise.

Mo. CONST. art. III, § 38(a)

Mo. REV. STAT. § 92.089.1

Mo. REV. STAT. § 92.089.2

Mo. REV. STAT. § 136.076

Curchin v. Missouri Indus. Dev. Bd., 722 S.W.2d 930 (Mo. banc 1987)

Champ v. Poelker, 755 S.W.2d 383 (Mo. Ct. App. E.D. 1988)

Fust v. Attorney General for the State of Missouri, 947 S.W.2d 424 (Mo. banc 1997)

Kilmer v. Mun, 17 S.W.3d 545 (Mo. 2000)

II. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article III, § 39(5) of the Missouri Constitution in that it gratuitously extinguishes a corporate tax debt thereby releasing a corporate indebtedness, liability or obligation due a municipality.

4 U.S.C. §§ 116-126

4 U.S.C. § 117

4 U.S.C. § 122

MO. CONST. art. III, § 38(a)

MO. CONST. art. III, § 39(5)

MO. REV. STAT. § 92.083.1(1)

MO. REV. STAT. § 92.086.6

MO. REV. STAT. § 92.089.1

MO. REV. STAT. § 139.031

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

The May Dept. Stores Co. v. Director of Revenue, 1986 WL 23204, at *15 (Mo. Adm. Hrg. Comm. 1986)

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

Metts v. City of Pine Lawn, 84 S.W.3d 106 (Mo. Ct. App. E.D. 2002)

III. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article III, § 40 of the Missouri Constitution in that it constitutes a special law because it regulates the affairs of the City, grants exclusive corporate privileges and arbitrarily creates closed-ended classifications without any reasonable basis, and to the extent it has legitimate purposes, these could be accomplished by other general laws.

MO. CONST. art. I, § 2

MO. CONST. art. III, § 40

MO. REV. STAT. § 71.675.1

MO. REV. STAT. § 92.077

MO. REV. STAT. § 92.086.6

MO. REV. STAT. § 92.086.9

MO. REV. STAT. § 92.086.10

MO. REV. STAT. § 92.086.13

MO. REV. STAT. § 92.089

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

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

Planned Industrial Expansion Auth. of the City of St. Louis v. Southwestern Bell Telephone Co., 612 S.W.2d 772 (Mo. 1981)

City of Bridgeton v. Northwest Chrysler-Plymouth, Inc., 37 S.W.3d 867 (Mo. Ct. App. E.D. 2001)

IV. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates the prohibition against retrospective laws under Article I, § 13 of the Missouri Constitution in that §§ 92.089.1 and 92.089.2 of HB 209 recharacterize past due taxes which had already matured as not liquidated; grant immunity for prior bad acts; and require the City to dismiss its lawsuit to collect past due taxes, all to the substantial prejudice of the City.

MO. CONST. art. I, § 13

MO. CONST. art. VI, § 1

MO. CONST. art. VI, § 15

MO. CONST. art. VI, § 16

MO. REV. STAT. § 92.089.1

MO. REV. STAT. § 92.089.2

MO. REV. STAT. § 139.031

MO. REV. STAT. Ch. 77-82

Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338 (Mo. banc 1993)

Mendelsohn v. State Bd. of Registration for the Healing Arts, 3 S.W.3d 783 (Mo. banc 1999)

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

Savannah R-III Sch. Dist. v. Public Sch. Ret., 950 S.W.2d 854 (Mo. banc 1997)

V. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209, which purports to require dismissal of this suit to collect municipal business license taxes, violates the tax uniformity requirement of Article X, § 3 of the Missouri Constitution in that it arbitrarily and unreasonably creates two separate tax rates for those who timely paid, and for those who did not pay, resulting in non-uniformity of taxation of subjects which fall within the same class or category.

MO. CONST. art. X, § 3

MO. REV. STAT. § 92.089

MO. REV. STAT. § 94.270

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

Southwestern Bell Tel. Co. v. Morris, 345 S.W.2d 62 (Mo. banc. 1961)

State ex rel. Stephan v. Parrish, 891 P.2d 445 (Kan. 1995)

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

VI. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article I, § 2 of the Missouri Constitution in that its exemption of certain businesses from tax liability arbitrarily classifies for purposes of taxation and discriminates against those who paid taxes.

MO. CONST. art. I, § 2

MO. REV. STAT. § 92.089

MO. REV. STAT. § 92.089.2

Pierre Chouteau Condominiums v. State Tax Commission, 662 S.W.2d 513 (Mo. banc 1984)

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

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 (Mich. 1984)

VII. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding that Sprint is immune from any past tax liability because the question of “good faith” is incapable of resolution on a motion for judgment on the pleadings or to dismiss in that Sprint does not possess a good faith belief

sufficient to qualify for lawsuit immunity and dismissal under HB 209.

MO. CONST. art. X, §§ 16 through 22

MO. REV. STAT. § 32.375

MO. REV. STAT. § 92.089.2

Swartz v. Mann, 160 S.W.3d 411 (Mo. Ct. App. W.D. 2005)

City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc., 14 S.W.3d 54 (Mo. Ct. App. E.D. 2000)

Grace v. Missouri Gaming Commission, 51 S.W.3d 891 (Mo. Ct. App. W.D. 2001)

Cheek v. United States, 498 U.S. 192, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991)

VIII. The trial court erred in granting Sprint's motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article II, § 1 of the Missouri Constitution, which prohibits one branch of government from impermissibly interfering with another's performance, or from assuming power that more properly is entrusted to another branch, in that it directs an outcome in pending cases, forecloses appellate review, and impedes municipal tax collection.

MO. CONST. art. II, § 1

MO. CONST. art. III, § 39(5)

MO. CONST. art. IV, § 22

MO. REV. STAT. § 32.010

MO. REV. STAT. § 92.083.2

MO. REV. STAT. § 92.086

MO. REV. STAT. § 92.089.1

MO. REV. STAT. § 92.089.2

State Auditor v. Joint Committee on Legislative Research (JCLR), 956 S.W.2d 228 (Mo. banc 1997)

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

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

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

IX. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates the single subject and clear title requirements of Article III, § 23 of the Missouri Constitution in that it is both under-inclusive and contains two unrelated subjects.

MO. CONST. art. III, § 23

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

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

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

X. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because those portions of HB 209 purporting to amend Mo. Rev. Stat. Chapters 71 and 92 are void in their

entirety in that said invalid provisions are so essentially connected with the remainder of the Act they are not severable.

MO. REV. STAT. § 1.140

MO. REV. STAT. § 92.092

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

ARGUMENT

STANDARD OF REVIEW

In an appeal from the trial court's grant of a motion for judgment on the pleadings, the appellate court reviews the allegations of the petition to determine whether the facts pleaded therein are insufficient as a matter of law. *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. banc 2000). "The party moving for judgment on the pleadings admits, for purposes of the motion, the truth of all well pleaded facts in the opposing party's pleadings." *Id.* When reviewing the dismissal of a petition, the pleading is granted its broadest intendment and it is construed favorably to the plaintiff to determine whether the averments invoke substantive principles of law which entitle the plaintiff to relief. *Farm Bureau Town & Country Ins. v. Angoff*, 909 S.W.2d 348, 351 (Mo. banc 1995).

Interpretation of a statute is a question of law. *Smith v. Shaw*, 159 S.W.3d 830, 833 (Mo. banc 2005). "Questions of law are matters reserved for de novo review by the appellate court, and we therefore give no deference to the trial court's judgment in such matters." *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 442 (Mo. Ct. App. W.D. 2004) (quoting *H & B Masonry Co., Inc. v. Davis*, 32 S.W.3d 120, 124 (Mo. Ct. App. E.D. 2000)).

Ordinary rules of statutory construction apply to the interpretation of the constitution, though "applied more broadly because of the permanent nature of constitutional provisions." *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392, 395 n.4 (Mo. banc 1996). "If a statute conflicts with a constitutional provision or provisions, this Court must hold that

the statute is invalid.” *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality do not apply “where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision.” *Witte v. Director of Revenue*, 829 S.W.2d 436, 439 n.2 (Mo. banc 1992).

The function of the Constitution is to establish the frame work and general principles of the government. *Pogue v. Swink*, 261 S.W.2d 40 (Mo. 1953). The State Constitution does not make specific grants of legislative power to the General Assembly; it limits the General Assembly’s power. *United C.O.D. v. State*, 150 S.W.3d 311 (Mo. 2004). Neither the language of a statute nor judicial interpretation thereof can abrogate a constitutional right. *State v. Bolen*, 643 S.W.2d 806 (Mo. 1983). The provisions of the 1945 Constitution are organic and not subject to alteration by statute or construction of courts, except in so far as interpretation as necessary to arrive at a meaning thereof. *State on Information of Dalton v. Dearing*, 263 S.W.2d 381 (Mo. 1954).

I. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article III, § 38(a) of the Missouri Constitution in that it gratuitously extinguishes a corporate tax debt thereby using public monies to aid private enterprise.

In Missouri, public money must be used for public purposes, not to help favored industries. The Missouri Constitution specifically prohibits the General Assembly from

granting public money to any corporation, “excepting aid in public calamity” and other narrowly prescribed circumstances, none of which are present here.

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) (emphasis added).¹

This straightforward constitutional prohibition arose from the abused railroad grants created by legislative largess in the 19th century. *See e.g., State Constitutional Limitations on Public Industrial Financing: an Historical and Economic Approach*, 111 U. Pa. L. Rev. 265, 280-281 (Jan. 1963) (“there was practically no public control over the planning of the railroad project or over the actual expenditures of publicly contributed funds . . . the public was commonly burdened with enormous debt while its interest in improved transportation, which motivated the projects in the first place, was completely or substantially frustrated.”) As Judge Welliver explained in *Curchin v. Missouri Indus. Dev. Bd.*, 722 S.W.2d 930, 934 (Mo. banc 1987):

Along in 1820 and ‘30 and ‘40[,] it was the custom of the state to give large

¹Although portions of Springfield’s Brief may be similar to other appellants’, as counsel worked together in drafting similar issues and arguments, the City of Springfield has facts and arguments unique to its position with respect to Sprint and the unconstitutionality of HB 209.

sums of money to railroads, canals, banks and so forth and the custom became so abused that nearly all the state constitutions wrote such sections as this in their fundamental law Article IV, Section 46 of the Missouri Constitution of 1875, the predecessor to Article III, Section 38(a) of the Missouri Constitution of 1945, was adopted to prevent railroad grants. The provision was adopted despite the significant public benefit provided by the railroads. Accordingly, in our application of Article III, Section 38(a) of the Missouri Constitution, we have held grants with a primarily private effect to be unconstitutional, despite the possible beneficial impact upon the economy of the locality and of the state

Curchin, 722 S.W.2d at 934-35; see also *State ex rel. Bd. of Control of St. Louis School and Museum of Fine Arts v. City of St. Louis*, 115 S.W. 534, 546-47 (Mo. 1908) (“[t]he convention which framed the Constitution of 1875 was fully cognizant of the recklessness with which the counties and cities of this state had voted aid and granted assistance to corporations with a view to construct railroads and aid other corporate enterprises, and it inserted section 46 of article 4 (Ann. St. 1906, p. 195),” which provides that the legislature shall not make any grant in aid of a private corporation).

The state’s forgiveness of the telephone company’s tax debts – through HB 209’s immunity and lawsuit dismissal provisions – falls directly within the constitutional prohibition found in § 38(a). It constitutes a “grant of public money” in aid of “private corporations.” Rather than benefitting the public at large, HB 209 merely serves to enrich a

small group of corporations and individuals: telephone companies who failed to pay taxes like their competitors; corporate shareholders unjustly enriched thereby; and the executives who made the decision to ignore ordinances applicable to “telephone” companies.

A. The forgiven tax liabilities constitute a grant of “public money” within the meaning of § 38(a).

There can be no dispute that HB 209 affects the past tax liabilities of telephone companies. Its dismissal and immunity provisions are entirely retrospective in nature. *See* MO. REV. STAT. § 92.089.2 (“in the event any telecommunications company, *prior to July 1, 2006*, failed to pay . . . based on a subjective good faith belief that . . . it was not a telephone company. . . . If any municipality , *prior to July 1, 2006*, has brought litigation, . . . it shall immediately dismiss”) (emphasis added).

It is similarly indisputable that tax revenues qualify as “public money or property” within the meaning of Article III, § 38(a). *See, e.g., Champ v. Poelker*, 755 S.W.2d 383, 388 (Mo. Ct. App. E.D. 1988) (“[p]ublic funds are ‘funds belonging to the state or any . . . political subdivision of the state; more especially taxes . . . appropriated by the government to the discharge of its obligations’”), *mtn. for reh’g and/or transfer denied*, (quoting *State ex rel. St. Louis Police Relief Ass’n. v. Igoe*, 107 S.W.2d 929, 933 (Mo. 1937)).

As a necessary corollary to the proposition that tax revenues are public money, “foregoing the collection of [a] tax” on private business also constitutes a grant of public aid within the meaning of Article III, § 38(a). The question of whether “tax credits” constitute “public money” was squarely addressed by this Court in its *Curchin* opinion. In striking tax

credits designed to benefit certain industrial revenue bondholders, the Court stated:

During oral argument, the parties agreed that there are no reported cases where a court has been called upon to decide whether the allowance of a tax credit constitutes a grant of public funds. This is true, we believe, since the answer is so obvious 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.”)

Curchin, 722 S.W.2d at 933 (emphasis added); *see also Sommer v. City of St. Louis*, 631 S.W.2d 676, 680 (Mo. Ct. 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”).

Like this Court in *Curchin*, courts throughout the country acknowledge that tax amnesties, tax credits, tax forgiveness, tax exemptions, and tax subsidies qualify as expenditures of “public money.” *See, e.g., Opinion of the Justices to the Senate*, 401 Mass. 1202, 514 N.E.2d 353, 355 (Mass. 1987) (“tax subsidies . . . are the practical equivalent of

direct government grants”).²

Through its immunity and lawsuit dismissal provisions, HB 209 purports to extinguish the corporate debts of past taxes or, at a minimum, establish a new credit as to these taxes where a telephone company establishes “subjective good faith.” This gift to the telephone companies is tantamount to the granting of an ex post facto tax credit, and therefore plainly constitutes a gift of “public money” under the clear holding of *Curchin*. Accordingly, HB 209 is subject to the same constitutional infirmity as the industrial revenue bond scheme at issue in *Curchin*.

Indeed, HB 209 is the contemporary version of the catalyst to the Article III, § 38(a)

²*See also Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 236, 107 S. Ct. 1722, 1731, 95 L. Ed. 2d 209 (1987) (Scalia, J. dissenting) (“[o]ur opinions have long recognized – in First Amendment contexts as elsewhere – the reality that tax exemptions, credits and deductions are ‘a form of subsidy that is administered through the tax system’”); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 791, 93 S. Ct. 2955, 2974, 37 L. Ed. 2d 948 (1973) (money available through tax credit is charge made against state treasury; tax credit is “designed to yield a predetermined amount of tax ‘forgiveness’ in exchange for performing a certain act the state desires to encourage”); *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 861 n.5, 115 S. Ct. 2510, 2532 n.5, 132 L. Ed. 2d 700 (1995) (“the large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies”).

limitation on legislative power: railroad grants designed to enrich certain companies at the expense of the public's needed tax revenues. The cancellation of the telephone companies' tax debt and the creation of a new ex post facto tax credit for those with "subjective good faith," exacerbates the very harm the constitutional aid prohibition was designed to prevent: cash-strapped municipalities unable to meet their budgets for street improvements, police and fire protection and the like, who can now be expected to engage in borrowing due to tax revenue shortfalls. This effect is particularly devastating to Springfield because wireless telephone service continues to displace wireline telephone service and HB 209 forbids and hinders the City in collecting the back-taxes due and owing from the fastest growing competitors within the telephone industry.

SBC said it best in their manual for Community Relations Managers: "When other telecommunications providers offer similar services to SWBT, those companies should also pay a GRT. If that doesn't occur, Southwestern Bell can be at a competitive disadvantage in which customers will select a competitor's service which has a greater effect of reducing the city's tax receipts." L.F. 352. As more fully described in the next section, the primary effect of HB 209 is a naked gift of public financial resources to telephone companies who evaded their taxes, which is illegal under Article III, § 38(a).

B. Respondents, not the public, are the recipients of this public aid.

Respondents will surely argue that HB 209 is good for the public and therefore not a

constitutionally forbidden aid to private enterprise.³ Again, *Curchin* has directly spoken on this issue: even where some benefit flows to the public, if the “primary effect” of a public expenditure “is not to subserve a public municipal purpose, but to promote some private end, the expense is illegal, even though it may incidentally serve some public purpose.” *Curchin*, 722 S.W.2d at 933-34 (“While it is possible that the projects to be supported by the tax credit-bearing revenue bonds could have a beneficial public impact, the grant of public money to these businesses’ bondholders is unconstitutional just as railroad grants were.”).

Perhaps recognizing that the untenable import of HB 209 is the grant of substantial sums of public money to some telephone companies, but not all, the General Assembly loads HB 209 with the following “public purpose”:

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

³The plain meaning of the term “corporation,” as used in Article III, §38(a), which prohibits public aid to the same, “uniformly refers to private or business organizations of individuals,” like Sprint. *City of Webster Groves v. Smith*, 102 S.W.2d 618, 619 (Mo. 1937).

the claims of the municipal governments regarding such business licenses
have neither been determined to be valid nor liquidated

MO. REV. STAT. § 92.089.1.

Although the General Assembly may attempt to explain its actions with whatever language passes through the committees, when it comes to deciding the “primary effect” of legislation which smacks of an illegal grant of public financial aid, “the stated purpose of the legislature, as pronounced in [the statute], is not dispositive.” *Curchin*, 722 S.W.2d at 934. Rather, this Court makes the determination of the primary effect of the statute in terms of whether it serves a public or unconstitutional private purpose, based upon the history of Article III, § 38(a) of the Missouri Constitution and upon cases in which the Court has applied the constitutional provision in the past.” *Curchin*, 722 S.W.2d at 934. If it appears that the public purpose designated by the legislature is “arbitrary or unreasonable,” this Court need not to accept the pronouncement. *Fust v. Attorney General for the State of Missouri*, 947 S.W.2d 424, 429 (Mo. 1997).

Springfield submits that the “public purpose” designated by the legislature in HB 209 is, in fact, unreasonable because it is counterfactual in two (2) material respects, and is arbitrary in its application, as described in the following sections.

1. Section 92.089.1 is counterfactual as it relates to “costly litigation” and the representation that Springfield’s claims have not been determined to be “valid”.

Perhaps recalling testimony relating to tort reform, which was also addressed in the legislative session that birthed HB 209, the General Assembly states that “costly litigation” is “detrimental to the economic well being of the state,” and HB 209 is necessary to cure these ills. “Costly litigation,” however, must refer to the coffers of the telephone companies, not the City of Springfield. As the Respondents well know, the municipalities’ counsel have this matter on a contingent fee arrangement – a fact highlighted by Respondents in their unsuccessful attempt to defeat summary judgment being granted by the federal district court in favor of Springfield on their liability. *See City of Jefferson, et al. v. Cingular Wireless LLC, et al.*, Case No. 04-4099, June 9, 2005, Order, at 13 (rejecting Defendants’ reliance upon Mo. Rev. Stat. § 136.076, banning certain contingent fee arrangements, as a basis for the unenforceability of the Springfield ordinance); A014-A030; L.F. 216-232. Springfield’s costs in this litigation, therefore, are as favorable as they can be to the City and its citizens, and are most certainly not “harmful” to the “economic well being of the state.”⁴ It is the uncollected tax revenues which are harmful to the “economic well

⁴Moreover, as for the use of “costly” as an adjective to the referenced litigation, it is noteworthy that it is the wireless telephone carriers’ dogged, yet counter-intuitive position, that they are not “telephone” companies, which drives the “costly” part of the litigation. *See City of Jefferson* Order at 4 (“Despite the voluminous briefing in this case, the primary issue to be resolved is relatively simple. Are the Defendants in the business of providing telephone services in the two Cities? If they are, then the Cities’ ordinances

being of the state” and the citizens of Springfield. Ironically, the direct effect of the legislation is to trammel upon Springfield’s right to access to the courts to collect its tax revenues by requiring dismissal of the lawsuits. MO. REV. STAT. § 92.089.2.

Regardless of the litigation “costs” being incurred by the telecommunications companies, this tax enforcement action is akin to any other prosecutorial function of government. It always costs money to prosecute lawbreakers, especially when they have expensive defense teams. However, it cannot serve the “economic well being” of the state to refuse to prosecute delinquent taxpayers just because it may be expensive. This is especially true where, as here, the enforcement action seeks to recover millions of dollars in revenue for the City.

Additionally, HB 209's express recitation that “*the claims of the municipal governments have neither been determined to be valid nor liquidated*” is false generally, and as it relates to Springfield specifically. The statement was false at the time the Bill was passed out of the General Assembly in May of 2005, as well as at the time the Governor signed the bill in July of 2005. *See City of Jefferson v. Cingular, supra*, Case No. 04-4099, Doc. No. 209 (May 10, 2005, order) and Doc. No. 221 (June 9, 2005, order granting partial summary judgment in favor of Springfield and the City of Jefferson, rejecting the defense that the ordinance is inapplicable to wireless telephone companies); A014-A030; L.F. 216-232.

require them to pay a gross receipts tax.”); A014-A030; L.F. 216-232.

Judge Laughrey’s opinion in the *City of Jefferson* case, that wireless telephone companies provide telephone service in the City of Springfield, is not aberrational. It is a well founded common sense opinion, which is consistent with similar decisions by six (6) appellate courts, including a Missouri Court of Appeals decision. *See Order* at p. 8 (collecting cases and noting, “[f]urthermore, the court’s conclusion is consistent with other courts which have considered the same or analogous issues”); A014-A030; L.F. 216-232. A far more accurate fact for the General Assembly to have noted in its “findings” is that the defense by the wireless telephone companies – that they are not “telephone” companies – has little, if any, contemporary judicial support. Indeed, the defense was rejected by the first Missouri court to hear it in *City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo. Ct. App. E.D. 1999).

2. The immunity and dismissal provisions are arbitrary.

It is unclear how the immunity and dismissal provisions work inter se as reflected in Mo. Rev. Stat. § 92.089.2, but this much is clear: the General Assembly has carved out a “subjective good faith” ex post facto tax credit for wireless telephone companies that failed to pay taxes.⁵ MO. REV. STAT. § 92.089.2 (“In the event any telecommunications company,

⁵SBC, the landline company which Springfield alleges underpaid its taxes, receives an exemption too. MO. REV. STAT. § 92.089.2 (“In the event any telecommunications company, prior to July 1, 2006, failed to pay any amount to a municipality based on a subjective good faith belief that . . . certain categories of its revenues did not qualify

prior to July 1, 2006, failed to pay any amount to a municipality based on a subjective good faith belief that . . . it was not a telephone company . . . is entitled to full immunity’). This “subjective good faith” standard, as urged by Respondents below, leads to an outright forgiveness of taxes for the telephone companies who refused to pay taxes if they simply managed to get an answer on file in the underlying collection action.

Thus, not only is HB 209 harmful to the coffers of Springfield, it provides an unfair competitive advantage to the wireless telephone companies who did pay their taxes to Springfield, such as T-Mobile. SBC, who has historically recognized Springfield’s gross receipts ordinance and paid some (but not all) gross receipts taxes for decades, recognized this unfair competitive advantage. Time and again, SBC urged Springfield to apply the gross receipts ordinance to its competitors in the market: the wireless telephone companies.⁶ L.F. 309-316, 319. To quote *Curchin* once again, “providing the tax credits to only a select few companies lends itself to abuse and is analogous to the railroad grants of yesteryear, which prompted the adoption of Article III, Section 38(a) of the Missouri Constitution.” *Curchin*, 722 S.W.2d at 933-34.

Simply stated, HB 209 operates retrospectively to include within its ex post facto tax credit only those taxpayers who were delinquent in their tax payments – those telephone

under the definition or wording of the ordinance as gross receipts . . . such a telecommunications company is entitled to full immunity’).

⁶*See* Statement of Facts *supra*.

companies who failed and refused to pay the tax. The legislation provides no such credit for telephone companies who dutifully paid the tax. A statute that provides exclusive credits to those who violate the law penalizes the law-abiding. The effect of HB 209 – the gift of a free and valuable pass out of past due taxes – is not only irrational but the epitome of arbitrary legislation. *See e.g. Kilmer v. Mun*, 17 S.W.3d 545, 552 n.21 (Mo. 2000) (“A statute that creates arbitrary classifications that are irrelevant to the achievement of the statute’s purpose may be struck down because the arbitrary classifications violate equal protection.”) (internal citations omitted); *Airway Drive-In Theatre Co. v. City of St. Ann*, 354 S.W.2d 858 (Mo. banc 1962) (portion of ordinance levying annual license tax on drive-in theaters at \$1.50 per speaker and on other motion picture theaters at \$50.00 per year, resulting in drive-ins being taxed 17 to 30 times greater than motion picture theaters, held arbitrary and abuse of taxing power).

In sum, the dismissal and immunity provision of HB 209 inure only to the benefit of the private interests of select telephone companies, and not the public good of the State of Missouri or the City of Springfield. At this juncture, therefore, *Curchin’s* primary effect test demands that the statute be struck. The language, history, and purpose of Article III, § 38(a) is unequivocal. The tax give-away in HB 209 to delinquent telephone companies – premised upon nothing more than the pretext of advancing “the economic well being of the state,” by relieving the telephone companies of “costly litigation,” where Springfield’s claims have already been determined to be meritorious – must be struck as an unconstitutional abuse of legislative power.

II. **The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article III, § 39(5) of the Missouri Constitution in that it gratuitously extinguishes a corporate tax debt thereby releasing a corporate indebtedness, liability or obligation due a municipality.**

Like the earlier public aid limitation found in § 38(a), the Missouri Constitution prohibits the General Assembly from releasing any corporate obligation due to a City. Article III, § 39, provides:

The general assembly shall not have the power: . . . to release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual due this state or any county or municipal corporation[.]

MO. CONST. art. III, § 39(5) (emphasis added).

Two issues underlie the application of this prohibition: are the forgiven tax liabilities an “indebtedness, liability or obligation” and if so, has legal consideration been exchanged?

A. **The gross receipt taxes due to Springfield constitute a matured “indebtedness” as well as a “liability or obligation” under Article III, § 39(5) of the Missouri Constitution.**

The wireless telephone companies will likely argue that their alleged defense to the Springfield ordinance, specifically the applicability of the ordinance to their “commercial

mobile radio service,” renders their liability to Springfield something other than an “indebtedness, liability or obligation.” However, this Court, in *Graham Paper Co v. Gehner*, 59 S.W.2d 49 (Mo. 1933), made clear that such a restrictive view of the constitutional prohibition in § 39(5) is error:

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, 59 S.W.2d at 52 (emphasis added). Courts in other jurisdictions have reached the same conclusion, finding that a law which releases a tax liability violates similar constitutional provisions.⁷ Judge Laughrey, in declining to retain jurisdiction in light of the

⁷*Ollivier et al. v. City of Houston*, 54 S.W. 943 (Tex. 1900); *Community Public Service Company v. James*, 167 S.W.2d 588 (Tex. Ct. App. 1943); *Werner v. Riebe*, 296 N.W. 422 (N.D. 1941); *Fontenot v. Hurwitz-Mintz Furniture Co*, 7 So.2d 712 (La. 1942);

imminence of this appeal, specifically noted as to the claims of Springfield:

the question raised by HB 209 is whether the state can retroactively confiscate the property of its municipalities – e.g. the back taxes that are owed to plaintiffs – and give that property to private corporations . . . even if this Court had not already resolved the defendant’s liability for the past due taxes at the time this legislation was adopted and signed into law by the Governor, the plaintiffs had an inchoate property right to any past due taxes authorized by then existing law and HB 209 effectively takes away that right.

See City of Jefferson, et al. v. Cingular Wireless LLC, et al., Case No. 04-4099, Doc. 302, at p. 6, n.6; *see also First Nat. Bank of St. Joseph v. Buchanan County*, 205 S.W.2d 725, 731 (Mo. 1947) (city ordinance levying ad valorem tax on shares of stock of all banks in city was valid and operative for 1946, since statutes expressly repealing power of first-class cities to levy such tax did not become operative before July 1, 1946, when liability for city tax for 1946 was already fixed and hence could not be extinguished because of Article III, § 39(5)).

In short, merely because the Respondents – both wireline and wireless companies –

State v. Pioneer Oil & Refining Co., et al, 292 S.W. 869 (Tex. Ct. App. 1927); *City of Louisville v. Louisville Ry. Co*, 63 S.W. 14 (Ky. App. 1901); *Daniels v. Sones*, 147 So.2d 626 (Miss. 1962); *Sloan v. Calvert*, 497 S.W.2d 125 (Tex. Ct. App. 1973); *Smith v. State*, 420 S.W.2d 204 (Tex. Ct. App. 1967); *Ivester v. State ex rel Gillum*, 83 P.2d 193 (Okla. 1938).

have yet to pay the tax, or because they can articulate some affirmative defense to the amount of the tax, does not mean that the tax is not a “liability or obligation of every kind.” These quoted words, as interpreted by this Court, prohibit the discharge of tax obligations by legislative fiat.

Moreover, the gross receipts taxes due to Springfield are not merely inchoate, they are past due. As explained in *The May Dept. Stores Co. v. Director of Revenue*, 1986 WL 23204, at *15 (Mo. Adm. Hrg. Comm. 1986), when revenues (as opposed to real property, for instance) are the object of the taxation, the billing of the revenue is the taxable event. Thus, in contrast to real estate and personal property taxes – which are due annually and paid upon an assessment and levy, like in *Beatty v. State Tax Commission*, 912 S.W.2d 492, 496-98 (Mo. banc 1995) – municipal gross receipt taxes are quantifiable at the time of the receipt, are self-executing, and, in Springfield’s case, are due every quarter.⁸

On this point, analogous cases have held that tax liabilities relating to income or revenue, already incurred, cannot thereafter be compromised or reduced by the General Assembly. See, e.g., *Graham Paper*, 59 S.W.2d at 52; *James McKeever v. Director of*

⁸The Municipal Code of the City of Springfield provides: “every person required to pay the license tax levied by this Article shall cause to be filed with the Director of Finance on January 15, April 15, July 15 and October 15 of each year a true statement, under oath, of the gross receipts of such business for the three calendar months preceding the filing of such statement.” L.F. 450.

Revenue, 1980 WL 5130, at *4 (Mo. Admin. Hrg. Com. 1980) (“[O]nce a tax liability has been finally assessed, i.e. computed at its exact rate, the Department of Revenue (D.O.R.) cannot then bargain or compromise for a lesser or greater amount than what it has determined is owed. For example, D.O.R. cannot compromise a tax liability at the time of sale to be less than the 3% rate authorized by statute” [under sales tax act.]); *Ark. Op. Atty. Gen. No. 2003-025*, 2003 WL 1347746, at *5 (Ark. A.G. 2003) (act of Arkansas legislature purporting to forgive gross receipts taxes previously incurred by truck and semitrailer owners was illegal, because, *inter alia*, it “purports to forgive a matured tax obligation”)⁹ (citing *Federal Express Corp. v. Skelton*, 578 S.W.2d 1, 6 (Ark. banc 1979) (legislative enactment exempting aircraft, aircraft equipment, and railroad parts, cars, and equipment from compensating use tax impaired a matured “indebtedness” and was unconstitutional).

Once a tax obligation is fixed (an inquiry separate and apart from whether the taxpayer chooses to pay as noted above) the legislature cannot change the obligation. This proposition was forcefully explained in *City of Dubuque v. Illinois Central R. Co.*, 39 Iowa 56, 1874 WL 416 (Iowa 1874). In that case, the Iowa Supreme Court addressed a statute purporting to release certain property of railroads – “rolling stock” – from taxation. Like HB

⁹The Arkansas act was similar in language, and identical in effect, to HB 209. The Arkansas Attorney General’s discussion and analysis of the act is polite, but withering. It is highly readable and presents a cogent review of the applicability of Arkansas constitutional prohibitions similar to the Missouri provisions discussed in this appeal.

209, the Iowa legislature passed the statute during the pendency of a collection action brought by the city against the railroad company. *Id.* An earlier opinion had established that the railroad was liable for the tax and the city was enforcing the tax in a collection case. *Id.*

Although the Iowa Supreme Court's decision was handed down a century ago, it is cited at length here for the clarity of its analysis relating to constitutional infirmities similar to those evident in HB 209 today:

The right of plaintiff [municipality] to the taxes in question and the obligation of defendant to pay them were perfect before the statute under consideration was enacted. Plaintiff had a valid, legal claim against defendant for the amount of the assessment. This claim – a chose in action – was property, and entitled to the same protection from the law as other property. It rested, as we have seen, upon a contract implied by the law, whereby defendant was bound to pay the money in suit to plaintiff. The statute in question deprives plaintiff of this property by declaring the taxes levied by the city shall not be collected, and by releasing defendant from their payment. It impairs the obligation of the contract implied by the law whereby defendant became bound to pay the taxes, by attempting to relieve defendant therefrom and declaring plaintiff shall not enforce its lawful claim therefor. Here, by a statute, is an attempt to deprive plaintiff of its property without due process of law, and to utterly impair the obligation of a valid contract. The legislature is expressly prohibited by the constitution from the exercise of such despotic and

oppressive power . . . It is true that the legislature may take away the powers conferred upon the city – may destroy its corporate existence, but it cannot divest it of property or rights under contracts lawfully acquired. The State, by legislation, may decree the death of the municipality, and may become its executioner, but cannot seize and dispose of its estate at will. The authority of the legislature to take away or abridge municipal powers by no means carries with it authority to destroy rights of property, and rights under contract, acquired while those powers were lawfully possessed and exercised.

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

B. The General Assembly’s release of Respondent’s tax liabilities is without consideration.

Having established that Respondent’s tax liabilities fall within the prohibition of §39(5) as an “indebtedness, liability or obligation,” the constitutional analysis under the Missouri Constitution must then turn to whether the release of Respondent’s tax liability is “without consideration,” as contemplated by Article III, § 39(5). Apparently anticipating judicial scrutiny of HB 209, the General Assembly assures the municipalities that they will receive the consideration demanded by the Constitution, notwithstanding the tax giveaway:

The general assembly further finds and declares that the resolution of such uncertain litigation, the uniformity, and the administrative convenience and cost savings to municipalities resulting from, and the revenues which will or may accrue to municipalities in the future as a result of the enactment of

sections 92.074 to 92.098 are full and adequate consideration to municipalities, as the term “consideration” is used in Article III, Section 39(5) of the Missouri Constitution, for the immunity and dismissal of lawsuits outline in subsection 2 of this section.

MO. REV. STAT. § 92.089.1. Each of these findings of “consideration” are addressed in turn below.

Before proceeding, however, it bears emphasizing that the General Assembly has unabashedly invaded the province of the judiciary and instructed this Court – the ultimate interpreter of the Missouri Constitution – on whether its acts pass constitutional muster. Incredibly, § 92.089.1 attempts to make a conclusive finding about the meaning of a constitutional provision, namely, what is or is not adequate “consideration” under Article III, § 39(5). This “finding” is analogous to the legislature enacting a statute which declares that the death penalty for 15-year-old adolescents is not cruel or unusual, or that discrimination against African-Americans is not a violation of equal protection.

This blatant legislative overreaching is flatly prohibited by an uninterrupted line of cases dating back to *Marbury v. Madison*, 5 U.S. 137 (1803). See, e.g., *State ex rel. Dawson v. Falkenhainer*, 15 S.W.2d 342, 343 (Mo. banc 1929) (legislature cannot dictate to courts construction of constitutional provisions); *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125, 132 (Mo. banc 1997) (the legislative branch may not exercise a power that belongs to the judicial branch); *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So.2d 392, 405 (La. 2005) (“it is not within the province

of the Legislature to interpret legislation after the judiciary has already done so. Under our system of government, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

1. “The resolution of uncertain litigation” is not “consideration” in this case.

In Missouri, as elsewhere, consideration has been described as “either . . . a benefit conferred upon the promisor or . . . a legal detriment to the promisee, which means that the promisee changes his legal position; that is, . . . he gives up certain rights, privileges or immunities which he theretofore possessed or assumes certain duties or liabilities not theretofore imposed upon him.” *State ex rel. Kansas City v. State Highway Commission*, 163 S.W.2d 948, 953 (Mo. banc 1942) (citing American Law Institute, Restatement of the Law of Contracts § 75), *reh’g denied*. The first “consideration” proffered by the General Assembly in support of its release of the telephone company’s tax liability, is “the resolution of [the parties’] uncertain litigation.” MO. REV. STAT. § 92.089.1.¹⁰

Undoubtedly, the wireless telephone companies will argue that they are giving up the legal positions taken in the underlying cases – that they owed no taxes because they are not

¹⁰It should be noted that the word “consideration” is not preceded by any qualifying language, such as “full,” “adequate” or “sufficient,” in Article III, § 39(5). However, Springfield joins in HB 209's conclusion that it should be fairly construed as requiring “full and adequate” consideration. *See* MO. REV. STAT. § 92.089.1.

“telephone” companies. This argument needs to be derailed before further paper is wasted. Although the compromise of a disputed claim can constitute consideration in certain circumstances, the forbearance of a claim or defense known to be unfounded does not qualify as consideration. *See, e.g., Robinson v. Benefit Ass’n of Railway Employees*, 183 S.W.2d 407, 412 (Mo. Ct. App. 1944) (“[U]nless the promisee, at the time it disputes the claim and agrees to the contract of release, knows that it has a **reasonable** defense, and acts on that knowledge, there is no consideration, for there is no good faith.”).¹¹ The mere defense of a claim does not validate the defense or evidence “good faith” on the part of the defender. *See, e.g., 3 Williston on Contracts* § 7:45 (4th ed. 2004) (“a mere assertion or denial of liability does not make a claim doubtful, and the fact that invalidity is obvious may indicate that it was known”).

¹¹*See also Daniel v. Snowdown Ass’n.*, 513 So.2d 946, 949 (Miss. 1987)

(“Forbearance to sue or institute some other legal proceeding can constitute consideration. However, . . . this rule is qualified by the corollary that the action foregone must be a **bona fide** one. If a claim or defense is obviously frivolous or groundless, refraining to assert it cannot furnish consideration for an agreement.”); *Sweeny v. Sweeny Inv. Co.*, 90 P.2d 716, 719 (Wash. 1939) (“If a claim is known by the claimant to have no foundation, it is clear that the forbearance to prosecute the claim is not sufficient consideration. The same principles seem applicable to forbearance to set up a defense as to forbearance to bring suit.”).

Springfield will not restate the ruling from Judge Laughrey or the Court of Appeals ruling in *Sunset Hills* again. Suffice it to say, the wireless respondents' arguments that they are not "telephone companies" are without legal or common sense support. In fact, the wireless telephone companies should be estopped from arguing to this Court (or any other) that they are surprised or shocked to learn that Springfield would have an ordinance that applied to their telephone service. It is precisely because of Springfield's ordinance, and others like it in localities throughout the country, that Respondents, as an industry, lobbied for the federal Mobile Telecommunications Sourcing Act. 4 U.S.C. §§ 116-126; L.F. 421-429. Recognizing that local taxation of wireless telephone calls exists in our nation, the wireless telephone industry supported the tax simplification scheme embodied in the MTSA, which provides that only those state and local jurisdictions encompassing the customer's "place primary use" may tax the mobile telephone call. 4 U.S.C. §§ 117, 122; L.F. 423, 425-426.

As explained by the Hon. George W. Gekas, the Congressman from Pennsylvania, the problem was this:

[L]et us give a brief overview of the rationale that brings us to the witness table and to the committee table. There is an ongoing controversy – not so much a controversy as a problem with respect to the emerging, still emerging telecommunications service throughout our country. We have seen tremendous developments including a figure that astounds me: there were 4 million wireless telephone units in our country in 1990, and there are now

perhaps 80 million units being utilized across the Nation. Ergo, where do the taxing authorities come in? **Everyone knows that telephone service or telecommunications service is not exempt from taxing authorities, generally speaking, and therefore, if there is to be a taxation program how will it be implemented?** That has been bandied about. Happily we can report, and the testimony at this hearing will probably endorse what I am about to say, that industry and taxing authorities have been negotiating for quite some period of time and have reached some conclusions about what they want and ask that the Congress adopt

See Wireless Telecommunications Sourcing and Privacy Act: Hearing on H.R. 3489 Before the House Comm. On the Judiciary, 106th Cong. 8 (2000) (statement of Hon. George W. Gekas, Chairman of the Subcommittee) (emphasis added); L.F. 375-376.

And, as the President and CEO of the Cellular Telecommunications Industry Association (CTIA) further explained to a subcommittee of the Judiciary Committee of the United States Congress:

A new method of sourcing wireless revenues for state and local tax purposes is needed to provide carriers, taxing jurisdictions and consumers with an environment of certainty and consistency in the application of tax law; and to do so in a way that does not change the ability of states and localities to tax these revenues. After more than three years of discussions, CTIA and representatives from the National Governors Association, the National League

of Cities, the Federation of Tax Administrators, the Multistate Tax Commission, the National Conference of State Legislatures, and other state and local leaders have worked to develop a nationwide, uniform method of sourcing and taxing wireless revenues.

L.F. 395.

As a result of their participation in, and support of, the MTSA, which was passed in 2000 (after three (3) years worth of discussion) the wireless telephone companies' defense that they did not understand that the Springfield telephone ordinance applied to their service is dubious. At worst, the wireless telephone companies' defense that they are not "telephone companies" evidences premeditated, strategic delay on the part of the wireless telephone companies who sought relief from past due taxes by a legislative bail-out before an imminent judgment. *See, City of Jefferson*, Case No. 04-4099, Doc. 196 (denying motions to stay based on the pendency of HB 209).

Without question, Springfield has much to lose by dismissing its claims. It is far less clear that the wireless telephone companies' forbearance of their defense to these claims – i.e. that they are not "telephone" companies – constitutes any consideration at all, let alone "full and adequate consideration." In light of Judge Laughrey's decision, the *Sunset Hills* decision and the legislative history to the Mobile Telecommunications Sourcing Act, the wireless telephone companies cannot seriously contend that they reasonably believed that the Springfield ordinance, applicable to "telephone service," was not applicable, at all relevant times, to their businesses. The fact that wireless telephone companies are "telephone

companies” is neither novel nor surprising. “One should not be able to avoid a tax on shoes by calling shoes slippers.” *Foland Jewelry Brokers, Inc. v. City of Warren*, 210 Mich. App. 304, 532 N.W.2d 920 (Mich. App. 1995) (citing *Rhodes v. City of Hartford*, 201 Conn. 89, 513 A.2d 124 (Conn. 1986)).

Even if the telephone companies continue to maintain, on a substantive level, that they had no idea an ordinance relating to “telephone service” applied to them, or that “gross receipts” was more than the sales tax base, their legal position is severely undercut on a procedural basis because Missouri’s tax protest procedure was wholly ignored. Obviously at some point, no later than the filing of the Springfield lawsuit in federal court (or the other suits which are consolidated in this appeal), the telephone companies were on notice that taxing jurisdictions believed they were owed tax money. Nonetheless, the telephone companies never filed a Hancock case, nor did they pay the tax under protest, either before or after the filing of the lawsuits.

In Missouri, as in most states, there are well-established methods for protesting the payment of taxes, namely, the institution of a tax protest suit under Mo. Rev. Stat. § 139.031. By foregoing this exclusive method for disputing taxes, the telephone companies waived any and all defenses to the underlying claims. As explained in *Metts v. City of Pine Lawn*, 84 S.W.3d 106, 109 (Mo. Ct. App. E.D. 2002):

The fact that plaintiffs failed to pay the charges when due does not entitle them to enjoin enforcement of those payments when they failed to make a timely challenge as set out in *Ring* . . . Plaintiffs failed to ask the trial court for

an injunction prior to the date the charges were due and failed to comply with the protest procedures of section 139.031. They now owe the delinquent charges. *They cannot create an alternate method of challenging the charges by merely withholding payment and raising their challenge when enforcement is attempted.* They are not entitled to relief from the consequences of their failure to timely pursue the remedies available to them

(Emphasis added.) Similarly, a legislative bail out does not satisfy the tax protest procedure long standing, yet ignored.

2. “Uniformity and administrative convenience” are not “consideration” in this case.

Resolution of uncertain litigation is not the only “consideration” the legislature holds out in HB 209. The General Assembly also suggests that “full and adequate consideration” for the ex post facto tax credit derives from “the uniformity, and the administrative convenience and cost savings to municipalities from, . . . the enactment of sections 92.074 to 92.098.” MO. REV. STAT. § 92.089.1.¹² Presumably, this legislative finding refers to the fact

¹²It is worth noting that the various items of “consideration” detailed by the General Assembly in Mo. Rev. Stat. § 92.089.1, are separated by the word “and.” Use of the conjunctive “and” suggests that all such items must be present and valid in order for there to be “full and adequate consideration,” at least in the mind of the legislature. If any single ground or basis is infirm, then there can never be “full and adequate” consideration

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

Further, a 5% cap will never qualify as “full and adequate consideration” or generate “cost savings” to Springfield, which has a rate of six percent (6%), unchanged since 1968. Not only does the math demonstrate an absence of consideration, the 1% rate reduction, coupled with the requirement that all past due tax liabilities are waived and any future monies received will be further reduced by collection charges, does not amount to any positive consideration at all.

Under HB 209, the telephone companies are legislatively authorized to do *less* than

under a plain reading of the statute. This is an accepted rule of statutory construction. *See, e.g., In re Commonwealth Trust Co. of Pittsburgh*, 54 A.2d 649, 652 (Pa. 1947) (“The legislature is presumed to have intended that words used in a statute shall be construed according to their common and approved uses.”)

that which they are legally obligated to do. *See, e.g., Asmus v. Pacific Bell*, 999 P.2d 71, 90 (Cal. 2000) (“A promise to do less than one is legally obligated to do cannot constitute consideration.”); *State ex rel. Kansas City v. State Highway Commission*, 163 S.W.2d 948, 953 (Mo. 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.”). Accordingly, the cap cannot serve as “full and adequate consideration.” *Id.*

The General Assembly further explains that “the revenues which will or may accrue to municipalities in the future as a result of the enactment of sections 92.074 to 92.098” are part of the “full and adequate consideration” provided in HB 209. MO. REV. STAT. § 92.089.1. The General Assembly seems uncertain on this point, since it equivocates about whether tax revenues “will or may” accrue to the municipalities in the future.¹³ What is clear from HB 209, however, is that substantial amounts of back-tax revenues are gone forever, *i.e.*, discharged and released *via* HB 209’s immunity and lawsuit dismissal provisions.¹⁴

¹³In another portion of HB 209, it is stated that sections 92.074 to 92.098 “shall have a revenue-neutral effect.” MO. REV. STAT. § 92.086.6.

¹⁴If Springfield refiles the lawsuit, and proves “subjective good faith,” Respondents will surely argue that the statute of limitations is three (3) years, as reflected in HB 209. If this argument is successful, Springfield will lose the ability to collect on unpaid taxes

The fiscal notes for HB 209 compiled by the Committee on Legislative Research, Oversight Division noted, on May 18, 2005, the fiscal impact on municipalities if the Act were to become effective. L.F. 300-307. Oversight noted the City of Springfield was assuming a potential loss of approximately one million dollars in revenue per year as the result of the proposal and that the amount of damages which could be recovered from a pending lawsuit against certain telecommunication companies could be significantly reduced. L.F. 304. The report also noted the financial impact of the proposal upon other cities in Missouri, all of whom projected their municipalities could lose significant revenues as the result of the business license tax modifications outlined in HB 209. L.F. 300-307.

Additionally, the base upon which Springfield’s gross receipts tax will be calculated is changed in Section 92.083.1(1) to a significantly narrower base:

Existing Definition of “Gross Receipts” in Springfield	Definition of Gross Receipts in HB 209
<p>Gross: The word “gross” as used in the phrase “gross receipts,” “gross sale,” or “gross rental receipts” shall include the entire amount of the <u>receipt or sale</u> without deduction, including all applicable state, federal, and local taxes</p> <p>Springfield Ord. 3395</p>	<p>“Gross receipts” means all receipts from the retail sale of telecommunications service taxable under § 144.020 and for any retail customers now or hereafter exempt from the state sales tax.</p> <p>MO. REV. STAT. § 92.083.1(1)</p>

Obviously, these two (2) definitions diverge substantially, since the HB 209 definition reduces the tax based from “gross receipts” to receipts from the “retail sale” of

for the years 1999-2003.

telecommunications services and plainly excludes “access charges” paid by other telephone companies who are not “retail” customers. *See, e.g., AT&T Communications of the Mountain States, Inc. v. State of Colorado*, 778 P.2d 677 (Colo. 1989) (local telephone access services necessary for interstate phone calls are intrastate telephone services within the meaning of statutes governing sales tax on intrastate telephone services).

No one can demonstrate that HB 209's speculative, future revenues are sufficient to off-set this loss in tax dollars. It is impossible for Springfield or any of the other municipalities with tax rates currently above 5% to somehow gain in the future. Indeed, the General Assembly's hesitancy is understandable because there is no assurance that all the telephone companies will continue to do business in these municipalities, that subscribers will continue to do business with these telephone companies, or that HB 209 will remain in effect and not be modified by subsequent legislation. *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 municipality] will continue to enforce the tax, or that [the business] will continue to be subject to the tax, or that the taxing statute will remain in effect and not be modified by legislation”) (citing *Healy v. Ratta*, 292 U.S. 263, 270-271, 54 S. Ct. 700, 703, 78 L. Ed. 1248 (1934)).

More than just a crippling loss of tax dollars, the purported justifications for HB 209 make a mockery of the legal concept of “consideration.” As previously demonstrated, Respondents are liable under the tax ordinances as written and as they existed prior to

passage of HB 209. This is self-evident from the fact that a judgment of liability for past taxes has been entered against the wireless telephone companies by the United States District Court. If HB 209 is allowed to stand, the carriers will simply be paying the type of taxes they wrongfully resisted paying in the past, on a prospective and reduced basis only. In such circumstances, the law is clear that a promise to do that which one is legally obligated to do cannot serve as consideration. *See, e.g., State ex rel. Kansas City v. State Highway Commission*, 163 S.W.2d 948, 953 (Mo. banc 1942); *Wise v. Crump*, 978 S.W.2d 1, 3 (Mo. Ct. App. E.D. 1998) (“[Defendant’s] promise to provide financial responsibility for his vehicle fails to provide the necessary consideration for the alleged contract. A promise to do that which one is already legally obligated to do cannot serve as consideration . . .”); *Zipper v. Health Midwest*, 978 S.W.2d 398, 416 (Mo. Ct. App. W.D. 1998) (same); *Blandford Land Clearing Corp. v. National Union Fire Ins. Co. of Pittsburgh*, 698 N.Y.S.2d 237, 243 (Sup. Ct. N.Y. 1999) (“promise to do no more than one is contractually or legally obligated to do is illusory”).

III. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article III, § 40 of the Missouri Constitution in that it constitutes a special law because it regulates the affairs of the City, grants exclusive corporate privileges and arbitrarily creates closed-ended classifications without any reasonable basis, and to the extent it has legitimate purposes, these could be accomplished by other general laws.

HB 209 is an unconstitutional special law. Section 40(30) of Article III of the Missouri Constitution provides that:

**The General Assembly should not pass any local or special law;
(30) where a general law can be made applicable, and whether a general
law could have been made applicable is a judicial question to be judicially
determined without regard to any legislative assertion on that subject.**

MO. CONST. art. III, § 40(30) (emphasis added).

Article III, § 40 of the Missouri Constitution prohibits the General Assembly from passing local or special laws in various, enumerated circumstances, especially where a general law can be made applicable to the subject addressed by the legislature.¹⁵ “The unconstitutionality of a special law is presumed.” *Harris v. Missouri Gaming Commission*, 869 S.W.2d 58, 65 (Mo. banc 1994), *modified on denial of reh’g*; *see also Tillis v. City of Branson*, 945 S.W.2d 447, 448 (Mo. banc 1997), *reh’g denied*; *State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 921 (Mo. banc 1993).

The contours of what constitutes “special legislation” have evolved over time as this

¹⁵The Missouri Constitution is somewhat unique because of its inclusion of the following language: “whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.” MO. CONST. art. III, § 40(30). *See McKaig v. Kansas City*, 256 S.W.2d 815, 816 (Mo. banc 1953).

court has examined statutes in the context of Article III, §40 of the Missouri Constitution. In *City of Springfield v. Smith*, 19 S.W.2d 1, 6 (Mo. banc 1929), the Court found a law encompassing less than all who are “similarly situated” to be constitutionally infirm. Later, in *Reals v. Courson*, 164 S.W.2d 306, 307-08 (Mo. 1942), the Court declared “a statute which relates to particular persons or things of a class” to be special (internal citations omitted).¹⁶ More recently, in *Harris v. Missouri Gaming Commission*, the Court’s test for special legislation focused on whether the challenged law was “open-ended” or “closed-ended.” *Harris*, 869 S.W.2d at 65 (internal citations omitted).

Regardless of the test employed, it seems clear that the “vice in special laws is that they do not embrace all of the class to which they are naturally related.” *Reals v. Courson*, 164 S.W.2d at 308. Thus, if an act “by its terms or in its practical operation,” can only apply to particular persons or things of a class, “it will be a special or local law, however carefully its character may be concealed by form of words.” *Id.* In evaluating any law, the judiciary must “use its own processes of logic in determining the presence or absence of reasonableness or unreasonableness in [a] given classification.” *City of Springfield v. Smith*, 19 S.W.2d at 3. Further, Defendants have the burden of proving a facially special law to be

¹⁶Also, in *Reals v. Courson*, the Court quoted approvingly from earlier decisions finding “[t]he test of a special law is the appropriateness of its provisions to the objects that it excludes . . . [citations omitted].” *Reals v. Courson*, 164 S.W.2d at 308, *overruled in part on other grounds*.

constitutional under Article III, § 40. *Tillis*, 945 S.W.2d 447.

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

- A. The statute’s classification of exempt cities is based on immutable historic facts which prevents for all time other cities from entering the class identified in the legislation which creates an impermissible “closed ended” special law in contravention of Article III, § 40(30).**

The issue of whether a statute is, on its face, special law depends on whether the classification is open-ended. *Treadway v. State of Missouri*, 988 S.W.2d 508, 510 (Mo. banc 1999) (citing *Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. banc 1997)).

Classifications are open-ended if it is possible that the status of members of the class can change. *Harris v. Missouri Gaming Commission*, 869 S.W.2d 58, 65 (Mo. banc 1994).

Here, the legislature did not seek to have HB 209 applied to “all of the given class alike” as required by Article III, § 40(30). Rather than using the permissible open-ended classification, the legislature enacted § 92.086.10 of HB 209 to create a “close-ended” classification of cities – specifically two cities, Jefferson City and Clayton – that are exempt from the dismissal requirement of § 92.089.2 and from the adjusted tax rate of §§ 92.086.6 and 92.086.9.¹⁷

¹⁷Section 92.086.10(1) provides that “[a]ny municipality which prior to November 4, 1980, had an ordinance imposing a business license tax on telecommunications

The criteria set forth in § 92.086.10, which defines the class of exempt cities, is
companies which specifically included the words ‘wireless’, ‘cell phones’, or ‘mobile phones’ in its business license tax ordinance as revenues upon which a business license tax could be imposed, and had not limited its tax to local exchange telephone service or landlines, and had taken affirmative action to collect such tax from wireless telecommunications providers prior to January 15, 2005, shall not be required to adjust its business license tax rate as provided in subsection 6 of this section and shall not be subject to the provisions of subsection 9 of this section.” Section 92.086.10(1) describes only one city – Jefferson City. MO. REV. STAT. § 92.086.10(1). *See* City of Jefferson, Ordinance No. 9485, §§ 16-68 and 16-71, enacted on August 18, 1980; L.F. 242-245.

Likewise, section 92.086.10(2) provides that “[a]ny municipality which has an ordinance or an amendment to an ordinance imposing a business license tax on telecommunications companies which was authorized or amended by a public vote subsequent to November 4, 1980, and such authorization specifically included the terms ‘wireless’, ‘cell phones’, or ‘mobile telephones’ as revenues upon which a business license tax could be imposed, and had not limited its tax to local exchange telephone service or landlines, and had taken affirmative action to collect such tax from wireless telecommunications providers prior to January 15, 2005, shall not be required to adjust its business license tax rate as provided in subsection 6 of this section and shall not be subject to the provisions of subsection 9 of this section.” Section 92.086.10(2) describes only one city – Clayton. MO. REV. STAT. § 92.086.10(2).

narrowly drawn to (1) require that there be an ordinance with particular language in existence prior to November 4, 1980, or (2) require that there be an ordinance authorized or amended by a public vote subsequent to November 4, 1980. In addition, both subsections require affirmative action by a municipality to collect the tax from wireless telecommunications providers prior to January 15, 2005. These statutory criterion create descriptions of “historic fact”, as opposed to a target that could embrace other cities in the future.

“Classifications based upon historical facts, geography, or constitutional status on immutable characteristics . . . are . . . facially special laws.” *Tillis v. City of Branson*, 945 S.W.2d 447, 449 (5) (Mo. banc 1997). Section 92.086.10's provision that a city can only be exempt from its effects if it had adopted an ordinance containing specific language “prior to November 4, 1980” or had taken affirmative action to collect the tax from wireless telecommunications providers “prior to January 15, 2005” makes it impossible for any other city in Missouri to become part of the class of cities addressed in subsections (1) and (2) because the dates utilized have already passed. *Cf. State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 921 (Mo. banc. 1993) (holding that the population at a fixed, past point in time was not an open-ended criterion and was an immutable characteristic similar to geography and constitutional status); *School Dist. of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 222 (Mo. banc. 1991) (holding that constitutional status is not a sufficiently open-ended factor).

In this case, there is no substantial justification for the immutable classification of

whether a city, such as Springfield, had adopted an ordinance containing certain wording before November 4, 1980, as described in Sections 92.086.10(1) and (2). It is noteworthy that in Springfield's pending federal district court action to collect unpaid gross receipts taxes the federal district judge found the wireless companies are telecommunication companies which provide "telephone service" in both the City of Springfield and Jefferson City. See, Order at pp. 3 & 11, dated June 9, 2005, in *City of Jefferson, et. al. v. Cingular Wireless, LLC, et. al.*, Case No. 04-4099-CV-C-NKL (W.D. Mo. 2005); A014-A030; L.F. 216-232.

Springfield's ordinance, Springfield Code § 20-22 (L.F. 176), which was originally enacted in 1946 and subsequently amended in 1968, was enacted prior to November 4, 1980, the date used in Section 92.086.10(2) of HB 209. Section 92.086.10(1), which describes Jefferson City's gross receipts tax ordinance verbatim, and uses the word "mobile phones" as the criteria for its exclusion from HB 209 dismissal requirements, creates a facially special law because Springfield's ordinance uses the term – "telephone service" – which has been found by the federal district court in *City of Jefferson, et. al. v. Cingular Wireless, LLC, et. al.*, *supra*, and the Missouri Court of Appeals, Eastern District in *City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo. Ct. App. E.D. 1999), *mtn. for reh'g and/or transfer denied*, to include mobile telephone service.

There is no "substantial justification" to include the City of Springfield in the lawsuit dismissal and rate adjustment requirements of HB 209 while simultaneously excluding Jefferson City and Clayton. In doing so, HB 209 confers exclusionary benefits and

privileges upon two (2) selected municipalities that no other city in Missouri can hope to enjoy.¹⁸ This closed-ended classification does not permit a municipality's status to change, i.e., to come within such classifications in the future, but rather grants exemptions based on unchanging, historical facts. The only purpose for having a limited exclusion of Jefferson City and Clayton from the bill's lawsuit dismissal requirement is to protect and limit the liability, both past and future, of the "telecommunications companies" to all other cities in Missouri. As such, § 92.086.10 creates an unconstitutional special law in violation of Article III, § 40(30) of the Missouri Constitution.

B. The statute does not apply to all members of the same class.

If the class is defined broadly as "utilities," HB 209 grants special rights, privileges and immunities to telephone companies (*e.g.*, tax forgiveness, lawsuit dismissal, etc.) not enjoyed by other utilities (*e.g.*, gas, water, electric, etc.).¹⁹

¹⁸Only the City of Jefferson City, Missouri would qualify for exemption under § 92.086.10(1), RSMo. Only the city of Clayton, Missouri would qualify for exemption under § 92.086.10(2), RSMo. However, there are over 200 Missouri cities and municipalities with telephone license tax ordinances that would not qualify for exemption.

¹⁹Telephone companies are "utilities," just like gas, electric and water companies, with the only difference being the type of service offered to the public. *See, e.g., Campanelli v. AT&T Wireless Serv., Inc.*, 706 N.W.2d 1267, 1269-70 (Ohio 1999)

Specifically, § 92.089 conveys an exclusive right, privilege, or immunity to “any telecommunications company” as to its liability for the non-payment or underpayment of business license taxes to a municipality up to and including July 1, 2006. Section 92.089, by its express terms, excludes all other companies and businesses that may be subject to liability for the failure to pay a municipality for “disputed amounts of business license taxes” except “telecommunications companies.” The statute does not encompass all businesses that are subject to existing business license tax ordinances in the cities. *See, e.g.*, L.F. 450-451 (Springfield regulations describing license taxes for water companies, telephone companies, and cable television service companies).

Section 92.089's classification of those businesses who must pay a municipalities business license tax is arbitrary and without a rational relationship to a legislative purpose in that it does not apply to all businesses similarly situated. Even if a law purports to be general, if the classification is unreasonable, unnatural, or arbitrary so that it does not apply to all persons or things similarly situated, it is then, in fact, special despite its apparent purpose. *Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered by Delinquent Tax Liens*, 517 S.W.2d 49, 53 (Mo. 1974). “If in fact the act is by its terms or ‘in its practical operation, it can only apply to persons or things of a class, then it will be a

(wireless telecommunications providers are considered utilities). To single out telephone companies for favored treatment, at the expense of similarly situated utilities, is to ignore logic, history, business methods and common sense.

special or local law, however carefully its character may be concealed by form of words.”
Id. (quoting *Dunne v. Kansas City Cable Ry. Co.*, 32 S.W. 641, 642, 131 Mo. 1, 5 (Mo. 1895)).

Here the legislature’s attempts to grant special immunities to less than all similarly situated businesses has been rejected by this court as violative of Article III, §40 of the Missouri Constitution. In *Planned Industrial Expansion Auth. of the City of St. Louis v. Southwestern Bell Telephone Co.*, 612 S.W.2d 772, 778 (Mo. 1981), the Court held that an amendment of a statute giving a telephone company a vested property interest in public land under which it had placed its cables and conduits was unconstitutional. The Court stated the amendment was “partial” in that it did not include and benefit all companies which distributed their services beneath the public ways. *Id.* at 777. The Court further explained there was no reasonable constitutional basis for granting a permanent easement to a telecommunications company while not granting a similar vested easement to other utility companies whose services might be provided through underground facilities. *Id.*

As in the *Planned Industrial Expansion* case, there is no reasonable constitutional basis in this case for granting to only the “telecommunications companies” immunity from past-due taxes. Many cities, including Springfield, have similar business license tax ordinances imposing taxes on other types of businesses and companies based on their activities within the cities. L.F. 167-174; 450-451. However, those businesses are not being granted immunity by HB 209 from liability for past-due taxes. Further, HB 209 “caps” prospective license taxes on telephone utilities at 5%, but it fails to confer the same benefit

upon other utilities.

Finally, and even more troubling is the legislation's arbitrary grant of immunity to telephone companies that failed to pay a city's business license tax, when other competing telephone companies such as T-Mobile, paid their taxes. L.F. 162-164. Such a legislative classification not only creates special legislation in violation of Article III, §40 of the Missouri Constitution, but also violates the equal protection clause of our Constitution, Article I, § 2 of the Missouri Constitution. *See* discussion in Section IV, below.

C. The statute's classifications are arbitrary and unreasonable.

HB 209 bars municipalities from pursuing class litigation against telephone companies "to enforce or collect any business license tax" (Mo. Rev. Stat. § 71.675.1), but does not foreclose telephone companies from pursuing class litigation against municipalities to recover payment of the same tax.²⁰ In addition, § 71.675.1 arbitrarily shields telephone companies from class actions "to enforce or collect any business license tax" (*id.*), but not other companies subject to the same business license taxes.

D. The statute's classifications are not germane to the purpose of the law.

The legislature's pronouncement that HB 209's classifications are necessary for

²⁰*See, e.g., AT&T Wireless Services PCS LLC, et al v. Jeremy Craig, et al.*, Case No. 04CC-000649, currently pending in the Circuit Court of St. Louis County, wherein AT&T Wireless and others have filed suit against fifteen (15) different municipalities to recover business license taxes allegedly paid under protest.

“telecommunications business license tax simplification,” is disingenuous because such a goal is not fostered by excluding other businesses and utilities similarly situated. If the General Assembly was concerned about the “economic well being of the state,” why does HB 209 authorize a telephone company “to pass through to its retail customers all or part of [a telecommunications] business license tax” (Mo. Rev. Stat. § 92.086.13).

Such a “pass through” purports to make the citizenry, as opposed to the telephone company, the business license taxpayer. It cannot be squared with HB 209's definition of a “business license tax,” which is a tax upon businesses, not individuals, “for the privilege of doing business within the borders of [a] municipality.” MO. REV. STAT. § 92.077(1).

Further, it runs counter to established thinking on who bears the burden of a gross receipt tax. *See, e.g., City of Bridgeton v. Northwest Chrysler-Plymouth, Inc.*, 37 S.W.3d 867, 872 (Mo. Ct. App. E.D. 2001) (“[G]ross receipts are merely a means to calculate the occupational license tax; what is being taxed is the privilege of doing business in [the municipality].”); *Anderson v. City of Joplin*, 646 S.W.2d 727, 728 (Mo. 1983) (describing the distinction between a sales tax and a gross receipts tax and finding that a gross receipts-license tax starts with the revenue received by the licensee as a base . . . and assesses a tax equal to a percentage of those revenues without regard to the markup of the revenue and without restrictions to the percentage stated in the taxing ordinance). Additionally, a gross receipts tax or surcharge is not a mandated charge to the customer and, in a competitive environment, the carriers will determine whether or not they will bill customers for such “recovery” charges. *See Morgan Jindrich, Group Wants Truth in Cell Phone Billing:*

Wireless firms bill clients \$937 million for 'federal recovery fees' (Apr. 13, 2004), available at <http://www.publicintegrity.org/telecom/report.aspx?aid=250&sid=200> (discussing number portability costs and how wireless phone companies are including these fees as a line item on the customer's bill denominated as a "federal recovery fee" or the like).

Section 92.086.13 also shortens the statute of limitations to three (3) years for actions involving "the alleged nonpayment or underpayment of [a telecommunications] business license tax".²¹ Again, if the concern is the "economic well being of the *state*," it is not alleviated by starving municipalities of tax revenues, foisting taxes upon the citizenry, and excluding similarly situated businesses from such benefits. Excusing Sprint from paying its share of local taxes, which, *inter alia*, support emergency responders and other general revenue services, actually harms the state and its citizens.

E. The statute constitutes a special law where a general law can be made applicable.

Being "special" on its face or in its practical operation, HB 209 violates Article III, § 40 of the Missouri Constitution, because it arbitrarily "regulat[es] the affairs of . . . cities" and grants "special right[s], privilege[s] or immunit[ies]" to corporations, "where a general law can be made applicable." MO. CONST. art. III, §§ 40(21), 40(28) and 40(30).

In the following recent decisions, the Missouri Supreme Court found legislation

²¹The current statute of limitations is at least five (5) years. *See Kansas City v. Standard Home Improvement Co., Inc.*, 512 S.W.2d 915, 918 (Mo. Ct. App. 1974).

containing the same infirmities as collectively appearing in HB 209 to be invalid “special legislation”: (i) *Planned Ind. Expansion Authority v. Southwestern Bell Tel. Co.*, 612 S.W.2d 772, 776-77 (Mo. banc 1981) (statutory amendment giving telephone utility, but not other utilities, a vested property interest in public land under which it had placed its conduits violated the constitutional ban on local or special laws); (ii) *State ex rel. Public Defender Comm. v. County Court of Greene County*, 667 S.W.2d 409, 413 (Mo. banc 1984) (since statute exempting Greene County, i.e., the Thirty-First Judicial Circuit, from operation of statute governing maintenance of public defender’s office was special on its face, it could be presumed invalid, as violative of constitutional ban on special legislation); (iii) *School Dist. of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 222 (Mo. banc 1991) (provisions of ad valorem tax rate adjustment statute purporting to treat political subdivisions in two counties differently than political subdivisions in other counties for purposes of rate adjustment following reassessment violated the provision of the Missouri Constitution prohibiting local or special laws when general law could be made applicable); (iv) *O’Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993) (act that could apply to only one county, authorizing counties to establish boundary commissions, was unconstitutional), *mtn. for reh’g, reconsideration or modification denied*; (v) *Harris v. Missouri Gaming Commission*, 869 S.W.2d 58, 65-66 (Mo. banc 1994) (statute exempting specifically described boats and others located between two bridges along Mississippi River from regulations covering riverboat gambling was facially special law, for purposes of constitutional prohibition against such laws, and was presumptively unconstitutional), *as*

modified on denial of reh'g; and (vi) *Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. banc 1997) (the requirement that a city be in a county bordering Arkansas in order to qualify for tourism tax is a closed-ended classification, thus, the statute is a facially special law, and its unconstitutionality is presumed), *reh'g denied*.

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

IV. The trial court erred in granting Sprint's motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates the prohibition against retrospective laws under Article I, § 13 of the Missouri Constitution in that §§ 92.089.1 and 92.089.2 of HB 209 recharacterize past due taxes which had already matured as not liquidated; grant immunity for prior bad acts; and require the City to dismiss its lawsuit to collect past due taxes, all to the substantial prejudice of the City.

Without question, HB 209's retrospective aspects create fatal flaws from a constitutional perspective. Whether it is nullifying the effect of prior tax ordinances,

forgiving a past indebtedness, impairing rights acquired under existing law, or giving a different construction to previous events, the practical effect of HB 209 is to take property away from municipalities and to transfer it to favored businesses – solely through means of legislative fiat. It is these backward-looking characteristics that sustain many of Plaintiff’s constitutional challenges, and are most responsible for giving one the sense that something is wrong with HB 209.

The Constitution of Missouri prohibits a law “retrospective in its operation.” MO. CONST. art. I, § 13. This prohibition is long-standing.²² While the Constitution does not define the term, statutes within Article I, § 13’s proscription have been characterized as laws that “take away or impair rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past.” *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 340 (Mo. banc 1993). This “does not mean that no statute relating to past transactions can be constitutionally passed, but rather that none can be allowed to operate retrospectively so as to affect such past transactions *to the substantial prejudice of parties interested* (emphasis in original).” *Fisher v. Reorganized Sch. Dist. No. R-V of Grundy County*, 567 S.W.2d 647, 649 (Mo. banc 1978). “A law must not give to something already done a different effect from that which it had when it transpired.” *Willhite v. Rathburn*, 61 S.W.2d 708, 711 (Mo.

²²Prior to adoption of Missouri’s 1945 Constitution, the Constitution of 1875, Article II, § 15 contained the same language.

1933). In determining what transactions or considerations are within the purview of retrospective laws, the courts use terms such as “liabilities” or “obligations,” as well as “debts.” *Graham Paper Co. v. Gehner*, 332 Mo. 155, 59 S.W.2d 49, 52 (Mo. banc 1933).

A. Section 92.089.1 recharacterizes past due taxes which had already matured as not liquidated and forgives a matured indebtedness to the substantial prejudice of the City.

Section 92.089.1 of HB 209 states, “The general assembly finds and declares . . . the claims of the municipal governments regarding such business licenses [on telecommunications companies] have neither been determined to be valid nor liquidated.” The statutory language makes no attempt to limit its application to operate prospectively only from the effective date of HB 209, August 28, 2005.²³ If this section is construed to operate prospectively, analysis under Article I, § 13 need not be had. However, Springfield’s claims, as well as all of the other cases on appeal before this Court, include claims for unpaid municipal business license tax debts, going back as far as 1999. To the extent this section purports to invalidate those debts which were incurred prior to HB 209’s August 2005 effective date, it offends Article I, § 13.

A retrospective law takes away or impairs “vested or substantial rights acquired under existing laws.” *Mendelsohn v. State Bd. of Registration for the Healing Arts*, 3

²³Other provisions of HB 209, such as those discussed in Part C, *infra*, leave no doubt as to the intent to apply retrospectively.

S.W.3d 783, 785-786 (Mo. banc 1999) (emphasis added). Section 92.089.1 purports to recast the municipalities' claims for collection of their matured tax debts, apparently including those debts for which the municipalities had already filed suit, as "neither valid nor liquidated." In doing so, this provision takes away substantial rights to tax proceeds already defined as a matured tax debt. Even an inchoate tax, though not due or yet payable, is such an obligation or liability as to be within the protection of the restriction against retrospective laws. *Graham Paper*, 59 S.W.2d at 152; *see also First Nat. Bank of St. Joseph v. Buchanan County*, 205 S.W.2d 726, 730-31 (Mo. 1947) (Bank Tax Act could not operate to supplant or supersede city's earlier tax; to the extent that it purports to operate prior to its effective date, "the act clearly falls within the prohibition" of Article 1, Section 13); *Ernie Patti Oldsmobile, Inc. v. Boykins*, 803 S.W.2d 106, 108 (Mo. Ct. App. E.D. 1990) ("[c]learly, retrospective repeal of the ordinance in question would impair the City's 'vested right' to collect the license fee"), *mtn. for reh'g and/or transfer to Supreme Court denied*.

Statutes pre-existing HB 209 authorized Springfield and the other municipalities to tax telephone business by ordinance. Not only did Springfield enact such a taxing ordinance, it succeeded in its collection proceedings as to liability for the tax debts which had already matured, all before HB 209 became law. To the extent this provision is construed to cancel this liability, it is unconstitutional.

B. Section 92.089.2 grants immunity to telecommunications companies for prior bad acts based upon "subjective good faith belief" up to and including July 1, 2006, and eliminates Springfield's vested right to collect

taxes.

Section 92.089.2 states that if prior to July 1, 2006, a telecommunications company failed to pay any amount to a municipality based on a subjective good faith belief that either:

(1) It was not a telephone company covered by the municipal business license tax ordinance, or the statute authorizing the enactment of such taxing ordinance, or did not provide telephone service as stated in the business license tax ordinance, and therefore owed no business license tax to the municipality; or

(2) That certain categories of its revenues did not qualify under the definition or wording of the ordinance as gross receipts or revenues upon which business license taxes should be calculated;

such a telecommunications company is entitled to full immunity from, and shall not be liable to a municipality for, the payment of the disputed amounts of business license taxes, up to and including July 1, 2006. However, such immunity and release from liability shall not apply to any business license tax imposed in accordance with subdivisions (1) and (2) of subsection 10 of section 92.086 or sections 92.074 to 92.098 after July 1, 2006.

MO. REV. STAT. § 92.089.2. Again, as noted in Part A, *supra*, if this provision is construed to operate prospectively only, an Article I, § 13 analysis is unnecessary. However, to the extent this section purports to create immunity for payment of business license taxes prior to

the passage of HB 209, it is a retrospective law.

Prior to August 28, 2005, municipal business license taxes on telephone services were created and determined by local ordinances. No “immunity” from taxation existed as telephone tax liabilities were being incurred during this time period and Springfield’s ordinance provides no immunity. Any attempt by the legislature to create an immunity from past-due taxation thru § 92.089.2 clearly impairs Springfield’s substantial rights within the meaning of cases construing Article I, § 13. Under the existing law in effect, there was a tax liability, created by ordinance, upon each company engaged in telephone service. Legal title to the collection of that tax debt arose every quarter reports were due. *See City of Bridgeton*, 37 S.W.3d at 872; *Anderson*, 646 S.W.2d at 728; Footnote 8, *supra*.

Moreover, immunity purports to be created based on a telecommunication company’s belief prior to the enactment of HB 209 that it did not owe taxes. Even if a corporation could somehow form a “belief,” that cognitive process heretofore thought to be the exclusive province of human beings, it must be emphasized that prior to the passage of HB 209, any such “belief,” by itself, was not a defense to a claim that taxes were due and owing under the Springfield ordinance. The sole method for avoiding taxes prior to HB 209 – paying taxes under protest and filing suit under Chapter 139 of the Missouri Revised Statutes – was not followed.

Prior to August 28, 2005, a failure to pay one’s taxes – whatever one’s belief – was essentially a waiver of the right to challenge its imposition. *See MO. REV. STAT. § 139.031*;

see also Metts, 84 S.W.3d at 109.

Springfield sued Sprint and at the time suit was filed, had the right to claim that Sprint's failure to pay under protest was a waiver of the defense that the taxes were illegal. By ascribing immunity to Sprint's past inaction, HB 209 impairs the substantial right of Springfield to collect its tax.

C. Section 92.089.2 requires the City to dismiss its lawsuit to collect unpaid taxes to the substantial prejudice of the City.

Section 92.089.2 provides in part:

If any municipality, prior to July 1, 2006, has brought litigation or caused an audit of back taxes for the nonpayment by a telecommunications company of municipal business license taxes, it shall immediately dismiss such lawsuit without prejudice and shall cease and desist from continuing any audit, except those cities described in subsection 10 of section 92.086.

MO. REV. STAT. § 92.089.2. This provision makes no attempt to limit its application to suits filed after HB 209 became law, but rather, all suits, whenever filed, including those filed by Springfield prior to the effective date of HB 209.

When Springfield sued Sprint, it had a legal right to collect unpaid tax debts.

Missouri courts have previously found "vested rights" in connection with rights as a litigant.

In *Doe v. Roman Catholic Diocese*, *supra*, it was noted:

This Court has held that once the original statute of limitations 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.

862 S.W.2d at 341 (internal citations omitted). Logically, if legislation cannot be applied retrospectively to impair someone's vested right to be free from suit, it should not be allowed to retrospectively impair a vested right to a cause of action. Accordingly, HB 209 offends the Constitution, Article I, § 13, in that it purports to be retrospective in operation.

Some cases have determined that an otherwise unconstitutional law retrospective in operation may survive if it waives the rights of the "state." See *Savannah R-III Sch. Dist. v. Public Sch. Ret.*, 950 S.W.2d 854, 858 (Mo. banc 1997). The precise meaning of the word "state" in this context has not been defined by any bright-line rule, but rather, on a case-by-case basis. No Missouri case has been found which has specifically held that a municipality is considered the "state," for purposes of this waiver. In *Savannah*, which is the most recent case to expound on this issue, the term was interpreted to include local school districts because they are "creatures of the legislature."²⁴ *Id.* at 858. However, in this 5-2 decision,

²⁴"The controversy in *Savannah R-III School District v. Public School Retirement System* centered on the [] enactment . . . of a law precluding numerous school districts from recovering refunds of payments illegally collected by the Missouri Public School Retirement System. The Missouri legislature used retrospective legislation to eliminate

the dissent sharply criticized the majority's holding as specious, not only in its factual underpinnings, but as a legal proposition, in that it "rel[ies] on judicial creations that feed off one another while ignoring the constitution's plain words." 950 S.W.2d at 861 (Robertson, J., dissenting).

The dissent in *Savannah* first found the majority's characterization of school districts as established by statute to be "not entirely correct." *Id.* at 860. School districts were only permitted by the legislature, the statute providing they "may be established" by local voters. *Id.* "They are not directly-created instrumentalities of the state as would be, for instance, the department of elementary and secondary education." *Id.* As a foreshadowing of the present issue, the dissent went on to say:

In formation and purpose, the [school districts] are more municipal corporations than they are state entities. Of course, one could argue that municipal corporations are state instrumentalities, too. If one follows the

the school districts' right to recovery. . . . The Missouri Supreme Court upheld the seemingly unconstitutional retrospective law by means of a broad assertion that the legislature may waive the rights of school districts at will. This conclusion may surprise many communities that feel they have a direct interest at the local level in the operation of their school districts and in the preservation of school district funds." Turner, *Retrospective Lawmaking In Missouri: Can School Districts Assert Any Constitutional Right Against The State?*, 63 Mo.L.Rev. 833, 833 (Summer 1998).

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.

Id. at 860-861. The dissent then traced the history of the development of this waiver principle, which it described as having “questionable parentage,” *id.* at 861, concluding that it was essentially *dicta* from a Supreme Court case²⁵, which the Missouri courts adopted without ever engaging in any reasoned analysis therefor, and which is contrary to the plain language of Article I, § 13.

Even if this principle that the state can waive the prohibition on laws retrospective in operation is retained, it should not apply to municipalities. Municipalities, at least in the verbiage of the Constitution, are distinguished from “political subdivisions” of the state. Article VI, § 1 makes counties political subdivisions of the state, but says nothing about municipalities. Article VI, § 15 authorizes the general assembly to provide for four classes of cities and towns, but does not provide that they shall be political subdivisions of the state. Nothing in the statutes enacted pursuant to Article VI, § 15 declares the municipalities to be political subdivisions. *See* MO. REV. STAT. Ch. 77-82. Article VI, § 16 speaks in the disjunctive when it states “[a]ny municipality *or* political subdivision of this state . . .” The word “or” is ordinarily used as a disjunctive to mean “either” as “either this or that.”

²⁵*New Orleans v. Clark*, 95 U.S. 644 (1877).

Norberg v. Montgomery, 173 S.W.2d 387, 390 (Mo. banc 1943). This supports the construction that a municipality is not a political subdivision of the state. If a municipality is not a political subdivision of the state, then there can be no waiver of the prohibition against retrospective laws.

Once tested, it becomes clear that HB 209 constitutes a prohibited, retrospective law. HB 209 so impairs municipal rights, so alters legal history, that it permits no other conclusion. As the Missouri Supreme Court emphasized: “[i]t is best to keep in mind that the underlying repugnance to the retrospective application of laws is that an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to a different set of effects which alter the rights and liabilities of the parties thereto.” *State ex rel. St. Louis-San Francisco Railway v. Buder*, 515 S.W.2d 409, 411 (Mo. 1974). Much like the statute in *Buder*, no such reasons are discernable here: HB 209’s erroneous suppositions about “the economic well being of the state” hardly suffice to justify this oppressive and unfair piece of legislation.

V. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209, which purports to require dismissal of this suit to collect municipal business license taxes, violates the tax uniformity requirement of Article X, § 3 of the Missouri Constitution in that it arbitrarily and unreasonably creates two separate tax rates for those who timely paid, and for those who did not pay, resulting in non-uniformity of

taxation of subjects which fall within the same class or category.

The Missouri Constitution provides that “[t]axes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.” MO. CONST. art. X, § 3 (emphasis added). “Uniform” refers to the measure, gauge or rate of the tax. *508 Chestnut, Inc. v. City of St. Louis*, 389 S.W.2d 823, 830 (Mo. 1965). “Same class of subjects” refers to the classification of the subjects of taxation for the purposes of the tax.” *City of Cape Girardeau v. Fred A. Groves Motor Co.*, 142 S.W.2d 1040, 1043 (Mo. 1940), *overruled on other grounds*.

A “tax is uniform when it operates with the same force and effect in every place where the subject of it is found.” *Id.* at 1042; *see also Dalton v. Metropolitan St. Louis Sewer Dist.*, 275 S.W.2d 225, 233 (Mo. banc 1955) (the uniformity must correspond to the territorial limits of the taxing district: “If the tax is a state tax, it must be uniform throughout the state. If the tax is a county tax, it must be uniform throughout the county, etc.”). “The ‘uniformity clause’ of Mo. Const. art. X, § 3, requires that classification of property for purposes of taxation not be “palpably arbitrary.” *State ex rel. Transp. Mfg. & Equip. Co. v. Bates*, 224 S.W.2d 996, 1000 (Mo. banc 1949) (striking down a statute as violating Article X, § 3, which imposed a two percent use tax on motor vehicles, but exempted vehicles seating ten passengers). The legislative creation of reasonable classifications is permitted in the furtherance of public good. *Id.* “Exemptions from taxation are a renunciation of

sovereignty, must be strictly construed and generally are sustained only upon the grounds of public policy. They should serve a public, as distinguished from a private interest. Such is the basis of equal and uniform taxation.” *Id.*

Undoubtedly, absolute or perfect uniformity of taxation is not possible. Nevertheless, courts should strive to act in accordance with Article X, § 3 and to achieve equality and uniformity. “Broadly put, constitutional class legislation must include all who belong and exclude all who do not belong to the class. Legislative departments of governmental authorities may not split a natural class and arbitrarily designate the dissevered factions of the original unit as distinct classes and enact different rules for the government of each. ‘This would be a mere arbitrary classification, without any basis of reason on which to rest, and would resemble a classification of men by the color of their hair or other individual peculiarities, something not competent for the legislature to do.’” *City of Cape Girardeau*, 142 S.W.2d at 1045 (internal citation omitted).

HB 209 defines the subject of the tax as “telecommunications companies” and then, in § 92.089, it arbitrarily splits the class between those who have paid and those who have not. Section 92.089 does not just limit the remedy of Springfield, but eliminates the liability of telecommunication companies for the entire amount of any unpaid tax, thus creating an *ex post facto* tax exemption. In essence, the tax rate for those who paid the City’s gross receipts tax is 6% and the tax rate for those who did not pay the tax is 0%. The difference in the tax rate is not based on any difference in the subject of the tax; the only

basis for the distinction is the fact that the tax was not paid.

The telecommunications companies targeted in HB 209 are a natural class and must be taxed uniformly under Article X, §3. These companies are functionally identical to each other and “. . . are engaged in precisely the same business.” *See City of Cape Girardeau* at 1045. Between the companies that have paid taxes and those that are granted an *ex post facto* tax exemption, “[t]here is no natural and substantial difference, inhering in the subject matter with respect to localities, persons, occupations or property. . . justifying any distinction for purposes of taxation for revenue.” *Id.* Such discrimination is arbitrary and lacks the rational basis necessary to be constitutional. *See State ex rel. Stephan v. Parrish*, 891 P. 2d 445, 457 (Kan. 1995) (“[The challenged statute] is an unreasonable grant of a tax amnesty or ‘window of opportunity’ based solely on a characteristic or status of the taxpayer rather than upon appropriate classification of the property. Taxpayers are divided into two classes, those who honestly reported their property for taxation and those who, for whatever reason, did not report their property for taxation or underreported the property if returned. The latter group are granted freedom from taxation and statutory penalties, while the former group is not. Such discrimination, when judged against the taxation guidelines, is arbitrary and lacks the rational basis necessary to be constitutional.”).

Similarly, utility businesses, which form a natural class, are split by HB 209 for purpose of benefits (tax forgiveness, prospective cap, shortened statute of limitations, class action protection, etc.) depending upon whether the individual utility offers telephone, gas,

water or electric services. Further, HB 209's tax exemptions do not correspond to the territorial limits of the taxing district because two municipalities – the City of Jefferson and Clayton – can evade its provisions, whereas a 5% cap operates everywhere else in the State.

In *Southwestern Bell Tel. Co. v. Morris*, 345 S.W.2d 62, 68 (Mo. banc. 1961), this Court held that a compensating use tax, which assessed locally purchased tangible personal property but exempted tangible personal property that was purchased out-of-state, violated Article X, § 3. Instead of protecting the potential of the tax base, the law invaded and, to the extent of its reach, destroyed the base and was not “based on differences reasonably related to the purposes of the law.” *Id.* Hence, it created an unreasonable, arbitrary and discriminatory classification. *Id.* In the same manner, the *ex post facto* tax exemption in 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.

To warrant the taxing of one object or person and the exemption of another object or person within the same natural class, the classification must serve a public, as distinguished from a private, interest. *State ex rel. Transp. Mfg. & Equip. Co.*, 224 S.W.2d at 1000. The *ex post facto* tax exemption in HB 209 serves a purely private interest – the rescue of private telephone companies from their tax delinquencies. There is no public purpose in retroactively diminishing the tax base. The preferential treatment of private telephone companies who refused to pay their taxes, even after the Eastern District ruled in *City of Sunset Hills*, 14 S.W. 3d at 59, that such companies fell within the class of telephone

companies under Mo. Rev. Stat. § 94.270, and Judge Laughrey reiterated the same ruling, is not in the public interest and should not be sustained. *See State ex rel. Transp. Mfg. & Equip. Co.*, 224 S.W.2d at 1000.

The distinctions in HB 209 cannot be justified by reason, history or business practices and differ little from distinctions based on “the color of [a person’s] hair.” While the General Assembly is given latitude in making tax classifications, the Court under Article X, § 3 has not hesitated to strike down tax schemes, which discriminate against taxpayers who must pay the full measure of their taxes. *See e.g., City of St. Louis v. Spiegel*, 2 S.W. 839, 840 (Mo. 1887) (ordinance imposing a \$25 tax against meat shops in one part of the city while imposing a \$100 tax against meat shops in another part of the city held to discriminate under Article X, § 3); *State ex rel. Garth v. Switzler*, 45 S.W. 245 (Mo. banc 1898) (law imposing inheritance tax at rate of five percent for property valued under \$10,000, while rate was seven and one-half percent on value of estate in excess of \$10,000, held unconstitutional); *City of Kansas City v. Grush*, 52 S.W. 286, 288 (Mo. 1899) (ordinance which taxed merchants dealing in produce while exempting merchants dealing in dry goods or groceries alone was violation of Article X, § 3); *City of Washington v. Washington Oil Co.*, 145 S.W.2d 366, 367 (Mo. 1940) (ordinance which taxed transportation of gasoline to filling stations, but did not tax transportation of gasoline to filling stations owned by transporter, held not to be a uniform tax on classification); *City of Cape Girardeau*, 142 S.W.2d at 1045 (ordinance levying tax on city businesses which had

not been engaged in business during the prior calendar year, while exempting those which had been engaged in business during the prior calendar year, violated Article X, § 3); *State ex rel. Transp. Mfg. & Equip. Co.*, 224 S.W.2d at 1000 (provision of statute exempting from use tax motor vehicles seating ten passengers or more held invalid as violating uniformity clause of Article X, § 3); *Southwestern Bell Tel. Co.*, 345 S.W.2d at 69 (use tax which assessed locally purchased tangible personal property but exempted tangible personal property that was purchased out-of-state violated Article X, § 3); *Drey v. State Tax Comm'n*, 345 S.W.2d 228, 237 (Mo. 1961) (assessment of timberland at a different rate than farmland and town lots was improper subclassification of real estate and violated Article X, § 3); *Airway Drive-In Theatre Co. v. City of St. Ann*, 354 S.W.2d 858, 861-62 (Mo. banc 1962) (portion of ordinance levying annual license tax on drive in theaters at \$1.50 per speaker and on other motion picture theaters at \$50 per year held arbitrary).

If the *ex post facto* tax exemption is allowed to stand, one can easily foresee a line forming in Jefferson City during the next legislative session, as lobbyists for other businesses seek similar tax forgiveness. Such invasion of the tax base would debilitate municipalities statewide, with cities being unable to provide basic public services. HB 209 not only works a fraud upon all those who paid the full amount of their taxes, but, left unchecked, its ramifications will be felt by ordinary citizens for decades to come and in ways that the General Assembly has yet to imagine.

VI. The trial court erred in granting Sprint's motion for judgment on the pleadings

or to dismiss finding HB 209 constitutional because HB 209 violates Article I, § 2 of the Missouri Constitution in that its exemption of certain businesses from tax liability arbitrarily classifies for purposes of taxation and discriminates against those who paid taxes.

Where a statute is invalid as special legislation, it frequently also runs afoul of the Equal Protection Clause of the Missouri Constitution. MO. CONST. art. I, § 2. That section prevents arbitrary and unreasonable tax classifications in statutes. *See Pierre Chouteau Condominiums v. State Tax Commission*, 662 S.W.2d 513, 514 (Mo. banc 1984) (quoting *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526, 79 S. Ct. 437, 440, 3 L. Ed. 2d 480 (1959)).

For example, in *City of St. Louis v. Western Union Telegraph Co.*, 760 S.W.2d 577, 583 (Mo. Ct. App. E.D. 1988), one of the issues before the Court of Appeals was whether a gross receipts tax imposed by a city ordinance on telegraph companies, but not telephone companies providing telegraph service, violated equal protection. The trial court had found that the city ordinance violated the equal protection provisions of the Missouri Constitution, Article I, § 2, and the Fourteenth Amendment to the United States Constitution, and also violated the uniformity of taxation provisions of Article X, § 3 of the Missouri Constitution. *Id.* The Court of Appeals agreed. *Id.* at 583-84. The Court stated, “[a] tax unconstitutionally denies equal protection if it imposes a charge on one class and exempts another class when the exemption is not ‘based on a difference reasonably related to the

purpose of the law.” *Id.* at 583 (citing *Missouri Pacific R.R. Co. v. Kirkpatrick*, 652 S.W.2d 128, 132 (Mo. banc 1983)). The Court noted the sections of the city’s ordinance treated telephone companies who provided telegraph services differently than telegraph companies providing the same or similar service. *Id.* at 583-84. The Court stated the sections of the city’s ordinance violated the constitutional equal protection guarantees because of the “apparent disparate treatment.” *Id.* at 584. This is closely analogous to Section 92.089 of HB 209, which exempts one class of taxpayers - telephone companies who have not paid their gross receipts taxes – from liability, while a second class of taxpayers – those telephone companies who have paid their taxes - are treated differently with no reasonably related basis.

To the extent HB 209 exempts select businesses from taxation, arbitrarily classifies for purposes of taxation, or otherwise discriminates against those who paid taxes, it denies equal protection of the law under the United States and Missouri Constitutions. *See id; see, e.g., State ex rel. Hostetter v. Hunt*, 9 N.E.2d 676, 682 (Ohio 1937) (a statute under which non-delinquent taxpayers are obliged to pay taxes on a certain kind of property for certain years, while delinquent taxpayers owning the same kind of property during the same years are released from such obligations, violates the equal protection clause of the Constitution); *Armco Steel Corp. v. Dept. of Treasury*, 358 N.W.2d 839, 844 (Mich. 1984) (“case law in other jurisdictions has held it unconstitutional to benefit or prefer those who do not pay their taxes promptly over those who do” [collecting cases]); *State, ex rel. Stephan v. Parrish*, 891

P.2d at 457, *supra*.

Springfield respectfully submits that § 92.089.2 is a retroactive business license tax exemption, which creates an improper or a preferential classification of taxpayers in violation of Article I, § 2 of the Equal Protection Clause of the Missouri Constitution. In substance, the exemption works as a classification based upon a subjective belief of a particular taxpayer and not on the type of business generating the tax. By providing the wireline and wireless taxpayers an amnesty to avoid unpaid gross receipts taxes due Springfield, based exclusively on their “subjective good faith belief” that they were either “not a telephone company covered by the municipal business license tax ordinance” or “certain categories of its revenues” did not qualify as gross receipts upon which gross receipts taxes were calculated, HB 209 divides all telephone companies into two classes: those who paid taxes on time and those who did not. As previously discussed, § 92.089.2 of HB 209 effectively creates two separate tax rates - one for those telephone companies who have historically paid Springfield their gross receipts taxes at 6% and a rate of 0% for those who will assert a “subjective good faith belief” that they did not owe such taxes. The legislature’s attempt to define this sub-class of taxpayers is both unreasonable and arbitrary discrimination because telephone companies that have already paid their taxes for past years will be at a disadvantage to their competitors who have offered identical products and/or services within the same municipality but who will now be granted immunity for such back taxes.

VII. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding that Sprint is immune from any past tax liability because the question of “good faith” is incapable of resolution on a motion for judgment on the pleadings or to dismiss in that Sprint does not possess a good faith belief sufficient to qualify for lawsuit immunity and dismissal under HB 209.

HB 209 purports to grant lawsuit immunity based upon the subjective “good faith belief” of a wireless carrier that it was not a “telephone company” subject to taxation.²⁶ MO. REV. STAT. § 92.089.2(1) (“In the event any telecommunications company, prior to July 1, 2006, failed to pay any amount to a municipality based on a subjective good faith belief that . . . [i]t was not a telephone company covered by the municipal business license tax ordinance, or the statute authorizing the enactment of such taxing ordinance, or did not provide telephone service as stated in the business license tax ordinance, and therefore owed no business license tax to the municipality[,] . . . such a telecommunications company is entitled to full immunity from, and shall not be liable to a municipality for, the payment of the

²⁶*Cf.* MO. REV. STAT. § 32.375, which provides that the director of revenue may consider the reasons for a taxpayer’s failure to pay taxes, the “reasonable steps” taken by the taxpayer and whether the taxpayer “reasonably believed” that the transactions were not subject to tax and that the amounts in dispute were not owed in considering whether to abate all or any portion of the amount assessed.

disputed amounts of business license taxes, up to and including July 1, 2006.”).²⁷

Even if HB 209 was constitutional, which Springfield denies, Sprint was not entitled to judgment on the pleadings as a matter of law because its assertion of “subjective good faith immunity” is not sufficient to overcome the facts alleged in the City’s Petition, which are deemed true, including that Sprint provides telephone service subject to Springfield’s ordinance. L.F. 5-16.

Moreover, the question of “good faith” is a question of fact. *See, e.g., Swartz v. Mann*, 160 S.W.3d 411, 415 (Mo. Ct. App. W.D. 2005); *Radloff v. Penny*, 225 S.W.2d 498, 502 (Mo. Ct. App. Stl. 1949) (“[g]ood faith, when in issue is the ultimate fact, . . . and the question is ordinarily one of fact, for determination by the trier of facts”); *Henry v. Tinsley*, 218 S.W.2d 771, 777 (Mo. Ct. App. Spr. 1949) (“[t]he question of good faith is a question of fact”), *reh’g denied*. Good faith is incapable of resolution on a motion to dismiss or a motion for judgment on the pleadings. If the issue were reached, Sprint simply cannot possess a good faith belief that it was immune from taxation under Springfield’s ordinance in

²⁷It is unclear from the terms of HB 209 whether such a “good faith belief” is required for lawsuit immunity, lawsuit dismissal, of both. Regardless, to the extent HB 209 directs an outcome in this case, it is unconstitutional. Further, to the extent HB 209 qualifies “good faith belief” with the word “subjective,” it violates the separation of powers, special law, equal protection, and tax uniformity provisions of the Missouri Constitution.

light of *City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo. Ct. App. E.D. 1999), Judge Laughrey’s opinion (A014-A030; L.F. 216-232), and the cases relied upon therein.

Ignorance of the law is no defense. *See Grace v. Missouri Gaming Commission*, 51 S.W.3d 891, 903 (Mo. Ct. App. W.D. 2001) (“[p]ersons are conclusively presumed to know the law”). Further, the mere defense of a claim does not validate the defense or evidence “good faith” on the part of the defender. *See, e.g.*, 3 Williston on Contracts § 7:45 (4th ed. 2004) (“a mere assertion or denial of liability does not make a claim doubtful, and the fact that invalidity is obvious may indicate that it was known”). On the contrary, to persist in arguing that a wireless carrier is not a “telephone company” – at this late date – can only be seen as “bad faith” on the part of Sprint. It flies in the face of logic, history and precedent, and it cannot suffice for lawsuit immunity or dismissal under HB 209.

Likewise, respondents have argued in their affirmative defenses that pursuant to the Hancock Amendment, Article X, §§ 16 through 22 of the Missouri Constitution, Springfield’s ordinance is invalid. L.F. 29-34. There is a significant legal distinction between subjectively believing that no tax is owed and believing that the tax is not owed because it is an invalid tax. *Cheek v. United States*, 498 U.S. 192, 206, 111 S. Ct. 604, 611, 112 L. Ed. 2d 617 (1991); *U.S. v. Simkanin*, 420 F.3d 397, 404 (5th Cir. 2005) (distinguishing a defense based on the defendant’s good-faith belief that he was acting within the law from a defense based on the defendant’s views that the tax laws are

unconstitutional or otherwise invalid). The latter belief, regardless of how genuinely held by the defendant, does not negate the willfulness element. *Cheek*, 111 S. Ct. at 611. Evidence pertaining to a defendant's beliefs that the tax laws are invalid is simply irrelevant to establishing a legitimate good-faith defense. *Id.*; *U.S. v. Hanson*, 2 F.3d 942, 946 (9th Cir. 1993). Accordingly, Sprint's averments concerning the applicability of Springfield's tax are irrelevant to the issue of subjective good faith, and, in fact, establishes that Sprint was well aware of Springfield's gross receipts tax, disagreed with it, and simply did not pay. This is not subjective good faith.

VIII. The trial court erred in granting Sprint's motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates Article II, § 1 of the Missouri Constitution, which prohibits one branch of government from impermissibly interfering with another's performance, or from assuming power that more properly is entrusted to another branch, in that it directs an outcome in pending cases, forecloses appellate review, and impedes municipal tax collection.

The Missouri Constitution provides: “[t]he powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in instances in this constitution

expressly directed or permitted.” MO. CONST. art. II, § 1. “This provision has appeared in the Missouri Constitution in substantially the same form since 1820.” *Mo. Coalition for the Environment v. Joint Comm. On Admin. Rules (JCAR)*, 948 S.W.2d 125, 132 (Mo. banc 1997), *as modified on denial of reh’g*.

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

A. Encroachment Upon Judicial Branch.

Contravening *JCLR* and *Chadha*, HB 209 impermissibly encroaches upon the judiciary in one or more of the following respects: (i) it singles out specific litigation for legislative treatment;²⁸ (ii) it does not afford courts the opportunity to use their adjudicative

²⁸HB 209 reads in part: “If any municipality, prior to July 1, 2006, has brought litigation...” MO. REV. STAT. § 92.089.2. The lawsuits to which this provision applies are: (i) *City of University City, Missouri, et al. v. AT&T Wireless, et al.*, Case No. 01-CC-004454, formerly pending in the Circuit Court of St. Louis County; (ii) *City Collectors of*

skills, or to meaningfully exercise their judgment and discretion;²⁹ (iii) a judicial proceeding

Wellston and Winchester v. SBC Communications, Inc., et al., Case No. 054-01930, formerly pending in the Circuit Court of St. Louis City; (iii) *City of Jefferson, et al., v. Cingular Wireless, LLC, et al.*, Case No. 04-4099-CV-C-NKL, currently stayed in the U.S. District Court for the Western District of Missouri; (iv) *City of St. Louis v. Sprint Spectrum, L.P.*, Case No. 034-02912A, formerly pending in the Circuit Court of St. Louis City; (v) *City of Springfield v. Sprint Spectrum, L.P.*, Case No. 104CC-5647, formerly pending in the Circuit Court of Greene County; and (vi) *State of Missouri, et al., v. SBC Communications, Inc., et al.*, Case No. 4:05-CV-01770, currently stayed in the U.S. District Court for the Eastern District of Missouri.

²⁹HB 209 gives a court the power to grant immunity where the evidence demonstrates that a telephone company possessed a “good faith belief” it was not subject to taxation, but then qualifies that phrase with the word “subjective.” MO. REV. STAT. § 92.089.2. “Subjective” has several commonly understood meanings, including “proceeding from or taking place within an individual’s mind such as to be unaffected by the external world,” “existing only in the mind; illusory,” and “existing only within the experiencer’s mind and incapable of external verification.” *See* The American Heritage Dictionary (2nd ed. 1982). Thus, HB 209 purports to afford a role for judicial discretion and judgment, but then takes it away through use of the word “subjective.” Any telecommunications company possessing such a “subjective” good faith belief “shall not

is not allowed to take place, because it directs a particular outcome in pending cases; e.g dismissals;³⁰ (iv) it retroactively alters judicial construction of Springfield’s ordinance; (v) it attempts to define a constitutional provision;³¹ and (vi) it determines what the law is and applies it to cases.³²

Given these qualities, HB 209 is clearly “adjudicative” in nature, and it forces courts to engage in a charade of the judicial process. Alone, or in combination, such attributes have

be liable to a municipality for, the payment of the disputed amount of business license taxes” MO. REV. STAT. § 92.089.2.

³⁰HB 209 states that “[i]f any municipality, prior to July 1, 2006, has brought litigation . . . , it shall immediately dismiss such lawsuit without prejudice” MO. REV. STAT. § 92.089.2.

³¹HB 209 contains the following sentence: “The general assembly . . . finds and declares that the resolution of such uncertain litigation, the uniformity, and the administrative convenience and cost savings to municipalities resulting from, and the revenues which will or may accrue to municipalities in the future . . . are full and adequate consideration . . . as the term ‘consideration’ is used in Article III, Section 39(5) of the Missouri Constitution” MO. REV. STAT. § 92.089.1.

³²HB 209 provides that a defendant’s “subjective good faith belief” in its innocence shall satisfy pre-existing law and suffice for the immunity and dismissal of lawsuits. MO. REV. STAT. § 92.089.1.

been found to violate the doctrine of separation of powers in related contexts. *See, e.g., Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So.2d 392, 406 (La. 2005) (by passing law defining “retail sale,” “sale at retail,” “sales price,” and “use” so as to make providers of cellular and wireless communications devices exempt from sales and use tax, in response to a case holding to the contrary, the legislature “clearly assumed a function more properly entrusted to the judicial branch of government”); *Federal Express Corp. v. Skelton*, 578 S.W.2d 1, 7-8 (Ark. banc 1979) (act retroactively exempting railroad parts from use tax violated separation of powers, as being “a clear attempt by the 1975 General Assembly to interpret a law enacted by the 1949 General Assembly after this Court has interpreted and applied that law”; the legislature “does not have the power or authority to retrospectively abrogate judicial pronouncements of the courts of this State by a legislative interpretation of the law”), *reh’g denied*; *Ark. Op. Atty. Gen. No. 2003-025*, 2003 WL 1347746, at *5 (Ark. A.G. 2003) (act of Arkansas legislature purporting to forgive gross receipts taxes previously incurred by truck and semitrailer owners would violate doctrine of separation of powers).

As the Missouri Supreme Court has noted: “the constitution assigns the General Assembly the single power and sole responsibility to make, amend and repeal laws for Missouri and to have the necessary power to accomplish its law-making responsibility.” *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d at 230. Within these parameters, the legislature can reasonably limit common law causes of action and restrict or expand the causes of action that it creates. *See Fust v. Attorney General for the State of*

Missouri, 947 S.W.2d 424, 430-31 (Mo. banc 1997) (citing *Simpson v. Kilcher*, 749 S.W.2d 386, 391 (Mo. banc 1988)). Further, no one disputes that the general assembly can “amend statutes prospectively if it believes that a judicial interpretation [is] at odds with its intent” See *Roth v. Yackley*, 396 N.E.2d 520, 522 (Ill. 1979). However, none of these powers can adequately explain HB 209, the provisions and effects of which differ in kind and degree from all other bills passed by the Missouri legislature in recent (or even distant) memory.

In granting lawsuit immunity, HB 209 targets a discreet and identifiable group of litigants, *i.e.*, Springfield and the other plaintiff municipalities and defendant carriers in formerly pending and stayed lawsuits. By specifically referring to such lawsuits in HB 209, the general assembly violates separation of powers principles by applying law to individual litigants, rather than enacting law. In *I.N.S. v. Chadha*, where the Supreme Court found a legislative veto that overturned an INS decision suspending the deportation of an alien to be unconstitutional, Justice Powell noted that such legislative action was “clearly adjudicatory,” because:

[t]he House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches. Even if the House did not make a *de novo* determination, but simply reviewed the Immigration and Naturalization Service’s findings, it still assumed a function ordinarily entrusted to the federal courts . . . [citations

omitted] Where, as here, Congress has exercised a power ‘that cannot possibly be regarded as merely in aid of the legislative function of Congress,’ [citations omitted], the decisions of this Court have held that Congress impermissibly assumed a function that the Constitution entrusted to another branch . . . [citations omitted].

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

I.N.S. v. Chadha, 462 U.S. at 966 (Powell, J., concurring). By singling out individual litigants for unfavorable treatment, the dangers envisioned by Justice Powell have come to pass in the form of HB 209. Similarly, the Supreme Court in *United States v. Klein*, 80 U.S. 128, 146-47, 20 L. Ed. 519 (1871), found a legislative mandate to violate the separation of powers, because Congress had prescribed a “rule of decision” in a pending case.

Specifically, the Court in *Klein* found that because Congress had “prescribe[d] a rule for the decision of a cause in a particular way,” it had “passed the limit which separates the legislative from the judicial power,” thus, the statutory provision was unconstitutional. *Id.*

B. Encroachment Upon Executive Branch.

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

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

Once acknowledged, HB 209 then proceeds to discharge collection actions brought by municipalities in the courts below.³³ Thus, HB 209 both assumes executive power and

³³The legislature has encroached upon the powers and domain of the executive branch by ordering such dismissal and granting immunity from back taxes not paid in “subjective good faith,” where such tax assessment and collection actions taken by the municipalities are executive in nature and are taken pursuant to executive powers duly delegated to them by the Constitution and their charters. *See e.g., City of Springfield v. Clouse*, 206 S.W.2d 539, 545 (Mo. banc 1947) (holding that “the constitutional principles

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

IX. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because HB 209 violates the single subject and clear title requirements of Article III, § 23 of the Missouri Constitution in that it is both under-inclusive and contains two unrelated subjects.

The Missouri Constitution states that “no bill shall contain more than one subject which shall clearly be expressed in its title” MO. CONST. art. III, § 23. This language imposes two requirements. First, all provisions of the bill must fairly relate to the same subject. Second, the title of the bill must fairly embrace the subject matter covered by the

of separation of powers applies to municipalities because their legislative bodies exercise part of the legislative power of the state.”).

act. These limitations serve to “facilitate orderly procedure, avoid surprise, and prevent ‘log rolling,’ in which several matters that would not individually command a majority vote are rounded up into a single bill to ensure passage.” *Stroh Brewery Co. v. State of Missouri*, 954 S.W.2d 323, 326 (Mo. banc 1997).

HB 209's title reads: “AN ACT to amend Chapters 71, 92, and 227, RSMo., by adding thereto eighteen new sections relating to assessment and collection of various taxes on telecommunications companies.” A031-A046. The title is affirmatively misleading. It gives a reader the mistaken impression that HB 209 pertains exclusively to taxes on telecommunications companies, without alerting the reader to Chapter 227's provisions specifying the manner in which utilities in highway right-of-ways may be constructed or relocated. Consequently, HB 209's title is under-inclusive. *See, e.g., National Solid Waste Mgmt. Ass'n v. Director of Dept. of Natural Resources*, 964 S.W.2d 818, 821 (Mo. banc 1998) (stating there was a “fatal defect” as to the legislation at issue because there was a clear title violation), *as modified on denial of reh'g*.

In addition, HB 209 contains more than one subject, because it joins two unrelated acts: (i) the Municipal Telecommunications Business License Tax Simplification Act, with an effective date of August 28, 2005, which amends chapters 71 and 92, RSMo, and regulates the municipal collection of business license taxes on telecommunications companies, and (ii) the State Highway Utility Relocation Act, with an effective date of January 1, 2006, which amends chapter 227, RSMo, and governs the relocation of electric,

telephone, telegraph, fiberoptic, and cable television utility facilities. A031-A046. As a result, HB 209's disparate provisions cannot be said to “fairly relate” to the same subject. *See, e.g., Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102-103 (Mo. banc 1994) (“the test to determine if a bill contains more than one subject is whether all provisions of the bill fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose.”).

For one or both of these reasons, HB 209 violates the requirements imposed by Article III, § 23 of the Missouri Constitution.

X. The trial court erred in granting Sprint’s motion for judgment on the pleadings or to dismiss finding HB 209 constitutional because those portions of HB 209 purporting to amend Mo. Rev. Stat. Chapters 71 and 92 are void in their entirety in that said invalid provisions are so essentially connected with the remainder of the Act they are not severable.

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

1.140.

In contrast to the typical “severability” clause, which seeks to uphold an enactment in the event that a portion is found to be unconstitutional (*see* MO. REV. STAT. § 1.140), HB 209 contains a reverse severability clause. It provides, *inter alia*: “All provisions of sections 92.074 to 92.089 are so essentially and inseparably connected with, and so dependent upon, each other that no such provision would be enacted without all others. If a court of competent jurisdiction enters a final judgment on the merits that is not subject to appeal and that declares any provision or part of sections 92.974³⁴ to 92.089 unconstitutional or unenforceable then sections 92.074 to 92.089, in their collective entirety, are invalid and shall have no legal effect as of the date of such judgment.” MO. REV. STAT. § 92.092.

This suggests a recognition of possible constitutional infirmities, and it is a clear manifestation of legislative intent in the event of such a finding. Thus, if any portion of HB 209 is found to be invalid on one of the grounds herein, then the amendments to sections 92.074 to 92.089 are void in their entirety. *See State ex rel. Transport Manufacturing & Equip. Co. v. Bates*, 224 S.W.2d 996, 1001 (Mo. banc 1949).

CONCLUSION

In this nation and state, we enjoy many freedoms that are memorialized in our federal and state constitutions. These documents are the people’s will.

³⁴This is likely a drafting error. Presumably, “92.974” should read “92.074.”

James Madison wrote in the Federalist papers that no single group in society, nor any branch of government, should hold limitless power. He wrote specifically about the tyranny of the majority and warned against “ the superior force of an interested and overbearing majority . . . [acting on] some common influence of passion.” THE FEDERALIST, NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

Since the formation of our nation, there has been an order – found in the constitution – that makes our system of government work. As part of the judicial system, we are well aware that this order is based upon the concept of three distinct branches of government: the executive, legislative and judicial branches. In our schools, our children learn that the American system designed by our forefathers depends upon checks and balances between these branches of government.

This Court is the only branch of government which can measure the acts of the General Assembly against the will of the people as expressed in the Missouri Constitution. Under no circumstance is it the other way around. The 1945 Missouri Constitution, as well as its 1875 predecessor, insure that there would not be an all powerful branch of Government. At its core, this appeal challenges the unconstitutional over-reaching on the part of the General Assembly who plainly ignored a federal court decision squarely addressing the rights of the City of Springfield to collect delinquent taxes from telephone companies doing business within the city. The General Assembly, at the urging of certain telephone companies, enacted legislation which created special retroactive exceptions to

otherwise generally applicable tax laws, for the express purpose of terminating pending litigation. The result was the General Assembly adjudicating Springfield's case and ordering its dismissal based on unsupported legislative findings.

HB 209 is an unprecedented intrusion by the General Assembly into the judiciary's sphere of authority. Any decision upholding this law could invite mischief by the General Assembly to retroactively change other court decisions or carve out exceptions for other favored industries. It certainly would create a fertile field for the lobbyists of corporations who lose in court.

Alexander Hamilton said it best: "the complete independence of the courts of justice is peculiarly essential in a limited Constitution. This conclusion does not suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both." Accordingly, where a statute conflicts with the people's will expressed in the Constitution, then "the judges ought to be governed by the latter rather than the former." THE FEDERALIST, NO. 78.

The City of Springfield and its citizens urge this Court to fulfill its constitutionally mandated role and declare HB 209 unconstitutional, reverse the trial court's judgment of September 29, 2005, and remand this matter for further proceedings.

REQUEST FOR ORAL ARGUMENT

Notice is hereby given that Plaintiff-Appellant City of Springfield respectfully requests oral argument in this case.

Respectfully Submitted,

LOWTHER JOHNSON
Attorneys at Law, LLC

BY: _____

John W. Housley

Missouri Bar Number 28708

Angela K. Drake

Missouri Bar Number 35237

Kansas Bar Number 18661

Nicole D. Lindsey

Missouri Bar Number 53492

Florida Bar Number 165174

901 St. Louis, 20th Floor

Springfield, Missouri 65806

(417) 866-7777 – Telephone

(417) 866-1752 – Facsimile

Attorneys for Plaintiff-Appellant City of
Springfield

Nancy Yendes, City Attorney

City of Springfield

P.O. Box 8368

840 Boonville, 5th Floor

Springfield, MO 65801-8368

Telephone: (417) 864-1645

Fax: (417) 864-1551

CERTIFICATE OF SERVICE

I hereby certify that the original and ten copies of Appellant's Brief, as well as a floppy disk of same conforming to Mo. R. Civ. P. 84.06(g), were hand-delivered to the Clerk of the Court for filing, and two true and correct copies of Appellant's Brief and a floppy disk containing Appellant's Brief, and, were delivered via United States Mail, first class, postage prepaid, this _____ day of January, 2006, to

Randy R. Cowherd
Haden, Cowherd, Bullock and McGinnis
2135 East Sunshine, Suite 203
Springfield, Missouri 65804

Stephen R. Clark
Polsinelli Shalton Welte Suelthaus, PC
7733 Forsyth Boulevard, 12th Floor
St. Louis, Missouri 63105

By: _____
Angela K. Drake

CERTIFICATE OF COMPLIANCE UNDER RULE 84.06(c)

COMES NOW Angela K. Drake, of lawful age and having been duly sworn, states that this Brief complies with the limitations contained in Supreme Court Rule 84.06(b), as required by Rule 84.06(c).

I further state that the number of words contained in this Brief is 28,876, and that this Brief was prepared with and formatted in WordPerfect 8.0.

I further state that a floppy disk containing the Brief is being filed herewith, and said disk is double-sided, high density, IBM-PC compatible, 1.44 MB 3 ½ inch size and said disk has been scanned by Norton AntiVirus Corporate Edition for viruses and is virus free.

STATE OF MISSOURI §
 § ss.
COUNTY OF GREENE §

Angela K. Drake, being of lawful age and being first duly sworn upon her oath, states that she is the attorney and agent above named, and the facts and matters as stated above are true according to her best information, knowledge and belief.

Angela K. Drake

Subscribed to before me this _____ day of January, 2006.

Notary Public

My Commission Expires: