

**IN THE MISSOURI SUPREME COURT**

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**CAUSE NO. SC87400**

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**CITY OF ST. LOUIS**

APPELLANT,

v.

**SPRINT SPECTRUM, L.P.**

RESPONDENT.

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**APPEAL FROM THE CIRCUIT COURT,  
TWENTY-SECOND JUDICIAL CIRCUIT  
DIVISION NO. 5**

**HONORABLE DAVID L. DOWD**

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**REPLY BRIEF OF APPELLANT**

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**POINTS RELIED ON**

**I. SPRINT IS FORECLOSED FROM ARGUING ON APPEAL THAT ST. LOUIS'S TELEPHONE COMPANY ALTERNATIVE TAX ("TCAT") DID NOT APPLY TO IT BECAUSE IN THE TRIAL COURT SPRINT FILED A MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS ASSERTING ONLY DEFENSES BASED ON THE PROVISIONS OF HB 209, AND THE EFFECT OF FILING SUCH A MOTION IS TO ADMIT THE TRUTH OF ALL WELL-PLEADED FACTS IN THE OPPOSING PARTY'S PLEADINGS, AND ST. LOUIS'S FIRST AMENDED PETITION PLED FACTS SHOWING THAT SPRINT WAS SUBJECT TO ST. LOUIS'S TCAT ORDINANCE.**

*State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122 (Mo. banc 2000)

**II. HB 209 VIOLATES THE MISSOURI CONSTITUTION, ARTICLE III, SECTION 38(a) BECAUSE IT GRANTS PUBLIC MONEY (BACK TAXES DUE AND OWING TO ST. LOUIS) TO A PRIVATE CORPORATION (SPRINT), AND IT IS NOT NECESSARY THAT THERE BE A FIXED SUM CERTAIN FOR THERE TO BE A DETERMINATION THAT "PUBLIC MONEY" IS INVOLVED.**

Mo. Const. (1945), Art. III, § 38(a)

*Curchin v. Missouri Ind. Development Bd.*, 722 S.W.2d 930 (Mo. banc 1987)

*Sommer v. City of St. Louis*, 631 S.W.2d 676 (Mo. App. E.D. 1982)

**III. HB 209 VIOLATES THE MISSOURI CONSTITUTION, ARTICLE III, § 39(5) BECAUSE IT EXTINGUISHES AN INDEBTEDNESS, LIABILITY OR**

**OBLIGATION DUE TO ST. LOUIS (THE BACK TAX LIABILITY OWED BY SPRINT) WITHOUT CONSIDERATION, IN THAT THE PURPORTED “CONSIDERATION” ENUNCIATED IN HB 209 IS ILLUSORY.**

Mo. Const. (1945), Art III, § 39(5)

*Graham Paper Co. v. Gehner*, 332 Mo. 155, 59 S.W.2d 49 (en banc 1933)

*City of Sunset Hills v. Southwestern Bell*, 14 S.W.3d 54 (Mo. App. E.D. 1999)

**IV. ST. LOUIS DOES HAVE STANDING TO CHALLENGE HB 209 AS A “SPECIAL LAW,” AND HB 209 VIOLATES THE MISSOURI CONSTITUTION, ARTICLE III, § 40, AS A “SPECIAL LAW” BECAUSE IT CREATES AN ARBITRARY AND UNREASONABLE BUSINESS CLASSIFICATION FOR WHICH THERE IS NO SUBSTANTIAL JUSTIFICATION OR, ALTERNATIVELY, IT CREATES AN ARBITRARY AND UNREASONABLE CLASSIFICATION OF MUNICIPALITIES.**

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**V. HB 209 VIOLATES THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 13 AS A RETROSPECTIVE LAW, AND THE LEGISLATURE HAS NO AUTHORITY TO WAIVE ST. LOUIS’S OBJECTION THAT HB 209 IS UNCONSTITUTIONAL BECAUSE ST. LOUIS IS NOT THE “STATE.”**

Mo. Const. (1945), Art. I, § 13

*Graham Paper Co. v. Gehner*, 332 Mo. 155, 59 S.W.2d 49 (en banc 1933)

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

## ARGUMENT

### Introduction

Sprint has filed its Respondent's Brief, responding to St. Louis's assertions that HB 209 is unconstitutional. The following replies to those arguments where Sprint has incorrectly analyzed the legal issue or misapplied the law to the facts. This reply is intended only to address items in Respondent's Brief which are incorrect, inaccurate or irrelevant. For that reason, this argument will not reply to every single point in Sprint's Brief, so as to avoid a reargument of St. Louis's original Appellant's Brief, contrary to Rule 84.04(g). However, that no reply is made herein to a specific point in the Respondent's Brief should not be taken as a concession of the point, but rather, that in light of the word limitations for this Brief, the point was adequately briefed in the original Appellant's Brief, and St. Louis stands on its argument therein as the appropriate response to Respondent's Brief.

**I. SPRINT IS FORECLOSED FROM ARGUING ON APPEAL THAT ST. LOUIS'S TELEPHONE COMPANY ALTERNATIVE TAX ("TCAT") DID NOT APPLY TO IT BECAUSE IN THE TRIAL COURT SPRINT FILED A MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS ASSERTING ONLY DEFENSES BASED ON THE PROVISIONS OF HB 209, AND THE EFFECT OF FILING SUCH A MOTION IS TO ADMIT THE TRUTH OF ALL WELL-PLEADED FACTS IN THE OPPOSING PARTY'S PLEADINGS, AND ST. LOUIS'S FIRST AMENDED PETITION PLED FACTS SHOWING THAT SPRINT WAS SUBJECT TO ST. LOUIS'S TCAT ORDINANCE.**

This replies to Point I of Respondent’s Brief. The trial court’s judgment was premised on Sprint’s Motion for Judgment on the Pleadings or to Dismiss. *See* Judgment, at 1 - 2 (L.F., 158-159) (“The Court, being advised in the premises, declares that H.B. 209 is constitutional and requires the dismissal of this case without further showing. The Court further concludes that under H.B. 209, Defendant is immune from any past tax liability. Accordingly, the Court grants the Motion.”). Sprint’s Motion was based solely on the provisions of HB 209. *See* Sprint’s Motion for Judgment on the Pleadings or to Dismiss (L.F., 4-34). Not only did Sprint not assert in this Motion that it was not subject to St. Louis’s Telephone Company Alternative Tax (“TCAT”), Sprint had no right to assert such a defense, based on the nature of a Motion for Judgment on the Pleadings or to Dismiss.

A motion for judgment on the pleadings is addressed only to the sufficiency of the opposing party’s pleadings. 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. *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. banc 2000). St. Louis’s First Amended Petition pled that the TCAT applied to “[e]very person now or hereafter engaged in a general telephone business in the City.” *See* First Amended Petition, ¶ 4 (L.F., 120). The First Amended Petition also pled, *inter alia*, that Sprint: uses telephone lines, *i.e.*, the backhaul network, in the City’s public rights-of-way, ¶ 22 (L.F., 124); furnishes or supplies “telephone service” in the City within the meaning of Missouri Department of Revenue regulations on telephone service sales tax, ¶ 23 (L.F., 125); is established and operated for the purpose of furnishing or supplying telephone

service, and is marketed as being able to furnish or supply telephone service, ¶ 28 (L.F., 126); advertises its services in print media and electronic media, and in its advertisements references “telephones” or “phones” when referring to its product, ¶ 32 (L.F., 127); and “is ‘engaged in a general telephone business in the City’ within the meaning of the City’s Telephone Company Alternative Tax provisions,” ¶ 35 (L.F., 128). Sprint’s filing of the Motion for Judgment on the Pleadings or to Dismiss had the effect of admitting all of the above allegations, and many more in the First Amended Petition. Sprint has no right in this Court to dispute facts that were admitted by the filing of its Motion.

**II. HB 209 VIOLATES THE MISSOURI CONSTITUTION, ARTICLE III, SECTION 38(a) BECAUSE IT GRANTS PUBLIC MONEY (BACK TAXES DUE AND OWING TO ST. LOUIS) TO A PRIVATE CORPORATION (SPRINT), AND IT IS NOT NECESSARY THAT THERE BE A FIXED SUM CERTAIN FOR THERE TO BE A DETERMINATION THAT “PUBLIC MONEY” IS INVOLVED.**

This replies to Point II of Respondent’s Brief. Sprint claims that HB 209 does not violate Mo. Const., Art. III, § 38(a) because no “public fund” is involved until taxes are collected and the money is paid into the treasury. Respondent’s Brief, at 16. Sprint claims that St. Louis’s claims for back taxes have not been determined to be valid or liquidated. However, Art. III, § 38(a) does not impose a “vested right” or “fixed sum certain” requirement. It simply states: “the general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation ...” The prohibition focuses on the nature of

the aid and on the character of the recipient; its application does not depend on funds having entered the public treasury, as § 38(a)'s "public credit" language plainly attests.

There is no precedent for linking the definition of "public money" to the concept of "fixed sums" or "vested rights." Instead, the "public funds" analysis is much more pragmatic: it recognizes that foregoing the collection of a tax -- via tax amnesties, tax credits, tax forgiveness, tax exemptions or tax subsidies -- depletes the local treasury and results in public aid to the recipient. *See Curchin v. Missouri Ind. Development Bd.*, 722 S.W.2d 930, 933 (Mo. banc 1987) ("This tax credit is as much a grant of public money or property and is as much a drain on the state's coffers as would be an outright payment by the state to the bondholder upon default. There is no difference between the state granting a tax credit and foregoing the collection of the tax and the state making an outright payment to the bondholder from revenues already collected ... The allowance of such a tax credit constitutes a grant of public money or property within Article III, Section 38(a) of the Missouri Constitution."); *Opinion of the Justices to the Senate*, 401 Mass. 1202, 514 N.E.2d 353, 355 (Mass. 1987) ("[T]ax subsidies ... are the practical equivalent of direct government grants."); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J. dissenting ) ("[o]ur opinions have long recognized -- in First Amendment contexts as elsewhere -- the reality that tax exemptions, credits and deductions are 'a form of subsidy that is administered through the tax system.'"); *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 791 (1973) (money available through tax credit is charge made against state treasury; tax credit is "designed to yield a predetermined amount of tax 'forgiveness' in exchange for performing a certain

act the state desires to encourage.”); *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 861 n. 5 (1995) (“the large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies.”); *Sommer v. City of St. Louis*, 631 S.W.2d 676, 680 (Mo. App. E.D. 1982) (“tax abatement does not differ significantly from an expenditure of public funds, since in either case the conduct complained of could result in the treasury’s containing less money than it ought to.”).

Through HB 209, a select portion of the telephone industry has been granted back-tax forgiveness and prospective tax relief enjoyed by no other businesses -- hardware stores, service stations, electric companies, clothing manufacturers, gas utilities, and other telephone companies -- operating in local jurisdictions. The idea that similarly-situated companies can be relieved of a tax paid by all other businesses, and not qualify as public aid recipients, is incongruous. If Sprint’s position is adopted, constitutional analysis will turn on whether the taxes have been paid, collected or adjudicated (*i.e.*, whether they have entered the public treasury), a simplistic approach rejected by the courts above and by Art. III, § 38(a) itself.

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

The “determination of what constitutes a public purpose is primarily for the

legislative department.” *Menorah Med. Ctr. v. Health & Educ. Facilities Auth.*, 584 S.W.2d 73, 78 (Mo. banc 1979). However, courts retain power -- in the discharge of their duties -- to review an expenditure to see if it serves a public or private purpose. A public purpose is not presumed from the mere passage of a legislative enactment, and “the stated purpose of the legislature, as pronounced in [the statute], is not dispositive.” *Curchin*, 722 S.W.2d at 934. Where the legislature’s judgment is found to be arbitrary and unreasonable, its determination will be overturned. *Menorah Med. Ctr.*, 584 S.W.2d at 78 (“arbitrary and unreasonable” standard).

Here, the Legislature has offered as HB 209’s purpose the following:

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

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

Properly viewed, the general assembly’s reasoning cannot withstand minimal

scrutiny. Taken to its logical conclusion, such fears would prevent tax collection actions against businesses altogether, out of concern for their litigation budgets, and cause a breakdown in the tax system statewide. The impotence of municipalities in such circumstances truly would impair the “economic well-being of the state” by making all license tax payments voluntary.

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

**III. HB 209 VIOLATES THE MISSOURI CONSTITUTION, ARTICLE III, § 39(5) BECAUSE IT EXTINGUISHES AN INDEBTEDNESS, LIABILITY OR OBLIGATION DUE TO ST. LOUIS (THE BACK TAX LIABILITY OWED BY SPRINT) WITHOUT CONSIDERATION, IN THAT THE PURPORTED “CONSIDERATION” ENUNCIATED IN HB 209 IS ILLUSORY.**

**A. Indebtedness, Liability or Obligation**

This replies to Point III of Respondent’s Brief. Relying heavily on *Beatty v. State Tax Com’n*, 912 S.W.2d 492 (Mo. banc 1995), Sprint contends that Art. III, § 39(5) does not apply because St. Louis does not seek a liquidated sum and its right to collect is uncertain. Respondent’s Brief, at 26. Nearly all of Sprint’s arguments rest on this flawed premise: because the tax does not satisfy *Beatty*’s “fixed ... sum certain” standard, it cannot qualify as a protected “indebtedness, liability or obligation” within the meaning of

Art. III, § 39(5). The telecom carriers are alone in their belief that *Beatty* governs these claims. Certainly, the general assembly did not believe that these tax obligations were beyond the scope of constitutional safeguards, because they proffered “consideration ... for the immunity and dismissal of lawsuits ...” § 92.089.1, RSMo. The general assembly had to conclude that these are constitutionally-protected debts, liabilities or obligations, otherwise no “consideration” would have been required. Thus, a *Beatty* analysis is unnecessary.

Unlike the real estate taxes at issue in *Beatty*, there is no comparable uncertainty with respect to license taxes, which typically are due each month and at a specified rate. If it were otherwise, there would be no way for telephone service providers to pay taxes under the TCAT -- as at least some of them have done for years. Further, the carriers would be unable to comply with the terms of HB 209, which impose the same requirements on a going-forward basis, albeit at a reduced rate. The amount of taxes due has been, and will continue to be, ascertainable through mere mathematical calculation. The term “fixed” means no more than capable of ascertainment by reference to a specified rate.

Requiring a *Beatty*-type “assessment and levy” in this context would not only eliminate the self-reporting and payment of license taxes, but it would overrule *Graham Paper Co. v. Gehner*, 332 Mo. 155, 59 S.W.2d 49 (en banc 1933) and read the words “indebtedness, liability or obligation” out of Art. III, § 39(5) altogether. The Court in *Graham* clearly understood the people’s intent in adopting Art. III, § 39(5), when it stated:

The language of this constitutional provision [predecessor of Art. III, § 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.*

59 S.W.2d at 52 (emphasis added).

### **B. Consideration**

Art. III, § 39(5) prohibits the General Assembly from releasing or extinguishing a corporate indebtedness, liability or obligation “without consideration.” Sprint cites the prepackaged “consideration” in HB 209, namely, “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 ...” § 92.089.1. Sprint claims that “this Court gives great deference to Legislative declarations,” Respondent’s Brief, at 31, citing *Laret Investment Co. v. Dickmann*, 345 Mo. 449, 134 S.W.2d 65 (en banc 1939). However, even *Laret* acknowledges that legislative declarations are not binding. *Id.* at 68. Despite a legislative declaration, the task of interpreting legislation is still a judicial function.

*Murray v. City of St. Louis*, 947 S.W.2d 74, 79 (Mo. App. E.D. 1997).

This so-called “consideration” reads like it was written by Sprint’s and other telecommunications companies’ corporate lobbyists; it is completely illusory. The “resolution of uncertain litigation” clause particularly reads like the boilerplate language of a standard release, not a statute. 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. App. St.L. 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.”).

Ever since *City of Sunset Hills v. Southwestern Bell*, 14 S.W.3d 54, 59 (Mo. App. E.D. 1999), wireless carriers have been on notice that they are “telephone companies.” The alleged “uncertainty” that the wireless carriers allegedly are giving up -- *i.e.*, that they are not “telephone” companies -- does not constitute any consideration at all, let alone “full and adequate consideration.” In light of the *City of Sunset Hills* decision, plus the federal district court’s holding in *City of Jefferson, et al. v Cingular Wireless, LLC, et al.*, Cause No. 04-0499-CV-C-NKL, Doc. #221, Order (W.D. Mo. June 29, 2005), *slip. op.*, at 1 (“[T]he Plaintiffs’ gross receipt tax ordinances are enforceable and ... they apply to mobile telephone services just as they apply to land line telephone services.”), the wireless telephone companies cannot seriously contend they reasonably believed that any ordinance applicable to a “telephone company,” was not applicable, at all relevant times,

to their business.

The other cited bases for “consideration” are also illusory. There will still be no “uniformity,” because the municipalities’ respective tax bases are based on revenue taken in for the 2005 fiscal year, and tax bases undoubtedly are affected by the tax rate of the local jurisdiction. There will still not be uniform tax rates in Missouri -- the net effect will likely be that each jurisdiction will have its current tax rate reduced by about half. But since the jurisdictions all started with different tax rates, the rates will not be uniform. The “administrative convenience” apparently is a reference to the telecommunications companies’ administrative convenience, because the municipalities’ convenience is not significantly helped by removing all of the information from the local administrator and requiring the administrator to deal with the Director of Revenue in order to get any verifying information concerning the collection of this tax. Finally, the “cost savings” will probably offset about one-fiftieth of the amount St. Louis has lost in back taxes as a result of this legislation. If the foregoing sounds as though St. Louis does not believe the proffered consideration in HB 209 is real, then St. Louis has adequately conveyed its point.

**IV. ST. LOUIS DOES HAVE STANDING TO CHALLENGE HB 209 AS A “SPECIAL LAW,” AND HB 209 VIOLATES THE MISSOURI CONSTITUTION, ARTICLE III, § 40, AS A “SPECIAL LAW” BECAUSE IT CREATES AN ARBITRARY AND UNREASONABLE BUSINESS CLASSIFICATION FOR WHICH THERE IS NO SUBSTANTIAL JUSTIFICATION OR, ALTERNATIVELY, IT CREATES AN ARBITRARY AND UNREASONABLE**

## **CLASSIFICATION OF MUNICIPALITIES.**

### **A. Standing**

This replies to Point IV of Respondent's Brief. Initially, Sprint argues that St. Louis lacks standing to raise a "special law" challenge, because it has not been directly affected by HB 209 in the same manner as utilities and businesses that have paid the license taxes. Respondent's Brief, at 40-41. However, "[a]rguments ... that local government units are 'mere arms of the state' -- with no independent right to attack statutes that affect them -- have been expressly rejected in favor of a standing doctrine concerned primarily with 'sufficient controversy between the parties' regarding matters which 'directly affect them.'" *Arsenal Credit Union v. Giles*, 715 S.W.2d 918, 921 (Mo. banc 1986). Here, the municipalities have been "directly affected" by HB 209, because their telephone license taxes have been "capped", their back-tax claims have been extinguished, and they have been treated differently than Jefferson City and Clayton in both of these regards. Thus, given the public importance of the controversy, its immediate impact on substantial segments of the population, and its direct bearing on local services, it would be an abdication of judicial responsibility to do what the carriers suggest, namely, to defer ruling on the constitutionality of HB 209, even though the constitutional issues are fully briefed and presently before the Court.

### **B. Arbitrary And Unconstitutional Business Classifications**

There can be little doubt that HB 209 creates tax disparities between natural classes (the telephone industry versus the gas, water and electric industries), within natural classes (those telephone companies that paid taxes versus those telephone

companies that did not), and between Missouri municipalities (Jefferson City and Clayton versus all other municipalities -- discussed, *infra.*). To the extent that any of these distinctions are based on immutable characteristics, such as the municipal classifications (*see* §§ 92.086.10 and 92.089.2, RSMo), the law is closed-ended and “facially special”. *See, e.g., Harris v. Mo. Gaming Com’n*, 869 S.W.2d 58, 65 (Mo. banc 1994) (where legislation created class of casino boats by geographic location and by precise size and type of boat, which effectively included only one class member, it was “a facially special law under Article III, § 40(30).”). The unconstitutionality of such a special law is presumed, and the parties defending HB 209 must demonstrate a “substantial justification” for the special treatment. *Id.*

Sprint’s burden in this instance is not to suggest a conceivable reason, or even a rational reason, for HB 209’s distinctions, because its unconstitutionality is presumed. Only a “substantial justification” will suffice. Mistaking the burden, Sprint asserts a “rational” basis for the legislation, which is insufficient as a matter of law. Compounding this error, the justification -- that pending litigation provides a legitimate basis for classifying private businesses under Article III, § 40 -- is unsupported by precedent. No court has ever held that curbing the expenses of private litigants to a tax dispute is befitting constitutional recognition.

### **C. Arbitrary And Unconstitutional Municipal Classifications**

HB 209 exempts certain municipalities from having to adjust their business license tax rates and to dismiss their back-tax claims. §§ 92.086.10 and 92.089.2, RSMo. The exemptions are based upon, *inter alia*, dates that have passed (“prior to November 4,

1980”), preexisting ordinance language (“had an ordinance imposing a business license tax on telecommunications companies which specifically included the words ‘wireless’, ‘cell phones’, or ‘mobile phones’”), and pending litigation (“had taken affirmative action to collect such tax”). The classifications do not permit a municipality’s status to change, *i.e.*, to come within such classifications in the future, but rather grant exemptions based on unchanging, historical facts.

Only two municipalities qualify, or will ever qualify, for such exemptions -- Jefferson City and Clayton, Missouri. Given HB 209’s prerequisites, there is no way for other municipalities to qualify for these exemptions in the future. Sprint does not seem to disagree: it does not bother to explain how other municipalities might qualify for the exemptions; instead, it simply justifies such discrimination on the basis of the Hancock Amendment: “Municipalities that complied with their obligations under Hancock should not be lumped together with those that did not.” Respondent’s Brief, at 49. Further, Sprint suggests that “by excusing Hancock-compliant municipalities from certain HB 209 provisions, the General Assembly promoted the policies underlying the amendment, thereby satisfying the substantial justification requirement.” Respondent’s Brief, at 49. But Sprint’s justification is imagined and it appears nowhere in the text of HB 209. Further, it is contradictory. Whereas previously the justification for disparate treatment was pending litigation, now it is based on Hancock compliance. There is no need for such creative lawyering or shifting justifications, because the general assembly has spoken: HB 209 is necessary because “costly litigation which have or may be filed by Missouri municipalities against telecommunications companies, concerning the

application of certain business license taxes to certain telecommunications companies, and to certain revenues of those telecommunications companies, ... is detrimental to the economic well being of the state ..." § 92.089.1, RSMo. Given the legislature's goal, *i.e.*, eliminating costly litigation against telephone companies, it is readily apparent that no "substantial justification" exists for carving-out Jefferson City and Clayton. This is self-evident from the fact that Jefferson City continues to pursue telephone tax litigation today. *See City of Jefferson, et al., v. Cingular Wireless, LLC, et al., supra.* Thus, the statutory exemptions do not advance the legislative goal, but actively undermine it; they are irrational and unfounded under even the most lenient standard.

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

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

legislation under any accepted constitutional theory.

**V. HB 209 VIOLATES THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 13 AS A RETROSPECTIVE LAW, AND THE LEGISLATURE HAS NO AUTHORITY TO WAIVE ST. LOUIS'S OBJECTION THAT HB 209 IS UNCONSTITUTIONAL BECAUSE ST. LOUIS IS NOT THE "STATE."**

This replies to Point V of Respondent's Brief. It remains St. Louis's position that HB 209 violates Mo. Const., Art. I, § 13, which prohibits a law "retrospective in its operation." Such laws "take away or impair vested 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." *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 232 S.W.2d 897, 900 (en banc 1950). St. Louis submits it had a vested right to collection of past due tax money under its TCAT ordinance which was due and owing for every month prior to the enactment of HB 209. *Graham*, 59 S.W.2d at 51. Interestingly, Sprint responds to St. Louis's contention by arguing: first, that the Legislature waived St. Louis's right to collection of that tax money; second, if the Legislature was prohibited from waiving it, then St. Louis never had such a vested right, anyway.

Sprint states in its Brief, "[I]f Appellant's position on the scope of the protections in Article I § 13 is accepted, it would render meaningless Article III, § 39(5), which specifically governs the circumstances under which the Legislature may release or extinguish debts owed to municipalities," Respondent's Brief, at 34. This statement is based on a flawed premise, namely that Art. III, § 39(5) is an affirmative grant of legislative power. Art. III, § 39(5) is *not* an affirmative authorization of the Legislature's

power; it never states that the General Assembly “may release or extinguish debts owed to municipalities.” Rather, all of Art. III, § 39 is a *restriction* on the Legislature’s power:

The general assembly shall not have power:

\* \* \*

(5) 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 ...

There is no disharmony between Art. I, § 13 and Art. III, § 39(5): both are prohibitory. It may well be that the prohibition on retrospective laws in Art. I, § 13 overlapped the prohibition in Art. III, § 39(5).

St. Louis does not dispute Sprint’s contention that municipalities derive their power to tax from the state; but Sprint’s contention misses the point, namely, that at the relevant time periods at issue in this lawsuit, the State *had already given* St. Louis the power to tax telephone service. Section 92.045, RSMo, passed in 1967, gave St. Louis the power to impose a business license tax. St. Louis used that power to enact an ordinance taxing those engaged in a telephone business. At all times prior to August 28, 2005, St. Louis had the right to tax the telephone business. What Sprint extrapolates from its base contention, that the state has the right to reach back in time to declare that St. Louis, prior to August 28, 2005, never had the power to tax certain businesses, is what St. Louis disputes.

Sprint cites no case which has held that the Missouri General Assembly has the

power to retroactively waive the rights of a municipality. *Savannah R-III Sch. Dist. v. Public Sch. Ret. Sys.*, 950 S.W.2d 854 (Mo. banc 1997), held that the “State” may waive its objection to a retrospective law. But what constitutes the “State” remains ambiguous. In fact, reading the opinions issued in *Savannah*, the only reference to whether municipal corporations should be considered the State, for purposes of Art. I, § 13, comes from the dissent. And it seems fairly clear that the dissent would not characterize municipal corporations as the State:

Of course, one could argue that municipal corporations are state instrumentalities, too. If one follows the majority, municipalities cannot challenge the legislature’s enactment of laws retrospective in operation, either. But do we really want to say that? I think not. Local governments exist as much to insulate citizens from distant government as to carry out the state’s duties.

*Id.* at 860-861 (Robertson, J. dissenting).

The principal opinion in *Savannah* stated, “the retrospective law prohibition was intended to protect citizens.” *Id.* at 858. It should be remembered, as the dissent in *Savannah* did, that local governments are instrumental in protecting citizens from the state’s otherwise all-encompassing power. No better example of the state legislature’s all-encompassing power exists than in this case. That power can, if unchecked, morph into abuse, as one writer has suggested:

[R]etroactive lawmaking may promote legislative self-dealing. Legislators may curry favor with influential campaign contributors to ensure their

reelection. By either eliminating or strictly applying the Missouri constitutional prohibition on retrospective laws, the governed may be better protected against favoritism and graft.

Retrospective Lawmaking in Missouri: Can School Districts Assert Any Constitutional Rights Against the State?, 63 Mo. L. Rev. 833, 848 (1998). When it comes to issues like the power to tax, municipalities assert the rights of citizens who would otherwise be powerless to challenge corporate behemoths such as Sprint, who have already shown they can exert influence over the Legislature in a way no ordinary citizen could.

It should be beyond argument that St. Louis had a vested right to the tax proceeds from the TCAT for the time period prior to August 28, 2005. A “vested right” is “a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand by another.” *La-Z-Boy Chair Co. v. Director of Economic Development*, 983 S.W.2d 523, 524 (Mo. banc 1999). A municipality has a vested right to a matured tax debt. *Graham*, 59 S.W.2d at 51. For Sprint to contend, as it does, that St. Louis did not have a vested right unless and until it went to court and got a judgment against Sprint for back-tax liability is to turn logic on its head and to make the state tax protest procedure virtually meaningless. Moreover, to claim as Sprint does, that *Graham* found a tax debt was a “vested right” under Art. III, § 39(5), but not under Art. I, § 13, is not just to parse words, but to mince them into an indistinguishable mush. *Graham* cites two earlier cases, *State ex rel. Kolen v. Southwestern Bell Tel. Co.*, 316 Mo. 1008, 292 S.W. 1037 (1927) and *Smith v. Dirckx*, 283 Mo. 188, 223 S.W. 104 (en banc 1920) for the holding that income taxes, even

though not due until the end of the year, cannot be retrospectively affected by a new law enacted before the end of the year. 59 S.W.2d at 52. Noting those two cases, *Graham* stated, “It was there held that an inchoate tax, though not yet due or payable, is such an obligation or liability 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.” *Id.*

On the basis of the foregoing, St. Louis had a vested right to its past due taxes imposed by ordinance. HB 209’s attempt to retroactively eliminate that vested right cannot stand under Art. I, § 13. And the Legislature cannot waive a municipality’s vested rights under the rubric that it is waiving rights of the State.

### **CONCLUSION**

Sprint contends in its Brief, “Appellant cannot credibly argue that HB209 ‘readily and clearly’ violates the constitution but need 123 pages of arguments, relying on extraneous evidence.” Respondent’s Brief, at 7. In point of fact, it took 123 pages to detail all of the constitutional provisions that HB 209 offends, because it offends so many of them. Moreover, with respect to the arguments advanced by St. Louis concerning the unconstitutionality of HB 209, Sprint’s purported first “defense” to a majority of those arguments is not that HB 209 is constitutional, but rather, that St. Louis and the other municipalities lack standing to challenge it under the constitutional provision. See Respondent’s Brief, Points V, VI, IX and XI. While no one disputes Sprint’s right to assert a standing argument, Sprint is in no position to cast aspersions on the municipalities’ argument based on the amount of ink consumed. HB 209 is a bad bill,

which unfortunately the legislative and executive branches of this State were willing to allow go through. It is up to this Court to put a stop to it. HB 209 must be declared unconstitutional, and the judgment of the trial court must be reversed.

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06**

The undersigned hereby certifies that this Brief of Appellant was prepared in the format of Microsoft Word, using Times New Roman typeface in font size 13. This Brief contains approximately 6,519 words of text. The accompanying diskette, containing a complete copy of Brief of Appellant, has been scanned and found to be virus-free. The name, address, bar and telephone number of counsel for Appellant are stated herein and the Brief has been signed by the attorney of record.

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Mark Lawson

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of the Reply Brief of Appellant, along with a copy of the Brief on a diskette, scanned and determined to be virus-free, were served by U.S. Mail, postage prepaid, on March 27, 2006, upon:

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