IN THE
SUPREME COURT OF MISSOURI

No. SC 87208

ST. LOUIS COUNTY, MISSOURI, *et al.*,
Plaintiffs/Appellants
v.
AT&T WIRELESS SERVICES, INC., *et al.*,
Defendants/ Respondents

Consolidated into

CITY OF UNIVERSITY CITY, MISSOURI, *et al.*,
Plaintiffs/Appellants
v.
AT&T WIRELESS SERVICES, INC., *et al.*,
Defendants/ Respondents

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

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

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to art. V, § 3 of the Missouri Constitution because this case involves the validity of a state statute. Plaintiff St. Louis County, Missouri ("County") brought this action to collect delinquent business license taxes from cell phone companies who derive revenue from providing exchange telephone services in the unincorporated area of St. Louis County. Senate Substitute for Senate Committee Substitute for House Committee Substitute for House Bill No. 209 (hereafter "HB 209"), LF[1] 102-120,which took effect on August 28, 2005, purports to require dismissal of suits previously filed against telecommunications companies to collect municipal business license taxes (§92.089.2, RSMo), including this action, and purports to grant telephone companies immunity from having to pay business license taxes, up to and including July 1, 2006 (§92.089.2, RSMo), including taxes currently due and owing to cities and counties.

A justiciable controversy exists between Plaintiffs and Defendants. HB 209, if valid, would diminish the tax base retroactively, and thereby increase the tax

1 "LF", as used throughout this brief, refers to the Legal File of Appellants St. Louis County, Missouri, *et al.*

burden on resident taxpayers, like Plaintiff Eugene Leung[2], for police protection and other essential county services. LF 91 at ¶125. In addition, HB 209 involves a direct expenditure of public funds, because, *inter alia*, it requires the Missouri department of revenue to spend money to "collect, administer, and distribute telecommunications business license tax revenues," to "publish a list," to "furnish any municipality with information it requests," and to "forecast whether a shortfall or excess in municipal revenues for each municipality is likely to occur" (§§92.086.1, 92.086.3, 92.086.5, 92.086.7, 92.086.11, RSMo). LF 91 at ¶126.

This appeal arises from the judgment dated September 16, 2005, A1, LF 123, and the amended judgment dated October 14, 2005, A3, LF 125, declaring that HB 209 is valid and constitutional and requires dismissal of this case, as consolidated.[3] Although the judgment and amended judgment do not resolve the Defendants' counterclaims seeking attorney fees and costs, the trial court found that there is no just reason for delay.

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[2] Director of Revenue Eugene Leung sues as a resident taxpayer and as a County official. LF 90-92 at ¶¶120, 124, 127. Director is a resident of the unincorporated area of County. LF 91 at ¶124.

3 County's case was consolidated into the earlier case brought by Plaintiffs City of University City, Missouri, *et al.* LF 122.

STATEMENT OF FACTS

On June 15, 2004, County filed this suit to collect delinquent business license taxes from Defendants, who have failed and refused to pay such taxes for many years, LF 74 at ¶ 52. County's license tax ordinance[4] imposes a license or occupational tax on public utilities for the privilege of engaging in the business of supplying or furnishing exchange telephone service in the unincorporated area of County. LF 79 at ¶ 74. Defendants are public utilities who provide exchange telephone services to customers in the unincorporated area of County. LF 74 at ¶ 51, LF 81 at ¶82. The telephone services that Defendants provide allow their subscribers to transmit telephonic messages to, from and within unincorporated County. LF 75 at ¶ 56. Defendants place, construct and modify their facilities in the unincorporated areas of County and use land line telephone facilities in County's public rights-of-way. LF 78 at ¶ 68, 69.

On July 14, 2005, Governor Matt Blunt signed HB 209, LF 102-120, which purports to require dismissal of this and other suits to collect delinquent business license taxes from telecommunications companies.

§ 92.089.2 of HB 209, LF 109-110, provides:

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4 In 1969, County enacted Ordinance 5,214, LF 96-98, which imposes the license tax authorized by Section 66.300 RSMo, LF 72 at ¶¶47 and 48.

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 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 § 92.086 or §s 92.074 to 92.098 after July 1, 2006. 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 § 92.086.

Id.

On August 5, 2005, Defendants filed a motion for judgment on the pleadings or to dismiss County's petition on the basis of HB 209 contending that (i) HB 209 requires dismissal of this lawsuit, and (ii) this case must be dismissed because HB 209 grants Defendants immunity. LF 30-60.

On August 26, 2005, pursuant to leave of court, County, Director of Revenue Eugene Leung ("Director"), and County Counselor Patricia Redington ("County Counselor") filed an amended petition ("the Amended Petition"), which seeks a declaration that providers of cell phone service in unincorporated County are liable for gross receipts tax under County's ordinance and a declaration that HB 209 is unconstitutional and that its provisions are not severable. LF 62-121. Director sues as a resident taxpayer and as a County official. LF 90-92 at ¶¶120, 124, 127. Director is a resident of the unincorporated area of County. LF 91 at ¶124. As a resident, he pays taxes to the State of Missouri and to County, and he relies upon the police protection supported by County's license taxes, including those on Defendants. *Id.* As the Director of Revenue, his duties and powers include, *inter alia*, the collection of the taxes imposed by County's license tax

ordinance. LF 90 at ¶120. County Counselor sues in her capacity as the county counselor of St. Louis County, Missouri. LF 89-90 at ¶116. As the county counselor, her powers and duties include, *inter alia*, the prosecution of actions to collect taxes owing to County. *Id.* The parties and the Court agreed that the Defendants' Motion for Judgment on the Pleadings and/or to Dismiss would be considered and directed against the Amended Petition. LF 61.

The Amended Petition alleges that HB 209 is unconstitutional because it violates numerous provisions of the Missouri Constitution:

- By gratuitously extinguishing the corporate tax debts owed by Defendants to County, it violates the prohibition on the use of public monies to aid private enterprise in art. III, § 38(a) of the Missouri Constitution. (LF 83 at ¶92)
- By gratuitously extinguishing the corporate tax debts owed by Defendants to County, it violates Mo. Const. art. III, § 39(5), which prohibits the general assembly from releasing a corporate indebtedness, liability or obligation due a county or municipality. (LF 83 at ¶93)
- Section 92.089 of HB 209 violates the prohibition on retrospective laws in Mo. Const. art. I, § 13 in that: (i) it takes away County's right to receive taxes that are currently due and owing by Defendants; (ii) it grants immunity for prior bad acts occurring "up to and including July 1, 2006" (§92.089.2,

RSMo); and (iii) it eliminates all remedies available for past transgressions. (LF 83-84 at ¶ 94)

- By arbitrarily classifying businesses and municipalities, HB 209 violates Mo. Const. art. III, § 40, which prohibits the legislature from passing local and special laws. In particular, based solely on unchanging, historical facts, HB 209 (a) arbitrarily exempts certain municipalities from having to adjust their business license tax rates. 92.086.10, RSMo.; (b) arbitrarily grants special rights, privileges and immunities to telephone utilities (*e.g.*, tax forgiveness, lawsuit dismissal, etc.) not enjoyed by other similarly situated utilities (*e.g.*, gas, water, electric, etc.); and (c) arbitrarily grants special rights, privileges and immunities to telephone companies that failed to pay taxes, but not to telephone companies (wireline and wireless) that did. (LF 84 at ¶ 95)
- Section 92.089 of HB 209 violates the Equal Protection Clause of art. I, § 2 of the Missouri Constitution, in that, by providing certain taxpayers an amnesty to avoid unpaid gross receipts taxes due County, 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, it (a) arbitrarily and

unreasonably treats similarly situated taxpayers differently; and (b) discriminates against persons who paid the taxes; and it does so without any legitimate remedial purpose. (LF 84 at ¶ 96)

- Section 92.089(2) of HB 209 violates separation of powers principles set forth in art. II, § 1, of the Missouri Constitution in that it (a) encroaches on the judiciary by directing a particular outcome in pending cases; and (b) encroaches on the powers granted to the executive branch by preventing Plaintiffs from conducting tax audits and taking legal action to collect the taxes that were, are now, and will be due and owing by Defendants under County's license tax ordinance. (LF 84-85 at ¶97)
- HB 209 violates the tax uniformity requirement of art. X, § 3 of the Missouri Constitution by creating two separate tax rates of 5% for those who timely paid, and 0% for those who did not pay, thus arbitrarily creating non-uniformity of taxation of subjects which fall in the same class or category, and thereby detrimentally impacting County and Director. (LF 86 at ¶102)
- The constitutionally invalid provisions of HB 209 are not severable as provided in § 92.092 of HB 209, and therefore, those portions of HB 209 relating to taxation of telecommunications companies are totally and completely invalid. (LF 86 at ¶103)

On September 16, 2005, the trial court entered its order and judgment dismissing Plaintiffs' original and amended petition with prejudice and declaring that HB 209 is constitutional and that, under HB 209, Defendants are immune from any past tax liability. A1, LF 123. On October 14, 2005, the trial court entered an amended judgment that clarifies its finding, pursuant to Mo. Sup. Ct. R. 74.01(b), that there is no just reason for delay, and therefore, the judgment is final for purposes of appeal. A3, LF 125. Plaintiffs appealed. LF 128.

In addition, Plaintiffs hereby adopt and incorporate by reference the statement of fact section of the Brief of Plaintiff/Appellants City of University City, *et al.* (hereafter "University City Brief").

POINTS RELIED ON

I. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because HB 209, which purports to require dismissal of this suit to collect County's business license taxes, is unconstitutional in that, by gratuitously extinguishing the corporate tax debts owed by Defendants to County, HB 209 violates the prohibition on the use of public monies to aid private enterprise contained in art. III, § 38(a) of the Missouri Constitution.

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

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

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

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

Mo. Const. art. III, § 38(a)

II. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because HB 209, which purports to require dismissal of this suit to collect County's business license taxes, is unconstitutional in that, by gratuitously extinguishing the corporate tax debts owed by Defendants to County, HB 209 violates Mo. Const. art. III, § 39(5), which prohibits the General Assembly from releasing, without consideration, a corporate indebtedness, liability or obligation due a municipality or county.

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

First Nat. Bank of St. Joseph v. Buchanan County, 205 S.W. 2d 725 (Mo. 1947)

State ex rel. Dawson v. Falkenhainer, 15 S.W. 2d 342 (Mo. *banc* 1929)

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

Mo. Const. art. III, § 39(5)

III. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because HB 209, which purports to require dismissal of this suit to collect County's business license taxes, violates Mo. Const. art. I, § 13 because it is a law that is retrospective in its operation when it takes away County's right to receive taxes that are past due and owing by Defendants and eliminates all enforcement mechanisms for collecting back taxes.

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

Doe v. Roman Catholic Diocese, 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)

Hallmark Cards, Inc. v. Director of Revenue, 159 S.W.3d 352 (Mo. *banc* 2005)

Mo. Const. art. I, § 13

IV. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because § 92.089(2) of HB 209 violates the separation of powers principles set forth in art. II, § 1 of the Missouri Constitution by encroaching on the executive function of collecting taxes.

*Missouri Coalition for the Environment v. Joint Committee on Administrative Rules***,** 948 S.W. 2d 125 (Mo. *banc* 1997)

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

U.S. v. Nixon, 418 U.S. 683 (1974)

Mo. Const. art. II, § 1

§66.300 RSMo

V. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because § 92.089(2) of HB 209 violates the separation of powers principles set forth in art. II, § 1, of the Missouri Constitution by encroaching on the judiciary by directing a particular outcome in this lawsuit.

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

United States v. Klein, 13 Wall. 128, 80 U.S. 128(1871)

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

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)

Mo. Const. art. II, § 1

§66.300 RSMo

VI. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss in that, by arbitrarily classifying businesses and municipalities, HB 209 is a local special law that violates Mo. Const. art. III, § 40 and that detrimentally impacts Plaintiffs, including resident taxpayers, like Director.

Laclede Power & Light Co. v. City of St. Louis, 182 S.W.2d 70 (Mo. *banc* 1944)

Planned Ind. Expansion Authority v. Southwestern Bell Tel. Co., 612 S.W.2d 772 (Mo. *banc* 1981)

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)

Mo. Const. art. III, § 40

VII. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss in that, HB 209, which purports to require dismissal of this suit to collect County's business license taxes, violates the tax uniformity requirement of art. X, § 3 of the Missouri Constitution by arbitrarily and

unreasonably creating different tax rates for those who timely paid, and for those who did not pay, thus arbitrarily creating non-uniformity of taxation of subjects which fall in the same class or category, all to the detriment of Plaintiffs, including resident taxpayers, like Director.

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

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

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

Mo. Const. art. X, § 3

VIII. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because § 92.089 of HB 209 violates the Equal Protection Clause of art. I, § 2 of the Missouri Constitution, in that, by providing certain taxpayers an amnesty to avoid unpaid gross receipts taxes due Plaintiffs, based exclusively on Defendants' "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 (a) arbitrarily and unreasonably treats similarly situated taxpayers differently; and (b) discriminates against persons who paid the taxes; and it does so without any legitimate remedial

purpose, all to the detriment of Plaintiffs, including resident taxpayers, like Director.

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

State ex rel. Hostetter v. Hunt, 9 N.E.2d 676 (Ohio 1937)

Armco Steel Corp. v. Dept. of Treasury, 358 N.W.2d 839 (Mich. 1984)

State of Kansas v. Parrish, 891 P.2d 445 (Kan. 1995)

IX. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because even if HB 209 was constitutional, Defendants are not entitled to judgment as a matter of law because their assertion of "subjective good faith immunity" and other defenses is not sufficient to overcome the facts alleged in Plaintiffs' amended petition.

Ste. Genevieve School District R-II v. Board of Aldermen of the City of St. Genevieve, 66 S.W.3d 6 (Mo. *banc* 2002)

Neel v. Strong, 114 S.W.3d 272 (Mo. App. E.D. 2003)

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

3 Williston on Contracts § 7:45 (4th ed. 2004)

ARGUMENT

Introduction

This section largely follows the argument in the standard of review section of the City of St. Louis's Brief in case no. SC 87400 with permission.

County's declaratory judgment claims, LF 62-121, invoke the special statutory jurisdiction of § 527.010, *et seq.*, RSMo. The test for sufficiency of a petition for declaratory judgment is whether the pleaded facts along with any reasonable inferences therefrom demonstrate the parties' entitlement to a declaration of rights or status. *City of St. Peters v. Concrete Holding Co.*, 896 S.W.2d 501, 503 (Mo. App. E.D. 1995). The court accepts as true all well-pleaded facts and their concomitant reasonable inferences, ignoring all conclusions. *Id*. If the facts demonstrate any justiciable controversy, the trial court should declare the rights of the parties. *Id*. It is improper for a trial court to decide the merits of a properly pleaded declaratory relief action by dismissal. *Moutray v. Perry State Bank*, 748 S.W.2d 749, 753 (Mo. App. E.D. 1988).

On 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.2d 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*. Thus, the Court must assume, for purposes of the Defendants' motions, that Defendants have failed and refused to pay County's license taxes for many years, LF 74 at ¶ 52. "The position of a party moving for judgment on the pleadings is similar to that of a movant on a motion to dismiss; *i.e.*, assuming the facts pleaded by the opposite party to be true, these facts are, nevertheless, insufficient as a matter of law." *Id*, quoting *Madison Block Pharmacy v. U.S. Fidelity*, 620 S.W.2d 343, 345 (Mo. *banc* 1981). When reviewing the dismissal of a petition, the pleading is granted its broadest intendment, all facts alleged are treated as true, 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).

I. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because HB 209, which purports to require dismissal of this suit to collect County's business license taxes, is unconstitutional in that, by gratuitously extinguishing the corporate tax debts owed by Defendants to County, HB 209 violates the prohibition on the use of public monies to aid private enterprise contained in art. III, § 38(a) of the Missouri Constitution.

The standard for review of a trial court's dismissal of a petition for failure to state a claim is *de novo*. *Vogt v. Emmons*, 158 S.W.3d 243, 247 (Mo. App. E.D. 2005).

This following argument largely follows the argument in Point 3 of the University City Brief in this case with permission.

The tax giveaway envisioned by HB 209 - *via* the immunity and lawsuit dismissal provisions of 92.089.2 – amounts to a naked gift of public financial resources to Defendants and thus falls directly within the prohibition of art. III, § 38(a) of the Missouri Constitution, which bars the use of public monies to aid private enterprise.

If the primary object 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 v. Missouri Industrial Development Board*, 722 S.W.2d 930, 934 (Mo. banc 1987), *reh'g denied*, quoting *State ex rel. City of Jefferson v. Smith*, 348 Mo. 554, 154 S.W.2d 101, 102 (Mo. banc 1941).

The vast majority of state constitutions contain provisions that expressly bar the use of public monies to aid private enterprise. Missouri's Constitution is no exception. It contains multiple, specific prohibitions barring the state and its political subdivisions from lending its credit or faith to, or subscribing to or

owning stock in, or giving its resources away to, private companies. *See, e.g.* Mo. Const. art. III, §§ 38(a) and 39, and art. VI, §§ 23 and 25. The state's forgiveness of the telephone companies' tax debts in this instance falls directly within these constitutional prohibitions. It constitutes a "grant of public money" in aid of private enterprise and, rather than benefiting the public at large, merely serves to enrich a small group of corporations.

Art. III, § 38(a) provides admirable clarity on this subject: "[t]he 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). It is undisputed that tax revenues qualify as "public money or property" within the meaning of art. III, § 38(a). *See, e.g., Champ v. Poelker*, 755 S.W.2d 383, 388 (Mo.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'"), *quoting State ex rel. St. Louis Police Relief Ass'n. v. Igoe*, 340 Mo. 1166, 107 S.W.2d 929, 933 (Mo. 1937). Further, the term "corporation," as used in this section, "uniformly refers to private or business organizations of individuals" like the defendants in this case. *City of Webster Groves v. Smith*, 340 Mo. 798, 102 S.W.2d 618, 619 (Mo. 1937). Thus, "foregoing the collection of [a] tax" on private business, such as the municipal license taxes at issue, constitutes a

grant of public aid within the meaning of art. III, § 38(a). *See, e.g.*, *Curchin* at 933:

> "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 art. III, § 38(a) of the Missouri Constitution."[5]

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5 Courts throughout the country join Missouri in holding that tax amnesties, tax credits, tax forgiveness, tax exemptions, and tax subsidies qualify as expenditures of public money. In *Sommer v. City of St. Louis*, 631 S.W.2d 676, 680 (Mo.App.E.D. 1982), this Court explained: "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." Similarly, see *Opinion of the Justices to the Senate*, 401 Mass. 1202, 514 N.E.2d 353, 355 (Mass. 1987) ("tax subsidies...are the practical equivalent of direct government grants"); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S.

The concerns animating the adoption of art. III, § 38(a) over a century ago, and similar constitutional provisions around the country, are no less pressing today. As Judge Welliver's opinion for this Court noted in striking down the state tax credit scheme in *Curchin*, at 934-5:

> "Along in 1820 and '30 and '40[,] it was the custom of the state to give large sums of money to railroads, canals, banks and so forth and

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221, 236, 107 S.Ct. 1722, 1731, 95 L.Ed.2d 209 (1987) (Scalia, J. dissenting) ("[o]ur opinions have long recognized . . . 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"). The fact that the funds never enter the public treasury is nevertheless a use of public money subject to constitutional scrutiny. *See, e.g., Rosenberger*, 115 S.Ct. at 2523-24.

the custom became so abused that nearly all the state constitutions wrote such sections as this in their fundamental law...art. IV, § 46 of the Missouri Constitution of 1875, the predecessor to art. III, § 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 art. III, § 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...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 art. III, § 38(a) of the Missouri Constitution. 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."[6]

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6 *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

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. However, it is the uncollected tax revenues which are harmful to the "economic well being of the state" and the citizens of County, not the cost of the litigation. 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, but it cannot serve the "economic well being" of the state to refuse to prosecute just because it may be expensive. This is especially true where, as here, the enforcement action leads to the recovery of millions of dollars in revenue of County.

The tax give-away envisioned by HB 209 is an even more direct and abusive grant of public aid to the private sector than the tax credit scheme rejected by this Court in *Curchin*, which required several conditions to be met before public aid could flow to private business. *See Curchin*, 722 S.W.2d at 933. HB 209 amounts to a naked gift of public financial resources in defiance of the constitutional ban.

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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).

Not only is this harmful to taxpayer residents of County such as Plaintiff Eugene Leung, but it provides an unfair competitive advantage to telephone companies at the expense of other businesses and utilities already operating in local jurisdictions. For example, electric companies, gas companies, water companies, and landline telephone companies have paid municipal license taxes for decades. In carving out an exemption for telephone companies, the General Assembly has penalized the law-abiding and discriminated against all other businesses in an arbitrary fashion.

Given the unequivocal language, history and purpose of art. III, § 38(a), this Court's interest in maintaining the integrity of the Missouri Constitution and in protecting public financial resources must not yield to legislative overreaching, *i.e.*, a tax give-away to select companies premised upon nothing more than the pretext of advancing "the economic well being of the state" (§92.089.1, RSMo).[7] To do otherwise would render the prohibitive wording of Missouri's constitutional aid limitations meaningless.

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7 In deciding the primary effect of a grant of public financial aid, "the stated purpose of the legislature, as pronounced in [the statute], is not dispositive. Rather, we must make the determination based upon the history and purpose of Article III, Section 38(a) of the Missouri Constitution and upon cases in which we have applied that constitutional provision." *Curchin*, 722 S.W.2d at 934.

II. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because HB 209, which purports to require dismissal of this suit to collect County's business license taxes, is unconstitutional in that, by gratuitously extinguishing the corporate tax debts owed by Defendants to County, HB 209 violates Mo. Const. art. III, § 39(5), which prohibits the General Assembly from releasing, without consideration, a corporate indebtedness, liability or obligation due a municipality or county.

This following argument largely follows the argument in Point II of the City of Springfield's Brief in case no. SC 87238 with permission.

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 county. 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).

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

A. <u>The gross receipt taxes due to County constitute a matured "indebtedness" as well as a "liability or obligation" under art. III, § 39(5) of the Missouri Constitution.</u>

The wireless telephone companies will likely argue that their alleged defense to the County ordinance, specifically the applicability of the ordinance to their "commercial mobile radio service," renders their liability to County 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 art. 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.[8] Judge Laughrey 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

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[8] *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. 1942); *Werner v. Riebe et al*, 296 N.W. 422 (N.D. 1941); *Fontenot v. Hurwitz-Mintz Furniture Co*, 7 So2d 712 (La. 1942); *State v. Pioneer Oil and Refining Co.* 292 S.W. 869 (Tex. 1927);*City of Louisville v. Louisville Ry. Co*, 63 S.W.14 (Ky. 1901); *Daniels v. Sones*, 157 So.2d 626 (Miss. 1962); *Sloan v. Calvert*, 497 S.W.2d 125 (Tex. 1973); *Smith v. State*, 420 S.W.2d 204 (Tex. 1967); *Iverter v. State ex rel Gillum*, 83 P.2d 193 (Okla. 1938).

> 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 art. III, § 39(5) of Missouri Constitution).

In short, merely because the Defendants 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 County 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 remain an inchoate lien until there is 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 they are incurred or shortly thereafter, are self-executing, and, in County's case, are due every quarter. LF 73 at ¶ 49.

On this point specifically, 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 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].); *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 addressed 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 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 an older opinion from our sister state, the Iowa Supreme Court's decision is cited at length here for the clarity of its analysis relating to constitutional infirmities similar to those evident in this case:

> *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 Defendants' tax liabilities is without consideration.

Having established that Defendants' 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 Defendants' tax liability is "without consideration," as contemplated by art. III, § 39(5). Apparently feeling concern about the fate of HB 209 in the courts, the General Assembly attempts to inoculate the bill against invalidity by asserting consideration:

> 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 art. III, Section 39(5) of the Missouri Constitution, for the immunity and dismissal of lawsuits outline in subsection 2 of this section.

RSMO. § 92.089.1. Each of these findings of "consideration" is 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. Section 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 art. III, § 39(5). This "finding" is analogous to the legislature declaring 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).

1. <u>"The resolution of uncertain litigation" is not "consideration" in this case.</u>

In Missouri, as elsewhere, consideration has been described as "either . . . a benefit conferred upon the promisor or . . . a legal detriment to the promissee,

which means that the promissee 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." RSMO. § 92.089.1.

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 "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. 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.").[9] 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").

Without question, County 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."

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[9] *See also Daniel v. Snowdoun 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.").

First, a federal district court already has entered judgment on related claims and found certain wireless telephone companies liable for back taxes due and owing under municipal gross receipt tax ordinances. *City of Jefferson, v. Cingular Wireless, LLC*, cause no. 04-4099-CV-C-NKL (W.D.Mo. June 9, 2005) (order granting summary judgment).

Second, courts here and around the country have found the wireless telephone companies' argument, that they are not "telephone companies" as that term is used in the gross receipt tax ordinances, to be without merit. *See, e.g., City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo.App.E.D. 1999) ("Southwestern Bell [Mobile] fell within the class of 'telephone companies' under section 94.270, such that the City had the authority to impose a business license fee on it."), *mtn. for rehearing and/or to transfer to Supreme Court denied, application to transfer denied. See also Airtouch Communications, Inc. v. Dept. of Revenue, State of Wyoming*, 76 P.3d 342, 349-51 (Wyo. 2003); *Southwestern Bell Mobile Systems, Inc. v. Arkansas Pub. Serv. Comm'n.*, 40 S.W.3d 838, 843 (Ark.App. 2001); *City of Lebanon Junction v. Cellco Partnership*, 80 S.W.3d 761 (Ky.App. 2001); *Campanelli v. AT&T Wireless Services, Inc.*, 706 N.E.2d 1267 (Ohio 1999); *Central Kentucky Cellular Tel. Co. v. Commonwealth of Kentucky, Revenue Cabinet*, 897 S.W.2d 601, 603 (Ky.App. 1995).

In sum, 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 University City lawsuit, 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 contesting the payment of taxes, namely, the institution of a tax protest suit under RSMo. § 139.031. By foregoing this exclusive method for disputing taxes, the telephone companies waived any and all defenses to the underlying claims. As fully explained in *Metts v. City of Pine Lawn*, 84 S.W.3d 106, 109 (Mo. 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 . . . .

Id. (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." RSMO. § 92.089.1. Presumably, this legislative finding refers to the fact that, henceforth, "the

maximum rate of taxation on gross receipts shall not exceed five percent for bills rendered on or after July 1, 2006 . . . " RSMO. § 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* RSMO. § 92.086.10. Such a variance, by definition and in terms of practical effect, is not "uniform."

Further, the cap does not qualify as "full and adequate consideration" or generate "cost savings" to the numerous municipalities with rates currently above 5% – rates based upon decisions of elected representatives and often as a result of popular votes – which must forego collection of back-taxes and survive on dramatically less revenue in the future (*e.g.*, University City - 9%, Ellisville - 7%, Ferguson - 6%, Gladstone - 7%, Independence - 9.08%, Jennings - 7.5%, Kirkwood - 7.5%, Maplewood - 9%, Northwoods - 10%, St. Joseph - 7%, Warson Woods - 9%, Winchester - 6%). R-806 to R-956[10]. Clearly, the cap does not generate "cost savings" to these municipalities, but rather monetary loss, and by

[10] "R" refers to the Record on Appeal of City of University City, Missouri *et al.* in this case.

obligating the wireless telephone companies to do *less* than that which they are legally obligated to do, it cannot serve as "full and adequate consideration."

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

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 any of the municipalities with tax rates currently above 5% to somehow gain in the future, hence, the understandable hesitancy and equivocation on the part of the General Assembly. Indeed, such caution is required, because there is no assurance that these 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)). Thus, if just one carrier stops doing business in one municipality or enters bankruptcy or loses a customer – either thirty days or thirty years from now – that municipality has been denied HB 209's "consideration" as a matter of law.

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, Defendants are liable under the tax ordinances as written and as they existed prior to passage of HB 209. Thus, in the future, the wireless telephone companies simply will be complying with the law as it already exists, albeit at a reduced and preferred rate. They will be paying the 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. 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. App. W.D. 1998) (same).

"Consideration" is not antiquated legal finery, but that which distinguishes a contract from a gift. *See, e.g., Deli v. Hasselmo*, 542 N.W.2d 649, 656 (Minn. App. 1996) (citing *Baehr v. Penn-O-Tex Oil Corp.*, 104 N.W.2d 661, 665 (Minn. 1960)); *Westly v. U.S. Bancorp*, 7 Cal. Rptr. 3d at 841 ("The cancellation of a debt may constitute a gift even though nothing is transferred."). The General

Assembly's tax give-away, both retroactively and prospectively, designed to benefit the few at the expense of the many, can only be considered a "gift" (or, in today's parlance, "corporate welfare"). All of its proffered bases for "consideration" being legally infirm, this Court should declare HB 209 invalid as violative of art. III, § 39(5), reverse the trial court's order of dismissal based on the invalid statute, and remand this case for further proceedings.

III. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because HB 209, which purports to require dismissal of this suit to collect County's business license taxes, violates Mo. Const. art. I, § 13 because it is a law that is retrospective in its operation when it takes away County's right to receive taxes that are past due and owing by Defendants and eliminates all enforcement mechanisms for collecting back taxes.

The standard for review of a trial court's dismissal of a petition for failure to state a claim is *de novo*. *Vogt v. Emmons*, 158 S.W.3d 243, 247 (Mo. App. E.D. 2005).

If HB 209 is unconstitutional, the Trial Court was obliged to overrule Defendants' motion for judgment on the pleadings and to dismiss. HB 209 is unconstitutional because, *inter alia*, it retrospectively deprives County of accrued taxes and of the right to sue for such taxes.

This following argument largely follows the argument in Point 5 of the City of St. Louis's Brief in case no. SC 87400 with permission.

The Constitution of Missouri prohibits a law "retrospective in its operation." art. I, § 13 of the Missouri Constitution. This prohibition is long-standing.[11] While the Constitution does not define the term, laws within its 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*, 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). 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).

[11] Prior to adoption of Missouri's 1945 Constitution, the Constitution of 1875, art. II, § 15 contained the same language.

Many municipalities[12] for years have had ordinances taxing "telephone" business. The authority for imposing such taxes appears in various "business license" tax statutes in Ch. 66, 92 and 94, R.S. Mo. Nothing in HB 209 purports to expressly repeal or amend any of these taxing statutes.

A. Section 92.089.1 of H.B.209 purports to recharacterize past due County taxes which had already matured as a debt to County at the time HB 209 became effective, as not liquidated.

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.[13] If § 92.089 1 is construed to operate prospectively, analysis under art. I, § 13 is not needed. However, all of the cases on appeal before this Court contained claims by municipalities for unpaid municipal business license tax debts, in some cases going

12 "Municipalities", as used though out this brief, refers to County and cities.

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

back as far as 1996. To the extent this section purports to invalidate those debts which were incurred prior to HB 209's effective date, it offends art. 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 S.W.3d 783, 785-786 (Mo. *banc* 1999). 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 made by another." *Hallmark Cards, Inc. v. Director of Revenue*, 159 S.W.3d 352, 354 (Mo. *banc* 2005). It "must be something more than a mere expectation based upon an anticipated continuance of the existing law." *Id*. For the reasons set forth in Point II of this brief, County's right to collect the past due taxes is vested.

Section 92.089.1 purports to recast the municipalities' claims for collection of these 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 a vested legal entitlement 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*, *supra*, at 152. Statutes pre-existing HB 209 authorized these municipalities to tax telephone business by ordinance. Not only did these municipalities enact such taxing ordinances, they began

collection proceedings for the tax debts which had already matured, all before HB 209 became law. To the extent this provision is construed to cancel those debts, it is unconstitutional.

B. Section 92.089.2 of H.B. 209 purports to retroactively create immunity from past due County taxes which had already matured as a debt to County at the time HB 209 became effective, based on beliefs which were not valid grounds for non-payment at the time the taxes were due.

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 § 92.086 or §s 92.074 to 92.098 after July 1, 2006.

Again, as noted in Part A, *supra*, if this provision is construed to operate prospectively only, an art. I, § 13 analysis is unnecessary. However, to the extent this section purports to create immunity from 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," "cell phone," "wireless" or other-named services were the products of local governments and determined by local ordinances. No "immunity" from taxation existed as tax liabilities were being incurred during this time period, unless local ordinance provided for it, and the record shows no local ordinance providing such immunity. Any attempt to create an immunity from past-due taxation clearly impairs a "vested right" within the meaning of cases construing art. I, § 13 and its ban on laws retrospective in operation. Under the existing law in effect, there was

a tax liability created by ordinance upon each person engaged in a general telephone business based upon that individual's gross receipts. There was legal title to the collection of the tax debt each month that the tax liability was incurred. *Graham*, *supra*. This provision purports to take away the vested right to collect that tax.

Immunity under § 92.089.2 purports to be created based on the 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 item heretofore thought to be the exclusive property 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. There was a method for avoiding taxes prior to HB 209 — paying taxes under protest and filing suit under Ch. 139, R.S. Mo. Several wireless providers did make such payments under protest.

By characterizing past actions (or, in this instance, inaction) which at that time waived the right to challenge taxes, as instead giving them the legal effect of immunity, HB 209 impairs a vested right of County and cities which filed suit to collect these taxes. 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 § 139.031, R.S. Mo. *Metts v. City of Pine Lawn*, 84 S.W.3d 106,

109 (Mo. App. E.D. 2002); *See also B & D Inv. Co., Inc. v. Schneider*, 646 S.W.2d 759, 763 (Mo. *banc* 1983) (§ 139.031 tax protest was exclusive remedy for taxpayer to recover payments of tax). The municipalities filed suit against those non-payers, and at the time suit was filed, had the right to claim that their failure to pay under protest was a waiver of the defense that the taxes were illegal. Section 92.0989 2. retrospectively effaces that vested right. The Trial Court relied on this provision to dismiss the County's suit with prejudice.[14]

[14] Even though there was no process *nisi* by motion, affidavit, or hearing to find facts relating to the Defendants' subjective good faith belief.

C. Section 92.089.2 purports to require County to dismiss its lawsuit to collect past taxes due and owing, and thereby retroactively deprives County of a remedy which existed when suit was filed, prior to the effective date of HB 209.

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 § 92.086.

This provision makes no attempt to limit its application to suits filed only after HB 209 became law, but rather, all suits, whenever filed, including those filed by the current appellant municipalities, all of whom filed suits prior to the effective date of HB 209.

When the municipalities filed their suits, there was a legal right to collect on matured tax debts. As noted in Part A, *supra*, the tax debts of various wireless providers under the respective municipal ordinances had matured and were, in fact, unpaid. In short, prior to the enactment of HB 209, the municipalities held legal

title to a cause of action for the collection of tax debt, which action they had already begun to prosecute. Clearly, the municipalities had a "vested right" to pursue their collection actions.

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, art. I, § 13 prohibits the legislative revival of the cause of action. *Uber v. Missouri Pacific R.R. Co.*, 441 S.W.2d 682 (Mo. 1969); *see also Wentz v. Price Candy Co.*, 352 Mo. 1, 175 S.W.2d 852 (1943); *State ex rel. Research Medical Center v. Peters*, 631 S.W.2d 938 (Mo. App. 1982).

862 S.W.2d at 341. 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.

Based on the foregoing, HB 209 offends the Constitution, art. I, § 13, in that it purports to be retrospective in operation.

Unfortunately, the Missouri Supreme Court has stated that "the retrospective law prohibition was intended to protect citizens and not the state, [thus] the legislature may constitutionally pass retrospective laws that waive the rights of the state." *Savannah R-III School Dist. v. Public School Retirement System of Missouri*, 950 S.W.2d 854, 858 (Mo. banc 1997), rehearing denied. Because the complaining party in *Savannah Schools* was a school district – *i.e.*, an "instrumentalit[y] of the state" or a "creature[] of the legislature" – the Court found that the general assembly could "waive or impair the vested rights of school districts without violating the retrospective law prohibition." *Id.*[42]

[42] "The controversy in Savannah R-III School District v. Public School Retirement System centered on the retrospective enactment by the Missouri legislature 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 school districts' right to recovery. Despite a clear constitutional prohibition against retrospective laws in Article 1, section 13 of the Missouri Constitution, the retroactive law at issue in *Savannah R-III School District* withstood constitutional challenge. The Missouri Supreme Court upheld the seemingly unconstitutional retrospective law by means of a broad assertion that the legislature may

In the 5-2 decision in *Savannah*, the dissent sharply criticized this 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:

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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. The Savannah R-III School District case illustrates the power of distant government to tread upon the rights which belong, at least in part, to local communities." Turner, *Retrospective Lawmaking In Missouri: Can School Districts Assert Any Constitutional Right Against The State?*, 63 Mo.L.Rev. 833, 833 (Summer 1998).

> 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 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 case[15], which the Missouri courts adopted without ever engaging in any reasoned analysis therefor, and which is contrary to the plain language of art. I, § 13.

Unlike the plaintiffs in *Savannah*, the plaintiffs in this suit include resident taxpayers and public officials who are adversely affected by the statute in question. *See Ste. Genevieve School District R-II v. Board of Aldermen of the City of Ste. Genevieve*, 66 S.W.3d 6 (Mo. *banc* 2002); *Arsenal Credit Union v. Giles*, 715 S.W. 2d 918, 920 (Mo. *banc* 1986); and *Federal Express Corp. v. Skelton*, 578 S.W.2d

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

1, 6 (Ark. *banc* 1979). Director sues as a resident taxpayer and as a County official. LF 90-92 at ¶¶120, 124, 127. As the Director of Revenue, his duties and powers include, *inter alia*, the collection of the taxes imposed by County's license tax ordinance. LF 90 at ¶120. County Counselor sues in her capacity as the county counselor of St. Louis County, Missouri. LF 89-90 at ¶116. As the county counselor, her powers and duties include, *inter alia*, the prosecution of actions to collect taxes owing to County. *Id.* Further, HB 209 does not resolve a legal dispute between two statutory instrumentalities of government, as did the statute at issue in *Savannah;* it legislatively dismisses tax enforcement actions against private entities.

Because HB 209 retrospectively deprives County of accrued taxes and of the right to sue for such taxes, it is unconstitutional and invalid, and the trial court erred in granting Defendants' motion to dismiss or for judgment on the pleadings.

IV. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because § 92.089(2) of HB 209 violates the separation of powers principles set forth in art. II, § 1 of the Missouri Constitution by encroaching on the executive function of collecting taxes.

The standard for review of a trial court's dismissal of a petition for failure to state a claim is *de novo*. *Vogt v. Emmons*, 158 S.W.3d 243, 247 (Mo. App. E.D. 2005).

If HB 209 is unconstitutional, the Trial Court was obliged to overrule Defendants' motion for judgment on the pleadings and to dismiss. HB 209 is unconstitutional because, *inter alia*, it encroaches on the executive function of collecting taxes.

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.

As Judge Price noted in *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules***,** 948 S.W. 2d 125 (Mo. *banc* 1997)**,** "Art. II, § 1 strictly confines the power of the legislature to enacting laws and does not permit the legislature to execute laws already enacted." *Id.* at 134. "[T]he constitution intends for the legislature's power to cease when a bill becomes law and the executive branch begins to exercise its power to administer and enforce that law." *State Auditor v. Joint Committee on Legislative Research*, 956 S.W. 2d 228, 231 (Mo. *banc* 1997).

In 1967, the General Assembly enacted §66.300 RSMo.[16], delegating to County the authority to impose a utilities license tax. Pursuant to that delegated authority, County's license tax ordinance[17] imposes a license tax on public utilities for the privilege of engaging in the business of supplying or furnishing exchange telephone service in the unincorporated area of County. LF 79 at ¶ 74. The power

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16 Section 66.300 RSMo., A6, provides:

> The county council or other legislative authority of any first class county having a population of over six hundred thousand inhabitants is hereby authorized to impose a license tax whereby every public utility engaged in the business of supplying or furnishing electricity, electrical power, electrical service, gas, gas service, water, water service, sewer service, telegraph service or exchange telephone service in the part of the county outside incorporated cities shall pay to the county, as a license or occupational tax, an amount not in excess of five percent of the gross receipts derived from such business within the unincorporated areas of the county.

17 In 1969, County enacted Ordinance 5,214, LF 96-98, which imposes the license tax authorized by Section 66.300 RSMo, LF 72 at ¶¶47 and 48.

of enforcing the law authorized by §66.300 RSMo. belongs to County[18] and its director of revenue and county counselor[19], not to the General Assembly. By

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18 On November 6, 1979, the voters of St. Louis County adopted a revised charter, which provides that "the county shall have all powers possible for a county to have under the constitution and laws of Missouri . . . and all powers necessary and proper to carry into execution any other power." St. Louis County Charter ("County Charter"), Section 1.030, LF 82 at ¶¶ 84 and 85; LF 100.

19 Director and County Counselor have executive power to enforce County's license tax ordinance. Section 4.340 of the County Charter, A8, LF 121, directs and authorizes Director to collect County's business license tax. LF 90-91 at ¶¶ 120 and 121. Section 5.030 of County Charter, A9, LF 101, authorizes County Counselor to prosecute actions to collect taxes owing to County. LF 82 at ¶¶ 86, 87 and LF 89-90 at ¶116. Article VI, Section 18 (b) of the Missouri Constitution, grants charter counties the power to provide for "the exercise of all powers and duties of counties and county officers prescribed by the constitution and laws of the state." Sections 4.340 and 5.030 of County Charter are reasonably necessary to carry out the taxing power granted in Mo. Const. Article VI, section 18 and § 66.300 RSMo. *See Flower Valley Shopping Center, Inc. v. St. Louis County*, 528 S.W. 2d 749, 754 (Mo. *banc* 1975).

mandating dismissal of this action and forbidding audits and new enforcement actions, HB 209 impermissibly controls execution of the law authorized by §66.300 RSMo. *See State Auditor* at 233.

Although the General Assembly may attempt to control the executive branch by amending §66.300, *see Missouri Coalition for the Environment* at 134, it has not done so. HB 209 does not expressly[20] amend §66.300, nor does the title to the bill make any reference to §66.300 or Chapter 66. Section 92.083.2 provides: "Nothing in this section shall have the effect of repealing any existing ordinance imposing a business license tax on a telecommunications company; provided that a city with an ordinance in effect prior to August 28, 2005, complies with the provisions of section 92.086." Consequently, County's license tax ordinance remains in full force and effect following the enactment of HB 209. Insofar as the definitions[21] and formula in HB 209 may affect the calculation of the tax, the new

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

21 Pursuant to §92.083.1, LF 104, the terms "gross receipts" and "exchange telephone service" are to be construed, <u>on or after July 1, 2006</u>, to have the meanings set forth in § 92.083.1. *Id.* (emphasis added).

definitions and formula do not take effect until July 1, 2006. §92.086.6[22], LF 106-107.

The General Assembly's mandate to dismiss this enforcement action is no different than directing a prosecutor to dismiss a pending criminal case.[23] It is not the business of the General Assembly to decide when the executive branch should dismiss a lawsuit. *See State Auditor* at 233 ("it is not the business of the legislative branch to operate executive agencies."); *U.S. v. Nixon*, 418 U.S. 683, 693 (1974)("The executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case").

Moreover, HB 209 creates a gap period in enforcement. Section 92.086.3 provides that the Missouri director of revenue shall begin collecting the tax on July 1, 2006. Until then, neither the Missouri director of revenue nor County may conduct audits or file suit against any telecommunications company that fails to

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22 Section 92.086.6 provides: "Such tax rates shall be the applicable business license tax rate for bills rendered on or after July 1, 2006."

23 The decision whether to prosecute Defendants civilly or criminally is within the discretion of County Counselor. *See City of Warrenton v. Pickens*, 906 S.W. 2d 411, 413 (Mo. App. E. D. 1995).

pay business license taxes. § 92.089.2. Regardless of whether the gap period "enforcement moratorium" is applied to tax delinquencies that occurred before enactment of HB 209 or after, it encroaches on executive branch powers to enforce existing law. This evisceration of executive power is far more egregious than the legislative overreaching in *State Auditor*, where the legislative branch sought to post-audit the management performance of an executive branch agency, and in *Missouri Coalition for the Environment*, where the legislative branch sought to control execution of rule making authority. As a result, §92.089(2) of HB 209 violates Mo. Const. art. II, § 1. *See Missouri Coalition for the Environment* at 134.

For these reasons, §92.089(2) of HB 209 is unconstitutional and invalid as applied to County, County Counselor, and Director, and the trial court erred in granting Defendants' motion to dismiss or for judgment on the pleadings.

V. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because § 92.089(2) of HB 209 violates the separation of powers principles set forth in art. II, § 1 of the Missouri Constitution by encroaching on the judiciary by directing a particular outcome in this lawsuit.

The standard for review of a trial court's dismissal of a petition for failure to state a claim is *de novo*. *Vogt v. Emmons*, 158 S.W.3d 243, 247 (Mo. App. E.D. 2005).

Section 92.089(2) of HB 209 is unconstitutional and invalid because it encroaches on the judicial function by directing a particular outcome in this lawsuit, thereby violating Mo. Const. art. II, § 1, which 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." As a result, the trial court erred in granting Defendants' motion to dismiss or for judgment on the pleadings.

The Missouri Supreme Court "has consistently held that the doctrine of separation of powers, as set forth in Missouri's constitution, is 'vital to our form of government,' [citations omitted], because it 'prevent[s] the abuses that can flow from centralization of power.' [citations omitted]." *Mo. Coalition for the Environment v. Joint Comm. On Admin. Rules*, 948 S.W.2d 125, 132 (Mo. *banc* 1997). "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*, 956 S.W.2d 228 (Mo. *banc* 1997), 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).

As *State Auditor* illustrates, Missouri courts refer to US Supreme Court cases for helpful analysis, even though the federal constitution does not mandate separation of powers as emphatically as art. II, § 1 Mo. Const. The Supreme Court has identified three sets of circumstances where legislation encroaches on judicial power in a manner that the United States Constitution forbids. *City of Chicago v. United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 423 F. 3d 777, 783 (7th Cir. 2005), citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995).

> First, as explained in *United States v. Klein*, 13 Wall. 128, 80 U.S. 128(1871), Congress cannot "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id*. at 146. Second, "Congress cannot vest review of the decisions of art. III courts in officials of the Executive Branch." *Plaut*, 514 U.S. at 218 (citing *Hayburn's Case*, 2 U.S. 408 (1792). Third, Congress

cannot command federal courts to retroactively open final judgments. *Plaut*, 514 U.S. at 219.

Id.

In *Klein*, the Supreme Court refused to give effect to a statute requiring the courts to consider the acceptance of a pardon as conclusive proof of disloyalty and to dismiss for lack of jurisdiction any case in which the claimant had accepted a pardon, finding that Congress had "inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147. In reaching that conclusion, the Court stated:

> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? . . . We are directed to dismiss the appeal. . . Can we do so without allowing one party to the controversy to decide in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?
>
> We think not.

Id. at 146.

By requiring the dismissal of pending suits to collect delinquent business license taxes and by granting immunity based on the subjective beliefs of telecommunications companies, § 92.089(2) of HB 209 attempts to prescribe a rule of decision to the judicial department, thus encroaching on the judicial department in the same manner as the legislation struck down in *Klein*.

Before HB 209 was enacted, the courts adjudicating claims against wireless telephone companies were obliged to determine whether wireless telecommunications service is telephone service. In *City of Sunset Hills v. Southwestern Bell Mobile Systems*, 14 S.W.3d 54 (Mo. App. E.D. 2000), the Eastern District decided that it is. "The [wireless telecommunications] services Southwestern Bell provided clearly fell within the definition or genus of a telephone company . . . Southwestern Bell's assertion that it was not a telephone company is disingenuous in light of the fact that it relied on the [Federal Telecommunications Act] to defeat City's license fee ordinance . . . Southwestern Bell fell within the class of 'telephone companies' under § 94.270, such that COUNTY had the authority to impose a business license fee on it." *Id.* at 59. Without expressly amending or repealing prior law, §92.089.2 of HB 209 retroactively alters the Eastern District's construction of §94.270 RSMo and allows each wireless telecommunications service provider to decide in its own favor by simply asserting that it "subjectively" believed, notwithstanding the Eastern

District's decision to the contrary, that wireless telecommunications service is not telephone service. Moreover, by mandating dismissal of pending suits, HB 209 prescribes a rule of decision that, like the statute struck down in *Klein*, requires the court to declare that its jurisdiction has ceased. Given these qualities, HB 209 is clearly "adjudicative" in nature, and it forces this Court to engage in a charade of the judicial process. Alone, or in combination, such attributes have 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 case holding to the contrary, 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"); *Roth v. Yackley*, 396 N.E.2d 520, 522 (Ill. 1979) (legislature's declaration that amendatory act applied to events occurring before its effective date

was an assumption of the role of a court in contravention of the principle of separation of powers; "it is the function of the judiciary to determine what the law is and to apply statutes to cases"); *Harris v. Commissioners of Allegany County*, 100 A. 733, 735-36 (Md.App. 1917) (act violated separation of powers principles, where although "in the form of a law, [it was] clearly in effect a legislative decree or judgment in favor of petitioner against the county commissioners of Allegany county, and in the nature of judicial action"); *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). *See also State ex rel. Dawson v. Falkenhainer*, 15 S.W.2d 342, 343 (Mo. *banc* 1929) ("[t]o the courts is given authority to construe the Constitution"). In such circumstances, there is little difference between HB 209 entering judgment in favor of defendants, or a court doing so, since both involve the application of law.

The fact that HB 209 singles out specific litigation for legislative treatment[24] amplifies its "adjudicative" qualities. As Justice Powell warned in

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24 HB 209 reads in part: "If any municipality, prior to July 1, 2006, has brought litigation..." §92.089.2, RSMo. The lawsuits to which this provision applies are: (i) This case; (ii) *City Collectors of Wellston and Winchester v. SBC*

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. 919, 966 (1983) (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.

Unlike the statute upheld in *Savannah R-III School District v. Public School Retirement System of Missouri*, 950 S.W. 2d 854 (Mo. *banc* 1997), the subjective immunity provision of HB 209 contravenes a final adjudication of a court of this state, i.e. the *City of Sunset Hills* decision, where the Eastern District specifically found that Southwestern Bell's belief that it was not a telephone company was disingenuous. Further, HB 209 does not resolve a legal dispute between two

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Communications, Inc., et al., No. SC 87207, currently pending in this Court; (iii) *City of Jefferson, et al., v. Cingular Wireless, LLC, et al.*, cause no. 04-4099-CV-C-NKL, currently pending in the U.S. District Court for the Western District of Missouri; (iv) *City of St. Louis v. Sprint Spectrum, L.P.*, No. SC 87400, currently pending in this Court; and (v) *City of Springfield v. Sprint Spectrum, L.P.*, No. SC 87238, currently pending in this Court.

statutory instrumentalities of government, as did the statute at issue in *Savannah;* it legislatively dismisses tax enforcement actions against private entities. Finally, unlike the plaintiffs in *Savannah,* the plaintiffs in this suit include resident taxpayers and public officials who are adversely affected by the statute in question. *See Ste. Genevieve School District R-II v. Board of Aldermen of the City of Ste. Genevieve*, 66 S.W.3d 6 (Mo. *banc* 2002), holding that the superintendent of the school district, who was also a resident taxpayer, had standing to challenge a city's authority to amend a redevelopment project, given that the challenged amendment would cause pecuniary loss to the city and school district; *Arsenal Credit Union v. Giles*, 715 S.W. 2d 918, 920 (Mo. *banc* 1986), holding that the tax assessor and collector of revenue for the City of St. Louis had standing to challenge, on constitutional grounds, a tax exemption statute that would deny the city its opportunity to collect certain personal property taxes; *Federal Express Corp. v. Skelton*, 578 S.W.2d 1, 6 (Ark. *banc* 1979) ("we hold that a public official may question the constitutionality of a legislative enactment where public interests or public rights are involved"); Albus, *Taxpayer Standing In Missouri,* 54 J.Mo.B. 199, 202 (July-August 1998) ("public officials, to the extent they are elected, can claim they better represent all Missouri taxpayers, indeed all citizens, when it comes to deciding what illegal acts should be pursued").

Because the legislature may not exercise power that has been granted to the judicial branch, § 92.089(2) of HB 209 is unconstitutional and invalid, and the trial court erred in granting Defendants' motion to dismiss or for judgment on the pleadings.

VI. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss in that, by arbitrarily classifying businesses and municipalities, HB 209 is a special law that violates Mo. Const. art. III, § 40 and that detrimentally impacts Plaintiffs, including resident taxpayers, like Director.

In support of this argument, Plaintiffs hereby adopt and incorporate by reference Section 5 of the University City Brief and Section VII of this Brief.

VII. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss in that, HB 209, which purports to require dismissal of this suit to collect County's business license taxes, violates the tax uniformity requirement of art. X, § 3 of the Missouri Constitution by arbitrarily and unreasonably creating different tax rates for those who timely paid, and for those who did not pay, thus arbitrarily creating non-uniformity of taxation of subjects which fall in the same class or category, all to the detriment of Plaintiffs, including resident taxpayers, like Director.

The standard for review of a trial court's dismissal of a petition for failure to state a claim is *de novo*. *Vogt v. Emmons*, 158 S.W.3d 243, 247 (Mo. App. E.D. 2005).

§ 92.089(2) of HB 209 is unconstitutional and invalid because it violates the tax uniformity requirement of art. X, § 3 of the Missouri Constitution by arbitrarily and unreasonably creating two separate tax rates for those who timely paid, and for those who did not pay, thus creating non-uniformity of taxation of subjects which fall in 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. "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. "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). 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.*

The Legislature cannot arbitrarily split natural classes in order to create subclasses to which different rules of taxation apply.

> 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 at 1045.

HB 209 defines the subject of the tax as "telecommunications companies" and then, in §92.098, 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 County but

eliminates the liability for the entire amount of the unpaid tax, thus creating an *ex post facto* tax exemption. The tax rate for those who paid County's business license tax is 5%. 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 art. 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 of Kansas 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.").

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 art. X, § 3, since, instead of protecting the potential of the tax base, it instead "invades and to the extent of its reach destroys such base" and "is not based on differences reasonably related to the purposes of the law" and hence creates 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.* 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, and thereby increasing the tax burden on resident taxpayers such as Plaintiff Eugene Leung. 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 § 94.270 RSMo, is not in the public interest and should not be sustained. *See State ex rel. Transp. Mfg. & Equip. Co.* 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 art. 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 art. 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 art. 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 art. 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 art. 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 art. 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 art. 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, unless checked, its ramifications will be felt by ordinary citizens for decades to come and in ways that the General Assembly has yet to imagine.

Because HB 209 arbitrarily splits the natural class of telecommunications companies into those who have paid and those who have not paid, § 92.089(2) of HB 209 is unconstitutional and invalid, and the trial court erred in granting Defendants' motion to dismiss or for judgment on the pleadings.

VIII. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because § 92.089 of HB 209 violates the Equal Protection Clause of art. I, § 2 of the Missouri Constitution, in that, by providing certain taxpayers an amnesty to avoid unpaid gross receipts taxes due Plaintiffs, 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 (a) arbitrarily and unreasonably treats similarly situated taxpayers differently; and (b) discriminates against persons who paid the taxes; and it does so

without any legitimate remedial purpose, all to the detriment of Plaintiffs, including resident taxpayers, like Director.

In support of this argument, Plaintiffs hereby adopt and incorporate by reference Point 9 of the University City Brief and Section VII of this brief.

IX. The Trial Court erred in granting Defendants' motion for judgment on the pleadings or to dismiss because even if HB 209 was constitutional, Defendants are not entitled to judgment as a matter of law because their assertion of "subjective good faith immunity" and other defenses is not sufficient to overcome the facts alleged in Plaintiffs' amended petition.

The standard for review of a trial court's dismissal of a petition for failure to state a claim is *de novo*. *Vogt v. Emmons*, 158 S.W.3d 243, 247 (Mo. App. E.D. 2005).

Even if HB 209 was constitutional, Defendants are not entitled to judgment as a matter of law because their assertion of "subjective good faith immunity" and other defenses is not sufficient to overcome the facts alleged in the Amended Petition.

The Motion is properly granted only if, from the face of the pleadings, Defendants are entitled to judgment as a matter of law. *Ste. Genevieve School District R-II v. Board of Aldermen of the City of St. Genevieve*, 66 S.W.3d 6, 11

(Mo. *banc* 2002); *Neel v. Strong*, 114 S.W.3d 272, 274 (Mo. App. E.D. 2003). For purposes of the Motion, Defendants admit the truth of all well pleaded facts in the Amended Petition. *Id.* Thus, the Court must assume, for purposes of the Motion, that Defendants' failure to pay the taxes due and owing under County's license tax ordinance is not based on a good faith belief on the part of any Defendant that it did not owe any business license tax to County. LF 81 at ¶ 83. 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"). At most, it evidences premeditated, strategic delay on the part of the Defendants. In 1999, the Eastern District held that one of the Defendants' defenses (that they are not telephone companies) is disingenuous. *City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo.App.E.D. 1999). For reasons more fully set forth in Point 2 of the University City Brief and Point 2 of this brief, which Plaintiffs hereby adopt and incorporate by reference, the other defenses asserted by Defendants are without any support and have been soundly rejected by courts across the United States and consequently, do not establish the existence of any "good faith belief". In any event, the statutory phrase "subjective good faith belief" requires each Defendant to prove what it "subjectively" believed. Thus,

Defendants' unsupported contention that each of them possessed the required "subjective good faith belief" does not entitle any of them to judgment as a matter of law.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2000 and contains 20,709 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 14-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

_____

Cynthia L. Hoemann

CERTIFICATE OF SERVICE

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

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