No. 87208

In the Supreme Court of Missouri

CITY OF UNIVERSITY CITY, MISSOURI, et al., on behalf of themselves and all others similarly situated,	)	On Appeal from the Circuit Court of St. Louis County, State of Missouri
Plaintiffs-Appellants,	)	No. 01-CC-004454
v.	)	Honorable Bernhardt Drumm, Judge Presiding
AT&T WIRELESS SERVICES, INC., et al.,	)	
Defendants-Respondents.	)	

BRIEF OF PLAINTIFFS-APPELLANTS

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I JURISDICTIONAL STATEMENT

On September 16, 2005, the trial court dismissed the Cities' tax collection and enforcement action pursuant to House Bill 209. The Cities sought to collect unpaid license taxes from various wireless telephone companies operating in Missouri. This appeal concerns the validity and construction of HB 209, which amended Chapters 71, 92 and 227 of the Missouri Revised Statutes, effective August 28, 2005. Under Article V, § 3 of the Missouri Constitution, the Missouri Supreme Court has exclusive appellate jurisdiction over questions involving the validity of a statute. Further, when a constitutional dispute is contingent upon the application of a challenged statute, the Supreme Court has jurisdiction over all issues in the case. Appeals are not bifurcated. State ex rel. Union Elec. Co. v. Public Service Comm., 687 S.W.2d 162, 165 (Mo. banc 1985).

II STATEMENT OF FACTS

A. The Parties

Plaintiffs – the Cities of University City, Blue Springs, Cape Girardeau, Chesterfield, Dexter, Ellisville, Ferguson, Florissant, Gladstone, Independence, Jennings,

Kirkwood, Manchester, Maplewood, Maryland Heights, Northwoods, O'Fallon, St. Joseph, Vinita Park, Warson Woods, Wellston and Winchester – are a group of third class, fourth class and constitutional charter cities geographically disbursed throughout Missouri ("Plaintiffs" or "Cities"). (R-770 to R-771.) They have adopted ordinances that impose a business or occupational license tax upon entities engaged in supplying or furnishing "telephone service" or "exchange telephone service" within the Cities. (R-806 to R-956.)

Plaintiff – Gail M. Winham – is the Mayor of Winchster, Missouri ("Plaintiff Winham"). As a resident, she pays taxes to the State of Missouri and the City of Winchester, and she relies upon local services paid for by Winchester's license taxes, e.g., police protection, trash collection, parks and recreation, etc. (R-800.)

Defendants – largely foreign corporations – provide cellular or wireless communication services throughout Missouri ("Defendants" or "Wireless Carriers" or "Carriers"). (R-771 to R-779.) Such services are interconnected with the public switched telephone network, and involve the transmission of signals between antennae located at fixed sites within a service area and the cellular, mobile, or car phones used by Defendants' customers. (Generally, R-786 to R-791.) They are commonly referred to as "cell phone companies."

B. The Ordinances

Various states and municipalities impose a tax upon utilities – such as water, gas, electric and telephone companies – doing business within their boundaries. The provision of cellular communication services is no different. As Congress recognized in passing the Mobile Telecommunications Sourcing Act, 4 U.S.C. §§ 116-126, state and local tax administrators often "levy taxes on the consumption of wireless services that occur within

their respective jurisdictions." H.R. Conf. Rep. No. 106-719, *reprinted* in U.S. Cong. Ad. News, 2000, at 509. Such taxes, charges and fees may take the form of a "fixed charge for each customer or [may be] measured by gross amounts charged to customers for mobile telecommunications services..." 4 U.S.C. § 116(a).[1]

In Missouri, cities may impose license taxes upon telephone companies. For example, 94.270, RSMo, provides in pertinent part: "The mayor and board of alderman shall have power and authority to regulate and to license and to levy and collect a license tax on...telephone companies..." 94.270, RSMo. Consistent with such statutory authority, the Cities have adopted ordinances that impose a business or occupational license tax upon companies engaged in supplying or furnishing telephone service within the Cities,

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[1] The "nature of wireless telecommunications [made] the collection of these taxes complicated and expensive for the carriers, and difficult for the taxing authorities to monitor." H.R. Conf. Rep. No. 106-719, *reprinted* in U.S. Cong. Ad. News, 2000, at 509. Accordingly, in an effort to standardize this process, the wireless industry proposed a solution, namely, to "identify the mobile telephone customer's 'place of primary use' and require taxation of calls made by the customers to be imposed only by taxing authorities which have jurisdiction in that location." Id., at 510. This proposal became a reality with the passage of the Mobile Telecommunications Sourcing Act in 2000, 4 U.S.C. §§ 116-126, which provides "a uniform method for fairly and simply determining how State and local jurisdictions may tax wireless telecommunications." Id., at 508.

usually ranging somewhere between 3% - 9% of gross receipts (the "Ordinances"). (R-806 to R-956.)

Typical of such ordinances is one adopted and codified by the City of University City, Missouri, the relevant portions of which provide:

> "Every person engaged in the business of supplying or furnishing *telephone or telegraph service* in the city shall pay to the city as a license or occupational tax, *nine percent* of the gross receipts derived from such business within the city, effective August 1, 1979." University City Municipal Code, § 5.84.010 (emphasis added).
>
> "Telephone service," as used in § 5.84.010, "means the service ordinarily and popularly ascribed to it including, without limitation, the transmission of messages through use of local, toll and wide area telephone service, private line services, land line services, cellular telephone services, and maritime and air-to-ground telephone service. Telephone service includes the transmission of information over telephone lines and other telephonic media for facsimile transfers...Telephone lines refers to any means of transmitting telephone messages, including, but not limited to, wire, radio transmission, microwave and optic fiber technology." University City Municipal Code, § 5.84.015, adopted June 4, 2001.
>
> Every person engaged in the business of supplying or furnishing telephone service "is required to file with the director of finance of the city a sworn monthly statement showing the gross receipts derived from the operation of such business during every month of each calendar year, which statement shall be filed within thirty (30) days after the close of each such period, and the tax imposed by this chapter shall be paid at the time of the filing of such statement." University City

Municipal Code, § 5.84.020.

Any person delinquent in paying the tax shall pay "an additional ten percent of the tax found to be due for the first month or part thereof and one percent per month for each month or part thereof thereafter such delinquency shall continue, in addition to any other penalty prescribed for such delinquency." University City Municipal Code, § 5.04.150.

Any person who fails or refuses to pay the tax imposed "shall be charged and it shall be the duty of the director of finance to collect and account for, a penalty of two percent per month or fractional part thereof of the delinquent tax until paid." University City Municipal Code, § 5.84.060, adopted June 4, 2001.

University City is "authorized to investigate the correctness and accuracy of any statement filed pursuant to this chapter and for that purpose shall have access at all reasonable times to the books, documents, papers and records of any person making such return in order to ascertain the accuracy thereof." University City Municipal Code, § 5.84.040.

(See University City Municipal Code, §§ 5.84.010, *et seq.* [R-806 to R-823].)

The other Cities have adopted license tax ordinances nearly identical to University City's, with "gross receipt" accounting requirements, auditing and document inspection rights, and interest and penalty provisions for failure to pay the taxes or to otherwise comply with the ordinances (except that most of the other Cities' ordinances do not define "telephone service"). (See Municipal Codes of Blue Springs, Cape Girardeau, Chesterfield, Dexter, Ellisville, Ferguson, Florissant, Gladstone, Independence, Jennings, Kirkwood, Manchester, Maplewood, Maryland Heights, Northwoods, O'Fallon, St. Joseph, Vinita Park, Warson Woods, Wellston and Winchester [R-824 to R-956].)

These ordinances provide, in pertinent part, for the collection of taxes as follows:

City of Blue Springs, Missouri - *5%* of gross receipts derived from utility *service, including telephone* (R-824 to R-830);

City of Cape Girardeau, Missouri - *$27,500 annually* if supplying *telephone service* (R-831 to R-838);

City of Chesterfield, Missouri - *5%* of gross receipts derived from *exchange telephone services* (R-839 to R-849);

City of Dexter, Missouri - *5%* of gross receipts derived from *telephone service* (R-850 to R-851);

City of Ellisville, Missouri - *7%* of gross receipts derived from telephone or exchange *telephone service* (R-852 to R-856);

City of Ferguson, Missouri - *6%* of local exchange revenue derived from *telephone service* (R-857 to R-868);

City of Florissant, Missouri - *3%* of gross receipts derived from *telephone service* (R-869 to R-883);

City of Gladstone, Missouri - *7%* of gross receipts derived from *telephone company service* (R-884 to R-886);

City of Independence, Missouri - *9.08%* of gross receipts derived from *telephone service* (R-887 to R-894);

City of Jennings, Missouri - *7.5%* of gross receipts from *exchange telephone or service* connected therewith (R-895 to R-899);

City of Kirkwood, Missouri - *7.5%* of gross receipts derived from *telephone service* (R-900 to R-905);

City of Manchester, Missouri - *5%* of gross receipts telephone or *telephone service*

(R-906 to R-911);

City of Maplewood, Missouri - *9%* of gross receipts derived from *exchange telephone service* (R-912 to R-916);

City of Maryland Heights, Missouri - *5.5%* of gross receipts of *exchange telephone service* (R-917 to R-920);

City of Northwoods, Missouri - *10%* of gross receipts derived from *exchange telephone service* (R-921 to R-925)

City of O'Fallon, Missouri - *5%* of gross receipts from *telephone or other utilities services* on the first $10,000.00 purchased monthly by a user, and .5% thereafter (R-926 to R-929);

City of St. Joseph, Missouri - *7%* of gross revenues for *exchange services* from an operator of a telephone communicating system (R-930 to R-933);

City of Vinita Park, Missouri - *5%* of gross receipts from telephones or *telephone service*, or exchange telephone service (R-934 to R-944);

City of Warson Woods, Missouri - *9%* of gross receipts derived from *telephone services* or exchange telephone service (R-945 to R-949);

City of Wellston, Missouri - *5%* of gross receipts derived from *exchange telephone service* (R-950 to R-954); and

City of Winchester, Missouri - *6%* of gross receipts derived from telephone or *telephone service* (R-955 to R-956).

C. The Litigation

On December 31, 2001, the Cities instituted a tax collection and enforcement action in the Circuit Court of St. Louis County, seeking to collect unpaid license taxes from certain wireless telephone companies operating in Missouri. (R-24 to R-219.) The

Carriers had refused to pay taxes on the ground that they were not "telephone companies" or "exchange telephone companies" as specified in the Ordinances, but rather purveyors of "commercial mobile radio service." (R-36.) [2]

Defendants removed the action to the U.S. District Court for the Eastern District of Missouri on the basis of diversity of citizenship jurisdiction pursuant to 28 U.S.C. § 1332. (R-229 to R-236 and R-240 to R-251.) They answered Plaintiffs' petition by denying the material allegations and by asserting various affirmative defenses. (R-310 to R-491) Defendants contended, *inter alia*, that the Ordinances violated § 253(a) of the Federal Telecommunications Act of 1996 ("the FTA") and § 332(c)(3)(A) of the Federal Communications Act of 1934 ("the FCA"), as amended; that the Ordinances violated the Hancock Amendment (MO. CONST. art. X, §§ 16-22); and that the Ordinances violated

[2] Similar actions followed: (i) Cities of Wellston and Winchester, Missouri v. SBC Communications, Inc., et al., cause no. 044-02645, formerly pending in the Circuit Court of St. Louis City; (ii) City of Jefferson, et al., v. Cingular Wireless, LLC, et al., cause no. 04-4099-CV-C-NKL, currently stayed in the U.S. District Court for the Western District of Missouri; (iii) City of St. Louis v. Sprint Spectrum, L.P., cause no. 034-02912A, formerly pending in the Circuit Court of St. Louis City; (iv) City of Springfield v. Sprint Spectrum, L.P., cause no. 104CC-5647, formerly pending in the Circuit Court of Greene County; and (v) State of Missouri, et al., v. SBC Communications, Inc., et al, cause no. 4:05-CV-01770, currently stayed in the U.S. District Court for the Eastern District of Missouri.

the commerce, due process, equal protection, and uniformity clauses of the U. S. and Missouri Constitutions. (Id.) On May 24, 2002, U.S. District Judge Webber found subject-matter jurisdiction lacking, and he remanded the case to the Circuit Court of St. Louis County. (R-253 to R-263.)

Upon remand, Defendants renewed various motions to dismiss filed earlier, but not decided, in the federal court. (R-264 to R-299.) According to Defendants, this action is prohibited and preempted by FTA § 253(a) and FCA § 332(c)(3)(A), as amended. (Id.) On July 23, 2002, Judge Romines entered an order denying Defendants' motions to dismiss, but allowing discovery on the issue of federal preemption. (R-300 to R-304.)

Shortly thereafter, the AWS entities – AT&T Wireless Services PCS, LLC, MC Cellular Corporation and Telecorp Communications – began paying the taxes under protest to select plaintiffs and instituted protest actions pursuant to 139.031, RSMo. See, e.g., AT&T Wireless Services PCS LLC, et al v. Jeremy Craig, et al., cause no. 04CC-000649, currently stayed in the Circuit Court of St. Louis County.

Upon completion of discovery, Defendants renewed their motions to dismiss as motions for summary judgment, again arguing that this case was preempted by the FTA. (R-498 to R-685 and R-695 to R-710.) Following oral argument, Judge Romines denied Defendants' motion for summary judgment on June 17, 2003. (R-712 to R-714.) Dissatisfied with this ruling, Defendants sought writs of prohibition from the Missouri Court of Appeals, Eastern District, and the Missouri Supreme Court, which were denied on August 12 and October 28, 2003, respectively.

Subsequently, U.S. District Judge Laughrey granted summary judgment in favor of Springfield and Jefferson City in a related case, finding certain defendants liable for delinquent taxes under the same or similar gross receipt tax ordinances. See Order at pp.

1, 3 and 11, dated June 9, 2005, in City of Jefferson, et al., v. Cingular Wireless, LLC, et al., cause no. 04-4099-CV-C-NKL (W.D.Mo. 2005) ("[T]he Plaintiffs' gross receipt tax ordinances are enforceable and...they apply to mobile telephone services just as they apply to land line telephone services...It is also clear that the Defendants have not paid all of the taxes that, according to Plaintiffs, are due under the gross receipts ordinances...As to liability,...there is uncontroverted evidence that some of the Defendants' mobile telephone services occur within the limits of [Plaintiffs]."). [R-1053 to R-1069.]

On July 14, 2005, the Governor signed into law HB 209, which purports to immunize and release the Carriers from their tax obligations. HB 209 targets the lawsuits mentioned and provides, *inter alia*:

> "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 ...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..."

92.089.2, RSMo. The first clause is designed to shield wireless telephone companies from liability for non-payment of business license taxes. The second clause is designed to protect SBC landline from liability for under-reporting its gross receipts (*i.e.*, underpayment of municipal license taxes).

On July 14, 2005, Defendants filed a Motion For Judgment On The Pleadings Or To Dismiss Plaintiffs' Petition For Declaratory Judgment And Other Relief on the basis of HB 209, contending that (i) the Municipal Telecommunications Business License Tax Simplification Act requires dismissal of this lawsuit, and (ii) this case must be dismissed because the Act grants Defendants immunity. (R-731 to R-760.) The Cities responded that HB 209 did not apply as a matter of statutory construction, and that it violated at least ten (10) provisions of the U.S. and Missouri Constitutions. HB 209 took effect on August 28, 2005. (R-978 to R-1183.)

Following oral argument, Circuit Judge Drumm granted Defendants' motion and dismissed the Cities' claims with prejudice on September 16, 2005. The trial court declared that "HB 209 is constitutional and requires the dismissal of this case, as consolidated, without further showing." (Order, filed September 16, 2005, as amended, October 14, 2005 [R-1412 to R-1416].) The trial court further concluded that "under HB 209 Defendants are immune from any past tax liability." (Id.) The Cities appealed to the Missouri Supreme Court on October 17, 2005, challenging the validity of HB 209 and the trial court's application of it to these claims.

III POINTS RELIED ON

1. The Trial Court Erred In Dismissing All Claims Pursuant To HB 209, Because The Act Does Not Apply As A Matter Of Statutory Construction, In That It Does Not Govern Claims By The State Of Missouri.

   State of Missouri v. Rowe, 63 S.W.3d 647 (Mo. banc 2002)

   Brant v. Brant, 273 S.W.2d 734 (Mo.App.Stl. 1954)

2. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Does Not Apply As A Matter Of Statutory Construction, In That (i) The Question Of "Good Faith" Is Incapable Of Resolution On A Motion To Dismiss Or A Motion For Judgment On The Pleadings, And (ii) The Defendants Do Not Possess A "Good Faith Belief" Sufficient To Qualify For Lawsuit Immunity And Dismissal.

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

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

   Airtouch Communications, Inc. v. Dept. of Revenue, State of Wyoming, 76 P.3d 342 (Wyo. 2003)

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

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

3. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Violates Missouri's Aid Limitations (MO. CONST. art. III, § 38(a)), In That It Wrongfully Extinguishes A Corporate Tax Debt.

   Curchin v. Missouri Industrial Development Board, 722 S.W.2d 930 (Mo. banc 1987)

World Trade Ctr. Taxing Dist. v. All Taxpayers, 894 So.2d 1185 (La.App. 4 Cir. 2005), aff'd., 2005 WL 1528414 (La. 2005)

State ex rel. Bd. of Control of St. Louis School and Museum of Fine Arts v. City of St. Louis, 115 S.W. 534 (Mo. 1908)

Rubin, Constitutional Aid Limitation Provisions And The Public Purpose Doctrine, 12 St. Louis U. Pub. L.Rev. 143 (1993)

4. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Violates MO. CONST. art. III, § 39(5), In That It Wrongfully Discharges A Corporate Indebtedness, Liability Or Obligation To The Cities.

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

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

Federal Express Corp. v. Skelton, 578 S.W.2d 1 (Ark. banc 1979)

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

Ark. Op. Atty. Gen. No. 2003-025, 2003 WL 1347746 (Ark.A.G. 2003)

§ 139.031, RSMo

5. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Constitutes Special Legislation In Violation Of MO. CONST. art. III, § 40, In That It Regulates The Affairs Of Cities, Grants Exclusive Corporate Privileges, And Arbitrarily Classifies For Purposes Of Taxation.

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)

6. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Violates The Doctrine Of Separation Of Powers, As Set Forth In MO. CONST. art. II, § 1, In That It Directs An Outcome In Pending Cases And Impedes Municipal Tax Collection.

Mo. Coalition for the Environment v. Joint Comm. On Admin. Rules (JCAR), 948 S.W.2d 125 (Mo. banc 1997)

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

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

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

7. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Constitutes Retrospective Legislation In Violation Of MO. CONST. art. I, § 13, In That It Substantially Impairs Existing Municipal Rights.

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

First Nat. Bank of St. Joseph v. Buchanan County, 205 S.W.2d 726 (Mo.1947)

Ernie Patti Oldsmobile, Inc. v. Boykins, 803 S.W.2d 106 (Mo.App.E.D. 1990)

Planned Ind. Expansion Authority of City of St. Louis v Southwestern. Bell Telephone Company,

612 S.W.2d 772 (Mo. banc 1981)

8. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Violates The Tax Uniformity Requirements Of MO. CONST. art. X, § 3, In That It Arbitrarily And Unreasonably Classifies For Purposes Of Taxation.

State ex rel. Transport Manufacturing & Equipment 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

Drey v. State Tax Commission, 345 S.W.2d 228 (Mo. 1961)

Airway Drive-In Theatre Co. v. City of St. Ann, 354 S.W.2d 858 (Mo. banc 1962)

56 Am.Jur.2d Municipal Corporations § 756

9. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Violates The Equal Protection Clauses Of CONST. art. I, § 2 And MO. CONST. art. I, § 2, In That It Arbitrarily Classifies For Purposes Of Taxation.

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)

10. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Violates The Single Subject And Clear Title Requirements Of MO. CONST. art. III, § 23, In That It Is Both Over-Inclusive And Under-Inclusive.

    Stroh Brewery Co. v. State of Missouri,

    954 S.W.2d 323 (Mo. banc 1997)

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

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

11. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Is Void For Vagueness, In That It Provides No Legally Fixed Standards For Determining What Is Prohibited And What Is Not In A Particular Case.

    Bd. of Educ. of the City of St. Louis v. State of Missouri, 47 S.W.3d 366 (Mo. banc 2001)

    City of Waynesboro v. Keiser, 191 S.E.2d 196 (Va. 1972)

    People v. Lee, 144 Misc.2d 11, 543 N.Y.S.2d 613 (County Ct. 1989)

    State of Tennessee v. Thomas, 635 S.W.2d 114 (Tenn. 1982)

    The American Heritage Dictionary (2nd ed. 1982)

12. Because The Invalid Provisions Are So Essentially Connected With The Remainder Of The Act, They Are Not Severable And Those Portions Of HB 209 Purporting To Amend Chapters 71 and 92, RSMo, Are Void In Their Entirety.

Labor's Educ. and Political Club Ind. v. Danforth, 561 S.W.2d 339 (Mo. banc 1977)

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

In Re Constitutionality Of Section 251.18, Wisconsin Statutes, 236 N.W. 717 (Wis. 1931)

Zavaleta v. Zavaleta, 358 N.E.2d 13, 16 (Ill.App.1st Dist. 1976)

§ 1.140, RSMo

MO. CONST. art. III, § 40(4), (6) and (30)

IV ARGUMENT

A. The Trial Court Erred In Dismissing All Claims Pursuant To HB 209, Because The Act Does Not Apply As A Matter Of Statutory Construction, In That It Does Not Govern Claims By The State Of Missouri.

Standard: 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. "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).

On August 9, 2005, Circuit Judge Dowd entered an order in City of Wellston, et al., v. SBC Communications, Inc., et al., cause no. 044-02645 (Cir.Ct.Stl. 2005), which addressed the standing of third and fourth class cities to pursue license tax collection actions. According to Judge Dowd, "tax collection actions must be brought in the name of the state. [Third and fourth class cities] are not authorized to bring collection actions in their own names, and in fact, are not authorized to bring collection actions at all." See Order at p. 5, dated August 8, 2005. [R-1070 to R-1076.][3]

Following the City of Wellston ruling, Plaintiffs amended the petition in this case to make clear that the claims of third and fourth class cities are being pursued, in the

[3] A different category of cities – constitutional charter cities – has been found to possess standing to pursue tax collection and enforcement actions in their own names. See Order at p. 13, dated June 9, 2005, in City of Jefferson, et al., v. Cingular Wireless, LLC, et al., cause no. 04-4099-CV-C-NKL (W.D.Mo. 2005) ("there is no requirement that charter cities must collect taxes in the same way as the State"). [R-1065.]

The City of Wellston ruling is currently on appeal to the Missouri Supreme Court [Appeal No. 87207].

alternative, by the State of Missouri. (R-767.) HB 209 does not impact or impair these claims in any respect. A plain reading of the statute reveals that municipalities, not the State, are required to take action under its provisions. See, e.g., 92.089.2, RSMo ("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...") (emphasis added).

In utilizing HB 209 to dismiss all claims with prejudice, the trial court misinterpreted and misapplied the statute. HB 209 does not reference, implicate or apply to claims by non-municipal actors, such as the State of Missouri. The trial court was powerless to rewrite the statute as it did here and to extend it to persons or entities – i.e., the State of Missouri – not expressly covered by its terms. See, e.g., State of Missouri v. Rowe, 63 S.W.3d 647, 650 (Mo. banc 2002) ("this Court, under the guise of discerning legislative intent, cannot rewrite [a] statute"); Brant v. Brant, 273 S.W.2d 734, 736 (Mo.App.Stl. 1954) (court cannot "usurp the function of the General Assembly, or by construction rewrite its acts").

B. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Does Not Apply As A Matter Of Statutory Construction, In That (i) The Question Of "Good Faith" Is Incapable Of Resolution On A Motion To Dismiss Or A Motion For Judgment On The Pleadings, And (ii) The Defendants Do Not Possess A "Good Faith Belief" Sufficient To Qualify For Lawsuit Immunity And Dismissal.

Standard: 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. "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).

HB 209 purports to grant lawsuit immunity based upon the "good faith belief" of a wireless carrier that it was not a "telephone company" subject to taxation. 92.089.2(1).[4] The question of "good faith" is a question of fact. See, e.g., Swartz v. Mann, 160 S.W.3d

[4] It is unclear from the terms of HB 209 whether such a "good faith belief" is required for lawsuit immunity, lawsuit dismissal, or both. See discussion at pages 102-105, *infra.* Regardless, to the extent HB 209 directs an outcome in this case, it is unconstitutional. Further, to the extent HB 209 qualifies "good faith belief" with the word "subjective," it violates the separation of powers, special law, equal protection, and tax uniformity provisions of the Missouri Constitution, and it is void for vagueness.

411, 415 (Mo.App.W.D. 2005); Radloff v. Penny, 225 S.W.2d 498, 502 (Mo.App.Stl. 1949) ("[g]ood faith, when in issue is the ultimate fact,...and the question is ordinarily one of fact, for determination by the trier of facts"); Henry v. Tinsley, 218 S.W.2d 771, 777 (Mo.App.Spr. 1949) ("[t]he question of good faith is a question of fact"), rehearing denied. It is incapable of resolution on a motion to dismiss or a motion for judgment on the pleadings, and the trial court erred in addressing the question of lawsuit immunity on the basis of Defendants' motion.

Alternatively, if the issue is reached, the trial court erred because no defendant possesses the requisite "good faith belief" under HB 209, namely, a good faith belief that it was not a telephone company subject to taxation. In 1999, the Missouri Court of Appeals, Eastern District, reached a decision wherein it found (i) that Southwestern Bell Mobile Systems, Inc., a wireless carrier, was a "telephone company," and (ii) that the City of Sunset Hills had authority to impose a business license fee on it. See, e.g., City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc., 14 S.W.3d 54, 59 (Mo.App.E.D. 1999) ("The services Southwestern Bell provided clearly fell within the definition or genus of a telephone company. First, in its brief, Southwestern Bell labeled its business 'wireless communications services' which it described as 'transmitting radio signals between [its] antennae located at fixed sites throughout its service area and the mobile units – commonly called cell phones, car phones, or mobile phones – used by its customers.' Southwestern Bell's own characterization of its services as transmitting signals to 'phones' placed its services within a class of telephone companies enumerated in the statute. Second, Southwestern Bell's assertion that it was not a telephone company is disingenuous in light of the fact that it relied on the FTA to defeat City's license fee ordinance. The decisions relied upon by Southwestern Bell all stated in some fashion that

Congress enacted the FTA 'in an effort to foster rapid competition in the local telephone service market and to end the monopoly market of local providers.'...Thus, these cases indicate that the FTA applied to telephone companies, a class to which Southwestern Bell wished to belong when it invoked the FTA to defeat the ordinance; but from which it now attempts to exclude itself, also in an attempt to defeat the ordinance. Southwestern Bell 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.[5]

Courts around the country – both before and after Sunset Hills – have reached similar conclusions. See 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).

Based upon this consistent and uninterrupted line of authority, U.S. District Judge Laughrey found certain carriers liable under the same or similar gross receipt ordinances on June 9, 2005. See Order at p. 1, in City of Jefferson, et al., v. Cingular Wireless, LLC, et al., cause no. 04-4099-CV-C-NKL (W.D.Mo. 2005) ("[T]he Plaintiffs' gross receipt tax

[5] Like the defendant in Sunset Hills, each of the Wireless Carriers in this case invoked the FTA in an attempt to defeat the Ordinances.

ordinances are enforceable and...they apply to mobile telephone services just as they apply to land line telephone services.”). [R-1053.]

Thus, at least as far back as 1999 [Sunset Hills] or 2000 [Mobile Telecommunications Sourcing Act], if not earlier, Defendants had to know that they

qualified as telephone companies[6] under the Ordinances and that they were subject to

[6] Thomas Robinson, network technical sales support engineer for Cingular Wireless, testified that wireless service providers frequently access landline phone systems, utilize radio frequencies, recreate sounds, transmit electronic impulses over a distance, and provide 2-way, real time communication. (Deposition of Thomas Robinson, at pp. 11, 30, 37-39.) [R-1077, R-1087, R-1106, and R-1113 to R-1115.] He further testified that, just like landline telephone companies, wireless carriers offer local calling, long distance calling, 911 and E911 emergency services, operator assistance, 411 directory assistance, voice mail services, caller ID services, call waiting services, and conference calling to customers in Missouri. (Deposition of Thomas Robinson, at pp. 68-69.) [R-1144 to R-1145.]

Webster's Third New International Dictionary defines a telephone as "an instrument for reproducing sounds esp. articulate speech at a distance." See Order at p. 7, in City of Jefferson, et al., v. Cingular Wireless, LLC, et al., cause no. 04-4099-CV-C-NKL (W.D.Mo. 2005) ("[The] definitions reveal that being connected to a wire is not an essential characteristic of a telephone, even if it is a common one. CMRS – which converts an acoustic source into a signal for transmission to remote locations – falls squarely within these definitions."). [R-1059.] Therefore, it necessarily follows that "cell phone service" constitutes telephone service as that term is commonly understood.

taxation. Ignorance of the law is no defense. See Grace v. Missouri Gaming Commission, 51 S.W.3d 891, 903 (Mo.App.W.D. 2001) ("[p]ersons are conclusively presumed to know the law").

Defendants presented no evidence to the contrary in the court below; indeed, they presented no evidence at all on this question of fact. They simply asked the Court to presume "good faith," because they refused to pay the taxes and they raised affirmative defenses to this enforcement action. See Defendants' Motion For Judgment On The Pleadings, at p. 8 ("the substantial defenses asserted by Defendants here thus establish that Defendants have not paid the License Taxes in good faith") [R-738.] However, 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"). Accordingly, to the extent Defendants were found to possess the "good faith belief" needed for lawsuit immunity, the trial court's judgement is erroneous and contrary to the manifest weight of the evidence.

C. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Violates Missouri's Aid Limitations (MO. CONST. art. III, § 38(a)), In That It Wrongfully Extinguishes A Corporate Tax Debt.

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." Judge Welliver writing in Curchin v. Missouri Industrial Development Board, 722 S.W.2d 930, 934 (Mo. banc 1987), quoting State ex rel. City of Jefferson v. Smith, 348 Mo. 554, 154 S.W.2d 101, 102

(Mo. banc 1941).

Standard: Ordinary rules of statutory construction apply to the interpretation of the constitution, though "applied more broadly because of the permanent nature of constitutional provisions." Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). "If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid." State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality do not apply "where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision." Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

The 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 carriers' tax debts in this instance – *via* HB 209's immunity and lawsuit dismissal provisions – falls directly within these constitutional prohibitions. It constitutes a "grant of public money" in aid of private enterprise, and, rather than benefitting the public at large, merely serves to enrich a small group of individuals: the shareholders and executives of telephone companies.

Article III, Section 38(a) provides admirable clarity on this subject: "The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation..." MO.

CONST. art. III, § 38(a). It is undisputed that tax revenues qualify as "public money or property" within the meaning of Article III, Section 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'"), mtn. for rehearing and/or transfer denied, 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 Article III, Section 38(a). See, e.g., Curchin v. Missouri Industrial Development Board, 722 S.W.2d 930, 933 (Mo. banc 1987) ("This tax credit is as much a grant of public money or property and is as much a drain on the state's coffers as would be an outright payment by the state to the bondholder upon default. There is no difference between the state granting a tax credit and foregoing the collection of the tax and the state making an outright payment to the bondholder from revenues already collected...The allowance of such a tax credit constitutes a grant of public money or property within Article III,

Section 38(a) of the Missouri Constitution."), rehearing denied. [8]

[8] Courts throughout the country acknowledge that tax amnesties, tax credits, tax forgiveness, tax exemptions, and tax subsidies qualify as expenditures of public money. See, e.g., Opinion of the Justices to the Senate, 401 Mass. 1202, 514 N.E.2d 353, 355 (Mass. 1987) ("tax subsidies...are the practical equivalent of direct government grants"); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 236, 107 S.Ct. 1722, 1731, 95 L.Ed.2d 209 (1987) (Scalia, J. dissenting) ("[o]ur opinions have long recognized – in First Amendment contexts as elsewhere – the reality that tax exemptions, credits and deductions are 'a form of subsidy that is administered through the tax system'"); Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 791, 93 S.Ct. 2955, 2974, 37 L.Ed.2d 948 (1973) (money available through tax credit is charge made against state treasury; tax credit is "designed to yield a predetermined amount of tax 'forgiveness' in exchange for performing a certain act the state desires to encourage"); Rosenberger v. Rector & Visitors, 515 U.S. 819, 861 n. 5, 115 S.Ct. 2510, 2532 n. 5, 132 L.Ed.2d 700 (1995) ("the large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies"); Sommer v. City of St. Louis, 631 S.W.2d 676, 680 (Mo.App.E.D. 1982) ("tax abatement does not differ significantly from an expenditure of public funds, since in either case the conduct complained of could result in the treasury's

The concerns animating the adoption of Article III, Section 38(a) over a century ago, and similar constitutional provisions around the country, are no less pressing today. As Judge Welliver noted in striking down a state tax credit scheme in 1987:

> "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 the custom became so abused that nearly all the state constitutions wrote such sections as this in their fundamental law...Article IV, Section 46 of the Missouri Constitution of 1875, the predecessor to Article III, Section 38(a) of the Missouri Constitution of 1945, was adopted to prevent railroad grants. The provision was adopted despite the significant public benefit provided by the railroads. Accordingly, in our application of Article III, Section 38(a) of the Missouri Constitution, we have held grants with a primarily private effect to be unconstitutional, despite the possible beneficial impact upon the economy of the locality and of the state...Providing the tax credits to only a select few companies lends itself to abuse and is analogous to the railroad grants of yesteryear, which prompted the adoption of Article III, Section 38(a) of the Missouri Constitution. 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."

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containing less money than it ought to"). 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.

Curchin, 722 S.W.2d at 934-35. See also State ex rel. Bd. of Control of St. Louis School and Museum of Fine Arts v. City of St. Louis, 115 S.W. 534, 546-47 (Mo. 1908) ("[t]he convention which framed the Constitution of 1875 was fully cognizant of the recklessness with which the counties and cities of this state had voted aid and granted assistance to corporations with a view to construct railroads and aid other corporate enterprises, and it inserted section 46 of article 4 (Ann. St. 1906, p. 195)," which provides that the legislature shall not make any grant in aid of a private corporation), rehearing denied.[9]

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 Judge Welliver 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. Further, it exacerbates the very harm the constitutional aid prohibitions were designed to prevent: cash-strapped municipalities unable to meet their budgets for city services, *e.g.*, street improvements, police and fire

[9] See also Rubin, Constitutional Aid Limitation Provisions And The Public Purpose Doctrine, 12 St. Louis U. Pub. L.Rev. 143, 156-57 (1993) ("Opinion is unanimous that the impetus for the adoption of both state and local constitutional aid limitation provisions was the untrammeled and indiscriminate borrowing by governmental entities and the ruthless profiteering by private corporations and individuals...It was correctly thought that if local governmental agencies were restricted from rendering aid to [private] entities, the need to borrow would be lessened and the public trough would be closed to private entrepreneurs.").

protection, trash collection, etc., now can be expected to engage in borrowing due to tax revenue shortfalls. As wireless telephone service displaces landline telephone service here and around the country, the legislature has forbidden cities to collect back-taxes due and owing from this growth industry. This amounts to a naked gift of public financial resources ostensibly protected by constitutional mandate. See, e.g., World Trade Ctr. Taxing Dist. v. All Taxpayers, 894 So.2d 1185, 1194-95 (La.App. 4 Cir. 2005) (statute which relieved WTC hotel from presently existing hotel occupancy taxes violated state constitutional provision prohibiting state from loaning, pledging, or donating to any person any funds or property belonging to the state), aff'd., 2005 WL 1528414 (La. 2005).

Not only is this harmful to residents of the affected municipalities, but it provides an unfair competitive advantage to telephone companies at the expense of other businesses and utilities already operating in local jurisdictions. Certain wireless carriers, such as T-Mobile USA, Inc., have paid the subject license taxes without statutory protest, implicitly acknowledging the legitimacy of the ordinances and of the amounts due thereunder. [R-1148 to R-1152.] Further, electric companies, gas companies, water companies, and landline telephone companies have paid such municipal license taxes for decades. The general assembly – in carving out exemptions for wireless carriers that failed to pay taxes, and for Southwestern Bell which underpaid it taxes – has penalized the law-abiding and discriminated against all other businesses in an arbitrary fashion.

As Representative A.F. Morrison noted during the Indiana Constitutional Convention Debates of 1850, in support of a constitutional aid limitation: "corporations always labor and scheme for their individual benefit which is always antagonistic to the interests of the people." See Rubin, Constitutional Aid Limitation Provisions And The Public Purpose Doctrine, 12 St. Louis U. Pub. L.Rev. 143, 157 (1993). Given the

unequivocal language, history and purpose of Article III, Section 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).[10] To do otherwise, to "defer to the exigencies of economic development" out of judicial expediency (id., at 144), would

[10] 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.

render the prohibitive wording of Missouri's constitutional aid limitations meaningless.[11]

D. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Violates MO. CONST. art. III, § 39(5), In That It Wrongfully Discharges A Corporate Indebtedness, Liability Or Obligation To The Cities.

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[11] See, e.g., World Trade Ctr. Taxing Dist. v. All Taxpayers, 894 So.2d at 1196-97 ("While we agree that creation of jobs and economic development may be in the 'public interest' under [the challenged statute] and a desirable and social good, we do not find that this type of development constitutes a 'social welfare program for the aid and support of the needy' as contemplated by § 14(B)(1) [similar to MO. CONST. art. III, § 38(a)]. Under the rationale espoused by the appellee, almost any economic development project could be found to meet the exception in § 14(B)(1) and the exception would quickly subsume the rule, essentially invalidating the prohibitions put forth in § 14(A) [similar to MO. CONST. art. III, § 38(a)]. Thus, although we recognize the social benefit in creating employment opportunities, especially for those who might lack opportunity in the economic sector, to find that the WTC TIF statute satisfies this particular exception to the constitutional ban on donation of public funds would render La. Const. art. VII, § 14 essentially meaningless."), aff'd., 2005 WL 1528414 (La. 2005).

"[T]he Plaintiffs had an inchoate property right to any past due taxes authorized by then existing law and HB 209 effectively takes away that property right." Judge Laughrey writing in City of Jefferson, et al., v. Cingular Wireless, L.L.C., cause no. 04-4099-CV-C-NKL (W.D.Mo. Sept. 23, 2005) (Stay Order, at p. 6 n. 6).

Standard: Ordinary rules of statutory construction apply to the interpretation of the constitution, though "applied more broadly because of the permanent nature of constitutional provisions." Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). "If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid." State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality do not apply "where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision." Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

Like the earlier public aid limitations, numerous state constitutions contain provisions prohibiting a corporate indebtedness, liability or obligation to the state (or its political subdivisions) from being released or discharged in any manner. Again, Missouri's Constitution is no exception. Article III, Section 39, states: "The general assembly shall not have 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). It is unique only in its inclusion of the words "without consideration," which were added by the Constitution of 1945 to the

provisions of the 1875 Constitution, Article 4, Section 51.[12]

HB 209 implicates Article III, Section 39(5) in the following manner, *inter alia*: First, it purports to immunize a telecommunications company (defined elsewhere in HB 209 as a "telephone company"[13]) from liability for delinquent taxes owed prior to July 1, 2006, if it allegedly believed "[i]t was not a telephone company." 92.089.2(1), RSMo. Second, it calls for the dismissal of pending lawsuits brought by municipalities in the Circuit Court of St. Louis County and elsewhere seeking to enforce their rights and to collect such delinquent taxes. 92.089.2, RSMo. Third, it abrogates a recent judgment by a federal district court against the wireless carriers, finding certain defendants liable for delinquent taxes under the same or similar gross receipt tax ordinances . See Order at pp. 1, 3 and 11, dated June 9, 2005, in City of Jefferson, et al., v. Cingular Wireless, LLC, et al., cause no. 04-4099-CV-C-NKL (W.D.Mo. 2005). [R-1053 to R-1069.] See also City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc., 14 S.W.3d 54, 59 (Mo.App.E.D. 1999).

For purposes of Article III, Section 39(5), it is undisputed that the words "indebtedness, liability or obligation" encompass taxes due and owing. Further, the gross

[12] Some state constitutions provide that no corporate liability can be discharged "save by payment into the public treasury" (*e.g.*, ARK. CONST. art. 12, § 12), presumably the functional equivalent of Missouri's "without consideration" language, whereas other state constitutions are silent on the subject, refusing to permit states to compromise or discharge a pre-existing corporate indebtedness under any circumstances.

[13] See, e.g., 92.077(5) and (6), RSMo, and 92.083.1(2), RSMo.

receipt taxes imposed by the Ordinances constitute a matured "indebtedness"; they are not contingent or uncertain in any respect. This conclusion derives from the nature of the tax, which deems the collection of gross receipts to be the taxable event. See, e.g., The May Dept. Stores Co. v. Director of Revenue, 1986 WL 23204, at *15 (Mo.Adm.Hrg.Com. 1986) ("[T]he entire tax imposed by Section 144.010 to 144.510, RSMo [sales tax act] is a gross receipts tax and...the tax is levied and imposed upon the seller's gross receipts. Since the collection and receipt of the purchase price in the form of gross receipts is the event which triggers...liability for the tax, we think it obvious that the taxable event under the sales tax act is the collection of gross receipts on account of the retail sale of tangible personal property, and we so hold."). Once revenue is received, in effect generating the gross receipts, the tax is fixed and owing. This is made manifest by settled decisions (*e.g.*, May Dept. Stores, *supra*) and by the ordinances themselves, which treat gross receipt taxes as self-executing. Thus, in contrast to real estate and personal property taxes – which are due annually and cannot be known until there is an assessment and levy – municipal gross receipt taxes are due and quantifiable at the time they are incurred or shortly thereafter.[14]

[14] For example, the Municipal Code of the City of Ellisville provides: "It shall be the duty of every person engaged in any of the businesses described in this article to file with the director of budget and finance *on the last day of each month*, a sworn statement of the gross receipts derived from such businesses during the period of the prior month, and coincident with the filing of such statement *to pay the director of budget and finance the amount of tax due* pursuant to the provisions of this article." Chapter 25, Taxation,

Article III, Section 25-72, Municipal Code of the City of Ellisville (emphasis added). [R-114.]

These self-executing features distinguish a gross receipt tax from the situation before the Missouri Supreme Court in Beatty v. State Tax Commission, and other cases involving the assessment and levy of property taxes, none of which are applicable here. See, e.g., Beatty v. State Tax Commission, 912 S.W.2d 492, 496-97 (Mo. banc 1995) ("[The challenged statute] operates retrospectively only if appellants had a right to pay a certain amount of tax that vested prior to [the statute's effective date]. The determination of whether appellants had such a vested right requires a general discussion of the manner in which real property is taxed in Missouri...The determination of the amount of tax liability that attaches to a particular parcel of real property consists of two processes: the assessment of the property and the levying of the tax. Assessment is a process by which the assessor identifies property by parcel and owner, values it, classifies it and lists it so that taxing authorities can apply their tax levies...The second part of the taxing process, the levy, is the method by which the specific amount of tax due becomes known...As is evident from the statutory scheme, rights to a particular amount of tax do not vest in a taxpayer until assessment and levy are complete. At this point the government's [inchoate] lien becomes 'a fixed encumbrance'...and that taxpayer's liability for tax is reduced to a sum certain...Until the tax liability is fixed as a sum certain, the definitions used to arrive at that liability are subject to change by the legislature.").

At that point, the business becomes liable for the gross receipt tax, which liability, then attached, cannot be compromised or reduced. See, e.g., 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].); Ark. Op. Atty. Gen. No. 2003-025, 2003 WL 1347746, at *5 (Ark.A.G. 2003) (act of Arkansas legislature purporting to forgive gross receipts taxes previously incurred by truck and semitrailer owners was illegal, because, *inter alia*, it "purports to forgive a matured tax

obligation").[15] See also Federal Express Corp. v. Skelton, 578 S.W.2d 1, 6 (Ark. banc

[15] The Arkansas act was similar in language, and identical in effect, to HB 209. The Arkansas Attorney General's discussion and analysis of the act is polite, but withering.

To similar effect, but much less restrained, see City of Dubuque v. Illinois Central R. Co., 39 Iowa 56, 1874 WL 416 (Iowa 1874), wherein a statute releasing the property of railroads from taxation was passed subsequent to the assessment and levy of a tax for which an action was brought. Although quite old, and involving different constitutional infirmities, the Iowa Supreme Court's decision is cited here for the forcefulness of its language and conclusions:

> "*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

1979) (legislative enactment exempting aircraft, aircraft equipment, and railroad parts, cars, and equipment from compensating use tax impaired a matured "indebtedness" and was unconstitutional).

In the alternative, if not a matured "indebtedness" within the meaning of Article III, Section 39(5), then, at a minimum, the gross receipt tax imposed by the Ordinances

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> 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 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 exercise*."

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

constitutes a "liability or obligation" under this provision. See, e.g., Graham Paper Co. v. Gehner, 59 S.W.2d 49, 52 (Mo. banc 1933) ("The language of this constitutional provision [predecessor of Article III, Section 39(5)] is very broad and comprehensive in protecting the state against legislative acts impairing obligations due to it, in that it prohibits the release or extinguishment, in whole or in part, not only of indebtedness to the state, county, or municipality, *but liabilities or obligations of every kind*...[A]n inchoate tax, though not due or yet payable, is such a liability or obligation as to be within the protection of the restriction against retrospective laws, and for the same reason we must hold that *such inchoate tax is an obligation or liability within the meaning of the constitutional provision now being considered*.) (emphasis added).

In either case, to the extent HB 209 purports to immunize the Carriers from back tax liability, or to forgive, waive, extinguish or release such previously-incurred taxes, it falls squarely within the express terms of Article III, Section 39(5). See Graham Paper Co., 59 S.W.2d at 52 ("[A]n unmatured tax...has sufficient vitality to be protected in favor of the state against being extinguished or released by legislative enactment."); 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); Federal Express Corp. v. Skelton, 578 S.W.2d at 6 ("The courts of other states have been unanimous in holding that a law or ordinance which attempts to release a tax liability, obligation or indebtedness violates provisions of their constitutions." [collecting cases]).

Thus, the pivotal question is whether releasing the Defendants' tax liability was "without consideration," as contemplated by Article III, Section 39(5). According to the general assembly, the consideration for this discharge is "the resolution of [the parties'] uncertain litigation, the uniformity, and the administrative convenience and cost savings to municipalities 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." 92.089.1, RSMo. Each of these bases will be addressed below, but before proceeding, Plaintiffs direct the Court's attention to that portion of HB 209 wherein the general assembly declares that the foregoing shall constitute "full and adequate consideration to municipalities, as the term 'consideration' is used in Article III, Section 39(5) of the Missouri Constitution, for the immunity and dismissal of lawsuits outlined in subsection 2 of this section." 92.089.1, RSMo. With such language, HB 209 attempts to make a conclusive finding about the meaning of a constitutional provision, namely, what is adequate "consideration" under Article III, Section 39(5). It is analogous to the legislature declaring that the death penalty for 15-year olds is not cruel or unusual, or that governmental discrimination against African-Americans is not a violation of equal protection. This is more than legislative overreaching; it is flatly prohibited by an uninterrupted line of precedent dating back to Marbury v. Madison. 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).

Returning to the "consideration" proffered by the general assembly in support of its release of the carriers' tax liability, it is stated that "the resolution of [the parties'] uncertain litigation" qualifies as "full and adequate consideration." 92.089.1, RSMo. 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), rehearing denied.

For this reason, the compromise of a disputed claim can constitute consideration in certain circumstances, but the forbearance of a claim or defense known to be unfounded does not qualify as sufficient consideration. See, e.g., Robinson v. Benefit Ass'n of Railway Employees, 183 S.W.2d 407, 412 (Mo.App.Stl. 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."). 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, in Mississippi as in most other states, 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.").

Undoubtedly, the Cities have much to lose by dismissing their claims, but it is difficult to see how the Carriers' forbearance of a defense to these claims – a defense that expressly and implicitly has been rejected – constitutes any consideration at all, let alone

"full and adequate consideration."

First, a federal district court already has entered judgement on related claims and found certain carriers liable for back taxes due and owing under municipal gross receipt tax ordinances. City of Jefferson, *supra*.

Second, courts here and around the country have found the Wireless Carriers' 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).

Third, the general assembly, by its enactment of HB 209, has acknowledged that the prior tax ordinances were valid and enforceable against these Defendants: it states that the "term telephone company, as used in sections 94.110, 94.270, and 94.360, RSMo, shall have the same meaning as telecommunications company as defined in [HB 209]" (92.077(6), RSMo); that a telecommunications company is "any company doing business in this state that provides telecommunications service" (92.077(5), RSMo); that "[t]elecommunications service" shall have "the same meaning as such term is defined in

section 144.010, RSMo"[16] (92.077(6), RSMo); and, finally, that "'[t]elephone service', 'telecommunications service', 'telecommunications', 'local exchange service', 'local exchange telephone transmission service', 'exchange telephone service' or similar terms means telecommunications service as defined in section 92.077" (92.083.1(2), RSMo). For the most part, these are the *identical* terms appearing in the gross receipt tax ordinances as they existed prior to passage of HB 209, which the Cities are attempting to enforce in their pending lawsuits. The Cities now have legislative confirmation, as if any doubt existed before [and it did not], that the Carriers are "telephone companies" in the business of supplying "telephone service", "exchange telephone service", and the like.[17]

[16] "Telecommunications service," for purposes of this section, means "the transmission of information by wire, radio, optical cable, coaxial cable, electronic impulses, or similar means," thus, placing the Wireless Carriers – who have long maintained that they are commercial mobile radio service providers – squarely within its terms. 144.010.1(13), RSMo.

[17] One wonders how a wireless carrier, having been legislatively determined to be a "telephone company" with the passage of HB 209, can argue that it possessed a "good faith" belief that "[i]t was not a telephone company" previously? Undoubtedly, the Carriers will argue that their blanket refusal to pay the taxes, and their defense of Plaintiffs' claims, constitutes such a "good faith" belief. However, 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

In light of this authority, it is difficult to see how the Wireless Carriers have given up anything by foregoing a defense premised – speciously and against all logic – upon the contention that they are not "telephone companies."[18] This so-called "resolution

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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 Carriers. They merely "tested the waters," and when the legal tide turned, sought to engineer a legislative bail-out in advance of payment of back-taxes.

[18] Not only are the Carriers' defenses substantively invalid, but they also are procedurally invalid. In Missouri, as in most states, there are well-established methods for protesting the payment of taxes, namely, the institution of a tax protest suit under 139.031, RSMo. By foregoing this exclusive method for disputing taxes, the Carriers – with the exception of the AWS entities – waived any and all defenses to the underlying claims. See, e.g., 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

of...uncertain litigation," whereby one side gives away all its rights and the other side gives up nothing, is not mutual, not bargained for, not fair, equitable or just, and certainly not "full and adequate consideration."

Additionally, it is suggested by the general assembly that "full and adequate consideration" for the tax discharge derives from "the uniformity, and the administrative convenience and cost savings to municipalities from,...the enactment of sections 92.074 to 92.098." 92.089.1, RSMo.[19] Presumably, this refers to the fact that, in the future, "the

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failure to timely pursue the remedies available to them.") (emphasis added), mtn. for rehearing and/or to transfer denied. Thus, the Carriers have no defenses to compromise in the underlying litigation.

[19] It is worth noting that the various items of "consideration" detailed by the general assembly in 92.089.1, RSMo, are separated by the word "and." This suggests that all such items must be present and valid in order for there to be "full and adequate consideration," at least in the mind of the legislature. If any single ground or basis is infirm, then there can never be "full and adequate" consideration under a plain reading of the statute. The general assembly should be presumed to have known this, because it is an accepted and traditional rule of statutory construction. See, e.g., In re Commonwealth Trust Co. of Pittsburgh, 54 A.2d 649, 652 (Pa. 1947) ("The legislature is presumed to have intended that words used in a statute shall be construed according to their common and approved uses.")

maximum rate of taxation on gross receipts shall not exceed five percent for bills rendered on or after July 1, 2006..." 92.086.9, RSMo. The economic implications of this are addressed in more detail below, but let there be no doubt about the practical effect of HB 209: it 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 altogether. See 92.086.10, RSMo. Such a variance 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%). Clearly, the cap does not generate "cost savings" to these municipalities, but rather monetary loss, and by obligating the Carriers to do *less* than that which they are legally obligated to do, it cannot serve as "full and adequate consideration." 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.").

Finally, it is declared by the general assembly 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" shall be deemed "full and adequate consideration." 92.089.1, RSMo. 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.[20] What is clear from HB 209, however, is that back-tax revenues sought to be collected by the municipalities are gone forever, *i.e.*, discharged and released *via* HB 209's immunity and lawsuit dismissal provisions. This tax amnesty will cost the municipalities in excess of $400 million statewide, *i.e.*, at least $300 million in unpaid wireless taxes, and $100 million in unpaid wireline taxes, not including penalties and interest. [R-1153 to R-1158.] Prospectively, things do not look much better for the municipalities: those cities with gross receipt tax rates currently above 5%, but now forced to reduce their rates to 5%, can be expected to lose millions of dollars of additional revenue in the future. No one can demonstrate that HB 209's speculative, future revenues are sufficient to off-set this loss in tax dollars.

Moreover, there is no assurance that all of the Carriers will continue to do business in these municipalities, that subscribers will continue to do business with all of the Carriers, or that HB 209 will remain in effect and not be modified by subsequent legislation. Cf., Wright, Miller & Cooper, Federal Practice and Procedure, § 3708, at 250-251 (3rd ed.) (anticipated, future tax revenues cannot be utilized to satisfy amount-in-controversy required for federal jurisdiction, because "it cannot be assumed...that [the business] will continue to be subject to the tax, or that the taxing statute will remain in effect and not be modified by legislation"), citing Healy v. Ratta, 292 U.S. 263, 270-271, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934). If just one carrier stops doing business in one municipality or enters bankruptcy or loses a customer – either thirty days or thirty years

[20] In another portion of HB 209, it states that sections 92.074 to 92.098 "shall have a revenue-neutral effect." 92.086.6, RSMo.

from now – that municipality has been denied HB 209's "consideration" as a matter of law.[21]

More than just a crippling loss of tax dollars, this purported justification for HB 209 makes 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. This is self-evident from the fact that judgment has been entered against some of them; further, it is reinforced by HB 209's tax scheme, which validates Plaintiffs' tax ordinances and the Cities' interpretation of them. Thus, in the future, the Carriers simply will be complying with existing tax law, albeit at a reduced and preferred rate. They will be paying the taxes they wrongfully resisted paying in the past, on a prospective basis only.[22] In such circumstances, the law is clear that a promise

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[21] This is not a theoretical possibility. Since the filing of this action, one of the named defendants – MCI WorldCom Communications – filed for bankruptcy protection in July 2002. (R-305.)

[22] This presumes, of course, that the Wireless Carriers will pay such prospective taxes. Since HB 209's terms and definitions (*e.g.*, "telephone company," "telephone service," "exchange telephone service," etc.) are largely identical to those found in the municipalities' codes and ordinances, there is nothing to prevent the Carriers from persisting in their wrongful refusal to pay such taxes. They need only declare themselves to be something other than "telephone companies," wait for the Cities to initiate enforcement actions, and then assert the same defenses as before. Such a possibility is

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); Blandford Land Clearing Corp. v. National Union Fire Ins. Co. of Pittsburgh, 698 N.Y.S.2d 237, 243 (Sup.Ct.N.Y. 1999) ("promise to do no more than one is contractually or legally obligated to do is illusory").

"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). The general assembly's tax give-away, both retroactively and prospectively, designed to

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further evidence that the general assembly's "consideration" is illusory. Whereas the municipalities are asked to give up everything, the Carriers are not even required to forego their stated (albeit frivolous) defenses. See, e.g., State ex rel. Kansas City v. State Highway Commission, 163 S.W.2d at 953 (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.")

benefit a few at the expense of many, can only be considered a gift (or corporate welfare). All of its proffered bases for "consideration" being legally infirm, this Court should strike down HB 209 as violative of Article III, Section 39(5).

E. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Constitutes Special Legislation In Violation Of MO. CONST. art. III, § 40, In That It Regulates The Affairs Of Cities, Grants Exclusive Corporate Privileges, And Arbitrarily Classifies For Purposes Of Taxation.

Standard: Ordinary rules of statutory construction apply to the interpretation of the constitution, though "applied more broadly because of the permanent nature of constitutional provisions." Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). "If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid." State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality do not apply "where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision." Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

Article III, § 40 of the Missouri Constitution prohibits the general assembly from passing local or special laws in various, enumerated circumstances, especially where a general law can be made applicable to the subject addressed by the legislature.[23] "The

[23] The Missouri Constitution is somewhat unique, because of its inclusion of the following language: "whether a general law could have been made applicable is a judicial

unconstitutionality of a special law is presumed." Harris v. Missouri Gaming Commission, 869 S.W.2d 58, 65 (Mo. banc 1994), modified on denial of rehearing. See also Tillis v. City of Branson, 945 S.W.2d 447, 448 (Mo. banc 1997), rehearing denied; State ex rel. City of Blue Springs v. Rice, 853 S.W.2d 918, 921 (Mo. banc 1993).

"Special legislation" is not easy to categorize. Its contours have evolved over time with the different attempts to identify and define "special laws." In City of Springfield v. Smith, 19 S.W.2d 1, 6 (Mo. banc 1929), the Missouri Supreme Court found a law encompassing less than all who are "similarly situated" to be constitutionally infirm. Later, in Reals v. Courson, 164 S.W.2d 306, 307-08 (Mo. 1942), the Court declared "a statute which relates to particular persons or things of a class" to be special.[24] More

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question to be judicially determined without regard to any legislative assertion on that subject." MO. CONST. art. III, § 40(30). See McKaig v. Kansas City, 256 S.W.2d 815, 816 (Mo. banc 1953) ("there are only 'three other states, viz. Minnesota, Kansas, Michigan, which have constitutional provisions expressly making the determination of the question of whether a general law can be made applicable a judicial question'"), rehearing denied, quoting City of Springfield v. Smith, 19 S.W.2d 1, 3 (Mo. banc 1929), rehearing overruled.

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

recently, in Harris v. Missouri Gaming Commission, the Court's test for special legislation focused on whether the challenged law was "open-ended" or "closed-ended." Harris v. Missouri Gaming Commission, 869 S.W.2d at 65.

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

In light of these observations, HB 209 constitutes "special legislation" in one or more of the following respects:

1) The statute does not apply to all members of the same class. If the class is defined as "utilities," HB 209 grants special rights, privileges and immunities to telephone utilities (*e.g.*, tax forgiveness, lawsuit dismissal, etc.) not enjoyed by other utilities (*e.g.*, gas, water, electric, etc.). Further, it "caps" prospective license taxes on telephone utilities at 5%, but it fails to confer the same benefit upon other utilities.

2) The statute does not apply equally to each member of the same class. If the class is defined as "telephone companies," HB 209 grants special rights, privileges and immunities to telephone companies that failed to pay taxes, but not to telephone companies (wireline and wireless) that did.

3) The statute's classifications are not based on real distinctions that permit

meaningful differentiation between classes. Wireless carriers are "telephone companies," just like wireline carriers, with the only difference being the presence or absence of a wire. See, e.g., Order at pp. 6-7, dated June 9, 2005, in City of Jefferson, et al., v. Cingular Wireless, LLC, et al., cause no. 04-4099-CV-C-NKL (W.D.Mo. 2005) [R-1058 to R-1059]; City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc., 14 S.W.3d 54, 59 (E.D.Mo. 1999), mtn. for rehearing and/or to transfer to Supreme Court denied. To distinguish between such companies on the basis of a wire, say, when granting tax amnesty under HB 209, is to create a distinction without a difference.[25]

4) The statute's classifications are arbitrary and unreasonable. HB 209 bars municipalities from pursing class litigation against telephone companies "to enforce or collect any business license tax" (71.675.1, RSMo), but it does not foreclose telephone companies from pursuing class litigation against municipalities

[25] Similarly, telephone companies are "utilities," just like gas, electric and water companies, with the only difference being the type of service offered to the public. See, e.g., Campanelli v. AT&T Wireless Serv., Inc., 706 N.W.2d 1267, 1269-70 (Ohio 1999) (wireless telecommunications providers are considered utilities). To single out telephone companies for favored treatment, at the expense of similarly situated utilities, is to ignore logic, history, business methods and common sense.

to recover payment of the same tax.[26] In addition, it arbitrarily shields telephone companies from class actions "to enforce or collect any business license tax" (id.), but not other companies subject to the same business license taxes.

5) The statute's classifications are not germane to the purpose of the law. HB 209's classifications are deemed necessary for "telecommunications business license tax simplification," but the law does nothing to eliminate preexisting variations in telephone tax rates (see, *infra*.). Further, if the goal is business license tax simplification, it is not fostered by excluding other businesses and utilities similarly situated. Concerned about the "economic well being of the state," HB 209 shortens the statute of limitations to three years for actions involving "the alleged nonpayment or underpayment of [a telecommunications] business license tax" (92.086.12, RSMo),[27] and it authorizes a telephone company "to pass through to its retail customers all or part of [a telecommunications] business license tax" (92.086.13, RSMo).[28] Again, if the concern is the "economic

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

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

[28] Such a "pass through" purports to make the citizenry, as opposed to the

well being of the *state,*" it is not alleviated by starving municipalities of tax revenues, foisting taxes upon the citizenry, and excluding similarly situated businesses from such benefits.

6) The statute's classifications are based on existing circumstances only [*i.e.*, closed-ended]. HB 209 exempts certain municipalities from having to adjust their business license tax rates. 92.086.10, RSMo. The exemptions are based upon, *inter alia*, dates that have passed ("prior to November 4, 1980"), preexisting ordinance language ("had an ordinance imposing a business license tax on telecommunications companies which specifically included the words 'wireless', 'cell phones', or 'mobile phones'"), and pending litigation ("had taken affirmative action to collect such tax"). In doing so, HB 209 confers benefits and privileges upon select municipalities that no other city could hope to enjoy.[29] The classifications do not permit a municipality's status to change, *i.e.*, to come within such classifications in the future, but rather grant exemptions based on

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telephone company, the business license taxpayer. It cannot be squared with HB 209's definition of a "business license tax," which is a tax upon businesses, not individuals, "for the privilege of doing business within the borders of [a] municipality." 92.077(1), RSMo.

[29] The City of Jefferson City, Missouri would qualify for exemption under 92.086.10(1), RSMo. The City of Clayton, Missouri would qualify for exemption under 92.086.10(2), RSMo. However, there are over 200 Missouri cities and municipalities with telephone license tax ordinances that would not qualify for either exemption.

unchanging, historical facts.

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

In the following decisions, the Missouri Supreme Court found legislation containing an arbitrary tax, business or municipal classification – the same infirmities collectively appearing in HB209 – to be invalid "special legislation": (i) State ex rel. Ashby v. Cairo Bridge & Terminal Co., 100 S.W.2d 441, 444 (Mo. 1936) (statute imposing penalty on four of ten classes of public utility companies for failure to file property statements, required by law to be filed by all such companies, held unconstitutional); (ii) Laclede Power & Light Co. v. City of St. Louis, 182 S.W.2d 70, 73 (Mo. banc 1944) (city ordinance imposing a license tax on the supplying of electricity and exempting from payment thereof persons who had theretofore accepted specified ordinances and had paid and should continue to pay previously imposed franchise rental, where only one company could ever qualify for exemption, violates constitutional provision prohibiting adoption of "local" or "special laws" where a general law can be made applicable); (iii) State, on Inf. of Taylor v. Currency Services, 218 S.W.2d 600, 604 (Mo. banc 1949) (the statutory provision that no corporation, other than banking corporation, railroad express company, trans-atlantic steamship company, or telegraph or telephone company, shall possess power to transmit money by draft, traveler's check, money order or otherwise, is unconstitutional as granting special rights and privileges to special group of corporations and making arbitrary and unreasonable classification not

based on licensing, inspection, regulation, financial responsibility, or business methods of favored companies); (iv) Planned Ind. Expansion Authority v. Southwestern Bell Tel. Co., 612 S.W.2d 772, 776-77 (Mo. banc 1981) (statutory amendment giving telephone utility, but not other utilities, a vested property interest in public land under which it had placed its conduits violated the constitutional ban on local or special laws); (v) State ex rel. Public Defender Comm. v. County Court of Greene County, 667 S.W.2d 409, 413 (Mo. banc 1984) (since statute exempting Greene County, i.e., the Thirty-First Judicial Circuit, from operation of statute governing maintenance of public defender's office was special on its face, it could be presumed invalid, as violative of constitutional ban on special legislation); (vi) School Dist. of Riverview Gardens v. St. Louis County, 816 S.W.2d 219, 222 (Mo. banc 1991) (provisions of ad valorem tax rate adjustment statute that purported to treat political subdivisions in two counties differently than political subdivisions in other counties for purposes of rate adjustment following reassessment violated the provision of the Missouri Constitution prohibiting local or special laws when general law could be made applicable); (vii) O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99 (Mo. banc 1993) (act that could apply to only one county, authorizing counties to establish boundary commissions, was unconstitutional); (viii) Harris v. Missouri Gaming Commission, 869 S.W.2d 58, 65-66 (Mo. banc 1994) (statute exempting specifically described boats and others located between two bridges along Mississippi River from regulations covering riverboat gambling was facially special law, for purposes of constitutional prohibition against such laws, and was presumptively unconstitutional); and (ix) Tillis v. City of Branson, 945 S.W.2d 447, 449 (Mo. banc 1997) (the requirement that a city be in a county bordering Arkansas in order to qualify for tourism tax is a closed-ended classification, thus, the statute is a facially special law, and its unconstitutionality is

presumed).

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

F. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Violates The Doctrine Of Separation Of Powers, As Set Forth In MO. CONST. art. II, § 1, In That It Directs An Outcome In Pending Cases And Impedes Municipal Tax Collection.

Standard: Ordinary rules of statutory construction apply to the interpretation of the constitution, though "applied more broadly because of the permanent nature of constitutional provisions." Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). "If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid." State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality do not apply "where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision." Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

The Missouri Constitution provides: "[t]he powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in instances in this constitution expressly directed or permitted." MO. CONST. art. II, § 1. "This provision has appeared in the Missouri Constitution in substantially the same form since 1820." Mo. Coalition for the Environment v. Joint Comm. On Admin. Rules (JCAR), 948 S.W.2d 125, 132 (Mo. banc 1997), as modified on denial of rehearing.

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]." Id. Although frequently invoked to maintain the institutional integrity of government, the doctrine also serves to protect the rights and liberties of individuals. See, e.g., Mistretta v. United States, 488 U.S. 361, 380, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (noting that the Separation of Powers Clause is "essential to the preservation of liberty"); Rhodes v. Bell, 130 S.W. 465, 467-68 (Mo. 1910) ("[t]he purpose which the people had in view in keeping separate the different departments of government is well known to have had its origin in the jealousy of the framers of our state and federal governments and the great solicitude to keep them separate in order to preserve the liberty of the people").

"There are two broad categories of acts that violate the constitutional mandate of separation of powers. 'One branch may interfere impermissibly with the other's performance of its constitutionally assigned [power]...[citations omitted]. Alternatively,

the doctrine [of separation of powers] may be violated when one branch assumes a [power]...that more properly is entrusted to another. [citations omitted].'" State Auditor v. Joint Committee on Legislative Research (JCLR), 956 S.W.2d 228 (Mo. banc 1997), as modified on denial of rehearing, 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).

(i) Encroachment Upon Judicial Branch

Contravening JCLR and Chadha, HB 209 impermissibly encroaches upon the judiciary in one or more of the following respects: (i) it singles out specific litigation for legislative treatment;[30] (ii) it does not afford courts the opportunity to use their

[30] 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) City of University City, Missouri, et al. v. AT&T Wireless, et al., cause no. 01-CC-004454, formerly pending in the Circuit Court of St. Louis County; (ii) Cities of Wellston and Winchester, Missouri v. SBC Communications, Inc., et al., cause no. 044-02645, formerly pending in the Circuit Court of St. Louis City; (iii) City of Jefferson, et al., v. Cingular Wireless, LLC, et al., cause no. 04-4099-CV-C-NKL, currently stayed in the U.S. District Court for the Western District of Missouri; (iv) City of St. Louis v. Sprint Spectrum, L.P., cause no. 034-02912A, formerly pending in the Circuit Court of St. Louis City; (v) City of Springfield v. Sprint Spectrum, L.P., cause no. 104CC-5647, formerly pending in the Circuit Court of Greene County; and (vi) State of Missouri, et al., v. SBC Communications, Inc., et al, cause no. 4:05-CV-01770, currently stayed in the U.S.

adjudicative skills, or to meaningfully exercise their judgment and discretion;[31] (iii) a judicial proceeding is not allowed to take place, because it directs a particular outcome in

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District Court for the Eastern District of Missouri.

[31] HB 209 gives a court the power to grant immunity where the evidence demonstrates that a telephone company possessed a "good faith belief" it was not subject to taxation, but then qualifies that phrase with the word "subjective." 92.089.2, RSMo. "Subjective" has several commonly understood meanings, including "proceeding from or taking place within an individual's mind such as to be unaffected by the external world," "existing only in the mind; illusory," and "existing only within the experiencer's mind and incapable of external verification." The American Heritage Dictionary (2nd ed. 1982). Thus, HB 209 purports to afford a role for judicial discretion and judgment, but then takes it away through use of the word "subjective." Any telecommunications company possessing such a "subjective" good faith belief "shall not be liable to a municipality for, the payment of the disputed amount of business license taxes..." 92.089.2, RSMo.

pending cases;[32] (iv) it retroactively alters judicial construction of Plaintiffs' ordinances;[33]

[32] HB 209 states that "[i]f any municipality, prior to July 1, 2006, has brought litigation..., it shall immediately dismiss such lawsuit without prejudice..." 92.089.2, RSMo.

[33] See, e.g., Order at pp. 1, 3 and 11, dated June 9, 2005, in City of Jefferson, et al., v. Cingular Wireless, LLC, et al., cause no. 04-4099-CV-C-NKL (W.D.Mo. 2005) ("[T]he Plaintiffs' gross receipt tax ordinances are enforceable and...they apply to mobile telephone services just as they apply to land line telephone services...") [R-1053, R-1055 and R-1063]; City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc., 14 S.W.3d 54, 59 (Mo.App.E.D. 1999) ("The services Southwestern Bell provided clearly fell within the definition or genus of a telephone company...Southwestern Bell 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.

(v) it attempts to define a constitutional provision;[34] and (vi) it determines what the law is and applies it to cases.[35]

Given these qualities, HB 209 is clearly "adjudicative" in nature and forces courts 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

[34] HB 209 contains the following sentence: "The general assembly...finds and declares that the resolution of such uncertain litigation, the uniformity, and the administrative convenience and cost savings to municipalities resulting from, and the revenues which will or may accrue to municipalities in the future...are full and adequate consideration...as the term 'consideration' is used in Article III, Section 39(5) of the Missouri Constitution..." 92.089.1, RSMo.

[35] HB 209 provides that a defendant's "subjective good faith belief" in its innocence shall satisfy pre-existing law and suffice for the immunity and dismissal of lawsuits. 92.089.1, RSMo.

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").

As the Missouri Supreme Court has noted: "the constitution assigns the General Assembly the single power and sole responsibility to make, amend and repeal laws for Missouri and to have the necessary power to accomplish its law-making responsibility." State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d at 230.[36] Within

[36] Conversely, judicial power has been described as "the power of a court to make and enter a final judgment with respect to the rights of persons or property upon a defined issue presented by adversary parties." People v. Sturman, 132 P.2d 504, 508 (Cal.App.

these parameters, the legislature can reasonably limit common law causes of action and restrict or expand the causes of action that it creates. See Fust v. Attorney General for the State of Misouri, 947 S.W.2d 424, 430-31 (Mo. banc 1997), citing Simpson v. Kilcher, 749 S.W.2d 386, 391 (Mo. banc 1988). Further, no one disputes that the general assembly can "amend statutes prospectively if it believes that a judicial interpretation [is] at odds with its intent..." See Roth v. Yackley, 396 N.E.2d at 522. However, none of these powers can adequately explain HB 209, the provisions and effects of which differ in kind and degree from all other bills passed by the Missouri legislature in recent (or even distant) memory.

First, HB 209 does not expressly repeal the underlying license tax ordinances. The Maryland Heights Municipal Code, for example, reads in part:

> "There is hereby levied and the city shall collect a license tax of five and one-half (5 ½) percent on the gross receipts of companies engaged in the business of supplying or furnishing electricity, electrical power, electrical service, gas, gas service, water, water service, telegraph...or exchange telephone service, within the boundaries of the city."

Maryland Heights Municipal Code, Section 13-127. (R-178.) Presumably, with the exception of the words "exchange telephone service," this Code provision remains in

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1942), as amended on denial of rehearing. See also Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174, 2179, 135 L.Ed.2d 606 (1996) ("It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm...")

force and effect following the enactment of HB 209. Similarly, a review of Florissant Code Sec. 14-602 reveals that:

> "Every person engaged in the business of supplying or furnishing electricity, electrical power, electrical service, furnishing gas or gas service, furnishing water or water service or furnishing telephone or telegraph service in the city shall pay to the city a license or occupational tax of three (3) percent of the gross receipts derived from such business within the city."

Florissant Code Sec. 14-602 (Code 1980, § 14-73; Ord. 5356, 6-22-92; Ord. 5925, 2-10-97; Ord. 5968, 5-27-97). [R-131.] Because Florissant's license tax rate does not exceed the 5% "cap," there is no indication that HB 209 intended to repeal Florissant Code Sec. 14-602.

Such a conclusion is buttressed by the language of 92.083.2, RSMo, which reads: "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." Thus, in many respects, and with the exception of the 5% "cap" [which is prospective only], HB 209 does not alter or repeal existing law, but merely elevates the language embodied in local codes and ordinances to a higher level (*i.e.*, a state statute).

Second, without expressly repealing prior law, HB 209 then proceeds to declare that certain conduct satisfies prior ordinances or else it requires a court to interpret the ordinances in a specified way. This is the clear import of 92.089.2, RSMo, which allows for lawsuit immunity and dismissal based on the subjective desires and wishes of a telephone company. Consequently, a defendant could have violated Florissant Code Sec. 14-602 above (*i.e.*, broken the law), yet still prevail in court so long as it complied with

the "subjective good faith requirements" of 92.089.2, RSMo. 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.[37] Such a result-directed outcome has constituted a separation of powers violation as far back as the mid-nineteenth century. See United States v. Klein, 80 U.S. 128, 20 L.Ed. 519 (1871).[38]

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[37] It is important to remember that, in passing HB 209, the general assembly is seeking to extinguish an "indebtedness, liability or obligation" protected by constitutional mandate. The taxes at issue are constitutionally protected funds. See, e.g., Graham Paper Co. v. Gehner, 59 S.W.2d 49, 52 (Mo. banc 1933). Further, courts interpreting the license tax ordinances have found them to apply to the wireless carriers as written. See note 33, *infra*. The wireless carriers, in turn, have ignored the exclusive remedy available to them for disputing such taxes. See, e.g., Metts v. City of Pine Lawn, 84 S.W.3d 106, 109 (Mo.App.E.D. 2002). Accordingly, given the posture of these cases, the general assembly is not merely changing a statute or restricting a cause of action, but, rather, it is undoing built-in Constitutional safeguards, ignoring the prior construction of statutes (*e.g.*, 139.031, RSMo) and ordinances, and permanently diminishing the role of the judiciary.

[38] Following the Civil War, Congress enacted the Abandoned and Captured Property Act, granting proceeds from the sale of property seized in the southern states to the original owners of that property so long as they had not given aid or comfort to the

Third, in granting lawsuit immunity, HB 209 targets a discreet and identifiable group of litigants, *i.e.*, the plaintiff municipalities and defendant carriers in pending lawsuits. By specifically referring to such lawsuits in HB 209, the general assembly again violates separation of powers principles by applying law to individual litigants, rather than making it. In I.N.S. v. Chadha, where the Supreme Court found a legislative

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insurrection. The Supreme Court, in an earlier case, found that receipt of a Presidential pardon was sufficient proof of loyalty under the Act for purposes of recovery. Because the landowner in Klein had received such a pardon, the Court of Claims awarded recovery. Pending the government's appeal of this decision, Congress responded with legislation providing that a Presidential pardon could not be offered in the Court of Claims as evidence that the recipient was entitled to a recovery, that acceptance of such a pardon was to be taken as conclusive evidence that the recipient had given aid and comfort to the insurrection, and that upon proof that the claimant had accepted such a pardon, the jurisdiction of the Court of Claims and of the Supreme Court on appeal would end. Upon review, the Supreme Court found this legislative mandate to violate the separation of powers, because Congress had prescribed a "rule of decision" in a pending case. United States v. Klein, 80 U.S. 128, 146-47, 20 L.Ed. 519 (1871). More specifically, because Congress had "prescribe[d] a rule for the decision of a cause in a particular way," it had "passed the limit which separates the legislative from the judicial power," thus, the statutory provision was unconstitutional. Id.

veto that overturned an INS decision suspending the deportation of an alien to be unconstitutional, Justice Powell noted that such legislative action was "clearly adjudicatory," because:

> [t]he House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches. Even if the House did not make a *de novo* determination, but simply reviewed the Immigration and Naturalization Service's findings, it still assumed a function ordinarily entrusted to the federal courts...[citations omitted]...Where, as here, Congress has exercised a power 'that cannot possibly be regarded as merely in aid of the legislative function of Congress,' [citations omitted], the decisions of this Court have held that Congress impermissibly assumed a function that the Constitution entrusted to another branch...[citations omitted].

I.N.S. v. Chadha, 462 U.S. at 964-66 (Powell, J., concurring). The fact that HB 209 is not a law of general application, *e.g.*, because it has little effect beyond the lawsuits mentioned, amplifies its "adjudicative" qualities. As Justice Powell warned in such circumstances: "[t]he only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to 'the tyranny of a shifting majority.'" I.N.S. v. Chadha, 462 U.S. at 966 (Powell, J., concurring). By singling out individual litigants for unfavorable treatment, the dangers envisioned by Justice Powell have come to pass in the form of HB 209.

(ii) Encroachment Upon Executive Branch

In addition to encroaching upon the judiciary, HB 209 also impermissibly

interferes with executive branch performance.

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

Once acknowledged, HB 209 then proceeds to discharge collection actions brought by municipalities in the courts below. Thus, HB 209 both assumes executive power and interferes with it, *i.e.*, it interferes with the municipal collection of taxes and assumes control over the enforcement actions by dismissing them. Such legislative encroachment is prohibited. As Judge Price noted in JCAR, "Article II, § 1 strictly confines the power of the legislature to enacting laws and does not permit the legislature to execute laws already enacted." Mo. Coalition for the Environment v. Joint Comm. On Admin. Rules (JCAR), 948 S.W.2d at 133. See also Buckley v. Valeo, 424 U.S. 1, 138, 96 S.Ct. 612, 691, 46 L.Ed.2d 659 (1976) ("[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the [executive branch], and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed'").

G. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Constitutes Retrospective Legislation In

Violation Of MO. CONST. art. I, § 13, In That It Substantially Impairs Existing Municipal Rights.

Standard: Ordinary rules of statutory construction apply to the interpretation of the constitution, though "applied more broadly because of the permanent nature of constitutional provisions." Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). "If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid." State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality do not apply "where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision." Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

HB 209's retrospective aspects are problematic from a constitutional perspective. It is this legislative quality that sustains many of Plaintiffs' constitutional challenges, and that is most responsible for giving one the sense that something is wrong with HB 209. Whether it is nullifying the effect of prior tax ordinances, forgiving a past indebtedness, impairing rights acquired under existing law, or giving a different construction to previous events, the practical effect of HB 209 is to take property away from municipalities and to transfer it to favored businesses – solely through means of legislative fiat. The language of HB 209 admits of no other construction. Thus, distilled to its essence, Plaintiffs' concern with respect to HB 209 is that it is harsh, oppressive, unreasonable and unfair.[39]

[39] For this reason, retrospective laws are oftentimes challenged, not because they

The Missouri Constitution expressly addresses the subject of retrospective laws and states that no law "retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted." MO. CONST. art. I, § 13. This does not mean that no statute relating to past transactions can be passed, "but rather that none can be allowed to operate retrospectively so as to affect such past transactions to the substantial prejudice of the parties interested. A law must not give to something already done a different effect from that which it had when it transpired." Willhite v. Rathburn, 61 S.W.2d 708, 711 (Mo. 1933).

A "retrospective law" is one that "takes away or impairs vested or substantial rights acquired under existing laws, or imposes new obligations, duties, or disabilities with respect to past transactions." Mendelsohn v. State Bd. of Registration, 3 S.W.3d 783, 785-86 (Mo. banc 1999). The distinction drawn is that "[s]ubstantive laws – relating to

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are backward-looking, but because they offend the Fourteenth Amendment to the U.S. Constitution guaranteeing due process of law. See, e.g., Winther v. Village of Weippe, 430 P.2d 689, 695 (Idaho 1967) ("The facts in the instant case are indicative of a plan or scheme designed to eliminate respondents' business under color of municipal authority attempted to be exercised not only retroactively, but in an unreasonable, arbitrary and discriminatory manner. To permit this would be a departure from fundamental concepts of constitutional law as well as repugnant to the basic principles of 'fair play,' contrary to the United States Constitution, Fourteenth Amendment, and Idaho's Constitution, Art. I, s 13, guaranteeing due process of law.")

rights and duties that give rise to a cause of action – may not apply retrospectively," whereas, "[p]rocedural laws – relating to the machinery for process in the causes of action – may apply retrospectively." Mendelsohn v. State Bd. of Registration, 3 S.W.3d at 786. In making a determination as to whether a law is substantive or procedural, "notions of justice and fair play in a particular case are always germane." State ex rel. St. Louis-San Francisco Railway v. Buder, 515 S.W.2d 409, 411 (Mo. banc 1974).

By its terms, HB 209 is intended to apply retrospectively, or else it operates retrospectively in terms of its practical effect. Such a conclusion derives from the fact that: (i) HB 209 forgives a matured indebtedness to the substantial prejudice of municipalities; (ii) HB 209 grants immunity for prior bad acts occurring "up to and including July 1, 2006" (92.089.2, RSMo); (iii) HB 209 eliminates all remedies available for past transgressions (*i.e*, it affects more than the "machinery" of litigation)[40]; (iv) HB 209 permits a current belief in one's innocence to satisfy pre-existing law (*i.e.*, it gives something done a different effect from that which it had); and (v) HB 209 alters history by denying that certain transactions ever took place (*e.g.*, the generation of "gross receipts"). Being retrospective in operation, HB 209 violates art. 1, § 13 of the Missouri Constitution to the extent that it purports to alter or impair the liabilities and obligations imposed by Plaintiffs' license tax ordinances. See, e.g., Graham Paper Co. v. Gehner, 59 S.W.2d 49, 52 (Mo. banc 1933) ("an inchoate tax, though not due or yet payable, is...an

[40] See, e.g., Koch v. Missouri-Lincoln Trust Co., 181 S.W. 44, 48-49 (Mo. 1915) ("the Legislature is powerless...to deny all remedy or so to condition and restrict the remedy as materially to impair" a vested right).

obligation or liability... within the protection of the restriction against retrospective laws..."); First Nat. Bank of St. Joseph v. Buchanan County, 205 S.W.2d 726, 730-31 (Mo. 1947) (Bank Tax Act could not operate to supplant or supersede city's earlier tax; to the extent that it purports to operate prior to its effective date, "the act clearly falls within the prohibition" of Article 1, Section 13); Ernie Patti Oldsmobile, Inc. v. Boykins, 803 S.W.2d 106, 108 (Mo.App.E.D. 1990) ("[c]learly, retrospective repeal of the ordinance in question would impair the City's 'vested right' to collect the license fee"), mtn. for rehearing and/or transfer to Supreme Court denied.[41]

[41] See also Burns v. Labor & Ind. Relations Comm., 845 S.W.2d 553, 557 (Mo. banc 1993) (amended statute applying new test for determining whether individual is an employee, for employment security tax purposes, is clearly substantive and does not apply retrospectively); Liberty Mutual Ins. Co. v. Garffie, 939 S.W.2d 484, 486-87 (Mo.App.E.D. 1997) (amended statute reducing employer's subrogation rights did not apply retroactively to claimant's case; such amendment impaired employer's vested rights under existing law which allowed full subrogation rights), mtn. for rehearing and/or to transfer to Supreme Court denied; State ex rel. Western Outdoor Advertising Co. v. State Highway and Transp. Comm. of State of Missouri, 813 S.W.2d 360, 363 (Mo.App.W.D. 1991) (decision of State Highway and Transportation Commission requiring outdoor advertiser to remove sign on ground that it had lost its nonconforming status improperly affected advertiser's substantive right to take remedial action that was afforded at time notice of original violation was given; attempted retrospective application of subsequent

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

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regulation, which prohibited remedial action by outdoor advertisers, was ex post facto).

school districts without violating the retrospective law prohibition." Id.[42]

The same conclusion should not, however, be reached here: although Plaintiffs are political subdivisions of the State, the vested rights of municipalities and cities are specifically singled out for protection in the Missouri Constitution; further, the underlying

[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 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).

litigation is not an intramural fight between "two statutory instrumentalities of government," as in Savannah, but rather an attempt to protect and advance local interests. Cf. Savannah R-III School Dist. v. Public School Retirement System of Missouri, 950 S.W.2d at 861 (Robertson, J., dissenting) ("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."); Planned Ind. Expansion Authority of City of St. Louis v. Southwestern Bell Telephone Company, 612 S.W.2d 772, 776 (Mo. banc 1981) ("The City's counterclaim [raising constitutional challenges] is an action for a declaratory judgment which is regulated by Rule 87...For such purposes, the City is declared to be a 'person' by Rule 87.05 and it may properly seek a declaration as to [the statute]..."; City's retrospective law challenge upheld).[43]

Even if Planned Ind. Expansion Authority of City of St. Louis did not support Plaintiffs' right to bring this challenge, Mayor Gail M. Winham, a taxpayer and public official, also alleges that HB 209 violates the retrospective law prohibition. Because the effect of the tax amnesty is to eliminate businesses from the tax rolls, to illegally squander

[43] See also Arsenal Credit Union v. Giles, 715 S.W.2d 918, 921 (Mo. banc 1986) ("Arguments...that local government units are 'mere arms of the state' with no independent right to attack statutes that affect them – have been expressly rejected in favor of a standing doctrine concerned primarily with 'sufficient controversy between the parties' regarding matters which 'directly affect them.').

public funds, and to deplete the local treasury, Mayor Winham possesses taxpayer[44] and

[44] See, e.g., Ste Genevieve School Dist. R-II v. Board of Aldermen, 66 S.W.3d 6, 10-11 (Mo. banc 2002) ("A taxpayer has standing to challenge an alleged illegal expenditure of public funds, absent fraud or compelling circumstances, if the taxpayer can show either a direct expenditure of funds generated through taxation, an increased levy in taxes, or a pecuniary loss attributable to the challenged action...Missouri courts allow taxpayer standing so that ordinary citizens have the ability to make their government officials conform to the dictates of the law when spending public money...Because the redevelopment project costs the district and the city future tax revenue, the taxpayer has standing to seek a declaratory judgment."), rehearing denied; American-Republican, Inc. v. City of Waterbury, 441 A.2d 23, 25 (Conn. 1981) ("Once a probable increase in his tax burden from the challenged activity has been shown, a plaintiff has passed the threshold of standing even though the pecuniary effect upon him may be extremely small"; thus, taxpayer had standing to challenge purchase of land by city for later transfer to housing authority where, although funds used came from federal government, it would remove property from municipal tax list); World Trade Ctr. Taxing Dist. v. All Taxpayers, 2005 WL 1528414, at *5 (La. 2005) ("[U]nlike a citizen attempting to *compel* the performance of a public duty, a citizen attempting to *restrain* unlawful action by a public entity is not required to demonstrate a special or particular interest distinct from that of the public at large...Consequently, taxpayers seeking to *restrain* action by a public body are afforded a

public official[45] standing to challenge the constitutionality of HB 209. The significance of individual standing is made clear by a sentence in Savannah R-III School District, which reads: "The analysis of this constitutional claim would be different had any one of the named parties been a teacher." Savannah R-III School Dist. v. Public School Retirement System of Missouri, 950 S.W.2d at 858. This strongly suggests that the Court would have reached a different result – and found the statute to be impermissibly retrospective – had the plaintiff in Savannah R-III School Dist. been an individual, rather than a state actor.

Whether challenged by a city, a taxpayer or a public official, there must be a

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right of action upon a mere showing of an interest, however small and indeterminable.") (emphasis in original); Albus, Taxpayer Standing In Missouri, 54 J.Mo.B. 199, 202 (July-August 1998) ("[t]he ability of taxpayers to submit their legal challenges to the courts protects unpopular minorities").

[45] See, e.g., 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"), rehearing denied; 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").

mechanism in place to question the validity of HB 209 under art. 1, § 13 of the Missouri Constitution. Clearly, HB 209 constitutes a prohibited, retrospective law. HB 209 so impairs municipal rights, so alters legal history, that it permits no other conclusion. As the Missouri Supreme Court emphasized: "[i]t is best to keep in mind that the underlying repugnance to the retrospective application of laws is that an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to a different set of effects which alter the rights and liabilities of the parties thereto." State ex rel. St. Louis-San Francisco Railway v. Buder, 515 S.W.2d at 411. Much like the statute in Buder, no such reasons are discernable here: HB 209's erroneous suppositions about "the economic well being of the state" hardly suffice to justify this oppressive and unfair piece of legislation.[46]

[46] Aside from the fallacies and inconsistencies noted earlier (see pages 65-69, *infra*.), HB 209 makes no attempt to explain how a lawsuit pending against foreign corporations, wherein no money has changed hands, impairs "the economic well being of the state." Not only does HB 209 evidence a distrust of the judicial system, but its unstated premise is that any lawsuit brought against any company constitutes a threat to the State of Missouri. In effect, HB 209 places the profits and concerns of business interests on the same footing as state interests, blurring and equating the two to the point where the statement by GM President Charles E. Wilson over fifty years ago – "What's good for the country is good for General Motors, and vice versa" – is more true than ever before.

H. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Is Void For Vagueness, In That It Provides No Legally Fixed Standards For Determining What Is Prohibited And What Is Not In A Particular Case.

Standard: Ordinary rules of statutory construction apply to the interpretation of the constitution, though "applied more broadly because of the permanent nature of constitutional provisions." Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). "If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid." State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality do not apply "where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision." Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

The standard for determining whether a statute is void for vagueness is "whether the terms or words used are of 'common usage and are understandable by persons of ordinary intelligence.'" Bd. of Educ. of the City of St. Louis v. State of Missouri, 47 S.W.3d 366, 369 (Mo. banc 2001). When statutory terms "are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, the statute is void." Id. A statute that interferes with constitutionally protected rights – such as the various rights afforded municipalities in the Missouri Constitution – is held to a more stringent test for vagueness than other enactments. See, e.g., Geaneas v. Willets, 715 F.Supp. 334, 337-38 (M.D.Fla. 1989) ("enactments which interfere with constitutionally protected conduct should be held to a more stringent test for vagueness

than other enactments"), affirmed 911 F.2d 579 (11th Cir. 1990).

HB 209 purports to give a court power to grant immunity where the evidence demonstrates that a telephone company possessed a "subjective good faith belief" that it was not a telephone company or subject to taxation. 92.089.2, RSMo. A telephone company possessing such a subjective good faith belief "shall not be liable to a municipality for, the payment of the disputed amount of business license taxes..." Id. The phrase – "subjective good faith belief" – is not defined anywhere in the statute. See State of Tennessee v. Thomas, 635 S.W.2d 114, 116 (Tenn. 1982) ("[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined").

The word "subjective," as noted earlier, has several commonly accepted meanings, including "proceeding from or taking place within an individual's mind such as to be unaffected by the external world," "existing only in the mind; illusory," and "existing only within the experiencer's mind and incapable of external verification." The American Heritage Dictionary (2nd ed. 1982). Plaintiffs do not mean to suggest that the word "subjective" is unclear. Indeed, it is understood all too well. Rather, Plaintiffs' concern is that HB 209's application – being subjective – is idiosyncratic to each telephone company, and is incapable of verification or challenge by a court or municipality. Stated differently, to the extent HB 209 allows for lawsuit immunity based on the personal wishes and desires of Defendants, it is free of external constraints and incapable of coherent application. A good faith standard based upon one's subjective belief is no standard at all: it is arbitrary, meaningless, and illusory.

In addition to being "subjective," HB 209 is vague because of the looseness of 92.089.2, RSMo. It is difficult to know whether the "subjective good faith belief"

requirement applies to lawsuit immunity only, or to lawsuit dismissal as well. Within the space of two sentences, HB 209 states that a telephone company's "subjective good faith belief" in its innocence shall entitle it to back-tax immunity, prospective tax immunity, and a release from liability. In the next sentence, HB 209 directs municipalities to immediately dismiss their lawsuits against such telephone companies without prejudice. Thus, does a telephone company need to first qualify for the "release from liability" before a municipality can be forced to dismiss its lawsuit?[47] Further, what is the significance of the words "without prejudice" in this section? Why force a municipality to dismiss its lawsuit, and then re-file it, if a telephone company is imbued with immunity up to and including July 1, 2006?

The best example of vagueness is gleaned from the Act's effect during the period August 28, 2005 [HB 209's effective date] - July 1, 2006. Between those dates, exactly what is Missouri's tax policy with respect to telephone companies? If understood correctly, a telephone company can pay a municipal license tax if it wants to during this period, but need not if it doesn't want to, depending upon its "subjective good faith belief" as to whether such taxes are owed. 92.086.1, 92.086.2, 92.086.3, 92.086.4, 92.086.9, 92.089.2, RSMo. Thus, Missouri's tax scheme for wireless and wireline telephone companies is whatever each carrier thought it was (before August 28, 2005) and whatever each carrier thinks it should be (from August 28, 2005 through July 1, 2006). Obviously,

[47] In another section of the bill, lawsuit immunity and lawsuit dismissal are discussed in the conjunctive insofar as "consideration" is concerned. See 92.089.1, RSMo.

a tax system based on such unchecked discretion, *i.e.*, what each taxpayer thinks it was or is, cannot be allowed to stand.[48]

Because there is no way to apply HB 209 without getting an absurd result, its provisions are constitutionally void for vagueness.[49]

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[48] The concern about "subjectivity" in taxation underlies a number of plaintiffs' constitutional challenges, whether based on tax uniformity, special laws, or other constitutional grounds. The arguments made in this section are specifically incorporated by reference in all other sections of this brief wherein the constitutionality of HB 209 is challenged.

[49] See, e.g, Bd. of Educ. of the City of St. Louis v. State of Missouri, 47 S.W.3d 366, 371 (Mo. banc 2001) (school board's challenge to statute on ground of vagueness upheld, where the terms of statute on election of school board members "are of such uncertain and contradictory meaning that this Court is unable to discern with reasonable certainty what was intended"); City of Waynesboro v. Keiser, 191 S.E.2d 196, 199 (Va. 1972) (portion of 1968 amendment to statute permitting adjustments in assessment of real estate taxes "if the court in its discretion finds the ends of justice would be met by making an adjustment" was vague and overly broad and unconstitutional); People v. Lee, 144 Misc.2d 11, 543 N.Y.S.2d 613, 615 (County Ct. 1989) (criminal statute prohibiting "wasting" of oil was unconstitutionally vague since term "waste" was "fraught with subjectivity and widely-varying connotations").

I. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Violates The Tax Uniformity Requirements Of MO. CONST. art. X, § 3, In That It Arbitrarily And Unreasonably Classifies For Purposes Of Taxation.

"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." Judge Conkling, writing in State ex rel. Transport Manufacturing & Equipment Co. v. Bates, 224 S.W.2d 996, 1000 (Mo. banc 1949), rehearing denied.

Standard: Ordinary rules of statutory construction apply to the interpretation of the constitution, though "applied more broadly because of the permanent nature of constitutional provisions." Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). "If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid." State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality do not apply "where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision." Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

The 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. The word "uniform," for purposes of this section, refers to "the measure, gauge or rate of

the tax," whereas the words "same class of subjects" refer to "the classification of the subjects of taxation for...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. The uniformity must correspond to the territorial limits of the taxing district: "If the tax is a state tax, it must be uniform throughout the state. If the tax is a county tax, it must be uniform throughout the county, etc." Dalton v. Metropolitan St. Louis Sewer Dist., 275 S.W.2d 225, 233 (Mo. banc 1955). Thus, a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." City of Cape Girardeau v. Fred A. Groves Motor Co., 142 S.W.2d at 1042.

Undoubtedly, absolute or perfect uniformity in taxation is not possible. Nevertheless, courts should strive to act in accordance with Article X, § 3 and to achieve equality and uniformity. As Judge Conkling explained:

> "With wide discretion the General Assembly may make classifications for taxation purposes, but it is uniformly held that persons or property to be taxed may not be classified 'without reason or necessity.' There is no precise yardstick as to reasonableness of classification...Taxation is not an exact science and tax acts are not to be condemned merely because unavoidable inequalities may result. But the classification cannot be 'palpably arbitrary.' And while the General Assembly may enact statutes applicable to and classifying certain persons or property for taxation purposes yet such classification must include all persons or objects naturally falling within the class. Constitutional class taxation must include within the established class all who belong in it and must exclude all who do not belong in it. *All in each natural class must be taxed or exempted alike. A natural class may not be split. The Legislature may not arbitrarily designate for taxation a portion*

> *only of a separate class and thus exclude a portion which reasonably should be included and taxed*. The tax imposed must apply alike to all naturally and reasonably within the classification set up by the statute. 'The demands of the organic laws are satisfied if all similarly situated are included and none are omitted whose relationship to the subject-matter cannot *by reason* be distinguished from that of those included.'"

State ex rel. Transport Manufacturing & Equipment Co. v. Bates, 224 S.W.2d 996, 1000 (Mo. banc 1949) (emphasis added). See also City of Cape Girardeau v. Fred A. Groves Motor Co., 142 S.W.2d at 1045 ("Broadly put, constitutional class legislation must include all who belong and exclude all who do not belong to the class. Legislative departments... 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.'").

For the reasons discussed earlier, the general assembly's tax classifications and exemptions do not apply uniformly to the same class of subjects. Under HB 209, direct competitors are treated differently for purposes of tax amnesty (*i.e.*, wireless and wireline carriers that failed to pay taxes are granted forgiveness to the exclusion of wireless and wireline carriers that did).[50] Similarly, businesses forming a natural class are split for

[50] There is little doubt that wireless and wireline telephone companies compete for the same customers. In commercials, wireless companies show people talking on cell phones while using their landline phones to tenderize steak or to play catch with the dog.

purposes of benefits (tax forgiveness, prospective cap, shortened statute of limitations, class action protection, etc.), depending upon whether they offer telephone, gas, water or electric services. Further, HB 209's tax exemptions do not correspond to the territorial limits of the taxing district, because two municipalities – Jefferson City and Clayton – can evade its provisions, whereas a 5% cap operates everywhere else in the State.

Such distinctions cannot by justified by reason, history or business practices and differ little from a prohibited classification based on the color of a person's hair. While the general assembly is given latitude in making tax classifications, the Missouri Supreme Court has not hesitated to strike down tax schemes under Article X, § 3, like this one, which discriminate against taxpayers forced to pay, or who have paid, the full measure of their taxes. See, e.g., City of St. Louis v. Spiegel, 2 S.W. 839, 840 (Mo. 1887) ("Under the provisions of [the challenged ordinance], an owner of a meat-shop in the [new city limits] may, for the consideration of $50, not only sell meat in his stationary meat-shop, but may also sell meat in the [new city limits] from his ambulatory meat-shop on wheels, while the owner of a meat-shop in the [old city limits], though paying the same amount of license tax, has to content himself with making his sales at one place. If this is not discrimination, what is it?"); City of Kansas City v. Grush, 52 S.W. 286, 288 (Mo. 1899) ("Nor is there any reason why a merchant who deals altogether in produce should be required to pay $50 for the privilege of carrying on his business, in addition to his ad valorem tax, while his neighbor, who deals in groceries, hardware, or dry goods, is

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[R-1167 to R-1168.] As John Zeglis, chairman and chief executive officer of AT&T Wireless Services, Inc., stated: "Wireless is going to displace wired big time." [R-1170]

wholly exempt from a license tax. Both are merchants, and neither are subject to more burdens than the other."); City of Washington v. Washington Oil Co., 145 S.W.2d 366, 367 (Mo. 1940); State ex rel. Transport Manufacturing & Equipment Co. v. Bates, 224 S.W.2d 996, 1000 (Mo. banc 1949) ("Is there any rational basis whatever for splitting buses into two classes, taxing smaller ones and exempting larger ones seating ten passengers or more? We have carefully...examined the Act for some indication of reasonable or public purpose in writing in the instant exemption, but none is found therein."); Southwestern Bell Tel. Co. v. M. E. Morris, 345 S.W.2d 62, 69 (Mo. banc 1961) ("Under the Sales Tax Act, locally purchased tangible personal property used or consumed by telephone companies, railroad and other public utilities,...in producing their services is subject to the sales tax...The [statutory] provisions now under examination would exempt from the use tax like property used for the same purposes, if purchased out of state. In so discriminating against locally purchased tangible personal property..., this exemption is...unconstitutional and void..."); Drey v. State Tax Commission, 345 S.W.2d 228, 237 (Mo. 1961) ("It seems hardly necessary to add that all wild timberlands must be assessed on an equal and comparable basis with all lands in the county whether rural or urban, farm land or timberland, improved or unimproved; that town lots, farm lands and wild timberlands may not be classified separately and assessed at different rates..., and that the constitutional requirements are not met by the assessment of all wild timberlands in the county on an equal, comparable and reasonably uniform basis while intentionally, designedly and systematically applying different rates to other entire classes of real property."); Airway Drive-In Theatre Co. v. City of St. Ann, 354 S.W.2d 858, 861-62 (Mo. banc 1962) ("[W]e find it difficult to justify a distinction between moving picture shows held indoors and moving picture shows held outdoors in what is called a drive-in

theater. The product sold by these highly competitive businesses is precisely the same and is dispensed for the same purpose...This unreasonable discrimination in the tax imposed on one subclassification of the statutory class of moving picture shows to the substantial tax advantage of actual or potential competitors with no reasonable justification for the different treatment clearly constitutes an abuse of the taxing power.").[51]

If these classifications are allowed to stand, one easily can foresee a line forming in Jefferson City during the next legislative session, as lobbyists for gas, water and electric companies – indeed, all businesses – seek similar license tax caps, immunities, and benefits. Extended to other industries, such caps and benefits would prevent municipalities from offering many of the services that citizens have a right to expect. HB 209 not only works a fraud upon businesses and individuals that pay their taxes, but its costs will hit ordinary citizens the hardest in the years to come.

J. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Violates The Equal Protection Guarantees Of CONST. art. I, § 2 And MO. CONST. art. I, § 2, In That It Arbitrarily Classifies For Purposes Of Taxation.

Standard: Ordinary rules of statutory construction apply to the interpretation of

[51] See also 56 Am.Jur.2d Municipal Corporations § 756 ("It has been held that the remission, release, or compromise of a valid claim for taxes, authorized by the legislature, violates a constitutional requirement that taxes be uniform upon the same class of subjects.")

the constitution, though "applied more broadly because of the permanent nature of constitutional provisions." Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). "If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid." State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality do not apply "where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision." Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

"A tax unconstitutionally denies equal protection if it imposes a charge on one class and exempts another class when the exemption is not 'based on a difference reasonably related to the purpose of the law.'" City of St. Louis v. Western Union Telegraph Co., 760 S.W.2d 577, 583 (Mo.App.E.D. 1988).[52] To the extent HB 209 exempts select businesses from taxation, arbitrarily classifies for purposes of taxation, or otherwise discriminates against those who paid taxes, it denies equal protection of the law under the United States and Missouri Constitutions. See, e.g., City of St. Louis v. Western Union Telegraph Co., 760 S.W.2d at 583-584 (city ordinance which exempted telephone companies providing telegraph services from a tax imposed on telegraph services, but did not exempt telegraph companies, violated equal protection); State ex rel.

[52] Because the issues and analysis overlap, Plaintiffs' arguments with respect to Article X, § 3 (tax uniformity) and Article III, § 40 (special laws) are incorporated by reference herein, and *vice versa*.

Hostetter v. Hunt, 9 N.E.2d 676, 682 (Ohio 1937) (a statute under which non-delinquent taxpayers are obliged to pay taxes on a certain kind of property for certain years, while delinquent taxpayers owning the same kind of property during the same years are released from such obligations, violates the equal protection clause of the Constitution); Armco Steel Corp. v. Dept. of Treasury, 358 N.W.2d 839, 844 (Mich. 1984) ("case law in other jurisdictions has held it unconstitutional to benefit or prefer those who do not pay their taxes promptly over those who do" [collecting cases]); State of Kansas 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.").[53]

[53] Mayor Winham pays taxes and has an interest in seeing that all other persons pay their required taxes. She possesses standing to bring this challenge, because HB 209 depletes the local treasury and/or it involves a direct expenditure of public funds. See, e.g., State ex rel. Hostetter v. Hunt, 9 N.E.2d at 681 (taxpayer, suing to recover taxes county treasurer failed to collect, had standing to challenge statute on equal protection grounds); Harris v. Missouri Gaming Commission, 869 S.W.2d 58, 60 (Mo. banc 1994)

K. The Trial Court Erred In Dismissing The Cities' Claims Pursuant To HB 209, Because The Act Violates The Single Subject And Clear Title Requirements Of MO. CONST. art. III, § 23, In That It Is Both Over-Inclusive And Under-Inclusive.

Standard: Ordinary rules of statutory construction apply to the interpretation of the constitution, though "applied more broadly because of the permanent nature of constitutional provisions." Thompson v. Committee on Legislative Research, 932 S.W.2d 392, 395 n. 4 (Mo. banc 1996). "If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid." State of Missouri v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991). The presumption of constitutionality and the requirement that the challenging party prove unconstitutionality do not apply "where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision." Witte v. Director of Revenue, 829 S.W.2d 436, 439 n. 2 (Mo. banc 1992).

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

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(taxpayer had standing to challenge constitutionality of statute exempting riverboats in certain geographic locations from requirements of gambling statute, where there was a direct expenditure of funds generated through taxation), as modified on denial of rehearing.

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

HB 209's title reads: "AN ACT to amend Chapters 71, 92, and 227, RSMo., by adding thereto eighteen new sections relating to assessment and collection of various taxes on telecommunications companies." The title is affirmatively misleading. It gives a reader the mistaken impression that HB 209 pertains exclusively to taxes on telecommunications companies, without alerting the reader to chapter 227's provisions specifying the manner in which utilities in highway right-of-ways may be constructed or relocated. Consequently, HB 209's title is under-inclusive. See, e.g., National Solid Waste Mgmt. Assoc. v. Director of Dept. of Natural Resources, 964 S.W.2d 818, 821 (Mo.banc 1998), as modified on denial of rehearing.

In addition, HB 209 contains more than one subject, because it joins two unrelated acts: (i) the Municipal Telecommunications Business License Tax Simplification Act, with an effective date of August 28, 2005, which amends chapters 71 and 92, RSMo, and regulates the municipal collection of business license taxes on telecommunications companies, and (ii) the State Highway Utility Relocation Act, with an effective date of January 1, 2006, which amends chapter 227, RSMo, and governs the relocation of electric, telephone, telegraph, fiberoptic, and cable television utility facilities. As a result, HB 209's disparate provisions cannot be said to "fairly relate" to the same subject. See, e.g., Hammerschmidt v. Boone County, 877 S.W.2d 98, 103 (Mo. banc 1994).

For one or both of these reasons, HB 209 violates the requirements imposed by MO. CONST. art. III, § 23.

L. Because The Invalid Provisions Are So Essentially Connected With The Remainder Of The Act, Those Portions Of HB 209 Purporting To Amend Chapters 71 And 92, RSMo, Are Void In Their Entirety.

"The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." 1.140, RSMo.

"The test of the right to uphold a law, some portions of which may be invalid, is whether or not in so doing, after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left, which the Legislature would have enacted if it had known that the exscinded portions were invalid." Labor's Educ. And Political Club Ind. v. Danforth, 561 S.W.2d 339, 350 (Mo. banc 1977), rehearings denied, quoting from State ex rel. Audrain County v. Hackmann, 205 S.W. 12, 14 (Mo. banc 1918).

In contrast to the typical "severability" clause, which seeks to uphold an enactment in the event that a portion is found to be unconstitutional (see 1.140, RSMo), HB 209 contains a reverse severability clause. It provides, *inter alia*: "All provisions of sections 92.074 to 92.089 are so essentially and inseparably connected with, and so dependent upon, each other that no such provision would be enacted without all others. If a court of competent jurisdiction enters a final judgment on the merits that is not subject to appeal

and that declares any provision or part of sections 92.974[54] to 92.089 unconstitutional or unenforceable then sections 92.074 to 92.089, in their collective entirety, are invalid and shall have no legal effect as of the date of such judgment." 92.092, RSMo.

This suggests recognition of possible constitutional infirmities, and it is a clear manifestation of legislative intent in the event of such a finding. Thus, if any portion of HB 209 is found to be invalid on one of the grounds herein, then the amendments to sections 92.074 to 92.089 are void in their entirety. See also State ex rel. Transport Manufacturing & Equip. Co. v. Bates, 224 S.W.2d 996, 1001 (Mo. banc 1949) (Where an "exemption or excepting proviso of a taxing statute is found to be unconstitutional, the substantive provisions which it qualifies cannot stand. The courts have no power by construction to extend the scope of a taxing statute and make it applicable to those to whom the General Assembly never intended it should apply, thus taxing those whom the Legislature said should not be taxed."), rehearing denied.

That leaves 71.675, RSMo, which is treated separately from the Municipal Telecommunications Business License Tax Simplification Act and is protected by its own "severability" clause. See 92.089, RSMo. 71.675, RSMo, reads in part: "Notwithstanding any other provision of law to the contrary, no city or town shall bring any action in federal or state court in this state as a representative member of a class to enforce or collect any business license tax imposed on a telecommunications company." 71.675.1, RSMo. In the absence of words expressing a contrary legislative intent, this provision is prospective only and does not affect the instant case, but rather lawsuits filed on or after

[54] This is likely a drafting error. Presumably, "92.974" should read "92.074."

HB 209's effective date. However, it is arbitrary and unfair in the extreme: not only does 71.675, RSMo, deny cities the right to pursue class actions enjoyed by citizens, businesses and counties, and shield telephone companies – alone – from municipal class actions, but it impairs municipal access to federal courts and it contravenes Mo. S. Ct. Rule 52.08 and Fed. R. Civ. P. 23. In light of this conflict, the Missouri Constitution and the Supreme Court Rules control over 71.675, RSMo. See, e.g., Clark v. Austin, 101 S.W.2d 977, 988 and 995 (Mo. banc 1937) ("Neither the granted or inherent powers of the General Assembly can be taken away by the courts, nor can the like powers of our constitutional courts be usurped or destroyed by the General Assembly.") (Ellison, C.J., separate opinion); In Re Constitutionality Of Section 251.18, Wisconsin Statutes, 236 N.W. 717, 720 (Wis. 1931) ("[T]he power to regulate procedure, at the time of the adoption of the Constitution, was considered to be essentially a judicial power, or at least not a strictly legislative power..."); Zavaleta v. Zavaleta, 358 N.E.2d 13, 16 (Ill.App.1st Dist. 1976) ("Where a statute conflicts with a supreme court rule on a matter of procedure, the supreme court rule controls."), rehearing denied.[55] Being invalid and self-contained, 71.675, RSMo, falls alongside the Municipal Telecommunications Business License Tax Simplification Act. It cannot be saved by a "severability" clause that is no broader in scope than the void provision.

[55] See also MO. CONST. art. III, § 40(4), (6) and (30), which forbids the passage of local or special laws (i) "regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before the courts," (ii) "for limitation of civil actions," and (iii) "where a general law can be made applicable."

V CONCLUSION.

"The power of construing the constitution must necessarily be lodged in some department of government to insure...practical sanction of its mandates which is essential to preserve their vitality and force. This delicate and sacred trust is devolved upon the judiciary as a manifestation of the political principle that ours is a government of laws, rather than of men. In exercising that power the courts should take a large and comprehensive view of constitutional language, mindful that 'every scripture is to be interpreted by the same spirit which gave it forth,' and with a deep desire to enforce its full and exact meaning." Wells v. Missouri Pac. Ry. Co., 19 S.W. 530, 532 (Mo. 1892). See also Marbury v. Madison, 5 U.S. 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.")

House Bill 209 differs little from the special interest legislation that led to fiscal calamity and ruthless profiteering by private corporations over a century ago, and ultimately to the adoption of the Constitution of 1875. Compounding this error, it undermines the balance of governmental powers and displays an unprecedented (and unconstitutional) disregard for the affairs of cities and the public services they provide. In their wisdom, the people of Missouri have seen fit to limit such legislative transgressions through multiple, specific prohibitions in their Constitution. See United C.O.D. v. State of Missouri, 150 S.W.3d 311, 313 (Mo. banc 2004) ("The Missouri Constitution, unlike the federal constitution,... does not make specific grants of legislative power to the General Assembly, but rather specifies limits on its power.")

Because House Bill 209 violates the U.S. and Missouri Constitutions, Plaintiffs-Appellants request that the Missouri Supreme Court (i) declare those portions of HB 209

purporting to amend Chapters 71 And 92, RSMo, void in their entirety, (ii) reverse the trial court's judgments of September 16 and October 14, 2005, and (iii) remand this case to the trial court for further proceedings thereon.

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RULE 84.06(c) CERTIFICATION

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2002 and contains 29,469 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

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CERTIFICATE OF SERVICE

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