IN THE MISSOURI SUPREME COURT

CAUSE NO. SC87400

CITY OF ST. LOUIS

APPELLANT,

v.

SPRINT SPECTRUM, L.P.

RESPONDENT.

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

HONORABLE DAVID L. DOWD

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This action involves the question of whether Respondent Sprint Spectrum, L.P. had immunity from a local tax ordinance of the City of St. Louis, on the basis of § 92.089.2, R.S. Mo., by showing that it had a "good faith belief" that it was either "not a telephone company covered by the municipal business license tax ordinance" or "[t]hat 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," and hence, involves the construction of a revenue law of this State, within the exclusive jurisdiction of the Missouri Supreme Court, pursuant to Mo. Const. Art. V, § 3.

This action involves the question of whether a state statute, namely, House Bill 209 ("HB 209") passed during the 2005 Regular Session, codified at §§ 71.675, 92.074-.098 and 227.241-.249, R.S. Mo., violates provisions of the United States and Missouri Constitutions, and hence involves the validity of a statute of this State, within the exclusive jurisdiction of the Missouri Supreme Court, pursuant to Mo. Const. Art. V, § 3.

STATEMENT OF FACTS

This appeal concerns the constitutionality of a recently-passed law, sometimes referred to as HB 209[1], the provisions of which have been codified at §§ 71.675, 92.074-.098, and 227.241-.249, R.S. Mo.

The City of St. Louis ("St. Louis") has by ordinance imposed a tax on telephone providers who do business within its borders. The current version of this tax is contained in Sections 23.34.010 - .090 of the Revised Code of the City of St. Louis (1994). *First Amended Petition, ¶ 4* (L.F., 120) It is referred to as the Telephone Company Alternative Tax ("TCAT"), and states in § 23.34.010:

> **Telephone companies to pay tax.** Every person now or hereafter engaged in a general telephone business in the City, providing both exchange, or local, and toll or long distance, telephone service to its customers shall pay to the city a tax as hereinafter provided in this chapter.

First Amended Petition, ¶ 4 (L.F., 120). The provisions impose a ten percent (10%) tax on gross receipts, as well as reporting requirements, on any such business.

St. Louis originally filed an action in the Missouri State Court, Twenty-Second Judicial Circuit on November 20, 2003, with multiple wireless carriers as defendants. Defendants were all alleged to provide services variously described as "cellular, digital, personal communications, or mobile or wireless telephone or phone service" within the city.

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[1]Technically, SS HCS SCS HB 209 (2005). Unless otherwise specified, all references throughout to "HB 209" refer to the truly agreed to and finally passed version of the Bill.

The Petition sought, *inter alia*, a declaratory judgment that these defendants were subject to the TCAT and an accounting for five years' worth of tax liability based gross receipts, plus interest and penalties. Defendants removed the case to the U.S. District Court for the Eastern District of Missouri. However, Sprint was found, for purposes of determining federal jurisdiction, to have Missouri citizenship, thereby destroying diversity of citizenship and remanding St. Louis's case against Sprint back to the Circuit Court. *Minutes, Cause No. 034-02912A, 7/20/04* (L.F., 1).

Following the Missouri General Assembly's passage of HB 209, the bill was signed by the Governor on July 14, 2005. It became effective on August 28, 2005. On October 13, 2005, Sprint filed its Motion for Judgment on the Pleadings or to Dismiss. (L.F., 4-34). The Motion attached a copy of HB 209, and offered alternative bases, based on provisions of HB 209, why Sprint was entitled to judgment on the pleadings and/or dismissal of the suit: 1. Language providing (in § 92.089.2) that, "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 business license taxes, it shall immediately dismiss such lawsuit without prejudice and shall cease and desist from continuing any audit . . ." 2. Language providing (in § 92.089.2) for immunity to telecommunications companies for unpaid taxes prior to July 1, 2006, based on a "subjective good faith belief" that it was not a telephone company or did not provide telephone service. (L.F., 4-34).

Prior to any ruling on Sprint's Motion, St. Louis filed a First Amended Petition (L.F., 119-135). The Petition added a claim for declaratory judgment that HB 209 was

unconstitutional and alleged that it contravened one or more of ten expressly-cited provisions of the Missouri Constitution. *First Amended Petition, ¶¶ 47-53* (L.F., 131-134). St. Louis also notified the Attorney General of Missouri of its intent to contend that HB 209 was unconstitutional (L.F., 35-36). Sprint filed an Answer and Affirmative Defenses to the First Amended Petition (L.F., 136-151). The parties also stipulated that Sprint's previously filed Motion for Judgment on the Pleadings or to Dismiss would be as applicable to the First Amended Petition as the original Petition. *Stipulation and Order Between Plaintiff and Defendant* (L.F., 152-153).

Following a hearing, the circuit court on November 1, 2005 entered a judgment (L.F., 158-159), finding "that HB 209 is constitutional and requires the dismissal of this case without further showing."[2] St. Louis then filed its Notice of Appeal (L.F., 156-159).

Copies of the trial court's judgment and HB 209 are included in the Appendix to this Brief.

[2]The judgment did not dispose of all issues in the case, including Sprint's counterclaim, but stated that "there is no just reason for delay."

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT OF DISMISSAL BY GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS, BECAUSE A MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS ADMITS AS TRUE ALL FACTS PLED IN PLAINTIFF'S PETITION AND, ADMITTING AS TRUE ALL FACTS PLED IN ST. LOUIS'S FIRST AMENDED PETITION, ST. LOUIS SHOWED THAT IT HAD INVOKED SUBSTANTIVE PRINCIPLES TO ALLEGE A JUSTICIABLE CONTROVERSY FOR PURPOSES OF A DECLARATORY JUDGMENT ACTION AS TO WHETHER SPRINT HAD LIABILITY TO PAY ST. LOUIS'S TELEPHONE COMPANY ALTERNATIVE TAX, AND SPRINT DID NOT ESTABLISH AS A MATTER OF LAW THAT IT HAD A "GOOD FAITH BELIEF" UNDER THE PROVISIONS OF § 92.089.2, R.S. MO., SO AS TO QUALIFY FOR IMMUNITY FROM ST. LOUIS'S SUIT.

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

City of Jefferson, et al., v. Cingular Wireless, LLC, et al., Cause No. 04-4099-CV-C-NKL, (W.D. Mo. 2005)

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

II. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE HB 209 CONTRAVENES THAT PORTION OF ARTICLE III,

SECTION 38(a) OF THE MISSOURI CONSTITUTION WHICH PROVIDES "THE GENERAL ASSEMBLY SHALL HAVE NO POWER TO GRANT PUBLIC MONEY . . . TO ANY PRIVATE PERSON, ASSOCIATION OR CORPORATION," IN THAT HB 209 HAS THE EFFECT OF CANCELING AN INCHOATE TAX DEBT BELONGING TO ST. LOUIS, AND GRANTING THAT MONEY TO TELECOMMUNICATIONS COMPANIES, AS PRIVATE CORPORATIONS.

Mo. Const., Art. III, § 38(a)

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

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

III. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE III, SECTION 39(5), IN THAT THE EFFECT OF § 92.089.2, R.S. MO. GRANTING IMMUNITY TO TELECOMMUNICATIONS COMPANIES (INCLUDING SPRINT) FOR FAILURE TO PAY MUNICIPAL BUSINESS LICENSE TAXES PRIOR TO JULY 1, 2006 (INCLUDING TAXES OWED TO ST. LOUIS), IS TO RELEASE OR EXTINGUISH THE INDEBTEDNESS, LIABILITY OR OBLIGATION OF A CORPORATION TO A MUNICIPAL CORPORATION WITHOUT CONSIDERATION.

Mo. Const. Art. III, § 39(5)

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

City of Jefferson, et al., v. Cingular Wireless, LLC, et al., Cause No. 04-4099-CV-C-NKL, (W.D. Mo. 2005)

IV. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE III, SECTION 40, PROHIBITING SPECIAL LAWS, IN ANY ONE OR MORE OF THE FOLLOWING WAYS:

A. § 92.086.10(1) CREATES A CLASSIFICATION OF EXEMPT CITIES BASED ON IMMUTABLE HISTORIC FACTS, WHICH PREVENTS FOR ALL TIME OTHER MUNICIPALITIES FROM ENTERING THE CLASS IDENTIFIED, WHICH CREATES AN IMPERMISSIBLE "CLOSED-ENDED" SPECIAL LAW IN CONTRAVENTION OF ART. III, § 40(30);

B. §§ 92.074-.098 CREATES A SUB-CLASS OF UTILITIES WITH SPECIAL RIGHTS, PRIVILEGES AND IMMUNITIES NOT GRANTED TO OTHER UTILITIES, IN CONTRAVENTION OF ART. III, § 40(28);

C. § 92.089 CREATES SPECIAL RIGHTS, PRIVILEGES AND IMMUNITIES WITHIN A SUB-CLASS OF TELECOMMUNICATIONS COMPANIES BY GRANTING IMMUNITY TO COMPANIES THAT DID NOT PAY TAXES PRIOR TO JULY 1, 2006, WHILE NOT GRANTING IMMUNITY TO THOSE THAT DID PAY, IN CONTRAVENTION OF ART. III, § 40(28);

D. § 92.089 CREATES SPECIAL RIGHTS, PRIVILEGES AND IMMUNITIES WITHIN A SUB-CLASS OF TELECOMMUNICATION COMPANIES BY GRANTING IMMUNITY TO COMPANIES THAT DID NOT PAY TAXES PRIOR TO JULY 1, 2006, WHILE NOT GRANTING IMMUNITY TO THOSE THAT DID PAY, WHICH IN PRACTICAL EFFECT GAVE IMMUNITY TO WIRELESS CARRIERS, WHILE NOT GRANTING IMMUNITY TO WIRELINE CARRIERS, IN CONTRAVENTION OF ART. III, § 40(28);

E. § 71.675 IS A SPECIAL LAW LIMITING CIVIL ACTIONS IN THAT IT BARS ONLY CITIES AND TOWNS AS CLASS REPRESENTATIVES IN A CLASS ACTION AGAINST TELECOMMUNICATIONS COMPANIES, IN CONTRAVENTION OF ART. III, § 40(6);

F. § 92.086.13 CREATES SPECIAL RIGHTS, PRIVILEGES AND IMMUNITIES WITHIN THE CLASS OF UTILITIES BY EXPRESSLY AUTHORIZING TELECOMMUNICATIONS COMPANIES TO "PASS THROUGH" THE BUSINESS LICENSE TAX, IN CONTRAVENTION OF ART. III, § 40(28);

G. §§ 92.074-098 CONSTITUTE A SPECIAL LAW WHERE A GENERAL LAW CAN BE MADE APPLICABLE, IN CONTRAVENTION OF ART. III, §§ 40(21), 40(28), AND 40(30);

H. §§ 92.074-.098 IS A SPECIAL LAW WHICH HAS THE EFFECT OF CHANGING THE ST. LOUIS CITY CHARTER BY LIMITING ST. LOUIS'S POWER TO COLLECT TAXES, IN CONTRAVENTION OF ART. III, § 40(22).

Mo. Const., Art. III, § 40

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

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

V. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209 AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THAT PORTION OF THE MISSOURI CONSTITUTION, ART. I, SECTION 13, WHICH PROHIBITS THE ENACTMENT OF A "LAW . . . RETROSPECTIVE IN ITS OPERATION," IN THAT ONE OR MORE OF THE HEREINAFTER ENUMERATED PORTIONS OF HB 209 PURPORT TO AFFECT "TRANSACTIONS" INVOLVING THE CITY WHICH OCCURRED PRIOR TO HB 209'S EFFECTIVE DATE, TO THE SUBSTANTIAL PREJUDICE OF THE CITY, IN THE FOLLOWING RESPECTS:

A. § 92.089.1 PURPORTS TO RECHARACTERIZE PAST DUE CITY TAXES WHICH HAD ALREADY MATURED AS A DEBT TO THE CITY AT THE TIME HB 209 BECAME EFFECTIVE, AS BEING NOT LIQUIDATED;

B. § 92.089.2 PURPORTS TO RETROACTIVELY CREATE IMMUNITY FROM PAST DUE CITY TAXES WHICH HAD ALREADY MATURED AS A DEBT TO THE CITY AT THE TIME HB 209 BECAME EFFECTIVE, BASED ON BELIEFS WHICH WERE NOT VALID GROUNDS FOR NON-PAYMENT AT THE TIME THE TAXES WERE DUE;

C. § 92.089.2 PURPORTS TO REQUIRE THE CITY TO DISMISS ITS LAWSUIT TO COLLECT PAST TAXES DUE AND OWING, AND THEREBY

RETROACTIVELY DEPRIVES THE CITY OF A REMEDY WHICH EXISTED WHEN SUIT WAS FILED, PRIOR TO THE EFFECTIVE DATE OF HB 209.

Mo. Const., Art. I, § 13

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

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

VI. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE II, SECTION 1, PROHIBITING MEMBERS OF ONE BRANCH OF GOVERNMENT EXERCISING POWERS PROPERLY BELONGING TO ANOTHER, IN THAT THE PROVISIONS OF SECTION 92.089(2), BY PURPORTING TO ORDER THE DISMISSAL OF LAWSUITS FILED BY LOCAL GOVERNMENTS AGAINST TELECOMMUNICATIONS COMPANIES, ARE AN ENCROACHMENT BY THE LEGISLATURE ON THE JUDICIAL FUNCTION OF ADJUDICATING LAWSUITS.

Mo. Const., Art. II, § 1

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

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

VII. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT

WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE II, SECTION 1, PROHIBITING MEMBERS OF ONE BRANCH OF GOVERNMENT EXERCISING POWERS PROPERLY BELONGING TO ANOTHER, IN THAT THE PROVISIONS OF HB 209, BY PURPORTING TO OVERRIDE THE TAXING AUTHORITY OF LOCAL GOVERNMENTS, ARE AN ENCROACHMENT BY THE LEGISLATURE ON THE EXECUTIVE FUNCTION OF COLLECTING TAXES.

Mo. Const. Art. II, § 1

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

§ 92.045, R.S. Mo. (2000)

VIII. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE III, SECTION 23, IN THAT IT CONTAINS MORE THAN ONE SUBJECT AND THE SUBJECTS OF THE BILL ARE NOT CLEARLY EXPRESSED IN ITS TITLE.

Mo. Const. Art. III, § 23

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

National Solid Waste Mgmt. Assoc. v. Director of Dept. of Nat. Res., 964 S.W.2d 818

(Mo. banc 1998)

IX. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE X, SECTION 22 (THE "HANCOCK AMENDMENT"), IN THAT IT ALTERS A TAX LEVY AND BASE IN PLACE AT THE TIME THE HANCOCK AMENDMENT WAS APPROVED, NOVEMBER 4, 1980, WITHOUT VOTER APPROVAL.

Mo. Const., Art. X, § 22

Tannenbaum v. City of Richmond Heights, 704 S.W.2d 227 (Mo. banc 1986)

Smith v. State of Missouri, 152 S.W.3d 275 (Mo. banc 2005)

X. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE X, SECTION 16, WHICH PROHIBITS THE STATE FROM SHIFTING THE TAX BURDEN TO LOCAL GOVERNMENTS, IN THAT THE EFFECT OF § 92.086 IS THE REDUCTION OF THE TAX REVENUE OF LOCAL GOVERNMENT, THEREBY REQUIRING LOCAL GOVERNMENT TO BEAR THE BURDEN OF LOST TAX REVENUE, WHILE THE STATE (BY WAY OF THE DIRECTOR OF REVENUE) IS ALLOWED, THROUGH THE PROVISIONS OF § 92.086.5, TO RETAIN ONE PERCENT OF TAX REVENUE IT WAS NOT PREVIOUSLY

AUTHORIZED TO RETAIN.

Mo. Const., Art. X, § 22

Mo. Const., Art. X, § 16

Miller v. City of Springfield, 750 S.W. 2d 118 (Mo. App. S.D. 1988)

XI. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THAT PORTION OF THE MISSOURI CONSTITUTION, ARTICLE X, SECTION 3, WHICH REQUIRES THAT "TAXES . . . SHALL BE UNIFORM UPON THE SAME CLASS OR SUBCLASS OF SUBJECTS," IN THAT THE PROVISIONS OF HB 209 CREATE NON-UNIFORM TAXATION WITHIN THE CLASS OF TELECOMMUNICATIONS COMPANIES BY AUTHORIZING IMMUNITY FROM TAX LIABILITY FOR THOSE COMPANIES WHICH FAILED TO PAY BUSINESS LICENSE TAXES PRIOR TO JULY 1, 2006, BUT ALLOWING TAXATION FOR THOSE THAT DID PAY.

Mo. Const. Art. X, § 3

City of Cape Girardeau v. Fred A. Groves Motor Co., 346 Mo. 762, 142 S.W.2d 1040 (1940)

State ex rel. Transp. Mfg. & Equip. Co. v. Bates, 359 Mo. 1002, 224 S.W.2d 996 (en banc 1949)

XII. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR

JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THAT PORTION OF THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, SECTION 1, AND THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 2, PROVIDING FOR EQUAL PROTECTION UNDER THE LAW, IN THAT THE PROVISIONS OF HB 209 ARBITRARILY CLASSIFY FOR PURPOSES OF TAXATION, IN ANY ONE OR MORE OF THE FOLLOWING WAYS:

A. § 92.086 AUTHORIZES A LOWER RATE OF TAXATION FOR TELECOMMUNICATIONS COMPANIES THAN FOR OTHER UTILITIES, EVEN THOUGH THEY ARE SIMILARLY SITUATED;

B. § 92.089.2 CREATES NON-UNIFORM TAXATION WITHIN THE CLASS OF TELECOMMUNICATIONS COMPANIES BY AUTHORIZING IMMUNITY FROM TAX LIABILITY FOR THOSE COMPANIES WHICH FAILED TO PAY BUSINESS LICENSE TAXES PRIOR TO JULY 1, 2006, BUT ALLOWING TAXATION FOR THOSE THAT DID PAY.

United States Constitution, Amendment IV, § 1

Mo. Const., Art. I, § 2

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

XIII. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT

WAS PREMISED ON HB 209, AND CERTAIN PROVISIONS OF HB 209 ARE UNCONSTITUTIONAL, AND THE REMAINING PROVISIONS WHICH ARE NOT UNCONSTITUTIONAL ARE SO DEPENDENT UPON THE VOID PROVISIONS THAT IT CANNOT BE PRESUMED THE LEGISLATURE WOULD HAVE ENACTED THE REMAINING PROVISIONS WITHOUT THE UNCONSTITUTIONAL ONES.

§ 1.140, R.S. Mo.

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

§ 92.092, R.S. Mo.

ARGUMENT

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT OF DISMISSAL BY GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS, BECAUSE A MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS ADMITS AS TRUE ALL FACTS PLED IN PLAINTIFF'S PETITION AND, ADMITTING AS TRUE ALL FACTS PLED IN ST. LOUIS'S FIRST AMENDED PETITION, ST. LOUIS SHOWED THAT IT HAD INVOKED SUBSTANTIVE PRINCIPLES TO ALLEGE A JUSTICIABLE CONTROVERSY FOR PURPOSES OF A DECLARATORY JUDGMENT ACTION AS TO WHETHER SPRINT HAD LIABILITY TO PAY ST. LOUIS'S TELEPHONE COMPANY ALTERNATIVE TAX, AND SPRINT DID NOT ESTABLISH AS A MATTER OF LAW THAT IT HAD A "GOOD FAITH BELIEF" UNDER THE PROVISIONS OF § 92.089.2, R.S. MO., SO AS TO QUALIFY FOR IMMUNITY FROM ST. LOUIS'S SUIT.

Standard of Review

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 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).

All of the municipalities who have now filed appeals in this Court included in their petitions in the trial court a claim for declaratory judgment concerning the liabilities of various wireless carriers under their respective municipal ordinances. Those claims alleged a justiciable controversy between plaintiffs and defendants concerning application of the ordinances to defendants' activities. Declaratory judgment claims invoke the special statutory jurisdiction of § 527.010, *et seq.*, R.S. Mo. The test for sufficiency of a petition for declaratory judgment is whether the pleaded facts along with any reasonable inferences therefrom demonstrate the parties' entitlement to a declaration of rights or status. *City of St. Peters v. Concrete Holding Co.*, 896 S.W.2d 501, 503 (Mo. App. E.D. 1995). The court accepts as true all well-pleaded facts and their concomitant reasonable inferences, ignoring all conclusions. *Id*. If the facts demonstrate any justiciable controversy, the trial court should declare the rights of the parties. *Id*. It is improper for a trial court to decide the merits of a properly pleaded declaratory relief action by dismissal. *Moutray v. Perry State Bank*, 748 S.W.2d 749, 753 (Mo. App. E.D. 1988).

The trial court's Judgment stated, *inter alia*:

> The Court, being advised in the premises, declares that HB 209 is constitutional and requires the dismissal of this case without further showing. The Court further concludes that under HB 209, Defendant is immune from any past tax liability. Accordingly, the Court grants the motion. Plaintiff's Amended Petition is dismissed with prejudice at Plaintiff's cost.

Judgment, at 1-2 (App., A1-A2).

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).[3] Thus, the trial court's Judgment could only be based on allegations in Sprint's Motion for Judgment on the Pleadings or to Dismiss, claiming that "[t]he [affirmative] defenses asserted by Sprint Spectrum in this case are sufficient to establish as a matter of law that Sprint Spectrum had a good faith basis for not paying the Alternative Tax in question." Sprint's Motion for Judgment, ¶ 16 (L.F., 9). However, this is insufficient to show that Sprint fits within the language of § 92.089.2 as qualifying it for immunity.

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[3] 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 § 92.089.2. Regardless, to the extent HB 209 directs an outcome in this case, it is unconstitutional, as discussed *infra*, at 88. 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

The question of "good faith" is a question of fact. *See, e.g., Swartz v. Mann*, 160 S.W.3d 411, 415 (Mo. App. W.D. 2005); *Radloff v. Penny*, 225 S.W.2d 498, 502 (Mo. App. St.L. 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*, 240 Mo. App. 163, 218 S.W.2d 771, 777 (Spr. 1949) ("[t]he question of good faith is a question of fact"). 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 Sprint's motion. Nothing in Sprint's motion ever expressly stated that "Sprint subjectively believed that it was not subject to St. Louis's gross receipts tax." Sprint presented no competent evidence in its motion to establish that "Sprint Spectrum, L.P.," the corporate entity itself, actually claimed to possess this subjective belief, how that subjective belief was manifested or recorded, which of the two possible subjective beliefs delineated in § 92.089 was being asserted, or when the corporation actually formed this subjective belief. These were all elements essential to Sprint fitting within the parameters of § 92.089.2.

Alternatively, if the issue is reached, the trial court erred because Sprint cannot, as a matter of law, establish 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,"

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provisions of the Missouri Constitution, and it is void for vagueness.

and (ii) that the City of Sunset Hills had authority to impose a business license fee on it. *City of Sunset Hills v. Southwestern Bell*, 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 [Federal Telecommunications Act] 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.

Courts around the country — both before and after *City of Sunset Hills* — have reached similar conclusions. *See Airtouch Communications, Inc. v. Dept. of Revenue,* 76 P.3d 342 349-51 (Wyo. 2003); *Southwestern Bell Mobile Systems, Inc. v. Arkansas Pub. Serv. Com'n.*, 40 S.W.3d 838, 843 (Ark. Ct. App. 2001); *City of Lebanon Junction v. Cellco Partnership,* 80 S.W.3d 761 (Ky. Ct. App. 2001); *Campanelli v. AT&T Wireless Services, Inc.*, 706 N.E.2d 1267 (Ohio 1999); *Cent. Ky. Cellular Tel. Co. v. Commonwealth of Ky.*, 897 S.W.2d 601, 603 (Ky. Ct. App. 1995).

Based upon this consistent and uninterrupted line of authority, the U.S. District Court for the Western District of Missouri[4] found certain carriers liable under the same or similar gross receipt ordinances on June 9, 2005. *City of Jefferson, et al., v. Cingular Wireless, LLC, et al.*, Cause No. 04-4099-CV-C-NKL, Doc. #221, Order (W.D. Mo. June 9, 2005), *slip. op.*, at 1 ("[T]he Plaintiffs' gross receipt tax ordinances are enforceable and . . . they apply to mobile telephone services just as they apply to land line telephone services.").

Thus, at least as far back as 1999 (*City of Sunset Hills*) or 2000 (Mobile Telecommunications Sourcing Act), if not earlier, Sprint and other companies similarly situated had to know that they qualified as telephone companies under local business license ordinances and that they were subject to taxation. Ignorance of the law is no

[4]Hon. Nanette K. Laughrey.

defense. *See Grace v. Missouri Gaming Com'n*, 51 S.W.3d 891, 903 (Mo. App. W.D. 2001) ("[p]ersons are conclusively presumed to know the law").

Sprint presented no evidence to the contrary in the trial court; indeed, Sprint presented no evidence at all on this question of fact. Sprint simply asked the Court to presume "good faith," because it refused to pay the taxes and it raised affirmative defenses to this enforcement action. See Sprint's Motion For Judgment On The Pleadings, at p. 8 ("the substantial defenses asserted by Sprint Spectrum here establish that Sprint has not paid the Alternative Tax in good faith"). 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 Sprint was found to possess the "good faith belief" needed for lawsuit immunity, the trial court's judgment is erroneous and contrary to the manifest weight of the evidence.

II. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE HB 209 CONTRAVENES THAT PORTION OF ARTICLE III, SECTION 38(a) OF THE MISSOURI CONSTITUTION WHICH PROVIDES "THE GENERAL ASSEMBLY SHALL HAVE NO POWER TO GRANT PUBLIC MONEY . . . TO ANY PRIVATE PERSON, ASSOCIATION OR

CORPORATION," IN THAT HB 209 HAS THE EFFECT OF CANCELING AN INCHOATE TAX DEBT BELONGING TO ST. LOUIS, AND GRANTING THAT MONEY TO TELECOMMUNICATIONS COMPANIES, AS PRIVATE CORPORATIONS.

In Missouri, public money must be used for public purposes, not to help certain favored industries. The Missouri Constitution specifically prohibits the General Assembly from granting public money to any corporation, "excepting aid in public calamity" and other narrowly prescribed circumstances, none of which are present here:

> The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation . . .

Mo. Const., Art. III, § 38(a).

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

> [I]n 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 . . . .

See also State ex rel. Bd. of Control of St. Louis School v. City of St. Louis, 216 Mo. 47, 115 S.W. 534, 546-547 (1908) ("[t]he convention which framed the Constitution of 1875 was fully cognizant of the recklessness with which the counties and cities of this state had voted aid and granted assistance to corporations with a view to construct railroads and aid other corporate enterprises, and it inserted section 46 of article 4 (Ann. St. 1906, p. 195)," which provides that the legislature shall not make any grant in aid of a private corporation).

The state's forgiveness of the telephone company's tax debts — through HB 209's immunity and lawsuit dismissal provisions — falls directly within the constitutional prohibition found in § 38(a). It constitutes a "grant of public money" in aid of "private corporations." Rather than benefitting the public at large, HB 209 merely serves to enrich a small group of corporations and individuals: telephone companies who failed to pay taxes like their competitors; corporate shareholders unjustly enriched thereby; and the executives who made the decision to ignore ordinances applicable to "telephone" companies.

There can be no dispute that HB 209 affects the past tax liabilities of telephone companies. Its dismissal and immunity provisions are entirely retrospective in nature. See § 92.089.2 ("in the event any telecommunications company, *prior to July 1, 2006,* failed to pay . . . based on a subjective good faith belief that . . . it was not a telephone

company . . . If any municipality, *prior to July 1, 2006*, has brought litigation, . . . it shall immediately dismiss . . .").

It is similarly indisputable that tax revenues qualify as "public money or property" within the meaning of Art. III, § 38(a). *See, e.g., Champ v. Poelker*, 755 S.W.2d 383, 388 (Mo. App. E.D. 1988) ("Public funds are 'funds belonging to the state or any . . . political subdivision of the state; more especially taxes . . . appropriated by the government to the discharge of its obligations'") (quoting *State ex rel. St. Louis Police Relief Ass'n. v. Igoe*, 340 Mo. 1166, 107 S.W.2d 929, 933 (Mo. 1937)).

As a necessary corollary to the proposition that tax revenues are public money, "foregoing the collection of [a] tax" on private business also constitutes a grant of public aid within the meaning of Art. III, § 38(a). The question of whether "tax credits" constitute "public money" was squarely addressed by this Court in the *Curchin* opinion. In striking tax credits designed to benefit certain industrial revenue bondholders, the Court stated:

> There is no difference between the state granting a tax credit and foregoing the collection of the tax and the state making an outright payment to the bondholder from revenues already collected . . . The allowance of such a tax credit constitutes a grant of public money or property within Article III, Section 38(a) of the Missouri Constitution.

Curchin, 722 S.W.2d at 933.

Like this Court in *Curchin*, courts throughout the country acknowledge that tax amnesties, tax credits, tax forgiveness, tax exemptions, and tax subsidies qualify as

expenditures of "public money." *See, e.g., Opinion of the Justices to the Senate*, 401 Mass. 1201, 514 N.E.2d 353, 355 (Mass. 1987) ("tax subsidies . . . are the practical equivalent of direct government grants").[5]

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

Indeed, HB 209 is the contemporary version of the catalyst to the Art. III, § 38(a) limitation on legislative power: railroad grants designed to enrich certain companies at the expense of the public's needed tax revenues. The cancellation of the telephone companies' tax debt and the creation of a new *ex post facto* tax credit for those with "subjective good faith," exacerbates the very harm the constitutional aid prohibition was designed to prevent: cash-strapped municipalities unable to meet their budgets for street improvements, police and fire protection and the like, who can now be expected to engage in borrowing due to tax revenue shortfalls. The primary effect is a naked gift of

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[5]*See also Sommer v. City of St. Louis*, 631 S.W.2d 676, 680 (Mo. App. E.D. 1982) ("[T]ax abatement does not differ significantly from an expenditure of public funds, since in either case the conduct complained of could result in the treasury's containing less money than it ought to").

public financial resources to telephone companies who cheated on their taxes, illegal under Art. III, § 38(a).

Sprint and other telephone companies will surely argue that HB 209 is good for the public and therefore not constitutionally forbidden aid to private enterprise.[6] Again, *Curchin* has directly spoken on this issue: even where some benefit flows to the public, if the "primary effect" of a public expenditure "is not to subserve a public municipal purpose, but to promote some private end, the expense is illegal, even though it may incidentally serve some public purpose." *Curchin*, 722 S.W.2d at 935. ("While it is possible that the projects to be supported by the tax credit-bearing revenue bonds could have a beneficial public impact, the grant of public money to these businesses' bondholders is unconstitutional just as railroad grants were.")

Perhaps recognizing that the untenable import of HB 209 is the grant of substantial sums of public money to some, but not all, telephone companies, the General Assembly loads HB 209 with a stated "public purpose" policy statement:

> The general assembly finds and declares it to be the policy of the state of Missouri that costly litigation which have or may be filed by Missouri municipalities against telecommunications companies, concerning the application of certain business license taxes to certain telecommunications

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[6]The plain meaning of the term "corporation," as used in Art. III, §38(a), which prohibits public aid to the same, "uniformly refers to private or business organizations of individuals," like the companies enriched by HB 209. *City of Webster Groves v. Smith*, 340 Mo. 798, 102 S.W.2d 618, 619 (1937).

companies, and to certain revenues of those telecommunications companies, as set forth below, is detrimental to the economic well being of the state, and the claims of the municipal governments regarding such business licenses have neither been determined to be valid nor liquidated...

§ 92.089.1.

Although the General Assembly may attempt to explain its actions with whatever language passes through the committees, when it comes to deciding the "primary effect" of legislation which smacks of an illegal grant of public financial aid, "the stated purpose of the legislature, as pronounced in [the statute], is not dispositive." *Curchin*, 722 S.W.2d at 934. Rather, this Court makes the determination of the primary effect of the statute in terms of whether it serves a public or unconstitutional private purpose, based upon the history of Art. III, § 38(a) of the Missouri Constitution and upon cases in which the Court has applied the constitutional provision in the past." *Id*. If it appears that the public purpose designated by the legislature is "arbitrary or unreasonable," this Court need not to accept the pronouncement. *Fust v. Attorney General for the State of Missouri,* 947 S.W.2d 424, 430 (Mo. banc 1997).

It is submitted that the "public purpose" designated by the legislature in HB 209 is, in fact, arbitrary and unreasonable because it is counterfactual in two material respects and arbitrary in its application, as hereinafter set forth.

First, the language assumes without support that there has been, or will be, "costly litigation." Perhaps recalling testimony relating to tort reform, which was also addressed in the legislative session that birthed HB 209, the General Assembly states that "costly

litigation" is "detrimental to the economic well being of the state," § 92.089.1, and HB 209 is necessary to cure these ills. "Costly litigation," however, must refer to the coffers of the telephone companies, not St. Louis, or any of the other municipalities. Certain plaintiffs in these various actions — *viz.*, St. Louis and St. Louis County — are represented by their "in-house" law departments, consisting of salaried attorneys. The other municipal plaintiffs have secured representation on a contingent fee arrangement. In either arrangement, local citizens are not paying anything "extra" for this litigation, which is as favorable as can be, and most certainly not "harmful" to the "economic well being of the state." It is the uncollected tax revenues which are harmful to the "economic well being of the state."

Additionally, HB 209's express recitation that "the claims of the municipal governments have neither been determined to be valid nor liquidated," § 92.089.1, is belied by legal precedent pre-dating HB 209. In *City of Sunset Hills v. Southwestern Bell*, *supra*, the issue before the court was whether a business providing "wireless communications services" fell within the classification of "telephone companies," as used in a state statute and pursuant to which a municipal ordinance claimed the power to impose a business license fee. The court held that providing wireless communication did, indeed, make the business a "telephone company."

> 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.

Id, at 59. *See also City of Jefferson*, *supra*, *slip op.*, at 8:

> In sum, the word "telephone," as it is commonly used, means essentially the same thing as it meant when the Cities' charters and ordinances were adopted. Indeed, usage of the word has not changed much since 1908, when a New York court stated that "[t]he telephone is simply an instrument by which two persons may talk directly to each other." *Gilpin v. Savage*, 112 N.Y.S. 802, 805 (N.Y. Sup. Ct. 1908), *rev'd on other grounds*, 94 N.E. 656 (N.Y. 1911).

Although there may still be issues regarding claims by municipalities against wireless carriers in individual circumstances — *e.g.*, what statute of limitations applies — this is insufficient to support the statement that "the claims of the municipal governments regarding such business licenses have neither been determined to be valid nor liquidated."

Secondly, the immunity and dismissal provisions are completely arbitrary. It is unclear how the immunity and dismissal provisions work *inter se* as reflected in § 92.089, but this much is clear: the General Assembly has carved out a "subjective good faith" *ex post facto* tax credit for wireless telephone companies that failed to pay taxes. §

92.089.2 ("In the event any telecommunications company, prior to July 1 2006, failed to pay any amount to a municipality based on a subjective good faith belief that . . . it was not a telephone company . . . is entitled to full immunity . . ."). This "subjective good faith" standard leads to an outright forgiveness of taxes for the telephone companies who refused to pay taxes if they simply managed to get an answer on file in the underlying collection actions.

In sum, the dismissal and immunity provision of HB 209 inure only to the benefit of the private interests of select businesses, and not the public good of the State of Missouri or the City of St. Louis. At this juncture, therefore, *Curchin*'s primary effect test demands that the statute be struck . The language, history, and purpose of Art. III, § 38(a) is unequivocal. The tax giveaway in HB 209 to delinquent telephone companies — premised upon nothing more than the pretext of advancing "the economic well being of the state," by avoiding the telephone company's "costly litigation" where precedent has already established that Sprint and others are telephone companies — must be struck as an unconstitutional abuse of legislative power.

III. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE III, SECTION 39(5), IN THAT THE EFFECT OF § 92.089.2, R.S. MO. GRANTING IMMUNITY TO TELECOMMUNICATIONS COMPANIES (INCLUDING SPRINT) FOR FAILURE TO PAY MUNICIPAL BUSINESS

LICENSE TAXES PRIOR TO JULY 1, 2006 (INCLUDING TAXES OWED TO ST. LOUIS), IS TO RELEASE OR EXTINGUISH THE INDEBTEDNESS, LIABILITY OR OBLIGATION OF A CORPORATION TO A MUNICIPAL CORPORATION WITHOUT CONSIDERATION.

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

> "The general assembly shall not have the power:
>
> * * *
>
> (5) to release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual due this state or any county or municipal corporation[.]"

Mo. Const. Art. III, § 39(5).

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

As to the first issue, Missouri law makes clear that tax liability is an "indebtedness, liability or obligation," as a matured tax debt. It does not matter that some of the wireless carriers have never paid any such taxes. This Court, in *Graham Paper Co. v. Gehner*, 332 Mo. 155, 59 S.W.2d 49 (en banc 1933) made clear that such a restrictive view of the constitutional prohibition in § 39(5) is error:

> The language of this constitutional provision [predecessor of Article III, Section 39(5)] is very broad and comprehensive in protecting the state against legislative acts impairing obligations due to it, in that it prohibits the release or extinguishment, in whole or in part, not only of indebtedness to the state, county, or municipality, *but liabilities or obligations of every kind* . . . [A]n inchoate tax, though not due or yet payable, is such a liability or obligation as to be within the protection of the restriction against retrospective laws, and for the same reason we must hold that *such inchoate tax is an obligation or liability within the meaning of the constitutional provision now being considered.* (Emphasis added).

Id, at 52. Other courts have reached the same conclusion, finding that a law which releases a tax liability violates similar constitutional provisions.[7] At least one court has already opined that HB 209, by purporting to extinguish back taxes owed under a local business license tax ordinance, contravenes Art. III, § 39(5):

> The question raised by HB 209 is whether the state can retroactively confiscate the property of its municipalities — *e.g.*, the back taxes that are

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[7] *Ollivier. v. City of Houston,* 54 S.W. 940 (Tex. 1900); *Fontenot v. Hurwitz-Mintz Furniture Co*, 7 So.2d 712 (La. 1942); *City of Louisville v. Louisville Ry. Co*, 63 S.W.14 (Ky. 1901); *Iverter v. State ex rel. Gillum*, 83 P.2d 193 (Okla. 1938).

> owed to plaintiffs — and give that property to private corporations . . . Even if this Court had not already resolved the defendant's liability for the past due taxes at the time this legislation was adopted and signed into law by the Governor, the plaintiffs had an inchoate property right to any past due taxes authorized by then existing law and HB 209 effectively takes away that right.

City of Jefferson, *supra*, Doc. No. 302, Order (W.D. Mo. September 23, 2005), *slip op.*, at 6. *See also First Nat. Bank of St. Joseph v. Buchanan County*, 356 Mo. 1204, 205 S.W.2d 726, 731 (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 Mo. Const. Art. III, § 39(5)). In short, merely because the Respondents — both wireline and wireless — companies have yet to pay the tax, or because they can articulate some affirmative defense to the amount of the tax, does not mean that the tax is not a "liability or obligation of every kind." These quoted words, from *Graham*, as interpreted by this Court, prohibit the discharge of tax obligations by legislative fiat.

Moreover, the gross receipts taxes due to St. Louis are not merely inchoate, they are past due. As explained in *The May Dept. Stores Co. v. Director of Revenue*, 1986 WL 23204, at *15 (Mo. Adm. Hrg. Comm. 1986), when revenues (as opposed to real property, for instance) are the object of the taxation, the billing of the revenue is the taxable event. Thus, in contrast to real estate and personal property taxes — which are

due annually and remain an inchoate lien until there is an assessment and levy, like in *Beatty v. State Tax Commission*, 912 S.W.2d 492, 496-498 (Mo. banc 1995) — municipal gross receipt taxes are calculable at the time they are incurred and, in St. Louis's case, due every month.[8]

On this point specifically, several cases have held that tax liabilities relating to income or revenue, already incurred, cannot thereafter be compromised or reduced by the General Assembly. *See, e.g., Graham*, *supra;* Ark. Op. Atty. Gen. No. 2003-025, 2003 WL 1347746, at *5 (Ark. A.G. 2003) (act of Arkansas legislature purporting to forgive gross receipts taxes previously incurred by truck and semitrailer owners was illegal, because, *inter alia*, it "purports to forgive a matured tax obligation");[9] *citing Federal Express Corp. v. Skelton*, 578 S.W.2d 1, 6 (Ark. banc 1979).

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

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[8]Under the St. Louis Code, "[e]very telephone company, on or before the second last day of each month . . . shall file with the Comptroller a verified statement of its gross receipts upon which the gross receipts tax is laid for the next preceding month, and shall pay the tax at the same time as the filing of the report." § 23.34.030, R.C.St.L. (1994).

[9]The Arkansas act was similar in language, and identical in effect, to HB 209.

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

Although an older opinion from our sister state, the Iowa Supreme Court's decision is cited at length here for the clarity of its analysis relating to constitutional infirmities similar to those evident in this case:

> The right of plaintiff [municipality] to the taxes in question and the obligation of defendant to pay them were perfect before the statute under consideration was enacted. Plaintiff had a valid, legal claim against defendant for the amount of the assessment . . . 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 is true that the legislature may take away the powers conferred upon the city – may destroy its corporate existence, but it cannot divest it of property or rights under contracts lawfully acquired. The State, by legislation, may decree the death of the municipality, and may become its executioner, but cannot seize and dispose of its estate at will. The authority of the legislature to take away or abridge municipal powers by no means carries with it authority to destroy rights of property, and rights under contract, acquired while those powers were lawfully possessed and exercised.

39 Iowa at 67-68, 1874 WL 416, at **2 and 7.

Having established that Respondent's tax liabilities fall within the prohibition of Art. III, § 39(5) as an "indebtedness, liability or obligation," the constitutional analysis under the Missouri Constitution must then turn to whether the release of the telephone companies' tax liability is "without consideration," as contemplated by Art. III, § 39(5). Apparently feeling judicially prophetic, the General Assembly assures the municipalities that they will receive the consideration demanded by the Constitution, notwithstanding the tax giveaway:

> The general assembly further finds and declares that the resolution of such uncertain litigation, the uniformity, and the administrative convenience and cost saving to the municipalities resulting from, and the revenues which will or may accrue to municipalities in the future as a result of the enactment of sections 92.074 to 92.098 are full and adequate consideration to municipalities, as the term "consideration" is used in Article III, Section 39(5) of the Missouri Constitution, for the immunity and dismissal of lawsuits outline in subsection 2 of this section.

§ 92.089.1. Each of these findings of "consideration" are addressed in turn below.

Before proceeding, however, it bears emphasizing that the General Assembly has unabashedly invaded the province of the judiciary and instructed this Court — the ultimate interpreter of the Missouri Constitution — on whether its acts pass constitutional muster by construing what the words found in the Constitution mean as they are applied

to the questionable law.[10] Incredibly, § 92.089.1 attempts to make a conclusive finding about the meaning of a constitutional provision, namely, what is or is not adequate "consideration" under Art. III, § 39(5). This "finding"is analogous to the legislature declaring that the death penalty for 15 year-old adolescents is not cruel or unusual, or that discrimination against African-Americans is not a violation of equal protection.

This blatant legislative overreaching is flatly prohibited by an uninterrupted line of cases dating back to *Marbury v. Madison,* 5 U.S. 137 (1803). *See, e.g.*, *State ex rel. Dawson v. Falkenhainer*, 321 Mo. 1042, 15 S.W.2d 342, 343 (en banc 1929) (legislature cannot dictate to courts construction of constitutional provisions); *Mo. Coalition for the Environment v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 132 (Mo. banc 1997) (the legislative branch may not exercise a power that belongs to the judicial branch); *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So.2d 392, 405 (La. 2005) ("it is not within the province of the Legislature to interpret legislation after the judiciary has already done so. Under our system of government, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (quoting *Marbury v. Madison*, 5 U.S. at 177).

In Missouri, as elsewhere, consideration has been described as "either . . . a benefit conferred upon the promisor or in a legal detriment to the promisee, which means that the promisee changes his legal position; that is, that he gives up certain rights, privileges or

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[10]Further analysis on this issue is found *infra*, in the argument pertaining to encroachment on the judiciary.

immunities which he theretofore possessed or assumes certain duties or liabilities not theretofore imposed upon him." *State ex rel. Kansas City v. State Highway Com'n*, 349 Mo. 865, 163 S.W.2d 948, 953 (en banc 1942) (citing American Law Institute, Restatement of the Law of Contracts § 75). The first "consideration" proffered by the General Assembly in support of its release of the telephone company's tax liability, is "the resolution of [the parties'] uncertain litigation." § 92.089.1.

Undoubtedly, Sprint and the other telephone companies will argue that they are giving up the legal positions taken in the underlying cases — *viz.*, that they owed no taxes because they are not "telephone" companies. However, this argument is not tenable, under the current circumstances. Although the compromise of a disputed claim can constitute consideration in certain circumstances, the forbearance of a claim or defense known to be unfounded does not qualify as consideration. *See, e.g., Robinson v. Benefit Ass'n of Railway Employees*, 183 S.W.2d 407, 412 (Mo. App. St.L. 1944) ("[U]nless the promisee, at the time it disputes the claim and agrees to the contract of release, knows that it has a *reasonable* defense, and acts on that knowledge, there is no consideration, for there is no good faith."). 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").

Ever since *City of Sunset Hills v. Southwestern Bell*, *supra*, wireless carriers have been on notice that they are "telephone companies." 14 S.W.3d at 59. In fact, the wireless telephone companies should be estopped from arguing to this Court (or any

other) that they are surprised or shocked to learn that a local ordinance on a "telephone company" applied to them. In fact, this undoubtedly motivated the wireless industry to lobby for the federal Mobile Telecommunications Sourcing Act ("MTSA"). Recognizing that local taxation of cell phone calls exists in our nation, the wireless telephone industry supported the tax simplification scheme embodied in the MTSA, which provides that only those state and local jurisdictions encompassing the customer's "place of primary use" may tax the mobile telephone call.

The alleged "uncertainty" that the wireless carriers allegedly are giving up — *i.e.*, that they are not "telephone" companies — does not constitute any consideration at all, let alone "full and adequate consideration." In light of the *City of Sunset Hills* decision, plus the federal district court's holding in *City of Jefferson*, *supra*, the wireless telephone companies cannot seriously contend they reasonably believed that any ordinance applicable to a "telephone company," was not applicable, at all relevant times, to their business. In sum, that wireless telephone companies are "telephone companies" is neither novel nor surprising. "One should not be able to avoid a tax on shoes by calling shoes slippers." *Folands Jewelry v. Warren*, 210 Mich. App. 304, 308, 532 N.W.2d 920 (1995) citing *Rhodes v. City of Hartford*, 201 Conn. 89, 92, 513 A.2d 124 (1986).

Even if the companies continue to maintain, on a substantive level, that they had no idea an ordinance relating to a "telephone" business applied to them, or that "gross receipts" was more than the sales tax base, their legal position is severely undercut on a procedural basis because many of the wireless carriers — including Sprint — failed to follow Missouri's tax protest procedure. Obviously at some point, no later than the filing

of St. Louis's lawsuit (or the other suits which are currently on appeal to this Court), were on notice that taxing jurisdictions, including St. Louis, believed they were owed tax money. Nonetheless, many carriers never paid the tax under protest, either before or after the filing of the lawsuits.[11]

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, R.S. Mo. By foregoing this exclusive method for disputing taxes, unquestionably called to their attention no later than the filing of the first lawsuit in St. Louis County Circuit Court in 2000, the telephone companies waived any and all defenses to the underlying claims.

As fully explained in *Metts v. City of Pine Lawn*, 84 S.W.3d 106, 109 (Mo. App. E.D. 2002):

> The fact that plaintiffs failed to pay the charges when due does not entitle them to enjoin enforcement of those payments when they failed to make a timely challenge as set out in *Ring* [*v. Metropolitan Sewer Dist.*, 969 S.W.2d 716 (Mo. banc 1998)] . . . Plaintiffs failed to ask the trial court for

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[11]St. Louis does acknowledge that certain wireless carriers did pay its tax under protest and filed protest actions. *See VoiceStream PCS II Corp. v. Green, et al.*, Circuit Court of the City of St. Louis, Cause No. 034-01205; *ATT Wireless PCS, LLC v. Green, et al.*, Circuit Court of the City of St. Louis, Cause No. 044-01159. That these entities did pay under protest only underscores that the non-payers in the highly competitive wireless industry — including Sprint — cannot establish any "good faith" belief that the ordinance had no application to their business.

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

Similarly, a legislative bailout does not satisfy the tax protest procedure, long-standing, yet ignored.

Resolution of uncertain litigation is not the only "consideration" the legislature purports to find to try to help HB 209 pass muster under Art. III, § 39(5). The General Assembly also suggests that "full and adequate consideration" for the *ex post facto* tax credit derives from "the uniformity, and the administrative convenience and cost savings to municipalities from, . . . the enactment of sections 92.074 to 92.098." § 92.089.1.[12]

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[12]It is worth noting that the various items of "consideration" detailed by the General Assembly in § 92.089.1, are separated by the word "and." Use of the conjunctive "and" suggests that all such items must be present and valid in order for there to be "full and adequate consideration," at least in the mind of the legislature. If any single ground or basis is infirm, then there can never be "full and adequate" consideration 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., Commonwealth Trust Co. Mtge. Inv. Fund Case*, 54 A.2d 649, 652 (Pa. 1947) ("The

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

Further, a five percent cap will never qualify as "full and adequate consideration" or generate "cost savings" to St. Louis, which has a rate of ten percent, unchanged since 1969. Not only does the easy math demonstrate an absence of consideration, the five percent rate reduction, coupled with the requirement that all past due tax liabilities are waived and any future monies received will be further reduced by collection charges, does not amount to any positive consideration at all.

Under HB 209, the telephone companies are legislatively authorized to do *less* than that which they are legally obligated to do. *See, e.g., Asmus v. Pacific Bell*, 999 P.2d 71, 90 (Cal. 2000) ("A promise to do less than one is legally obligated to do cannot

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legislature is presumed to have intended that words used in a statute shall be construed according to their common and approved uses.")

constitute consideration."). *See also, State ex rel. Kansas City v. State Highway Com'n*, 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.") Accordingly, the cap cannot serve as "full and adequate consideration."

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

No one can demonstrate that HB 209's speculative, future revenues are sufficient to offset this loss in tax dollars. It is impossible for St. Louis or any of the other municipalities with tax rates currently above five percent to somehow gain in the future, hence, the understandable hesitancy and equivocation on the part of the General Assembly. Indeed, such caution is required, because there is no assurance that these telephone companies will continue to do business in these municipalities, that subscribers

[13]In another portion of HB 209, it is stated that §§ 92.074 to 92.098 "shall have a revenue-neutral effect." § 92.086.6.

will continue to do business with these telephone companies, or that HB 209 will remain in effect and not be modified by subsequent legislation. Thus, if just one carrier stops doing business in one municipality or enters bankruptcy or loses a customer, now or sometime in the future, that municipality has been denied HB 209's "consideration" as a matter of law.

More than just a crippling loss of tax dollars, the purported justifications for HB 209 make a mockery of the legal concept of "consideration." As previously demonstrated, the wireless carriers were liable under the tax ordinances as written and as they existed prior to passage of HB 209. This is self-evident from the fact that a judgment of liability has been entered against the wireless telephone companies. 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 and reduced basis only. In such circumstances, the law is clear that a promise to do that which one is legally obligated to do cannot serve as consideration. *See, e.g., State ex rel. Kansas City v. State Highway Commission*, 163 S.W.2d at 953; *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 . . .").

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

IV. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE III, SECTION 40, PROHIBITING SPECIAL LAWS, IN ANY ONE OR MORE OF THE FOLLOWING WAYS:

A. § 92.086.10(1) CREATES A CLASSIFICATION OF EXEMPT CITIES BASED ON IMMUTABLE HISTORIC FACTS, WHICH PREVENTS FOR ALL TIME OTHER MUNICIPALITIES FROM ENTERING THE CLASS IDENTIFIED, WHICH CREATES AN IMPERMISSIBLE "CLOSED-ENDED" SPECIAL LAW IN CONTRAVENTION OF ART. III, § 40(30);

B. §§ 92.074-.098 CREATES A SUB-CLASS OF UTILITIES WITH SPECIAL RIGHTS, PRIVILEGES AND IMMUNITIES NOT GRANTED TO OTHER UTILITIES, IN CONTRAVENTION OF ART. III, § 40(28);

C. § 92.089 CREATES SPECIAL RIGHTS, PRIVILEGES AND IMMUNITIES WITHIN A SUB-CLASS OF TELECOMMUNICATIONS COMPANIES BY GRANTING IMMUNITY TO COMPANIES THAT DID NOT PAY TAXES PRIOR TO JULY 1, 2006, WHILE NOT GRANTING IMMUNITY TO THOSE

THAT DID PAY, IN CONTRAVENTION OF ART. III, § 40(28);

D. § 92.089 CREATES SPECIAL RIGHTS, PRIVILEGES AND IMMUNITIES WITHIN A SUB-CLASS OF TELECOMMUNICATION COMPANIES BY GRANTING IMMUNITY TO COMPANIES THAT DID NOT PAY TAXES PRIOR TO JULY 1, 2006, WHILE NOT GRANTING IMMUNITY TO THOSE THAT DID PAY, WHICH IN PRACTICAL EFFECT GAVE IMMUNITY TO WIRELESS CARRIERS, WHILE NOT GRANTING IMMUNITY TO WIRELINE CARRIERS, IN CONTRAVENTION OF ART. III, § 40(28);

E. § 71.675 IS A SPECIAL LAW LIMITING CIVIL ACTIONS IN THAT IT BARS ONLY CITIES AND TOWNS AS CLASS REPRESENTATIVES IN A CLASS ACTION AGAINST TELECOMMUNICATIONS COMPANIES, IN CONTRAVENTION OF ART. III, § 40(6);

F. § 92.086.13 CREATES SPECIAL RIGHTS, PRIVILEGES AND IMMUNITIES WITHIN THE CLASS OF UTILITIES BY EXPRESSLY AUTHORIZING TELECOMMUNICATIONS COMPANIES TO "PASS THROUGH" THE BUSINESS LICENSE TAX, IN CONTRAVENTION OF ART. III, § 40(28);

G. §§ 92.074-098 CONSTITUTE A SPECIAL LAW WHERE A GENERAL LAW CAN BE MADE APPLICABLE, IN CONTRAVENTION OF ART. III, §§ 40(21), 40(28), AND 40(30);

H. §§ 92.074-.098 IS A SPECIAL LAW WHICH HAS THE EFFECT OF CHANGING THE ST. LOUIS CITY CHARTER BY LIMITING ST. LOUIS'S POWER TO COLLECT TAXES, IN CONTRAVENTION OF ART. III, § 40(22).

Art. 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.[14] "The unconstitutionality of a special law is presumed." *Harris v. Missouri Gaming Com'n*, 869 S.W.2d 58, 65 (Mo. banc 1994). *Accord*, *Tillis v. City of Branson*, 945 S.W.2d 447, 448 (Mo. banc 1997); *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*, the Missouri Supreme Court found a law encompassing less than all who are "similarly situated" to be constitutionally infirm. Later, in *Reals v. Courson*, 349 Mo. 1193, 164 S.W.2d 306, 307-308 (1942), the Court declared "a statute which relates to particular persons or things of a class" to be special.[15] More recently, in *Harris*, *supra*,

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[14]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 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*, 363 Mo. 1033, 256 S.W.2d 815, 816 (en 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'"), quoting *City of Springfield v. Smith*, 322 Mo. 1129, 19 S.W.2d 1, 3 (Mo. banc 1929).

[15]Also, in *Reals*, the Court quoted approvingly from earlier decisions that found "[t]he

the Court's test for special legislation focused on whether the challenged law was "open-ended" or "closed-ended." 869 S.W.2d at 65.

Regardless of the test employed, it seems clear that the "vice in special laws is that they do not embrace all of the class to which they are naturally related." *Reals*, 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:

A. Section 92.086.10(1) creates a classification of exempt cities based on immutable historic facts which prevents for all time other municipalities from entering the class identified, which creates an impermissible "closed-ended" special law in contravention of Art. III, §40(30).

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

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test of a special law is the appropriateness of its provisions to the objects that it excludes . . . [citations omitted]." 164 S.W.2d at 308.

possible that the status of members of the class can change. *Harris*, 869 S.W.2d at 65. The legislature did not seek to have HB 209 apply to "all of a given class alike" as required by Mo. Const. Art. III, § 40(21). Rather than using a permissible open-ended classification, the legislature enacted § 92.086.10 of HB 209 to create a "closed-ended" classification of cities — specifically two cities, Jefferson City and Clayton, that are exempt from the dismissal requirement of § 92.089.2 and from the adjusted tax rate of §§ 92.086.6 and 92.086.9.[16]

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[16]Section 92.086.10(1) provides that "[a]ny municipality which prior to November 4, 1980, had an ordinance imposing a business license tax on telecommunications companies which specifically included the words 'wireless', 'cell phones', or 'mobile phones' in its business license tax ordinance as revenues upon which a business license tax could be imposed, and had not limited its tax to local exchange telephone service or landlines, and had taken affirmative action to collect such tax from wireless telecommunications providers prior to January 15, 2005, shall not be required to adjust its business license tax rate as provided in subsection 6 of this section and shall not be subject to the provisions of subsection 9 of this section." Section 92.086.10(1) describes only one city — Jefferson City.

Likewise, § 92.086.10(2) provides that "[a]ny municipality which has an ordinance or an amendment to an ordinance imposing a business license tax on telecommunications companies which was authorized or amended by a public vote subsequent to November 4, 1980, and such authorization specifically included the terms 'wireless', 'cell phones', or 'mobile telephones' as revenues upon which a business license tax could be imposed, and had not limited its tax to local exchange telephone service or landlines, and had taken affirmative action to collect such tax from wireless

The criteria set forth in § 92.086.10 which defines the class of exempt cities is narrowly drawn to (1) require that there be an ordinance with particular language in existence prior to November 4, 1980, or (2) require that there be an ordinance authorized or amended by a public vote subsequent to November 4, 1980. In addition, both provisions require affirmative action to collect the tax from wireless telecommunications providers prior to January 15, 2005. These statutory criteria create descriptions of "historic fact," as opposed to a moving target that could change in the future to embrace other cities.

Classifications based upon historical facts, geography, or constitutional status on immutable characteristics . . . are . . . facially special laws. *Tillis*, 945 S.W.2d at 449. Both of these criteria in § 92.086.10 are immutable and it would be impossible for any other city to become part of the class of cities addressed in subsections (1) and (2) because the dates used have already passed. *Cf. State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d at 921 (holding that the population at a fixed, past point in time was not an open-ended criterion and was an immutable characteristic similar to geography and constitutional status); *School Dist. of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 222 (Mo. banc 1991) (holding that constitutional status is not a sufficiently open-ended factor).

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telecommunications providers prior to January 15, 2005, shall not be required to adjust its business license tax rate as provided in subsection 6 of this section and shall not be subject to the provisions of subsection 9 of this section." Section 92.086.10(2) describes only one city — Clayton.

For example, in *Tillis*, a challenge was brought to the establishment of a tax that could be imposed by "any municipality of the fourth classification with a population of more than three thousand inhabitants but less than five thousand inhabitants and with more than five thousand hotel and motel rooms inside the municipal limits which is located in a county that borders the state of Arkansas . . ." This description applied only to the City of Branson. When the validity of the enabling legislation was challenged, the city argued that the limited application of the statute to counties bordering Arkansas was "not so narrowly drawn as to permanently exclude all other cities." The Court said that the focus of the analysis is the nature of the factors used in arriving at the class and that "the fact that a closed-ended classification does not logically exclude all but one entity does not make it less immutable." 945 S.W.2d at 449. The Court held that the statute was a facially special law and, since the city had not met its burden of demonstrating substantial justification, the tourism tax was unconstitutional. *Id*.

In this case, there is no substantial justification for the immutable classification used in §§ 92.086.10(1) and (2). There is no "substantial justification" to exclude St. Louis, and other cities like St. Louis, from the rate adjustment provision and dismissal requirements of HB 209. The only purpose for having a limited exclusion of only Jefferson City and Clayton from the Bill's lawsuit dismissal requirement is to protect and limit the liability, both past and future, of the "telecommunications companies" to all other cities.

Based on the foregoing, it is beyond argument that the classification of Jefferson City and Clayton, in §§ 92.086.10(1) and (2) is closed and to the exclusion of all other

cities. There is no reasonable basis for the targeting of St. Louis or the exclusion of Jefferson City and Clayton from the application of HB 209, because all are similarly situated. Accordingly, HB 209 should be presumed unconstitutional because the closed-ended classification of cities in §§ 92.086.10(1) and (2) creates a facially special law in violation of Art. III, § 40(21) in that it fails to treat all cities with claims against the "telecommunications companies" equally.

B. Sections 92.074-.098 do 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 five percent, but it fails to confer the same benefit upon other utilities. *Cf. Big Sky Excavating, Inc. v. Illinois Bell Tel. Co.*, ___ Ill.3d ___, No. 99380 (Ill. December 1, 2005) (finding that legislation benefitting only Illinois Bell was not special legislation because the advantages received by Illinois Bell were not denied to others who were similarly situated, in that there were no others whose situation was similar to Illinois Bell).

C. Sections 92.074-.098 do 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.

Section 92.089 conveys an exclusive right, privilege, or immunity to "any telecommunications company" as to its liability for the non-payment or underpayment of

business license taxes to a municipality up to and including July 1, 2006. Section 92.089, by its express terms, excludes all other companies and businesses that may be subject to liability for the failure to pay a municipality for "disputed amounts of business license taxes" except "telecommunications companies." The statute does not include or benefit all companies and businesses that may be subject to the business license tax ordinances in place in the cities, and many other businesses and utilities have paid business license taxes to the cities.

Section 92.089's classification of those businesses who must pay a municipality's business license tax is arbitrary and without a rational relationship to a legislative purpose in that it does not apply to all businesses similarly situated. Even if a law purports to be general, if the classification is unreasonable, unnatural, or arbitrary so that it does not apply to all persons or things similarly situated, it is then, in fact, special despite its apparent purpose. *Collector of Revenue v. Parcels of Land, etc.*, 517 S.W.2d 49, 53 (Mo. 1974). "If in fact the act is by its terms or 'in its practical operation, it can only apply to persons or things of a class, then it will be a special or local law, however carefully its character may be concealed by form of words.'" *Id*, *quoting Dunne v. Kansas City Cable Co.*, 131 Mo. 1, 32 S.W. 641, 642 (1895).

Here, the legislature's attempts to grant special immunities to less than all similarly situated businesses has been rejected by this Court as violative of Art. III, § 40. In *Planned Industrial Expansion Auth. v. Southwestern Bell Telephone Co.*, 612 S.W.2d 772 (Mo. 1981), the Court held that an amendment of a statute giving a telephone company a vested property interest in public land under which it had placed its cables and

conduits was unconstitutional. The Court held the amendment was "partial" in that it did not include and benefit all companies which distributed their services beneath the public ways. *Id*, at 777. The Court further held that there was no reasonable constitutional basis for granting a permanent easement to a telecommunications company while not granting a similar vested easement to other utility companies whose services might be provided through underground facilities. *Id*.

As in the *Planned Industrial Expansion* case, there is no reasonable constitutional basis in this case for granting to only the "telecommunications companies" immunity from past-due taxes. Many cities, including St. Louis, have similar business license tax ordinances that impose taxes on other types of businesses and companies based on their activities within the cities. However, those businesses are not being granted immunity in HB 209 from liability for past-due taxes. Accordingly, § 92.089 violates Art. III, § 40(28).

D. The classifications in §§ 92.074-.098 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. *City of Sunset Hills*, 14 S.W.3d at 59. To distinguish between such companies on the basis of a wire when granting tax amnesty under HB 209, is to create a distinction without a difference.

E. The classifications of § 71.675 are arbitrary and unreasonable. HB 209 bars municipalities from pursuing class litigation against telephone companies "to enforce or collect any business license tax" (§ 7l.675.1), but it does not foreclose telephone

companies from pursuing class litigation against municipalities to recover payment of the same tax.[17] In addition, it arbitrarily shields telephone companies from class actions "to enforce or collect any business license tax," but not other companies subject to the same business license taxes.

F. The classifications in § 92.086.13 are not germane to the purpose of the law. The legislature's pronouncement that HB 209's classifications are deemed necessary for "telecommunications business license tax simplification," is disingenuous because such a goal is not fostered by excluding other businesses and utilities similarly situated. If the legislature was concerned about the "economic well being of the state," then it seems beyond curious that § 92.086.13 authorizes a telephone company to "pass through to its retail customers all or part of [a telecommunications] business license tax."[18]

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

[18]Such a "pass through" purports to make the citizenry, as opposed to the telephone company, the business license taxpayer. It cannot be squared with HB 209's definition of a "business license tax," which is a tax upon businesses, not individuals, "for the privilege of doing business within the borders of [a] municipality." § 92.077(1), R.S. Mo. Further, it runs counter to established thinking on who bears the burden of a gross receipt tax. *See*, *e.g.*, *The May Dept. Stores Co. v. Director of Revenue*, *supra*, at *15 ("[Pletitioner's entire argument is couched in terms of assuming that a retailer's role under the sales tax law is to collect the tax from the purchaser and remit the tax to the

Section 92.086.13 also 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, R.S. Mo.).[19] Again, if the concern is the "economic well being of the *state*," it is not alleviated by starving municipalities of tax revenues, foisting taxes upon the citizenry, and excluding similarly situated businesses from such benefits.

G. The provisions of §§ 92.074-.098 constitute a special law where a general law can be made applicable. Being "special" on its face or in its practical operation, HB 209 violates Art. III, § 40 of the Missouri Constitution because it arbitrarily "regulat[es] the affairs of . . . cities" and grants "special right[s], privilege[s] or immunit[ies]" to corporations, "where a general law can be made applicable." Mo. Const., Art III., §§

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state. To be sure, the sales tax as it existed from 1935 to 1965 was a tax on the sale with the legal incidence being on the purchaser. The tax was imposed at the time of purchase and the retailer acted as mere tax collector [Citations omitted]. Just as surely, however, the amendments made to the sales tax law in 1965 '. . . altered the nature of the tax as it had been . . .' [citations omitted] and '. . . the entire tax imposed by Chapter 144 is [now] a gross receipts tax' [citations omitted]. Under the current sales tax law as articulated in the above cases, the legal incidence of the tax is no longer on the purchaser as of old but is now on the seller. The retailer is no longer cast as a tax collector but is now the very person upon whom the tax is imposed. The provisions stating that the sales tax was 'a tax upon the sale' have been repealed in favor of a clear statement that the tax is upon the seller's gross receipts.")

[19]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).

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 HB 209—to be invalid "special legislation": (i) *State ex rel. Ashby v. Cairo Bridge & Terminal Co.*, 340 Mo. 190, 100 S.W.2d 441 (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*, 353 Mo. 79, 182 S.W.2d 70, 73 (en 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 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*, 358 Mo. 983, 218 S.W.2d 600, 604 (en banc 1949) (the statutory provision that no corporation, other than banking corporation, railroad express company, transatlantic 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 Industrial Expansion Auth. v. Southwestern Bell Tel. Co.*, *supra*, (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 Com'n. v. County Court of Greene County*, 667 S.W.2d 409 (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*, *supra* (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 (Mo. banc 1993) (act that could apply to only one county, authorizing counties to establish boundary commissions, was unconstitutional); (viii) *Harris*, *supra* (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*, *supra* (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).

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.

H. The provisions of §§ 92.074-.098 have the effect of changing the City's Charter. Finally, the legislature also violated Mo. Const., Art. III, § 40(22), which provides that "the General Assembly shall not pass any local or special law . . . incorporating cities, towns, or villages or *changing their charters*." (Emphasis added.) St. Louis is a constitutional charter city. Mo. Const. Art. VI, § 31. HB 209 alters St. Louis's charter by limiting its authority to declare, abate and/or bring suit to collect debts and taxes owed. For each of the foregoing reasons, HB 209 is constitutionally invalid because it creates special legislation in violation of Art. III, § 40 of the Missouri Constitution.

V. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209 AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THAT PORTION OF THE MISSOURI CONSTITUTION, ART. I, SECTION 13, WHICH PROHIBITS THE ENACTMENT OF A "LAW . . . RETROSPECTIVE IN ITS OPERATION," IN THAT ONE OR MORE OF THE

HEREINAFTER ENUMERATED PORTIONS OF HB 209 PURPORT TO AFFECT "TRANSACTIONS" INVOLVING THE CITY WHICH OCCURRED PRIOR TO HB 209'S EFFECTIVE DATE, TO THE SUBSTANTIAL PREJUDICE OF THE CITY, IN THE FOLLOWING RESPECTS:

A. § 92.089.1 PURPORTS TO RECHARACTERIZE PAST DUE CITY TAXES WHICH HAD ALREADY MATURED AS A DEBT TO THE CITY AT THE TIME HB 209 BECAME EFFECTIVE, AS BEING NOT LIQUIDATED;

B. § 92.089.2 PURPORTS TO RETROACTIVELY CREATE IMMUNITY FROM PAST DUE CITY TAXES WHICH HAD ALREADY MATURED AS A DEBT TO THE CITY AT THE TIME HB 209 BECAME EFFECTIVE, BASED ON BELIEFS WHICH WERE NOT VALID GROUNDS FOR NON-PAYMENT AT THE TIME THE TAXES WERE DUE;

C. § 92.089.2 PURPORTS TO REQUIRE THE CITY TO DISMISS ITS LAWSUIT TO COLLECT PAST TAXES DUE AND OWING, AND THEREBY RETROACTIVELY DEPRIVES THE CITY OF A REMEDY WHICH EXISTED WHEN SUIT WAS FILED, PRIOR TO THE EFFECTIVE DATE OF HB 209.

The Constitution of Missouri prohibits a law "retrospective in its operation." Art. I, § 13. This prohibition is long-standing.[20] While the Constitution does not define the term, laws within its proscription have been characterized as laws that "take away or

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

impair rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past." *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 340 (Mo. banc 1993). This "does not mean that no statute relating to past transactions can be constitutionally passed, but rather that none can be allowed to operate retrospectively so as to affect such past transactions *to the substantial prejudice of parties interested*." (Emphasis in original.) *Fisher v. Reorganized Sch. Dist., etc.*, 567 S.W.2d 647, 649 (Mo. banc 1978). In determining what transactions or considerations are within the purview of retrospective laws, the courts use terms such as "liabilities" or "obligations," as well as "debts." *Graham, supra*.

Many municipalities, including St. Louis, for years have had ordinances taxing "telephone" business. The authority for imposing such taxes appears in various "business license" tax statutes in Ch. 92 and 94, R.S. Mo.[21] Nothing in HB 209 purports to expressly repeal or amend any of these taxing statutes.

A. Section 92.089.1 of HB 209 states, "The general assembly finds and declares . . . the claims of the municipal governments regarding such business licenses [on telecommunications companies] have neither been determined to be valid nor liquidated." The statutory language makes no attempt to limit its application to operate prospectively only from the effective date of HB 209, August 28, 2005.[22] If this section is construed to

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[21]St. Louis's authority for a business license tax comes from § 92.045, R.S. Mo.

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

operate prospectively, analysis under Art. I, § 13 need not be had. However, all of the cases on appeal before this Court contained claims by municipalities for unpaid municipal business license tax debts, in some cases going back as far as 1996. To the extent this section purports to invalidate those debts which were incurred prior to HB 209's effective date, it offends Art. I, § 13.

A retrospective law takes away or impairs "vested or substantial rights acquired under existing laws." *Mendelsohn v. State Bd. of Registration for the Healing Arts*, 3 S.W.3d 783, 785-786 (Mo. banc 1999). A "vested right" is "a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another." *Hallmark Cards, Inc. v. Director of Revenue*, 159 S.W.3d 352, 354 (Mo. banc 2005). It "must be something more than a mere expectation based upon an anticipated continuance of the existing law." *Id*.

Section 92.089.1 purports to recast the municipalities' claims for collection of these matured tax debts, apparently including those debts for which the municipalities had already filed suit, as "neither valid nor liquidated." In doing so, this provision takes away a vested legal entitlement to tax proceeds already defined as a matured tax debt. Even an inchoate tax, though not due or yet payable, is such an obligation or liability as to be within the protection of the restriction against retrospective laws. *Graham*, *supra*, at 52. Statutes pre-existing HB 209 authorized these municipalities to tax telephone business by ordinance. Not only did these municipalities enact such taxing ordinances, they began collection proceedings for the tax debts which had already matured, all before HB 209 became law. To the extent this provision is construed to cancel those debts, it is

unconstitutional.

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

> (1) It was not a telephone company covered by the municipal business license tax ordinance, or the statute authorizing the enactment of such taxing ordinance, or did not provide telephone service as stated in the business license tax ordinance, and therefore owed no business license tax to the municipality; or
>
> (2) That certain categories of its revenues did not qualify under the definition or wording of the ordinance as gross receipts or revenues upon which business license taxes should be calculated.
>
> such a telecommunications company is entitled to full immunity from, and shall not be liable to a municipality for, the payment of the disputed amounts of business license taxes, up to and including July 1, 2006. However, such immunity and release from liability shall not apply to any business license tax imposed in accordance with subdivisions (1) and (2) of subsection 10 of section 92.086 or sections 92.074 to 92.098 after July 1, 2006.

Again, as noted in Part A, *supra*, if this provision is construed to operate prospectively only, an Art. I, § 13 analysis is unnecessary. However, to the extent this section purports

to create immunity from payment of business license taxes prior to the passage of HB 209, it is a retrospective law.

Prior to August 28, 2005, municipal business license taxes on "telephone," "cell phone," "wireless" or other-named services were the products of local governments and determined by local ordinances. No "immunity" from taxation existed as tax liabilities were being incurred during this time period, unless local ordinance provided for it, and the record shows no local ordinance providing such immunity. Any attempt to create an immunity from past-due taxation clearly impairs a "vested right" within the meaning of cases construing Art. I, § 13 and its ban on laws retrospective in operation. Under the existing law in effect, there was a tax liability created by ordinance upon each person engaged in a general telephone business based upon that individual's gross receipts. There was legal title to the collection of the tax debt each month that the tax liability was incurred. *Graham*, *supra*. This provision purports to take away the vested right to collect that tax. *Id*.

When St. Louis filed its suit to collect its Telephone Company Alternative Tax from Sprint (and others) in 2003, there was no immunity provision in effect, either in federal, state or local law, that authorized any "telecommunications company" to avoid payment of its tax obligations. Certainly, while Sprint raised affirmative defenses to St. Louis's claim that purported to avoid liability for payment of its tax obligations, it did not raise any affirmative defense prior to its Motion for Judgment on the Pleadings or to Dismiss, claiming that it had "immunity" from the provisions of the gross receipts tax.

By purporting to grant immunity to Sprint and others from tax liability long after that tax liability had matured, § 92.089.2 impairs a title vested in St. Louis to collect that tax debt. In this particular instance, this was even more than an "inchoate right." This was a right for which St. Louis had already instituted a collection procedure, and which it had begun to prosecute. If Art. I, § 13 is to mean anything, it must mean that those who complied with the law as it existed when its rights were acquired, had a right to rely on the title vested by such compliance. St. Louis had a vested right to collect its tax debt. It cannot be taken away by a later-enacted law.

Moreover, immunity purports to be created based on the company's belief prior to the enactment of HB 209 that it did not owe taxes. Even if a corporation could somehow form a "belief," that item heretofore thought to be the exclusive property of human beings, it must be emphasized that prior to the passage of HB 209, any such "belief," by itself, was not a defense to a claim that taxes were due and owing. There was a method for avoiding taxes prior to HB 209 — paying taxes under protest and filing suit under Ch. 139, R.S. Mo. Several wireless providers did make such payments under protest.

By characterizing past actions (or, in this instance, inaction) which at that time waived the right to challenge taxes, as instead giving them the legal effect of immunity, HB 209 impairs a vested right of St. Louis and other cities which filed suit to collect these taxes. Prior to August 28, 2005, a failure to pay one's taxes — whatever one's belief — was essentially a waiver of the right to challenge its imposition. See § 139.031, R.S. Mo. *See also B & D Inv. Co., Inc. v. Schneider*, 646 S.W.2d 759, 763 (Mo. banc

1983) (Section 139.031 tax protest was exclusive remedy for taxpayer to recover payments of tax). The municipalities filed suit against those non-payers, and at the time suit was filed, had the right to claim that their failure to pay under protest was a waiver of the defense that the taxes were illegal.

C. Section 92.089.2 provides in part:

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

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

When the municipalities filed their suits, there was a legal right to collect on matured tax debts. As noted in Part A, *supra*, the tax debts of various wireless providers under the respective municipal ordinances had matured and were, in fact, unpaid. In short, prior to the enactment of HB 209, the municipalities held legal title to a cause of action for the collection of tax debt, which action they had already begun to prosecute. Clearly, the municipalities had a "vested right" to pursue their collection actions.

Missouri courts have previously found "vested rights" in connection with rights as a litigant. In *Doe v. Roman Catholic Diocese*, *supra*, it was noted:

> This Court has held that once the original statute of limitations expires and bars the plaintiff's action, the defendant has acquired a vested right to be free from suit, a right that is substantive in nature, and therefore, article I, section 13 prohibits the legislative revival of the cause of action. *Uber v. Missouri Pacific R.R. Co.*, 441 S.W.2d 682 (Mo. 1969); *see also Wentz v. Price Candy Co.*, 352 Mo. 1, 175 S.W.2d 852 (1943); *State ex rel. Research Medical Center v. Peters*, 631 S.W.2d 938 (Mo. App. [W.D.] 1982).

862 S.W.2d at 341. Logically, if legislation cannot be applied retrospectively to impair someone's vested right to be free from suit, it should not be allowed to retrospectively impair a vested right to a cause of action.

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

Some cases have determined that an otherwise unconstitutional law retrospective in operation may survive if it waives the rights of the "state." *See Savannah R-III Sch. Dist. v. Public Sch. Ret.*, 950 S.W.2d 854, 858 (Mo. banc 1997). The precise meaning of the word "state" in this context has not been defined by any bright-line rule, but rather, on a case-by-case basis. No Missouri case has been found which has specifically held that a municipality is considered the "state," for purposes of this waiver.[23] In *Savannah*, which

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[23]Cases have cited general principles that could include a municipality. *See, e.g.*, *Graham*, *supra*, at 52 (quoting Corpus Juris as stating the general principle that the

is the most recent case to expound on this issue, the term was interpreted to include local school districts because they are "creatures of the legislature." *Id*, at 858. However, in this 5-2 decision, the dissent sharply criticized this holding as specious, not only in its factual underpinnings, but as a legal proposition, in that it "rel[ies] on judicial creations that feed off one another while ignoring the constitution's plain words." 950 S.W.2d at 861 (Robertson, J., dissenting).

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

> In formation and purpose, the [school districts] are more municipal corporations than they are state entities. Of course, one could argue that municipal corporations are state instrumentalities, too. If one follows the majority, municipalities cannot challenge the legislature's enactment of laws retrospective in operation, either. But do we really want to say that? I think not. Local governments exist as much to insulate citizens from distant government as to carry out the state's duties.

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waiver applies to the state itself or "governmental subdivisions thereof.")

Id, at 860-861. The dissent then traced the history of the development of this waiver principle, which it described as having "questionable parentage," *id*, at 861, concluding that it was essentially *dicta* from a Supreme Court case[24], which the Missouri courts adopted without ever engaging in any reasoned analysis therefor, and which is contrary to the plain language of Art. I, § 13.

Even if this principle that the state can waive the prohibition on laws retrospective in operation is retained, it should not apply to municipalities. Municipalities, at least in the verbiage of the Constitution, are distinguished from "political subdivisions" of the state. Art. VI, § 1 makes counties political subdivisions of the state, but says nothing about municipalities. Art. VI, § 15 authorizes the general assembly to provide for four classes of cities and towns, but does not provide that they shall be political subdivisions of the state. Nothing in the statutes enacted pursuant to Art.VI, § 15 declares the municipalities to be political subdivisions. See Ch. 77-82, R.S. Mo. Art. VI, § 16 speaks in the disjunctive when it states "[a]ny municipality *or* political subdivision of this state . . ." The word "or" is ordinarily used as a disjunctive to mean "either" as "either this or that." *Norberg v. Montgomery*, 351 Mo. 180, 173 S.W.2d 387, 390 (en banc 1943). This supports the construction that a municipality is not a political subdivision of the state. If a municipality is not a political subdivision of the state, then the legislature has no authority to waive the municipality's right to be free from the operation of retrospective laws.

[24]*New Orleans v. Clark*, 95 U.S. 644 (1877).

VI. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE II, SECTION 1, PROHIBITING MEMBERS OF ONE BRANCH OF GOVERNMENT EXERCISING POWERS PROPERLY BELONGING TO ANOTHER, IN THAT THE PROVISIONS OF SECTION 92.089(2), BY PURPORTING TO ORDER THE DISMISSAL OF LAWSUITS FILED BY LOCAL GOVERNMENTS AGAINST TELECOMMUNICATIONS COMPANIES, ARE AN ENCROACHMENT BY THE LEGISLATURE ON THE JUDICIAL FUNCTION OF ADJUDICATING LAWSUITS.

Section 92.089(2) of HB 209 is unconstitutional and invalid because it encroaches on the judicial function by directing a particular outcome in this lawsuit, thereby violating Mo. Const. Art. II, § 1, which provides: "[t]he powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in instances in this constitution expressly directed or permitted." As a result, the trial court erred in granting Sprint's Motion for Judgment on the Pleadings.

The Missouri Supreme Court "has consistently held that the doctrine of separation of powers, as set forth in Missouri's constitution, is 'vital to our form of government,'

[citations omitted], because it 'prevent[s] the abuses that can flow from centralization of power.' [citations omitted]." *Mo. Coalition for the Environment, supra,* 948 S.W.2d at 132. "There are two broad categories of acts that violate the constitutional mandate of separation of powers. 'One branch may interfere impermissibly with the other's performance of its constitutionally assigned [power] . . . [citations omitted]. Alternatively, the doctrine [of separation of powers] may be violated when one branch assumes a [power] . . . that more properly is entrusted to another. [citations omitted].'" *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997), quoting *I.N.S. v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring).

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

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

> federal courts to retroactively open final judgments. *Plaut*, 514 U.S. at 219.

423 F.3d at 777.

In *Klein*, the Supreme Court refused to give effect to a statute requiring the courts to consider the acceptance of a pardon as conclusive proof of disloyalty and to dismiss for lack of jurisdiction any case in which the claimant had accepted a pardon, finding that Congress had "inadvertently passed the limit which separates the legislative from the judicial power." 80 U.S. at 147. In reaching that conclusion, the Court stated:

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

Id, at 146.

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

legislation struck down in *Klein*.

Before HB 209 was enacted, the courts adjudicating claims against wireless carriers were obliged to determine whether wireless telecommunications service is telephone service. In *City of Sunset Hills,* the Eastern District decided that it is:

> The [wireless telecommunications] services Southwestern Bell provided clearly fell within the definition or genus of a telephone company . . . Southwestern Bell's assertion that it was not a telephone company is disingenuous in light of the fact that it relied on the [Federal Telecommunications Act] to defeat City's license fee ordinance . . . Southwestern Bell fell within the class of 'telephone companies' under section 94.270, such that the City had the authority to impose a business license fee on it."

Id. at 59. Without expressly amending or repealing prior law[25], § 92.089.2 of HB 209

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[25] HB 209 does not expressly repeal the underlying local license tax ordinances. Presumably, with the exception of the words "exchange telephone service," St. Louis's gross receipts tax ordinance remains in force and effect following the enactment of HB 209. Such a conclusion is buttressed by the language of 92.083.2, 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 five percent "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).

retroactively alters *City of Sunset Hills*'s construction of state statute and allows each wireless telecommunications service provider to decide in its own favor by simply asserting that it "subjectively" believed, notwithstanding the Eastern District's decision to the contrary, that wireless telecommunications service is not telephone service. Moreover, by mandating dismissal of pending suits, HB 209 prescribes a rule of decision that, like the statute struck down in *Klein*, requires the court to declare that its jurisdiction has ceased. Given these qualities, HB 209 is clearly "adjudicative" in nature, and it forces this Court to engage in a charade of the judicial process. Alone, or in combination, such attributes have been found to violate the doctrine of separation of powers in related contexts. *See, e.g., Unwired Telecom Corp. v. Parish of Calcasieu*, *supra*, at 406 (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*, *supra*, 578 S.W.2d at 7-8 (act retroactively exempting railroad parts from use tax violated separation of powers, as being "a clear attempt by the 1975 General Assembly to interpret a law enacted by the 1949 General Assembly after this Court has interpreted and applied that law"; the legislature "does not have the power or authority to retrospectively abrogate judicial pronouncements of the courts of this State by a legislative interpretation of the law"); *Roth v. Yackley*, 396 N.E.2d 520, 522 (Ill. 1979) (legislature's declaration that amendatory act applied to events occurring before its effective date was an assumption of the role of a court in contravention of the principle of separation of

powers; "it is the function of the judiciary to determine what the law is and to apply statutes to cases"); *Harris v. Commissioners of Allegany County*, 100 A. 733, 735-36 (Md. App. 1917) (act violated separation of powers principles, where although "in the form of a law, [it was] clearly in effect a legislative decree or judgment in favor of petitioner against the county commissioners of Allegany county, and in the nature of judicial action"); *Ark. Op. Atty. Gen. No. 2003-025*, 2003 WL 1347746, at *5 (Ark. A.G. 2003) (act of Arkansas legislature purporting to forgive gross receipts taxes previously incurred by truck and semitrailer owners would violate doctrine of separation of powers). *See also State ex rel. Dawson v. Falkenhainer*, *supra*, 15 S.W.2d at 343 ("[t]o the courts is given authority to construe the Constitution"). In such circumstances, there is little difference between HB 209 entering judgment in favor of defendants, or a court doing so, since both involve the application of law.

The fact that HB 209 singles out specific litigation for legislative treatment[26] 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

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[26]HB 209 reads in part: "If any municipality, prior to July 1, 2006, has brought litigation . . ." 92.089.2, R.S. Mo. The lawsuits to which this provision applies are: (i) This case; (ii) *City Collectors of Wellston and Winchester v. SBC Communications, Inc., et al.*, Appeal No. SC87207, currently pending in this Court; (iii) *City of Jefferson*, *supra*, currently pending in the U.S. District Court for the Western District of Missouri; (iv) *City of University City, et al. v. AT&T Wireless Services, Inc., et al.*, No. SC87208, currently pending in this Court; and (v) *City of Springfield v. Sprint Spectrum, L.P.*, No. SC87238,

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 (1983) (Powell, J., concurring). By singling out individual litigants for unfavorable treatment, the dangers envisioned by Justice Powell have come to pass in the form of HB 209.

Unlike the statute upheld in *Savannah*, *supra*, the subjective immunity provision of HB 209 contravenes a final adjudication of a court of this state, *i.e.*, *City of Sunset Hills*, where the Eastern District specifically found that Southwestern Bell's belief that it was not a telephone company was disingenuous. Further, HB 209 does not resolve a legal dispute between two statutory instrumentalities of government, as did the statute at issue in *Savannah;* it legislatively dismisses tax enforcement actions against private entities.

Because the legislature may not grant itself power that has been granted to the judicial branch, Section 92.089(2) of HB 209 is unconstitutional and invalid, and the trial court erred in granting Sprint's motion for judgment on the pleadings.

VII. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE II, SECTION 1, PROHIBITING MEMBERS OF ONE BRANCH OF GOVERNMENT

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currently pending in this Court.

EXERCISING POWERS PROPERLY BELONGING TO ANOTHER, IN THAT THE PROVISIONS OF HB 209, BY PURPORTING TO OVERRIDE THE TAXING AUTHORITY OF LOCAL GOVERNMENTS, ARE AN ENCROACHMENT BY THE LEGISLATURE ON THE EXECUTIVE FUNCTION OF COLLECTING TAXES.

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

The Missouri Constitution provides: "[t]he powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in instances in this constitution expressly directed or permitted." Mo. Const. Art. II, § 1.

As Judge Price noted in *Mo. Coalition for the Environment*, *supra*, "Article II, § 1 strictly confines the power of the legislature to enacting laws and does not permit the legislature to execute laws already enacted." 948 S.W.2d at 134. "[T]he constitution intends for the legislature's power to cease when a bill becomes law and the executive branch begins to exercise its power to administer and enforce that law." *State Auditor*, 956 S.W. 2d at 231.

In 1967, the General Assembly enacted § 92.045[27] delegating to St. Louis the authority to impose business license taxes. St. Louis's Telephone Company Alternative Tax ordinance[28] imposes a gross receipts tax on any person engaged in a "general telephone business" within the City of St. Louis. The power of enforcing the law authorized by § 92.045 belongs to St. Louis under its City Charter[29], not to the General Assembly. By mandating dismissal of this action and forbidding audits and new enforcement actions, HB 209 impermissibly controls execution of the law authorized by § 92.045. *See State Auditor* at 233.

Although the General Assembly may attempt to control the executive branch by amending § 92.045, *see Mo. Coalition for the Environment* at 134, it has not done so. HB 209 does not expressly amend[30] § 92.045, nor does the title to the bill make any reference

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[27]Section 92.045 reads in pertinent part:

> Any constitutional charter city in this state which now has or may hereafter acquire a population in excess of three hundred fifty thousand inhabitants, according to the last federal decennial census is hereby authorized, for city and local purposes, to license, tax, and regulate the occupation of merchants, manufacturers, and all businesses . . . and may, by ordinance, base such licenses on gross receipts . . .

[28]Sections 23.34.010-.090, R.C.St.L. (1994).

[29]Charter of the City of St. Louis, Art. I, § 1(1) empowers St. Louis "[t]o assess, levy and collect taxes for general and special purposes on all subjects or objects of taxation."

[30]Amendments by implication are not favored. *LeSage v. Dirt Cheap Cigarettes and*

to § 92.045. Section 92.083.2 provides: "Nothing in this section shall have the effect of repealing any existing ordinance imposing a business license tax on a telecommunications company; provided that a city with an ordinance in effect prior to August 28, 2005, complies with the provisions of section 92.086." Consequently, St. Louis's Telephone Company Alternative Tax remains in full force and effect following the enactment of HB 209. Insofar as the definitions[31] and formula in HB 209 may affect the calculation of the tax, the new definitions and formula do not take effect until July 1, 2006. §92.086.6[32].

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

Beer, 102 S.W.3d 1, 4 (Mo. banc 2003).

[31]Pursuant to § 92.083.1, the terms "gross receipts" and "exchange telephone service" are to be construed, "*on or after July 1, 2006*," to have the meanings set forth in § 92.083.1. (Emphasis added.)

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

Moreover, HB 209 creates a gap period in enforcement. Section 92.086.3 provides that the Missouri Director of Revenue shall begin collecting the tax on July 1, 2006. Until then, neither the Missouri Director of Revenue nor St. Louis may conduct audits or file suit against any telecommunications company that fails to pay business license taxes. § 92.089.2. Regardless of whether the gap period "enforcement moratorium" is applied to tax delinquencies that occurred before enactment of HB 209 or after, it encroaches on executive branch powers to enforce existing law. This evisceration of executive power is far more egregious than the legislative overreaching in *State Auditor*, where the legislative branch sought to post-audit the management performance of an executive branch agency, and in *Mo. Coalition for the Environment*, where the legislative branch sought to control execution of rule making authority. As a result, § 92.089(2) of HB 209 violates Mo. Const. Art. II, § 1. *See Mo. Coalition for the Environment*, at 134.

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

VIII. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE III, SECTION 23, IN THAT IT CONTAINS MORE THAN ONE SUBJECT AND THE SUBJECTS OF THE BILL ARE NOT CLEARLY EXPRESSED IN ITS

TITLE.

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 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*, 954 S.W.2d 323, 325 (Mo. banc 1997).

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 Legis. Research*, 932 S.W.2d 392, 395, n. 4 (Mo. banc 1996). "If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid." *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. 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 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 does not "clearly express" its subject matter. *See, e.g., National Solid Waste Mgmt. Assoc. v. Director of Dept. of Nat. Res.*, 964 S.W.2d 818, 821 (Mo. banc 1998).

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, R.S. Mo., 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, R.S. Mo., 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.

IX. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE X, SECTION 22 (THE "HANCOCK AMENDMENT"), IN THAT IT ALTERS A TAX

LEVY AND BASE IN PLACE AT THE TIME THE HANCOCK AMENDMENT WAS APPROVED, NOVEMBER 4, 1980, WITHOUT VOTER APPROVAL.

HB 209 violates Art. X, § 22 of the Missouri Constitution, commonly known as the Hancock Amendment. HB 209 has as its core purpose the wholesale revision of telephone business license taxes of municipalities which were in existence at the time of the Hancock Amendment's passage in 1980. It does so by redefining what type of services a telephone company may be taxed on by a city's business license tax from gross receipts to retail sales as defined by the legislature in Ch. 144, R.S. Mo. (Sales Tax Chapter). A main purpose of the Hancock Amendment's local government section was to allow local governments, not the state, to alter existing tax levies and bases. Art. X, § 22 grants the power to cities or counties to increase the base of tax while reducing the levy to be applied to the new base. This constitutional provision altered the relationship between the State and its political subdivisions. It prohibited State action of any kind which attempted to alter levies and bases of pre-existing taxes. Simply stated, the Hancock Amendment was intended to keep the State away from local taxes and tax levy amounts existing at the time of its passage. Any changes in existing local taxes or new taxes were to be left to the local voters. Local officials were only allowed to reduce levies and broaden tax bases if it reduced the tax levy to be revenue neutral the first year. Although the State was free after November 4, 1980, to authorize new taxes and repeal a new tax, it could not go back and usurp the power the people had given to local governments.

Despite the absence of State authority under Art. X, § 22 to change local taxes that

existed on November 4, 1980, the General Assembly enacted HB 209, which purports to exercise on behalf of all cities, whether required by the Constitution or not, the power to broaden a tax base and reduce the tax levy to be applied to the "new" base. The so-called "broadening" of the base is illusory for St. Louis because § 92.083.1(1), R.S. Mo., actually reduces the base of eligible tax receipts. The "base of an existing tax" is "that property against which the law allows a government to levy a tax." *Tannenbaum v. City of Richmond Heights*, 704 S.W.2d 227, 229 (Mo. banc 1986). The law prior to HB 209 already allowed taxation of wireless carriers as "telephone companies" under local gross receipts ordinances. *See City of Sunset Hills***,** 14 S.W.3d at 59 (company providing "wireless communications service" placed its services within a class of telephone companies).[33] "Telephone companies" were already subject to a business license tax in St. Louis at the time the Hancock Amendment became law. See § 23.34.010, *et seq.*, R.C.St.L. (1994). If the definitions of HB 209 are applied, limiting "gross receipts" to "receipts from the retail sale of telecommunications service taxable under section 144.020," per § 92.083.1(1), the pre-existing tax base is already reduced. Adding insult to

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[33]Contrary to the assertion in § 92.089 that the application of certain business license taxes to certain telecommunications companies by Missouri municipalities has "neither been determined to be validated nor liquidated," the legislation makes no attempt to declare that *City of Sunset Hills* was wrongly decided or somehow contrary to legislative intent. Cf. SB 420 and 344 (2005), codified at § 105.726.3, R.S. Mo., where the language of the statute specifically repudiated the court decision in *Wayman Smith, III, et al. v. State of Missouri*, 152 S.W.3d 275 (Mo. banc 2005).

injury, HB 209 also reduces St. Louis's tax levy from ten percent (10%) to five percent (5%) on the new base. Accordingly, the legislature overstepped its constitutional powers and violated Art. X, § 22 of the Hancock Amendment.

HB 209 also requires that any audits or lawsuits by municipalities now pending to enforce the power to tax must be dismissed. This violates Mo. Const., Art. X, § 22, which prohibits the suspension of the power to tax unless specifically permitted in the Constitution. Nowhere in the Missouri Constitution is the requirement of the cessation of an audit or the dismissal of a tax enforcement action permitted. Despite the lack of constitutional authority, the General Assembly requires, in newly enacted § 92.089.2, that any audit or lawsuit brought prior to July 1, 2006 be dismissed or ceased for all but two cities (Jefferson City and Clayton, which are excused from compliance). In effect, the municipalities' power to tax telephone companies, which is enforced through audits and collection suits, is suspended until July 1, 2006. This date was chosen because the five year statute of limitations for unpaid telephone company business license taxes is changed by HB 209 to three years, so that a new defense can become available to the telephone companies. This violates Art. X, § 22 and requires that §§ 92.074 through 92.089 be struck because they are inseparable under § 92.092 of HB 209.

X. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THE MISSOURI CONSTITUTION, ARTICLE X, SECTION 16, WHICH PROHIBITS THE STATE FROM SHIFTING THE TAX

BURDEN TO LOCAL GOVERNMENTS, IN THAT THE EFFECT OF § 92.086 IS THE REDUCTION OF THE TAX REVENUE OF LOCAL GOVERNMENT, THEREBY REQUIRING LOCAL GOVERNMENT TO BEAR THE BURDEN OF LOST TAX REVENUE, WHILE THE STATE (BY WAY OF THE DIRECTOR OF REVENUE) IS ALLOWED, THROUGH THE PROVISIONS OF § 92.086.5, TO RETAIN ONE PERCENT OF TAX REVENUE IT WAS NOT PREVIOUSLY AUTHORIZED TO RETAIN.

Although the "Hancock Amendment" is usually referred to in the singular, its provisions actually encompass several different sections of Article X.

As discussed *supra*, HB 209 violates Art. X, § 22 of the Missouri Constitution, commonly known as the Hancock Amendment. HB 209 has as its core purpose the wholesale revision of telephone business license taxes of municipalities which were in existence at the time of the Hancock Amendment's passage in 1980. It does so by redefining what type of services a telephone company may be taxed on by a city's business license tax from gross receipts to retail sales as defined by the legislature in Ch. 144, R.S. Mo. (Sales Tax Chapter).

The General Assembly then seeks to justify its naked attempt to protect the revenue streams of the telephone companies from the ongoing expense of defending lawsuits, as follows:

> it be the policy of the state of Missouri that costly litigation which have or may be filed by Missouri municipalities against telecommunications companies, concerning the application of certain business license taxes to

certain telecommunications companies, and to certain revenues of those telecommunications companies, as set forth below, is *detrimental to the economic well being of the state* . . . (Emphasis added.)

§ 92.089.1.

The State, instead of using its own revenues to accomplish its goals (which are extremely limited by its own repeated statements), decided to use local tax dollars to foster the "economic well being of the state," by forgiving the telecommunication companies debts to Missouri municipalities and reducing future liabilities. All of this was without the vote of local taxpayers or action by local governmental officials as required by the State Constitution.

The City of St. Louis is challenging the enactment of HB 209 under Mo. Const. Art. X, § 24 because this legislation is inconsistent with the purposes of the Hancock Amendment. It is well settled that cities have standing to challenge the constitutionality of statutes. *See City of St. Louis v. Cernicek,* 145 S.W. 3d 37 (Mo. App. E.D. 2004). Taxpayers are not the exclusive enforcers for violations of the Hancock Amendment. In fact, HB 209 purports to implement part of the Hancock Amendment and by doing so, it is inconsistent with both Art. X, § 22, which prohibits the City from collecting delinquent taxes, and the shifting of a tax under Art. X, § 16, as will be more fully discussed below. In a case presenting similar issues, the Court in *W.R. Grace and Co. v. Hughlett*, 729 S.W.2d 203 (Mo. banc 1987), explicitly recognized the standing of a city to challenge the constitutionality of a statute which had the effect of barring the city from retaining tangible personal property taxes that taxpayers had paid under protest, stating:

> The question of the sufficiency of a party's interest to challenge a statute which allegedly creates an unconstitutional tax exemption was given extensive consideration in our recent decision of *Arsenal Credit Union v. Giles*, 715 S.W.2d 918 (Mo. banc 1986) . . . We held that the City of St. Louis was adversely affected and thus had standing to challenge the constitutionality of § 148.620.3 because if the statute were valid the city would be barred from retaining the tangible personal property taxes the plaintiffs had paid under protest.

Id, at 206. The Court in *Hughlett* went on to conclude that a political subdivision could challenge the constitutionality of a statute when it noted:

> Though Jasper County espouses the position that the statute relied upon by appellant did not provide unconstitutional exemptions, in a properly positioned case the taxing authority might attack the validity of the referenced statutes as they apply to the taxpayers directly involved, as was the case in *Arsenal*.

Id, at 203.

The instant action by St. Louis against Sprint is not a suit to enforce the Hancock Amendment in the sense of seeking a refund of taxes. Instead, it is raised only as a defense to a Motion for Judgment on the Pleadings or to Dismiss filed by Sprint, which asserts HB 209 demands dismissal of St. Louis's action to collect delinquent taxes and prospectively lowers its gross receipts tax and limits its base of collections. St. Louis has a protectable interest because dismissal of its lawsuit will adversely impact its right to

collect delinquent gross receipts taxes. St. Louis is required to assert all constitutional claims in the instant action in defense of Sprint's motion, or suffer the Court declaring that they have been waived in any subsequent appeal.

Finally, the Court's decision in *State ex rel. City of St. Louis v. Litz*, 653 S.W.2d 703 (Mo. App. E.D. 1983), further recognizes a municipality's standing to challenge the constitutionality of HB 209 as violative of the Hancock Amendment due to its stake in fending off the Defendant's attempt to affirmatively use § 92.089.2, R.S. Mo., to cause the dismissal of Plaintiff's pending action to collect delinquent taxes. The court in *Litz* relied upon *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 (Mo. banc 1981), which noted that provision is made in § 23 of the Hancock Amendment "to give taxpayers and political subdivisions standing to enforce the amendment in the courts." The court explained that the standing focuses on a party's personal stake in the outcome of the controversy.

Based upon the foregoing, St. Louis respectfully suggests that it has standing to utilize the provisions of the Hancock Amendment to challenge the constitutionality and enforceability of HB 209, which will have a direct impact upon the City's ability to collect past and future gross receipt taxes.

Mo. Const., Art. X, § 16, as amended November 4, 1980, reads in pertinent part as follows:

> local taxes . . . may not be increased above the limitations specified herein without direct voter approval as provided by this constitution. The state is prohibited from . . . shifting the tax burden to counties and other political

subdivisions.

Although Art. X, § 16 prohibits the State of Missouri from shifting the tax burden for some state program or policy to local governments, HB 209 effectively shifts or "transfers" onto county and municipal governments the cost of the State's policy of rescuing telephone companies from their local tax delinquencies. HB 209 accomplishes this transfer of its tax burden to counties and municipalities by forgiving all past due business license taxes owed by telecommunications companies, creating a brand new immunity for telecommunications companies who were delinquent in the payment of such taxes to counties and municipalities, limiting the base upon which future business license taxes can be levied on telecommunications companies, and reducing the percentage of the levy for such taxes. All of this is done to the detriment of the City's taxpayers.

By limiting the base of the tax from gross receipts, which is every receipt received regardless of whether or not charged to a retail customer, to retail sales as defined from time to time by the General Assembly in Chapter 144, and then cutting the City's gross receipts tax levy rate for telecommunications companies from ten percent (10%) to five percent (5%), and then lowering the rate even further to some rate — yet to be determined — less than five percent, the State has shifted the cost of its policy to protect and promote telecommunications companies to counties and municipalities. This violates Art. X, § 16.

A tax on gross receipts is a broader based tax than a retail sales tax. The court in *Miller v. City of Springfield*, 750 S.W. 2d 118, 120 (Mo. App. S.D. 1988), explained the

difference between the base of a sales tax and a gross receipts tax by stating:

> In either instance, the base may be referred to as "gross receipts," but the distinction lies in the difference between the kinds of receipts upon which the tax is assessed. A gross receipts-license tax starts with the revenue received by the licensee as a base, not the basic charge made to the customer by the merchant, and assesses a tax equal to a percentage of those revenues without regard to the makeup of the revenue and without restrictions to the percentage stated in the taxing ordinance. On the other hand, a sales tax is assessed against the taxpayer as a percentage of the price of the goods [citation omitted].

The license tax starts with and is based upon all of the seller's revenue. The fee is not based upon a percentage of the price of the goods and services before taxes, but upon total receipts, including taxes. *Id*. *Accord*, *Ludwigs v. City of Kansas City*, 487 S.W.2d 519, 522 (Mo. 1972).

Gross receipts and retail sales receipts are not the same base for tax purposes, the sales tax base being less than the gross receipts base. Section 92.083.1(1) of HB 209 reduces the base of the tax by limiting the receipts that may be taxed to those defined in Chapter 144, Missouri's sales tax statutes. In addition, HB 209 eliminates receipts such as income derived from roaming charges between carriers when a long distance carrier pays the local carrier for a portion of a long distance call completed to a local number.

One of the central purposes of the Hancock Amendment, and particularly § 16, was to prevent the State from forcing local governnients to assume a greater proportion of

currently shared financial responsibilities. *Boone County Court v. State*, 631 S.W.2d 321, 325 (Mo. banc 1982). HB 209 seeks to implement a new State policy solely by shifting the cost of that policy to counties and municipalities. In doing so, HB 209 violates Art. X, § 16 of the Missouri Constitution.

XI. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THAT PORTION OF THE MISSOURI CONSTITUTION, ARTICLE X, SECTION 3, WHICH REQUIRES THAT "TAXES . . . SHALL BE UNIFORM UPON THE SAME CLASS OR SUBCLASS OF SUBJECTS," IN THAT THE PROVISIONS OF HB 209 CREATE NON-UNIFORM TAXATION WITHIN THE CLASS OF TELECOMMUNICATIONS COMPANIES BY AUTHORIZING IMMUNITY FROM TAX LIABILITY FOR THOSE COMPANIES WHICH FAILED TO PAY BUSINESS LICENSE TAXES PRIOR TO JULY 1, 2006, BUT ALLOWING TAXATION FOR THOSE THAT DID PAY.

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

The Missouri Constitution provides that "[t]axes may be levied and collected for

public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax." Mo. Const. Art. X, § 3. "Uniform" refers to the measure, gauge or rate of the tax. *508 Chestnut, Inc. v. City of St. Louis*, 389 S.W.2d 823, 830 (Mo. 1965). "Same class of subjects" refers to the classification of the subjects of taxation for the purposes of the tax." *City of Cape Girardeau v. Fred A. Groves Motor Co.*, 346 Mo. 762, 142 S.W.2d 1040, 1043 (1940).

A "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." *Id.* at 1042. "The 'uniformity clause' of Mo. Const. Art X, § 3, requires that classification of property for purposes of taxation not be "palpably arbitrary." *State ex rel. Transp. Mfg. & Equip. Co. v. Bates*, 359 Mo. 1002, 224 S.W.2d 996, 1000 (en banc 1949). The legislative creation of reasonable classifications is permitted in the furtherance of public good. *Id.* "Exemptions from taxation are a renunciation of sovereignty, must be strictly construed and generally are sustained only upon the grounds of public policy. They should serve a public, as distinguished from a private interest. Such is the basis of equal and uniform taxation." *Id*.

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

> Broadly put, constitutional class legislation must include all who belong and exclude all who do not belong to the class. Legislative departments of governmental authorities may not split a natural class and arbitrarily designate the dissevered factions of the original unit as distinct classes

> and enact different rules for the government of each. "This would be a mere arbitrary classification, without any basis of reason on which to rest, and would resemble a classification of men by the color of their hair or other individual peculiarities, something not competent for the legislature to do."

City of Cape Girardeau, at 1045.

HB 209 defines the subject of the tax as "telecommunications companies" and then, in § 92.098, it arbitrarily splits the class between those who have paid and those who have not. Section 92.089 does not just limit St. Louis's remedy but eliminates the liability for the entire amount of the unpaid tax, thus creating an *ex post facto* tax exemption. The tax rate for those who paid the Telephone Company Alternative Tax is five percent (5%). The tax rate for those who did not pay the tax is zero percent (0%). The difference in the tax rate is not based on any difference in the subject of the tax; the only basis for the distinction is the fact that the tax was not paid. The telecommunications companies targeted in HB 209 are a natural class and must be taxed uniformly under Art. X, §3. These companies are functionally identical to each other and ". . . are engaged in precisely the same business." *City of Cape Girardeau*, at 1045. Between the companies that have paid taxes and those that are granted an *ex post facto* tax exemption, "[t]here is no natural and substantial difference, inhering in the subject matter with respect to localities, persons, occupations or property . . . justifying any distinction for purposes of taxation for revenue." *Id.* Such discrimination is arbitrary and lacks the rational basis necessary to be constitutional. *See State of Kansas ex rel. Stephan v. Parrish*, 891 P.2d 445, 457 (Kan. 1995). ("[The

challenged statute] is an unreasonable grant of a tax amnesty or 'window of opportunity' based solely on a characteristic or status of the taxpayer rather than upon appropriate classification of the property. Taxpayers are divided into two classes, those who honestly reported their property for taxation and those who, for whatever reason, did not report their property for taxation or underreported the property if returned. The latter group are granted freedom from taxation and statutory penalties, while the former group is not. Such discrimination, when judged against the taxation guidelines, is arbitrary and lacks the rational basis necessary to be constitutional.").

In *Southwestern Bell Tel. Co. v. Morris*, 345 S.W.2d 62, 68 (Mo. banc 1961), this Court held that a compensating use tax which assessed locally purchased tangible personal property but exempted tangible personal property that was purchased out-of-state violated Art. X, § 3, since, instead of protecting the potential of the tax base, it instead "invades and to the extent of its reach destroys such base" and "is not based on differences reasonably related to the purposes of the law" and, hence, creates an unreasonable, arbitrary and discriminatory classification. *Id.* In the same manner, the *ex post facto* tax exemption in HB 209 invades and destroys the potential of the tax base without being based on differences reasonably related to the purposes of the law, which is taxation for revenue.

To warrant the taxing of one object or person and the exemption of another object or person within the same natural class, the classification must serve a public, as distinguished from a private, interest. *State ex rel. Transp. Mfg. & Equip. Co.*, at 1000. The *ex post facto* tax exemption in HB 209 serves a purely private interest — the rescue of private telecommunications companies from their tax delinquencies. There is no public purpose in

retroactively diminishing the tax base, and thereby increasing the tax burden on resident taxpayers. The preferential treatment of private telephone companies who refused to pay their taxes, even after the Eastern District ruled in *City of Sunset Hills*, 14 S.W.3d at 59, that such companies fell within the class of telephone companies under state statute, is not in the public interest and should not be sustained. *See State ex rel. Transp. Mfg. & Equip. Co.*, 224 S.W.2d at 1000.

The distinctions in HB 209 cannot be justified by reason, history or business practices and differ little from distinctions based on "the color of [a person's] hair." While the General Assembly is given latitude in making tax classifications, the Court under Art. X, § 3 has not hesitated to strike down tax schemes, which discriminate against taxpayers who must pay the full measure of their taxes. *See, e.g., City of St. Louis v. Spiegel*, 90 Mo. 587, 2 S.W. 839, 840 (1887) (ordinance imposing a $25 tax against meat shops in one part of the city while imposing a $100 tax against meat shops in another part of the city held to discriminate under art. X, § 3); *State ex rel. Garth v. Switzler*, 143 Mo. 287, 45 S.W. 245 (en banc 1898) (law imposing inheritance tax at rate of five percent for property valued under $10,000, while rate was seven and one-half percent on value of estate in excess of $10,000, held unconstitutional); *City of Kansas City v. Grush*, 151 Mo. 128, 52 S.W. 286, 288 (1899) (ordinance which taxed merchants dealing in produce while exempting merchants dealing in dry goods or groceries alone was violation of Art. X, § 3); *City of Washington v. Washington Oil Co.*, 346 Mo. 1183, 145 S.W.2d 366, 367 (1940) (ordinance which taxed transportation of gasoline to filling stations, but did not tax transportation of gasoline to filling stations owned by transporter, held not to be a uniform tax on classification); *City of Cape*

Girardeau, 142 S.W.2d at 1045 (ordinance levying tax on city businesses which had not been engaged in business during the prior calendar year, while exempting those which had been engaged in business during the prior calendar year, violated Art. X, § 3); *State ex rel. Transp. Mfg. & Equip. Co.*, 224 S.W.2d at 1000 (provision of statute exempting from use tax motor vehicles seating ten passengers or more held invalid as violating uniformity clause of Art. X, § 3); *Southwestern Bell Tel. Co.*, 345 S.W.2d at 69 (use tax which assessed locally purchased tangible personal property but exempted tangible personal property that was purchased out-of-state violated Art. X, § 3); *Drey v. State Tax Com'n*, 345 S.W.2d 228 (Mo. 1961) (assessment of timberland at a different rate than farmland and town lots was improper subclassification of real estate and violated Art. X, § 3); *Airway Drive-In Theatre Co. v. City of St. Ann*, 354 S.W.2d 858 (Mo. banc 1962) (portion of ordinance levying annual license tax on drive in theaters at $1.50 per speaker and on other motion picture theaters at $50 per year held arbitrary).

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

Because HB 209 arbitrarily splits the natural class of telecommunications companies into those who have paid and those who have not paid, § 92.089(2) of HB 209

is unconstitutional and invalid, and the trial court erred in granting Defendants' motion to dismiss or for judgment on the pleadings.

XII. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND HB 209 IS UNCONSTITUTIONAL BECAUSE IT CONTRAVENES THAT PORTION OF THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, SECTION 1, AND THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 2, PROVIDING FOR EQUAL PROTECTION UNDER THE LAW, IN THAT THE PROVISIONS OF HB 209 ARBITRARILY CLASSIFY FOR PURPOSES OF TAXATION, IN ANY ONE OR MORE OF THE FOLLOWING WAYS:

A. § 92.086 AUTHORIZES A LOWER RATE OF TAXATION FOR TELECOMMUNICATIONS COMPANIES THAN FOR OTHER UTILITIES, EVEN THOUGH THEY ARE SIMILARLY SITUATED;

B. § 92.089.2 CREATES NON-UNIFORM TAXATION WITHIN THE CLASS OF TELECOMMUNICATIONS COMPANIES BY AUTHORIZING IMMUNITY FROM TAX LIABILITY FOR THOSE COMPANIES WHICH FAILED TO PAY BUSINESS LICENSE TAXES PRIOR TO JULY 1, 2006, BUT ALLOWING TAXATION FOR THOSE THAT DID PAY.

The Fourteenth Amendment to the United States Constitution, § 1 provides in part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Likewise, Mo. Const. Art. I, § 2 provides in part, "that all persons are created

equal and are entitled to equal rights and opportunity under the law." Both provisions generally entail the same analysis. *See, e.g., Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1991).

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. Comm. on Legis. Research*, 932 S.W.2d at 395 n. 4. "If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid." *State ex rel. Upchurch v. Blunt*, 810 S.W.2d at 516. 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 at 439 n. 2.

"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).[34] 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

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

under the United States and Missouri Constitutions. *Id*, 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. 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 ex rel. Stephan v. Parrish*, 891 P.2d at 457 ("[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.").

XIII. THE TRIAL COURT ERRED IN GRANTING SPRINT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS BECAUSE JUDGMENT WAS PREMISED ON HB 209, AND CERTAIN PROVISIONS OF HB 209 ARE

UNCONSTITUTIONAL, AND THE REMAINING PROVISIONS WHICH ARE NOT UNCONSTITUTIONAL ARE SO DEPENDENT UPON THE VOID PROVISIONS THAT IT CANNOT BE PRESUMED THE LEGISLATURE WOULD HAVE ENACTED THE REMAINING PROVISIONS WITHOUT THE UNCONSTITUTIONAL ONES.

Section 1.140, R.S. Mo., provides:

> 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.

"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), (quoting *State ex rel. Audrain County v. Hackmann*, 275 Mo. 534, 205 S.W. 12, 14 (en 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), 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[35] 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.

The inclusion of this "suicide pill" in HB 209 suggests a recognition of possible constitutional infirmities, and it is a clear manifestation of legislative intent in the event of such a finding. Thus, if any portion of HB 209 is found to be invalid on one of the grounds herein, then the amendments to §§ 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 at 1001 (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

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

applicable to those to whom the General Assembly never intended it should apply, thus taxing those whom the Legislature said should not be taxed.").

That leaves § 71.675, R.S. Mo., which is treated separately from the Municipal Telecommunications Business License Tax Simplification Act and is protected by its own "severability" clause. See § 92.089. Section 71.675, 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."

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 HB 209's effective date. However, it is arbitrary and unfair in the extreme: not only does § 71.675 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. *See, e.g., Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977, 988 (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.").[36]

Being invalid and self-contained, § 71.675 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.

CONCLUSION

For more than two hundred years, the touchstone of the tripartite system of American government, be it federal, state or local, has been that the legislature enacts laws, but the judiciary interprets them. *See Marbury v. Madison*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."). The legislature may draft the language of the law, but it is not entitled to tell the courts what that law means. In enacting HB 209, the General Assembly has blurred the lines separating executive, legislative, and judicial functions. Now, it is for this Court to redraw those lines. Appellant City of St. Louis respectfully requests this Court to reverse the judgment of the trial court.

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[36]See also Mo. Const. Art. III, §§ 40(4), (6) and (30), which forbid 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."

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this Brief of Appellant was prepared in the format of Microsoft Word, using Times New Roman typeface in font size 13. This Brief contains approximately 28,741 words of text. The accompanying diskette, containing a complete copy of Brief of Appellant, has been scanned and found to be virus-free. The name, address, bar and telephone number of counsel for Appellant are stated herein and the Brief has been signed by the attorney of record.

_____
Mark Lawson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Brief of Appellant, along with a copy of the Brief on a diskette, scanned and determined to be virus-free, were served by U.S. Mail, postage prepaid, on January 26, 2006, upon:

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