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SC92500

IN THE SUPREME COURT OF MISSOURI

PEGGY NORTHCOTT AND LARRY POTASHNICK,

Respondents/Cross-Appellants,

vs.

ROBIN CARNAHAN, Missouri Secretary of State, et al.,

Appellants/Cross-Respondents.

Appeal from the Circuit Court of Cole County, Missouri
Nineteenth Judicial Circuit
The Honorable Daniel R. Green, Judge

REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS GEORGE DENNIS SHULL AND JERRY STOCKMAN

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INTRODUCTION

As signers and proponents of the Initiative Petition, Appellants Shull and Stockman possess a unique and substantial interest in the outcome of the four Industry Suits challenging the sufficiency of the Initiative Petition. Pursuant to Mo. Const. Art. III, § 49, Appellants have the right "to propose and enact or reject laws and amendments to the Constitution." While Appellants had the opportunity to exercise their right under Article III by signing the Initiative Petition and by donating funds in favor of the Initiative Petition, the circuit court undercut Appellants' right to fully engage in this process of participatory democracy by denying their motion for permissive intervention. The circuit court's decision deprived Appellants of the only venue available to defend their interest in protecting the signatures collected and in seeing the Initiative Petition appear on the November 2012 ballot, and thereby undermined the integrity of the Article III ballot initiative process.

Respondents offer no response to Appellants' argument that the circuit court abused its discretion in denying permissive intervention when the circuit court was aware of Appellants' unique interest in the success of the Initiative Petition, the failure of the State Defendants to adequately defend the Initiative Petition, and the absence of any alternative means for Appellants to defend the Initiative Petition. Respondents instead urge this Court to adopt a nonsensical and unworkable standard for intervention in ballot initiative litigation that is directly contradicted by recent precedent from this Court; and

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also incorrectly assert that the Court of Appeals' decision on Appellants' motion for intervention of right is dispositive of Appellants' motion for permissive intervention. Respondents are wrong on both accounts, and the circuit court's denial of permissive intervention remains an abuse of discretion that should be overturned by this Court.

ARGUMENT

A. As Proponents of the Initiative Petition, Appellants Possess a Unique Interest in the Outcome of this Litigation that is Sufficient to Warrant Permissive Intervention

In all four of their briefs, Respondents obfuscate the case law holding that trial courts have the discretion to grant permissive intervention when the proposed intervenor possesses an "interest unique to themselves" in the outcome of the litigation, *Comm. for Educ. Equal. v. State,* 294 S.W.3d 477, 487 (Mo. banc 2009), and that this discretion is bound by clear precedent that intervention should "be allowed with considerable liberality," *Ainsworth v. Old Sec. Life Ins. Co.,* 685 S.W.2d 583, 586 (Mo. App. W.D. 1985), and should be granted when "substantial justice mandates intervention." *Meyer v. Meyer,* 842 S.W.2d 184, 189 (Mo. App. 1992). Respondents incorrectly assert that "[p]ermissive intervention is not appropriate unless a new defense is asserted." (Reuter Br. 73; Northcott Br. 75) (citing *Johnson v. State,* SC92351, 2012 WL 1921640 at *6 (Mo., May 25, 2012)). This Court has never stated that a proposed intervenor must assert a new or separate defense to an initiative petition in order to obtain intervention in a ballot initiative challenge. Indeed, this Court very recently stated just the opposite: an intervenor with a "unique interest[]" may be granted permissive intervention in a case

where he seeks to defend the very same proposal that is already being defended by a state defendant. *Johnson,* SC92351, 2012 WL 1921640 at *7. It is then within the circuit court's discretion to determine whether the existence of that unique interest in the outcome of the litigation is sufficient to warrant permissive intervention. *Id.* at *5.

Appellants made is clear to the circuit court that they believed permissive intervention was merited in these cases because Appellants possess a unique interest in the ultimate success of the Initiative Petition that is not shared by the State Defendants. (Prentzler L.F. 73-77, 112-118; Reuter L.F. 21-26, 65-71; Northcott L.F. 87-90. 144-150; Francis L.F. 71-74, 96-102; Reuter 12/12/11 Tr. 3-4; Northcott/Francis 12/28/11 Tr. 6-8.) Appellants also alerted the circuit court to the fact that the State Defendants had inexplicably failed to serve any discovery on the Plaintiffs, did not intend to engage in any discovery, and could be surprised by experts at trial without any preparation. (Reuter 1/30/12 Tr. 13.) Appellants do not deny that the decision to grant permissive intervention to a party with a unique interest is discretionary. However, given the circuit court's knowledge of Appellants' unique interest in the litigation, Appellants' right to participate in the Article III ballot initiative process, the State Defendants' lack of preparation for trial, and Appellants' interest in actually preparing for trial, the circuit court abused its discretion in not granting permissive intervention to Appellants Shull and Stockman.

Respondents' contention that a party seeking permissive intervention must articulate a separate defense from the State defendants would result in a nonsensical and unworkable standard for intervention in ballot initiative cases. (*See* Reuter Br. 73; Francis Br. 113; Prentzler Br. 96; Northcott Br. 74.) As is the case here, proponents of an

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initiative petition often seek to intervene in a Section 116.190 challenge in order to defend the initiative petition that the Secretary of State and State Auditor are already charged with defending. (*See* Shull and Stockman Br. 8 n. 4.) To advance their interest in protecting the signatures already collected in support of the initiative, proponents of an initiative petition must defend the existing language created by the Secretary of State and State Auditor. A new standard that would require proponents to adopt a position contrary to that held by the State would undermine a proponent's interest in defending the initiative petition that is the product of their involvement in the Article III process. Furthermore, this Court rejected such a requirement when it held in *Johnson* that individuals could intervene in a case to defend the very same redistricting plan already defended by the Secretary of State. *Johnson,* SC92351, 2012 WL 1921640 at *7.

Finally, Respondents are simply wrong in asserting that Appellants' discussion of what they would have offered at trial had they been permitted to intervene is inappropriate and irrelevant. (Francis Br. 119-120; Prentzler Br. 102-105.) In exposing the deficiencies with the State Defendants' preparation for and performance at trial (Shull and Stockman Br. 33-35), Appellants are not attempting to improperly "inject new 'facts' into the record." (Prentzler Br. 104; Francis Br. 119.) Rather, Appellants are merely demonstrating that had the circuit court heeded their warning that the State Defendants were "walking in blind to trial" (Reuter 1/30/12 Tr. 13), Appellants could have and would have prepared for trial in a manner quite different from the State Defendants, and would

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have ultimately presented a distinct defense at trial.[1] At the time that the circuit court exercised its discretion to deny Appellants' motion for permissive intervention, evidence of Appellants' unique interest and the State Defendants' lack of preparation was before the trial court. (Prentzler L.F. 112-118; Reuter L.F. 65-71; Northcott L.F. 144-150; Francis L.F. 96-102; Northcott/Francis 12/28/11 Tr. 6-8; Reuter 01/30/12 Tr. 12-13.) The circuit court's failure to grant permissive intervention based upon *that* record was an abuse of discretion. *See* Prentzler Br. 104 (citing *State ex rel. Nixon v. Am. Tobacco Co., Inc.,* 34 S.W.3d 122, 131 (Mo. banc 2000) for the point that an appellate court should only consider what evidence was "then before" the trial court when its exercised its discretion to rule on permissive intervention.)

B. Collateral Estoppel does not Bar Appellants from Appealing the Circuit Court's Denial of Permissive Intervention

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[1] Respondents argue that Appellants never presented these defenses to the trial court at the intervention hearings. (Prentzler Br. 104; Francis Br. 119.) However, at the time of the intervention hearings, Appellants had no way of knowing exactly what evidence Respondents would put on at trial, and how the State Defendants would perform at trial. Additionally, Appellants raised many unique defenses in their post-trial brief. (*See generally* Shull and Stockman Post-Trial Br.) However, because Appellants' role was limited to that of amicus curiae, they could not fully participate in the trial as they would have had the circuit court permitted them to intervene.

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Respondents' argument that collateral estoppel bars Appellants from seeking appellate review of the circuit court's denial of permissive intervention lacks merit because collateral estoppel is completely inapplicable here. As noted in Respondents' own briefs, collateral estoppel applies where the issue decided in the prior litigation was identical to the issue in the present action, there was a judgment on the merits, the parties in the two cases are the same or in privity, and there was a full and fair opportunity to litigate the issue. *Newton v. Ford Motor Co.,* 282 S.W.3d 825, 833 (Mo. banc 2009) (Prentzler Br. 98-99; Francis Br. 114-115.) Respondents' argument fails on the first element: the issue in this appeal is not identical to the issue raised with the Court of Appeals. The Court of Appeals entered a final judgment on the merits of Appellants' motion for intervention of right. (Prentzler L.F. 134-145; Reuter L.F. 88-99; Northcott L.F. 172-183; Francis L.F. 127-138.) Appellants did not appeal the circuit court's denial of permissive intervention to the Court of Appeals, and could not have appealed the denial of permissive intervention at that time. Unlike a denial of intervention of right, which is subject to an immediate appeal, *see State ex rel. Reser v. Martin,* 576 S.W.2d 289, 291 (Mo. banc 1978), the denial of permissive intervention is reviewed only for an abuse of discretion and cannot be appealed until a final judgment is entered in the case. *Johnson,* SC92351, 2012 WL 1921640 at *5. The Court of Appeals' decision spoke only to Appellants' motion to intervene as of right, and is silent on whether the circuit court could have and should have used its discretion to allow Appellants to intervene permissively. *Prentzler v. Carnahan,* __ S.W.3d __ 2012 WL 985839 at *6 (Mo. App. W.D. Mar. 26, 2012).

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Further, because permissive intervention and intervention of right involve distinct elements and different standards of review, the Court of Appeals' decision on intervention of right is not dispositive of Appellants' motion for permissive intervention. An applicant for intervention of right must show: "(1) an interest relating to the property or transaction which is the subject of the action; (2) that the applicant's ability to protect the interest is impaired or impeded; and (3) the existing parties are inadequately representing the applicant's interest." *Am. Tobacco Co.,* 34 S.W.3d at 127 (quoting *Timmermann v. Timmermann,* 891 S.W.2d 540, 542 (Mo. App. E.D. 1995)). An applicant for permissive intervention must only show that his "claim or defense and the main action have a question of law or fact in common." *Comm. for Educ. Equality,* 294 S.W.2d at 487. Further, appellate courts view the interest required for intervention of right differently from the interest needed for permissive intervention. *See Am. Tobacco Co.,* 34 S.W.3d at 128 ("An interest necessary for intervention *as a matter of right* . . .") (emphasis added). Accordingly, this appeal does not involve a re-litigation of issues that have already been decided on the merits, and Respondents fail to cite to any authority to support their argument that an appellate decision on intervention of right should bar an individual from seeking appellate review of a denial of permissive intervention once a final judgment is entered in a case. Appellants therefore have the right to obtain appellate review here of the circuit court's denial of permissive intervention.

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court's denial of Appellants' motion for permissive intervention, remand the cases for further proceedings

that protect Appellants' interests from prejudice, and issue such other and further relief as justice may require.

Date: June 20, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF COMPLIANCE WITH RULE 84.06

I hereby certify that on the 20th day of June, 2012, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on all counsel of record. I also hereby certify that the foregoing Brief complies with the limitations contained in Rule 84.06(b) and that it contains 1,918 words.

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