IN THE SUPREME COURT OF MISSOURI

No. SC100742

MARY ELIZABETH ANNE COLEMAN, et al.,

Respondents-Plaintiffs,

v.

JOHN R. ASHCROFT, in his official capacity as Missouri Secretary of State,

Defendant,

and

ANNA FITZ-JAMES, et al.,

Appellants-Intervenors and Defendants.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
CASE NUMBER 24AC-CC07285
THE HONORABLE CHRISTOPHER LIMBAUGH

BRIEF OF SARAH LOCHMANN AND BARBARA SCHNARR AMICI CURIAE, IN SUPPORT OF RESPONDENTS-PLAINTIFFS

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IDENTITY OF AMICI CURIAE AND STATEMENT OF INTEREST

The Missouri Secretary of State, Respondents-Plaintiffs and Appellants-Intervenors, by and through their counsel of record, have consented to the filing of this brief by Amici. The Amici submit this brief to offer reasons in addition to those advanced by Respondents-Plaintiffs as to why the decision of the circuit court should be affirmed and the stay of the circuit court's impending injunction should be immediately lifted.

Amici include Sarah Lochmann, Juliana Woolley Benedict, Juliana Benedict, Robin Reed, Susan Pickert, Ruth Moussette, and Carla Bommarito - Missouri residents and taxpayers who are deeply committed to ensuring that state officials and the judiciary adhere to Missouri's constitution and Missouri statutes. They are particularly concerned about fraud and inadequate compliance with Missouri law by those who wish to change Missouri's Constitution. They are committed to ensuring that the judiciary take timely action when such action is mandated by state law. They are also committed to protect the lives of unborn Missourians. They will be volunteering time and money to keep Amendment 3 from becoming a part of the Missouri Constitution, and their expenditure of time and money is imminent and irreparable if the faulty amendment is placed on the Missouri ballot.

Amici also include Barbie Schnarr, a Missouri resident who signed the initiative petition but would not have done so if the initiative petition had properly articulated which laws would no longer be in effect if Amendment 3 passes. Ms. Schnarr has been informed that her signature was counted in the numbers for Congressional District 2 by the Office of the Secretary of State even though she would not have signed the petition

had the language of the initiative petition included the Missouri laws that would be repealed by the ballot measure. She is interested in ensuring that Amendment 3 is not placed on the ballot in light of their discovery that their signature and participation was coerced by an initiative petition that failed to comply with Missouri law.

ARGUMENT

The circuit court properly determined that Amendment 3 should not be placed on Missouri's ballot due to the failure of the initiative petitioners to satisfy procedural requirements necessary to proceed with the initiative. Thus, the circuit court issued an order on September 6, 2024, stating that on September 10, 2024, it would make effective an injunction maintaining the status quo in Missouri by enjoining the Missouri Secretary of State from placing Amendment 3 on the Missouri ballot. The trial court essentially entered the injunction on September 6, 2024, with a September 10 effective date.

On September 8, 2024, this Court issued an order staying the circuit court's impending injunction. This Court should lift its stay on the trial court's order and allow the trial court's injunction to go into effect on September 10, 2024.

"On review of a court-tried case, an appellate court will affirm the circuit court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Ivie v. Smith*, 439 S.W.3d 189, 198–99 (Mo. banc 2014) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). Because this case was submitted on stipulated facts, the standard of review is set forth in *Schroeder v. Horack*, 592 S.W.2d 742, 744 (Mo. banc 1979). *Mo. Elec. Coops. v. Kander,*

497 S.W.3d 905 (Mo. App. 2016). "Therefore, '[t]he only question before us is whether the trial court made the proper legal conclusion from the stipulated facts.'" *Id.* What matters is the correctness of the result, not the route taken by the trial court to reach it; the trial court's judgment should affirmed if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground. *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003).

I. This Court should lift its stay on the trial court's impending injunction.

Injunctive relief is appropriate to protect the interests of Amici and Respondents-Plaintiffs, as well as the interests of the general public, including all Missouri voters and residents. The trial court's decision granting injunctive relief on September 6, 2024 (with a September 10 effective date) should be permitted to proceed because the circuit court's decision was proper.

In the instant case, the circuit court's decision is not against the manifest weight of the evidence, there is evidence to support it, and Judge Limbaugh did not erroneously declare the law. Indeed, when considering a motion seeking injunctive relief, a court considers "the movant's probability of success on the merits, the threat of irreparable harm, the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest. *State ex rel. Director of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996). "The movant must show that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest if a stay is issued." *Id.* at 840.

Based on an analysis of these factors, the circuit court properly granted injunctive relief to prevent Amendment 3 from appearing on the Missouri ballot in a little over 8 weeks. This Court's stay preventing the injunctive relief until further order of the court should be lifted, or this Court should enter an order on the merits, by September 10. Section 116.200 mandates that the circuit court enter an injunction under the current circumstances.

a. Respondents are likely to succeed on the merits of this case and, indeed, have presented sufficient stipulated information to warrant an immediate decision on the merits by September 10.

The circuit court's decision in favor of Respondents-Plaintiffs properly states Missouri law. The initiative petition process provides Missourians the opportunity to make alterations to the rules that govern themselves. To achieve this end, the legislature has put in place numerous very specific requirements that must be present in order for an initiative petition to successfully qualify for its place on the Missouri ballot. *See* MO CONST. Art. III, Section 50 (requiring that each initiative petition contain the "full and correct text" of any constitutional amendment) and Missouri Revised Statutes Sections 116.040 and 116.050 (requiring that the text of all initiative petitions for constitutional amendments be "full and correct," and clarifying that to circulate "full and correct" language, the initiative petitioners "***shall***. . .include all sections of existing law or of the constitution which would be repealed by the measure.") (emphasis supplied).

The statutory requirements contained in 116.040 are a ***pre-requisite***, which, if not met, forbid placement of an initiative petition for constitutional amendment on the ballot.

See Section 116.040 (requiring that, for an initiative to be "sufficient," the "requirements of Section 116.050 and Section 116.080" must be met). This is further evidenced by the fact that prior to 1971, the now-repealed Section 126.040 specifically provided that certain statutory requirements for initiative petitions were not mandatory. Section 126.040 was repealed and replaced with the new Section 116.040 that removed the non-mandatory language and replaced it with a mandatory requirement that Section 116.050 be followed. The statutory pre-requisites are designed to ensure that signers of initiative petitions are not tricked or fraudulently convinced by any inaccurate information into signing an affidavit supporting an initiative to change the Missouri Constitution. Statutory safeguards against fraud and abuse, generally, are by their very nature deemed to be mandatory and not directory. *See* 82 C.J.S. Statutes § 376. That is why it is so vital that those wishing to change the Missouri Constitution comply with Missouri law when seeking signatures to put such initiatives on the Missouri ballot. That is the reason that Amici Schnarr's interest in the outcome is of vital importance.

Appellants-Intervenors admit that they did not comply with Section 116.050, RSMo. and MO CONST. Article III, Section 50, both of which require, at a minimum, that the initiative petition "shall" include the "full" and "correct" text of any amendment. Pursuant to Missouri law, for the text of the initiative petition to be both "full" and "correct," the proposed amendment "shall" have included a disclaimer stating what laws "would be repealed" by Amendment 3. *See* Section 116.050.

Appellants-Intervenors do not dispute that their initiative petition did not contain or reference a single Missouri law that would no longer be in effect after passage of the

Constitutional amendment. They failed to include this information even though it is plainly obvious that the proposed constitutional amendment not only affects, but fully repeals and nullifies multiple Missouri statutes.

As the trial court identified, Amendment 3 would directly nullify portions of Missouri Revised Statutes Chapter 180 that clearly and undoubtedly conflict with Amendment 3. For example, Amendment 3, which gives a mother a right to a late-term abortion as long any healthcare worker determines that the mother has a physical or mental health reason to get the late-term abortion, clearly conflicts with the current statutory requirement that an abortion, including late-term abortion, be permitted only in the case of a medical emergency threatening the physical life of the mother. *Compare* Amendment 3(5) and Section 180.017.2. In addition, Amendment 3(2) forbids any adverse action against the performer of any legal or illegal abortion; whereas Section 180.017.2 provides for prosecution and criminal charges, as well as civil penalties, against a person who performs an illegal abortion. Appellants-Intervenors refused to include any disclaimer at all, and failed to inform Missourians who were asked to sign that initiative petition about any statutes that would be repealed, or nullified, by Amendment 3.

The goal of statutory interpretation is to ascertain the intent of the legislature, as expressed in the words of the statute. *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 909 (Mo. banc 2006). To ascertain whether the legislature intended such a result, we look to the plain and ordinary meaning of the statutory language. *State v. Rodgers*, 396 S.W.3d 398, 401 (Mo.App.2013). "Ultimately, the

rationales for granting or refusing pre-election judicial review must give way to the plain language and reasonable construction of the constitution and statutory provisions relating to the initiative process." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824 (Mo. 1990). The purpose of statutory construction is to ***give effect*** to the plain language of the statute, not to render the language of the irrelevant or without any effect whatsoever.

Section 116.050 requires that any existing statute that "would be repealed" by the ballot measure be included in the initiative petition. In order to give effect to the statute, the meaning of the words "would be repealed" in Section 116.050 must include the anticipated legal nullification of an existing statute. Black's Law Dictionary, Sixth Edition, defines "repeal" to include "[t]he abrogation or annulling of a previously existing law" which occurs when a statute is both expressly or impliedly repealed, such as when a subsequent provision of the law is "contrary to or irreconcilable with" the earlier law. Thus, a statute that is later impliedly annulled by a constitutional amendment is impliedly repealed. Statutes that have been declared unconstitutional by a court or are nullified by a conflicting constitutional amendment are, for all intents and purposes, canceled and removed. Repealing, nullifying, impliedly or explicitly is one and the same, with no actual difference.

Moreover, the use of the term "would be" before "repealed" makes it clear that the Missouri legislature is requiring initiative petitioners who wish to amend the Missouri Constitution to be honest about ***at least*** the obvious and unquestionable effects of the ballot initiative on existing laws. Here, the effect on existing Missouri laws that clearly

and undoubtedly conflict with Amendment 3 is that they "would be" impliedly canceled, or impliedly repealed and of no further effect following passage of the ballot measure. Amici Schnarr was not given such information when she signed the initiative petition.

Appellants-Intervenors offer irrelevant excuses for their noncompliance that are unauthorized by either the Missouri Constitution or its statutes. They improperly argue that "repeal," as used in Section 116.040 can only include statutes that are expressly repealed, which can only occur when the legislature takes action to annul a statute. Appellants-Intervenors' argument fails to give effect to the plain language and reasonable construction of the terms "would be repealed" in Section 116.050. It is true that an "express repeal" of a statute will always require legislative action. In Missouri, an unconstitutional statute will not be removed by the Missouri Revisor until specifically repealed by the legislature. For example, section 115.364 which was declared unconstitutional by this Court in *Legends Bank v. State*, 361 S.W.3d 383 (Mo. banc 2012) but remains in the Missouri Revised Statutes because it has not been specifically repealed by the Missouri legislature. Thus, if "would be repealed" as used in Section 116.050 is read to mean what Appellants-Intervenors suggest – only an express, not implied, repeal - the term will be rendered completely meaningless, since no person circulating an initiative petition will ever be able to say for certain whether the legislature of Missouri will take action to force the Missouri Revisor to remove a conflicting statute from the Missouri Revised Statutes. Indeed, the legislature has not done so in the past even though Section 115.364 was declared unconstitutional and was therefore effectively repealed.

The constitutional amendment proposed by Appellants-Intervenors will clearly cancel, repeal, and nullify multiple provisions of Missouri law that were not referenced, in any respect, in the initiative petition. Thus, the initiative petition failed to satisfy the mandatory pre-requisites set forth in Section 116.050 and MO CONST. Art. III, Section 50. Amici Schnarr has no recourse for the actions of Appellants-Intervenors if this Court permits Amendment 3 to appear on the ballot. Respondents are likely to succeed on the merits of this case.

b. Amici and the public are likely to suffer irreparable harm if this Court does not either lift its stay on the trial court's impending injunction, or find in favor of Respondents-Plaintiffs on the merits before September 10.

Not only has Missouri adopted statutes plainly providing for definite pre-requisites for constitutional changes via initiative petition, but Missouri has also adopted a law that allows any Missourian to challenge an initiative's placement on the ballot ***before*** the ballots are finalized and presented to the public. Indeed, Section 116.200 provides the legal avenue to challenge certification ***before*** ballots are printed. Section 116.200 delivers a mandate to a reviewing court: if the initiative petition is deemed insufficient, "the court shall enjoin the secretary of state from certifying the measure and all other officers from printing the measure on the ballot." This section 116.200 was enacted in 1981 in response to this Court's decisions in multiple initiative petition cases relied upon by Appellants-Intervenors. The Missouri legislature clearly sought to ensure that courts err on the side of keeping insufficient ballot measures off the ballot, justifying injunctive relief at this time.

Despite the legislature's clear intent to ensure that procedurally and substantively insufficient ballot measures ***do not improperly make their way onto the Missouri ballot***, Appellants-Intervenors ask this Court to allow their faulty initiative petition to be given to the voters immediately, with a post-election adjudication on the merits of the sufficiency of their initiative petition. They suggest that this Court sort out whether their ballot initiative is faulty (1) ***after*** those who oppose the measure find themselves with no choice but to spend millions of dollars campaigning against the procedurally faulty ballot measure, (2) ***after*** asking every voter at the polls to cast a ballot for or against a procedurally-deficient constitutional amendment questions, and (3) ***after*** election authorities have spent tax dollars collecting and counting votes that are likely to be ultimately canceled. Missouri Revised Statutes Section 116.200 provides a remedy to ensure this does not happen, mandates court action to prevent insufficient initiative petitions from appearing on the ballot, and must be given effect in order to prevent irreparable harm to Amici and the general public.

If this Court does not immediately lift its stay of the circuit court's impending injunction, or decide the merits of this matter by September 10, Amici are committed to educate the public about the actual effect of Amendment 3 on existing Missouri statutes and laws. They are prepared to raise and spend hundreds of thousands of dollars and thousands of hours of volunteer time to do what Missouri law required Appellants-Intervenors to do: properly educate Missourians about the "full and correct" text of Amendment 3, which mandates a description of the true impact and effect of the proposed ballot measure.

Amici Schnarr will have absolutely no recourse for having been defrauded into signing an initiative petition that lacked sufficiency by failing to articulate which laws would be repealed or nullified. Amici Schnarr does not wish to enact a constitutional amendment that will nullify the statutory limits on abortion or will nullify statutes providing for prosecution of those that perform an unlawful late-term abortion, which Amendment 3 does do. Amici's signature was accepted by the Secretary of State in support of placement of Amendment 3 on the ballot under false pretenses. The harm to Amici Schnarr as a signatory, as well as all other signatories in the same position as Amici Schnarr, is immeasurable and irreparable.

Amici (as well as members of the public who support Amendment 3, and Appellants-Intervenors) will spend money and time campaigning for an insufficient ballot measure. They will be harmed in terms of monetary expenditures and loss of time that could be spent productively, rather than campaigning for a faulty ballot measure. The monetary expenditures and voluminous expenditures of time, carrying a substantial opportunity cost, cannot be reclaimed or replenished to Amici (or others who support the amendment). They will have no recourse to recover their time and funding once the funds are raised and spent to fight this faulty and insufficient ballot measure.

Moreover, election authorities across the State will expend substantial resources placing a faulty and insufficient initiative Amendment on the Missouri Ballot, tallying the votes, and publishing the results. Once an election occurs on a ballot measure later deemed insufficient, there is likely to be substantial voter confusion as to the status of the

Missouri Constitution, as well as confusion as to whether abortion and other laws regarding reproduction and unborn children are still in effect.

The harm to Amici and the public if relief is not granted by this Court is immeasurable and irreparable, and the legislature saw fit to protect Amici and the public from this harm by its enactment of Section 116.200, which this Court should follow to ensure that this faulty ballot measure is not placed on the November ballot.

c. The harm that will befall Amici and Respondents-Plaintiffs in the absence of the circuit court's impending injunctive relief is imminent.

As of September 10, there will be eight short weeks before election day. In addition, most Missouri election authorities now permit absentee voting for a certain period of weeks prior to election day. This means that election day is no longer the first Tuesday in November – it is actually a few-week-long election season, during which many Missouri voters may cast their votes at any time. Thus, any campaigning or re-education to be done by Amici must happen imminently. The circuit court's injunctive relief is necessary to help prevent harm, which is imminent, to Amici.

d. The balance of harms weighs in favor of lifting the stay on the trial court's impending injunction and/or deciding the merits of the case by September 10.

The balance of harms weighs in favor of granting the relief requested by Amici and Respondents-Plaintiffs. If this Court is unable to fully consider and rule on the merits of this appeal in sufficient time to ensure that a procedurally deficient matter is not erroneously placed on Missouri's ballots this November, this Court should maintain the status quo of Missouri laws and lift the stay on the circuit court's decision to enter an

injunction. Lifting the stay on the trial court's impending injunction will still allow this Court sufficient time to rule, but will avoid needless waste of resources and voter confusion, which is imminent and substantial.

By comparison, there is little to no harm whatsoever to Appellants-Intervenors or to the public if this Court lifts its stay on the trial court's entry of an injunction maintaining the status quo on Missouri law. Indeed, if this Court were to ultimately determine on some post-September 10 date that the initiative petitioners were either exempt from the pre-requisites set forth in Section 116.050 or that they complied with Section 116.050 (which they admit they did not do), the proposed initiative could be placed on the Missouri ballot at the next statewide election that occurs 8 weeks or more following this Court's decision on the merits. Should this Court decide the merits in favor of Appellants-Intervenors (which is not likely), then they will have their opportunity to present their issue to Missouri voters and their efforts to change Missouri's Constitution will be regarded in due time. They can still campaign for support of the amendment at a subsequent statewide election and will not be harmed by a delay.

The only reason to ignore the requirements of Section 116.200 and postpone a decision on the merits to after September 10 would be to get the ballot measure on the November ballot. The only difference between placing this measure on the November ballot as opposed to a post-November election ballot is the potential number of abortions that might occur inside the State. If this Court lifts the stay to decide the merits at a later date, then an injunction will prevent Amendment 3 from appearing on the ballot, and some children who would have been aborted be allowed to be born alive. Current and

prior Missouri law and policy encourages the live birth of unborn children except in an emergency to save a mother's life or physical condition. The voters of Missouri elected representatives to have their voices heard on the issue of abortion. For this Court to allow a procedurally and substantively deficient initiative petition to strike the will of the people articulated through the passage of its laws would disenfranchise every Missouri voter who elected representatives to enact laws. Accordingly, a balance of harms weighs in favor of maintaining the status quo on Missouri abortion law by lifting the stay on the circuit court's injunction until this Court can reach a decision on the merits.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 84.06(c)

A copy of this document were served on counsel of record through the Court's electronic notice system on September 9, 2024. This brief complies with the requirements and limitations contained in Supreme Court Rule 84.06. Relying on the word count of the Microsoft Word software program, the undersigned certifies that the total number of words contained in this brief is within the limits permitted by the rule excluding the cover, signature block, appendix, and this certificate. The font is Times New Roman, 13 point. Pursuant to Rule 55.03, the undersigned further certifies the original of this brief has been signed by the undersigned. Pursuant to Rule 103.08, this brief has been properly served.

/s/ *Kimberley J. Mathis*
Attorney for Amici Curiae Lochmann, et al.