SC100352

IN THE
Supreme Court of Missouri

Mary Elizabeth Coleman et al.,

Respondents,

v.

John R. Ashcroft, *Respondent* and

Missourians for Constitutional Freedom et al.,

Appellants-Intervenors.

Appeal from the Circuit Court of Cole County,
Honorable Christopher K. Limbaugh, Circuit Judge

BRIEF OF SECRETARY OF STATE JOHN R. ASHCROFT IN SUPPORT OF THE JUDGMENT BELOW

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Introduction

The Secretary administratively certified Amendment 3 for inclusion on the ballot on the backdrop of serious concern about whether the proposed amendment satisfies the legal requirements for adequate notice to the public. *See Fitz-James v. Ashcroft,* 678 S.W.3d 194 (Mo. App. W.D. 2023). On further review in light of the circuit court's judgment, the Secretary believes the amendment is deficient. While a proposed amendment need not identify every law that "could possibly or by implication be modified by the proposed amendment," a proposed amendment *must* "list provisions which would be in direct conflict." *Buchanan v. Kirkpatrick,* 615 S.W.2d 6, 15 (Mo. banc 1981). There is no credible dispute that the proposed amendment would be in "direct conflict" with existing Missouri law. But the proposed amendment failed to identify *any* statute or constitutional provision that is in direct conflict. Doc. 27, p. 6.

The amendment proponents cannot evade constitutional requirements that advocates of other amendments must and have satisfied simply because the proposed amendment concerns a highly charged moral topic. This Court should enforce the circuit court's judgment.

Argument

Although the Secretary undertook the administrative action to certify Amendment 3 for inclusion on the ballot, the courts are "charged with the ultimate judicial determination as to whether, under the Constitution and laws, the petition is sufficient or insufficient for the ballot." *Ketcham v. Blunt,* 847 S.W.2d 824, 831 (Mo. App. W.D. 1992). The findings of the circuit court reinforce the Secretary's longstanding concerns that the highly unusual approach taken by the drafters of Amendment 3 fails to adequately notify voters at large. After considering the findings of the circuit court below, the Secretary agrees that the petition failed to comply with § 116.050.2(2) and that its inclusion on the ballot is unlawful because of the many "undisclosed changes" the amendment would make to current law. *Moore v. Brown,* 165 S.W.2d 657, 269 (Mo. 1942).[1]

[1] On September 9, 2024, the Secretary decertified Amendment 3 for placement on the November 2024 ballot. The Secretary is charged with making the "with the ultimate administrative determination as to whether the petition complies with the Constitution of Missouri and with the statutes." *Ketcham*, 847 S.W.2d at 830 (Mo. App. W.D. 1992) (citing § 116.150, RSMo). As the Court of Appeals has held, "[t]he manner in which the secretary of state fulfills this mandatory duty is not clearly, unambiguously, or unequivocally limited by any statutory provision." *Sweeney v. Ashcroft*, 652 S.W.3d 711, 733-34 (Mo. App. W.D. 2022). The circuit court's decision to stay the operation of its judgment does not prohibit the Secretary's certification and decertification authority as confirmed by *Ketcham* and *Sweeney*, and the reasoning of the circuit court's decision is clear: the initiative petition did not comply with requirements for initiative petitions.

A. Amendment 3 failed to disclose its direct effect on Missouri law as required by § 116.050.2(2).

As the circuit court found, Amendment 3 failed to identify *any* "sections of existing law of the constitution which would be repealed by the measure." Doc. 27, p. 6. (quoting § 166.050.2(2)). Yet Amendment 3's proponents admitted below that Amendment 3 would alter "all sorts of laws." Doc. 27, p. 7. Still, the drafters of the amendment "purposefully decided not to include even the most basic of statues that would be repealed, at least in part, by Amendment 3." Doc. 27, p. 7–8.

The people of Missouri have a right to be informed about what they are voting on and what laws would be directly nullified or altered by the measure. The voters who sued below are right to be concerned that Amendment 3 would limit or overturn a host of Missouri laws including both constitutional provisions and statutes. *See* Pet. Pre-trial Br. at 39–48. While § 116.050.2(2) "does not require the makers of an initiative petition to 'ferret out' and to list all the provisions which could possibly or by implication be modified by the proposed amendment," it does require that the petition "list provisions which would be in direct conflict." *Buchanan,* 615 S.W.2d at 15; *see also Knight v. Carnahan,* 282 S.W.3d 9, 19 (Mo. App. W.D. 2009).

The drafters of Amendment 3 cannot credibly dispute that the amendment would be in "direct conflict" with provisions of Missouri law and

that they failed to list those provisions. Perhaps most obvious: a central purpose—if not the central purpose—of the proposed amendment is repealing Missouri's prohibition on elective abortions: "no abortion shall be performed or induced upon a woman, except in cases of medical emergency." § 188.017, RSMo; Doc. 27, p. 8–9. Amendment 3 is "so contrary to [and] irreconcilable with [§ 188.017] that only one of the two [laws] can stand in force." *See Knight,* 282 S.W.3d at 19. The text of Amendment 3 should have disclosed its implied repeal of Missouri law, and its failure to do so precludes its appearing on the ballot until the proponents fix that problem. § 116.050.2(2); *See id.*

Amendment 3 may also reach other statutes, but all this Court need do is find that the initiative did not disclose its "direct conflict" with § 118.017. The proponents of Amendment 3 did not identify that conflict for those who signed the initiative petition, preventing them from knowing what they were signing. Unless this Court enforces the circuit court's judgment, voters at the ballot box will be similarly misled.

B. Section 116.050.2(2) is valid and enforceable.

Appellants have argued that § 116.050.2(2) infringes on the right to initiative petition in the state constitution, but it does not. It is common for constitutional provisions to be unencumbered by procedural details. *State ex rel. Mathewson v. Bd. of Election Comm'rs of St. Louis Cty.*, 841 S.W.2d 633, 636 (Mo. banc 1992) (holding that "where the constitution is silent, the

legislature may properly address the issue"). The General Assembly's authority to do so is unquestioned, and its "statutes are presumed to be constitutional and will not be invalidated unless they clearly violate a constitutional provision." *Care & Treatment of Schottel v. State*, 159 S.W.3d 836, 841 (Mo. banc 2005). Like any statute, statutes governing the ballot measure process "carr[y] a presumption of constitutional validity." *Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608 (Mo. banc 1982). This Court has held, with specific reference to initiative petitions, that "a legislative body's power to enact reasonable implementations of a constitutional directive is generally recognized." *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. 1991). The requirements in § 116.050 have been reasonably implemented to prevent voter confusion and to promote informed participation in direct democracy.

The Missouri Constitution provides few requirements for the procedure, form, and content of statewide ballot measures. Just six sections in Article III relate to ballot measures, and only three of those exclusively relate to referendum petitions. The voters who adopted the 1945 Constitution left it to the General Assembly to enact specific legislation implementing the referendum process. Here, article III, § 50 requires that an initiative set out the "full text of the measure." Section 116.050 is a definitional statute that sets out the scope and contours of what that directive means. That is common for legislation and it is constitutionally permissible.

The initiative proponents' argument, taken to its logical end, would have the courts believe that *any* requirement to identify provisions of law in conflict with an initiative goes too far. They are wrong. Courts may "not invalidate a statute unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution." *Trenton Farms RE, LLC v. Hickory Neighbors United, Inc.*, 603 S.W.3d 286, 293 (Mo. banc 2020) (citation omitted). Section 116.050 does not "clearly and undoubtedly" violate any constitutional provision or "palpably affront" article III. *Id.*

Section 116.050 is part of a comprehensive statutory scheme that provides order and consistency to the ballot measure process, prevents voter confusion, and promotes informed participation by voters in the referendum process. For decades, the official ballot title (consisting of the summary statement and fiscal note summary), fair ballot language, and requirements in § 116.050 to identify the "full and correct text" of the measure have provided voters critical information about a ballot measure—both at the signature stage and in the ballot box. "There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983)). Giving the public a source of information, in addition to the traditional

electioneering from proponents and opponents accompanying the ballot measure process, increases awareness and participation in democratic governance. It is a vital source of ballot-measure information in the broader marketplace of ideas. Unbiased and accurate information preserves and promotes democracy and the integrity of the electoral process.

The summary statement promotes an informed electorate by stating the "legal and probable effects of the proposed [measure] . . . without bias, prejudice, deception, or favoritism." *Brown v. Carnahan*, 370 S.W.3d 637, 654 (Mo. banc 2012). For its part, the official ballot title ensures "that voters will not be deceived or misled," *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999), and the official ballot title requirement "thus provides that both the proponent's proposal and the summaries prepared by the state officers must be made available with each petition page used in the solicitation process." *Missouri Roundtable for Life v. Carnahan*, 676 F.3d 665, 669 (8th Cir. 2012). The requirements in § 116.050 are equally as vital. Voters should know the "full and correct text" of a measure and whether an initiative will conflict with existing law.

To the extent that the initiative proponents are mounting a constitutional challenge to § 116.050, the statute withstands scrutiny. "Where a party attacks the facial validity of a statute, a court may declare that statute unconstitutional only if there are no possible interpretations of the statute that

conform to the requirements of the constitution." *Beatty v. State Tax Comm'n*, 912 S.W.2d 492, 495 (Mo. banc 1995) (citing *United States v. Salerno* 481 U.S. 739, 745 (1987)).

First, § 116.050 has been applied constitutionally in initiative petitions for decades[2], and it is not facially invalid or invalid as applied to the proponents' particular initiative. This history should foreclose any argument that there are *no* circumstances in which the requirement can be constitutionally applied.

Second, there have been cases challenging whether an initiative properly identifies the "full and correct' text of a measure. *E.g.*, *Cady v. Ashcroft*, 606 S.W.3d 659, 670 (Mo. App. W.D. 2020); *Kuehner v. Kander*, 442 S.W.3d 224 (Mo. App. W.D. 2014). No court has held § 116.050's requirements to be unconstitutional in those cases, and it would be incongruous for this Court to be the first to do so in extraordinarily expedited proceedings given the long history of the statute being constitutionally applied and not called into serious question by any other court.

Third, the initiative proponents did not provide evidence below that § 116.050 would operate unconstitutionally. A facial challenge requires the challengers to "demonstrate that no set of circumstances exists under which

[2] *See In re Hill*, 8 S.W.3d 578, n.3 (Mo. banc 2000); *see also Kindred v. City of Smithville*, 292 S.W.3d 420, 425 (Mo. App. W.D. 2009).

the statute[s] may be constitutionally applied." *State v. Jeffrey*, 400 S.W.3d 303, 308 (Mo. banc 2013) (applying the no-set-of-circumstances framework for a facial challenge while holding that the challenging party also must demonstrate that a statute "clearly and undoubtedly" violates the Constitution). This framework imposes the burden of demonstrating that a statute has no valid applications on the Plaintiffs. *Donaldson v. Missouri State Bd. of Registration for the Healing Arts*, 615 S.W.3d 57, 66 (Mo. banc 2020) (holding that a party's evidence of his individual circumstances was not sufficient under the no-set-of-circumstances framework). Challengers are required to demonstrate that the ballot-title requirement is unconstitutional in *every* circumstance. *Id.* That evidence is entirely absent in the record.

C. Enforcement of § 116.050.2(2) is necessary to ensure the integrity of Missouri's elections.

This case shows the need for § 116.050.2(2). Despite widespread concern that Amendment 3 would have an unprecedented effect on Missouri law, Missouri voters have no direct notice that the Amendment will affect *any* statute.

Amendment 3 announces a sweeping constitutional right to reproductive freedom that has "no basis in the Constitution's text or our Nation's history," *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215, 300 (2022), and was long rejected by Missouri courts before *Roe v. Wade* was decided, including

the very year before, *Rodgers v. Danforth*, 486 S.W.2d 258 (Mo. banc 1972). Amendment 3 then enforces that right with a never-before-heard-of "ultra-strict scrutiny" that requires courts automatically to presume that any statute challenged by a plaintiff is invalid and to scrutinize those regulations using a never-before-heard-of definition of "compelling government interest" that appears to privilege this newly created right above every other right. *See* Doc. 18, p. 2.

The plaintiffs below identified a wide range of Missouri laws that they believe may be limited or overturned by Amendment 3, including Article III, § 38(d) of the Missouri Constitution and at least eight statutes. Doc. 14, p. 38–39. Regardless of whether the plaintiffs are correct about each of these provisions, there is no dispute that the amendment would invalidate at least one Missouri law.

The 100-word limit on ballot title summaries, § 116.334.1, RSMo, has never been considered legally sufficient on its own to inform voters about what an initiative will do. An amendment proponent must also comply with the statutory requirement that the proponent identify every legal provision in "direct conflict" with the proposed amendment—as previous proponents have done. Doc. 27, p. 5. Plaintiffs had a democratic and legal duty to disclose which laws are in "direct conflict" with the amendment. *Buchanan,* 615 S.W.2d at 15. They chose not to comply with that indispensable requirement.

Conclusion

This Court should enforce § 116.050.2(2) and affirm the circuit court's order.

Respectfully Submitted,

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Certificates of Service and Compliance

I certify that this brief complies with the limitations contained in Rule 84.06 as it contains 2,737 words, excluding the cover, certificate, signature block, and any appendix.

I further certify that I filed this brief using the Case.net system on September 9, 2024. Counsel for all other parties will receive electronic service.

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