IN THE SUPREME COURT OF MISSOURI

TIFFANY FRANCIS, et al.,	)	
	)	
Respondents/Cross-Appellants,	)	**Case No. SC92571**
	)	
vs.	)	**Cole County Circuit Court**
	)	**Case No. 11AC-CC00546**
ROBIN CARNAHAN, 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 RESPONDENTS/CROSS-APPELLANTS TIFFANY FRANCIS AND TROY HOOVER

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ARGUMENT

Respondents/Cross-Appellants Francis and Hoover ("Francis" hereinafter) appealed the trial court's decision finding that the constitutional deficiencies of the proposed Anti-Payday Lenders Initiative Petition (App. A9-12)[1] were not ripe. In the Francis Brief, the exceptions to ripeness were thoroughly addressed and discussed before this Court, as were the clear facial infirmities of the Anti-Payday Lenders Initiative Petition. The State parties, Secretary of State and State Auditor, both represented by the Attorney General, failed in any way to respond to these issues on appeal and thus have waived their opportunity to respond to the constitutional ripeness and facial points in the Francis Brief (Points X and XI).

Only the last minute Intervenor Appellants/Cross-Respondents, Missourians for Responsible Lending ("MRL") and James Bryan,[2] addressed Francis' Points on Appeal at all. The response by MRL and Bryan is cursory and, in a number of ways, fails to rebut the clear law and the appropriate public policy of this state and fails to preserve the deeply flawed and facially unconstitutional Anti-Payday Lenders Initiative Petition.

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[1] References to the Appendix filed with the Brief of Respondents/Cross-Appellants Francis ("Francis Brief") are to "App. A".

[2] MRL and Bryan intervened after the trial and after the Judgment was entered, despite clearly having notice of the case and having the same counsel as the failed Intervenors Shull and Stockman (who have since retained new counsel).

For the reasons laid out in the Francis Brief and in this Reply Brief, the trial court's Final Judgment regarding ripeness should be reversed, and this Court should find that the Anti-Payday Lenders Initiative Petition is facially unconstitutional.

The Facial Unconstitutionality of the Anti-Payday Lenders Initiative Petition Serves As An Exception to the General Rule on Ripeness of Pre-Election Challenges to Initiatives

Appellants MRL and Bryan spend only one paragraph in their entire Brief discussing the standard regarding ripeness and pre-election challenges regarding initiatives. In that paragraph, they give the sparsest references to *State ex rel. Trotter v. Cirtin*, 941 S.W.2d 498 (Mo. banc 1997) and to *Union Electric Company v. Kirkpatrick*, 678 S.W.2d 402 (Mo. banc 1984). Neither *Trotter* nor *Union Electric* deal with the clear facial unconstitutionality of a proposed initiative petition. However, it is instructive to note that this Court in *Trotter* expressly recognized that there would be an exception where the measure's unconstitutionality is "so clear or settled as to constitute matters of form." *Trotter*, 941 S.W.2d at 500 (citing *Craighead v. City of Jefferson*, 898 S.W.2d 543, 545 (Mo. banc 1995)). Either Appellants completely missed this language in the *Trotter* case, or concur that facial unconstitutionality is an exception to the ripeness theory incorrectly adopted by the trial court.

Prior to *Trotter*, this Court in *State ex rel. Dahl v. Lange*, 661 S.W.2d 7 (Mo. banc 1983), reviewed the ripeness doctrine with respect to an initiative. In *Dahl*, this Court

restated the general rule regarding pre-election reviews of initiative petitions finding that the general rule applied "unless the amendment is unconstitutional on its face." *Id.* at 8.

More recently, the Eastern District Court of Appeals conducted a substantive discussion of the law concerning facially unconstitutional proposed initiatives in *State ex rel. Hazelwood Yellow Ribbon Committee v. Klos*, 35 S.W.3d 457 (Mo. App. E.D. 2000). The Eastern District followed the language in *Trotter*, which appears to have its origin in *Dahl*, that courts would conduct a pre-election review of a ballot measure when it is facially unconstitutional. *Id.* at 468. The Eastern District proceeded to look at a proposed local initiative, found that it would unabashedly and directly conflict with provisions of Missouri law and thus would be unconstitutional on its face. *Id.* at 469-70. The Eastern District expressly relied on the *Trotter* and *Dahl* decisions to conduct the pre-election review. *Id.* at 469. This Court should adopt the Eastern District's determination that:

> [S]uch pre-election judicial review is **both** permissible and appropriate where the proposed ballot measure is clearly facially unconstitutional.

Id.

Anti-Payday Lenders Initiative Petition Facially Violates

Article III, Section 44 of the Missouri Constitution

Again, the State parties have not addressed the clear facial unconstitutionality of the proposed Anti-Payday Lenders Initiative Petition in their Brief, and thus have waived their opportunity to inform this Court of their argument on such issues. The Appellants MRL and

Bryan spend scant time discussing the clear facial unconstitutionality of the proposed Anti-Payday Lenders Initiative, referring briefly to this Court's decision in *Household Finance Corporation v. Shaffner*, 203 S.W.2d 734 (Mo. banc 1947). *Shaffner* is an important case and one which shows the importance which this Court has placed upon Article III, Section 44. In *Shaffner*, this Court found that the Small Loan Law was clearly and facially unconstitutional since it created a favored group or class of licensed lenders against other lenders. *Id.* at 738. First, this Court discussed the history of similar small loan laws:

> Laws similar to our Small Loan Law, fixing interest rates according to size of loan, have been enacted in nearly every state and they have been universally held to be constitutional....But no case that we can find has considered a constitutional provision similar to our Section 44.

Id. at 737. This Court continued looking at how other states had interpreted similar laws to determine if they classify lenders or only loans: "Most of the decisions which consider laws similar to our Small Loan Law speak of licensees as a 'class' of lenders." *Id.* (citations omitted).

Section 8171 of the Small Loan Law stated: "This article [the interest rate limit] shall not apply to any person, co-partnership or corporation doing business under any law of this state or of the United States relating to banks, trust companies, building and loan associations, or companies operating under the loan and investment companies act, or

licensed pawnbrokers." This Court found that this language violated the prohibitions in Article III, Section 44:

> Both parties agree that Section 8171 cannot stand against Section 44 and, of course, that is true. Section 44 makes the same interest rates available to all types of money lenders while Section 8171 purports to deny certain rates to banks and other institutions.

Id. at 736.

In a simple of act of comparing language, the provisions of Section 367.100(4) show that banks and credit unions are excluded from the ambit of the Anti-Payday Lenders Initiative Petition. This is facially violative of Article III, Section 44.

The Appellants attempt to distinguish *Shaffner* by arguing that the invalidity arose "because certain lenders (e.g., banks, trust companies, building and loan associations, and others) were prohibited from obtaining the required license and therefore could not charge the higher interest rates on small loans." MRL Reply Brief, at 22. First, this Court found that the carve out of banks was in and of itself unconstitutional. *Id.* at 736. Second, this Court found that the remaining provisions of the Small Loan Law (after the obvious elimination of Section 8171) were also unconstitutional since they did require licenses for banks - which had licenses under other provisions of law (both state and federal). *Id.* at 738. Simply put, this Court found that the Small Loan Law was facially unconstitutional because it treated classes of lenders differently.

This Court reviewed another statute, that served to limit interest rates on a class of lenders (credit unions), in 1979, finding it violated Article III, Section 44. *St. Louis Teachers' Credit Union v. Marsh*, 585 S.W.2d 474 (Mo. banc 1979). In both cases, *Shaffner and Marsh*, this Court found that if a class of lenders is protected from an interest rate restriction or if a class of lenders has a unique interest rate limitation that such restriction or limitation facially violates Article III, Section 44.

Even a cursory review of the Anti-Payday Lenders Initiative Petition in this case shows that it also treats classes of lenders differently. Specifically, Section 367.105, RSMo says that any "person" shall be subject to the provisions of the proposed Anti-Payday Lender Initiative. (Appendix A10). Pointedly, Section 367.100, RSMo, of the existing statutes provides definitions covering all sections, 367.100 to 367.200 (which would include the new 367.105). Section 367.100(4) defines "person" as follows:

> Person shall include individuals, partnerships, associations, trusts, corporations, and any other legal entities, excepting those corporations whose powers eminate from the laws of the United States and those which under other law are subject to the supervisory jurisdiction of the director or the director of the division of credit unions of Missouri.

(emphasis added). The term "director" as used in this definition is defined to be the "director of the division of finance". Section 367.100(2), RSMo. Therefore, the definition of person contained in Section 367.105, by its own language, excludes federal banks, state banks, and

credit unions from its ambit, thus creating a protected and privileged class of lenders (banks and credit unions) which are entitled to loan money at higher interest rates than those lenders restricted in Chapter 367.[3]

Appellants MRL & Bryan, in their short argument, also fail to address the plain language contained in Section 408.100.1, which expressly singles out the group of "lenders," which is facially violative of Article III, Section 44 of the Missouri Constitution. In fact, Appellants' argument against Points X and XI of Appellants/Cross-Respondents' Francis and Hoover's Brief do not even reference any provision contained in the Anti-Payday Lenders Initiative, especially those sections which expressly call out an individual class of lender to be discriminated against.

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[3]The Francis Brief also asserts that the term "person" is void for vagueness. If this Court determines that "person" in Section 367.105 of the initiative is as defined by Section 367.100(4), then the term "person" is not void for vagueness but then the Anti-Payday Lenders Initiative Petition facially violates Article III, Section 44. However, if this Court in its analysis determines that the definition of "person" in 367.100(4) does not apply to the new amendment of 367.105 in the Anti-Payday Lenders Initiative, then the term "person" is so overly broad and vague as to be void, and the arguments asserted in the Francis Brief regarding such vagueness indicate that the measure should be found to be unconstitutionally vague on its face.

Similarly, Appellants MRL and Bryan do not address, argue, or differentiate the clear and plain language of Section 370.300, which creates a class of lenders (credit unions) that would be exempt from the interest rate requirement, thus falling directly and expressly within the provision of this Court's decision in *Shaffner*. The language in *Shaffner* should be adopted by this Court:

> Undoubtedly the law purports to set up for a favored group or class of licensed lenders higher rates than are available to lenders who cannot or do not procure a license and engage in the small loan business, and this is in conflict with section 44.

Shaffner at 817. The proposed Anti-Payday Lenders Initiative creates a "favored group or class of licensed lenders" (banks and credit unions) to whom the interest rate restrictions would not apply if they make the same loans as the groups to which the measure has expressly and conclusively been designed to discriminate against (payday, title and installment lenders). This is facially violative of Article III, Section 44 of the Missouri Constitution and as such the proposed Anti-Payday Lenders Initiative Petition must be struck down.

The Anti-Payday Lender Initiative Petition Contains Terms

Which are So Vague as to be Void under the Due Process Clause

Again, the State fails to address in any manner the vagueness argument presented by Respondents/Cross-Appellants' Brief previously filed with this Court and thus have waived

the opportunity to present this Court with their arguments on this issue. Appellants MRL and Bryan have filed a total of three paragraphs of argument regarding the vagueness of the Anti-Payday Lenders Initiative Petition. Their inadequate response reflects that they have little support for their position. Plainly, the Anti-Payday Lending Initiative is so vague as to be void.

The term "device," contained in Section 408.100.3 of the Anti-Payday Lenders Initiative Petition, is not defined in the Petition or anywhere in Chapter 408, RSMo. The term "device" does appear in several locations in Chapter 408, predominantly with respect to definitions of the terms "credit cards." (Sections 408.145, 408.193, and 408.250, RSMo), and once with respect to certain credit agreements in Section 408.500.9. This term has never been defined in statute, or by any Missouri Court, with respect to any lending provision.[4] It

[4] Counsel has been unable to find any reported Missouri decision defining "device" in the lending environment; nor any case regarding Sections 408.145, 408.193, 408.250 or 408.500, RSMo. The only definitions of "device" in Missouri Statutes deal with physical (mostly medical or gaming) devices. The only reported case defining "device" is *State v. Blackstone*, 115 Mo. 424, 22 S.W. 370 (Mo. 1893), which defined "device" as being synonymous with "contrivance" which was defined as a "thing contrived, invented or planned." *Id*. at 371 (relating to devices for gaming). Using this definition, the proposed statute is absurd, thus reinforcing the vagueness of the term "device" in Section 408.100.3 of the proposal.

is clear that the term "device" does not put anyone on notice as to what is prohibited by the Anti-Payday Lenders Initiative Petition.

Appellants MRL raise a most curious argument, to wit, that if a word is defined in the dictionary it cannot be void for vagueness. This truly stands the concept of void for vagueness on its head. A simple review of the history of void for vagueness jurisprudence in Missouri and in the nation reflects that every word (or series of words) that have been found to be void for vagueness all have dictionary definitions. See e.g., *Ferguson Police Officers Ass'n v. City of Ferguson*, 670 S.W. 921, 927-28 (Mo. App. E.D. 1984). ("We cannot determine what was meant to be included in 'sponsoring.'...[W]here...words used in a statute or regulation such as the word 'sponsoring' here are of such uncertainty in meaning...the provision is void.").[5] The question is not whether a term has some definition or not, but whether in the context of the statute the term is understandable and puts one on notice of what is being prohibited. *State ex rel. Nixon v. Peterson*, 253 SW.3d 77, 81 (Mo. banc 2008). Clearly in reading Section 408.100.3, the term "device" makes no such sense. Further, the argument of future regulatory action to define this term is not applicable when looking at whether the statute itself is vague. See e.g., *Board of Educ. of the City of St. Louis v. State*, 47 S.W.3d 366 (Mo. banc 2001). *Id.* at 370 (rejecting State's argument that State

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[5]Of course, "sponsoring" is defined in the dictionary (as "to be or stand sponsor for: accept responsibility for," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2204)). Still, this did not prevent the court from finding the provision void for vagueness.

Board of Education could by regulation clarify and define an unconstitutional and vague statute).[6] It is clear and undisputed that there is no definition of the term "device," that the term "device," as used in Section 408.100.3, does not give anyone clear understanding as to what acts would be prohibited by the proposed statute, and thus the provisions of the Anti-Payday Lenders Initiative are void for vagueness.

No Appellant Has Opposed an Exception to Ripeness on the Basis of the Loss of Tax Dollars if an Election is Held on a Facially Unconstitutional Amendment

Respondents/Cross-Appellants raised this argument in Point XI of their Brief. No party has countered the argument in Point XI and thus all opposing parties have waived their opportunity to inform this Court of their position on Point XI. That puts this Court in a

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[6]Appellants MRL at page 22 of their Brief cite to *Conseco Finance Serving Corp. v. Missouri Department of Revenue*, 195 S.W.3d 410 (Mo. banc 2006) to assert that Respondents/Cross-Appellants have no standing to challenge vagueness. This Court in *Conseco Finance* made that statement and then proceeded to evaluate the claims of vagueness raised by *Conseco* in the case. *Id.* at 415. The *Conseco* case is not on point with the current case in that in the current case the harm to the aggrieved party, Respondents/Cross-Appellants, is the measure going forward on to the ballot and the waste of taxpayer funds to hold such an election. That harm gives rise to Respondent/Cross-Appellants' standing to challenge the clear and facial invalidity of the proposed initiative petition.

difficult position to divine the arguments for Appellants and yet not advocate for Appellants. *Lueker v. Mo. Western State Univ.*, 241 S.W.3d 865, 867 (Mo. App. W.D. 2008) ("Compliance with the briefing requirements of 84.04 is mandatory to ensure that appellate courts do not become advocates by speculating on facts and arguments that have not been asserted."). This is an unfair burden that Appellants have imposed on this Court. It is unquestioned that is that there will be a cost to taxpayers of approximately $170,000 if this facially unconstitutional Initiative Petition is put on the ballot. App. A15 and Jt. Ex. 3, pg. 3. Respondents/Cross-Appellants will not restate the full argument found in Point XI of the Francis Brief but instead refer and adopt by incorporation the same.

Conclusion

The State parties have not filed any arguments with respect to the appeal filed by Respondents/Cross-Appellants to the ripeness declaration and the unconstitutionality of the Anti-Payday Lenders Initiative Petition. Their failure to raise any argument in opposition may be indicative of their consensus that Respondents/Cross-Appellants' Points are valid and should be adopted by this Court. Even if not, their failure to raise any arguments in opposition waives the opportunity of the State parties to present their arguments with respect to the issues raised in Points X and XI of Respondents/Cross-Appellants' Brief.

Appellants MRL and Bryan have raised only cursory opposition to Respondents/Cross-Appellants' Point X, and no opposition at all to the policy arguments in Point XI. The Appellants MRL and Bryan fail to rebut any of the legal issues regarding the

exception to ripeness for facially unconstitutional provisions and moreover, have failed to offer any cogent argument as to why the Anti-Payday Lenders Initiative Petition does not conflict with Article III, Section 44 of the Missouri Constitution. This Court's decisions in *Household Finance Corporation v. Shaffner*, 203 S.W.2d 734 (Mo. banc 1947) and *St. Louis Teachers Credit Union v. Marsh*, 585 S.W.2d 474 (Mo. banc 1979), are controlling and unambiguously demonstrate that the provisions of the Anti-Payday Lenders Initiative Petition are facially violative of Article III, Section 44 of the Missouri Constitution. Therefore pre-election review of the Anti-Payday Lenders Initiative is proper and appropriate and this Court should determine that the Anti-Payday Lenders Initiative is facially violative of the Missouri Constitution.

Appellants' arguments regarding the vagueness challenge raised in the Francis Brief to the Anti-Payday Lenders Initiative are also insufficient and should be rejected. This Court should hold that the Anti-Payday Lenders Initiative is void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that:

(1) This Brief contains the information required by Rule 55.03;

(2) This Brief complies with the limitations contained in Rule 84.06(b); and

(3) There are 3,449 words in this Brief.

/s/ Marc H. Ellinger
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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing Reply Brief of Respondents/Cross-Appellants Francis and Hoover were served via Case.net this 22nd day of June, 2012, to the following:

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