No. SC92851

IN THE SUPREME COURT OF MISSOURI

HUMANE SOCIETY OF THE UNITED STATES, et al.,

Plaintiffs-Appellants

v.

STATE OF MISSOURI, et al.,

Defendants-Respondents.

Appeal from the Circuit Court of Cole County, Missouri
Case No. 11AC-CC00300

APPELLANTS' REPLY BRIEF

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INTRODUCTION

A central issue in this appeal is whether the repeal and reenactment of an unconstitutional statute leaves the citizens of Missouri and other individuals with no recourse for challenging that statute. The challenge in this case concerns Senate Bill ("SB") 795 which removed the exemption for animal shelters from paying a licensing fee. Appellants, who are two shelters impacted by the licensing fee as well as a national animal protection group that provides assistance to animals left without support when local rescue groups lack the finances to help them, contend that the removal of this exemption violated Article III, section 21 of the Missouri Constitution because SB 795, as passed, was not germane to the bill's original purpose.

Appellants have respectfully asked this Court to reexamine its holding in C.C. Dillon in light of the circumstances of this case. Taken to its logical extreme, as the Appellees would have the Court do in this case, the holding in C.C. Dillon infringes on the rights of Missouri citizens to raise constitutional challenges to the laws passed by elected officials. The unintended consequences of the C.C. Dillon holding yields too much power to the General Assembly by stripping individuals of any meaningful challenge to constitutionally defective statutes. In essence, any challenge can be thwarted by a subsequent repeal and reenactment of that statute, even if there are no substantive changes to the provision, the constitutional deficiencies were not cured, and the existing controversy created by such procedural defect still exists.

Appellants' opening brief made clear that the repeal and reenactment of a statute acts as a continuation of that previous statute as though it has been in effect from the date of its original passage. See Appellants' Brief at 12 (citing State v. Ward, 40 S.W.2d 1074, 1078 (Mo. 1931)), and therefore the controversy arising from the original statute's passage also remains in effect. Appellants also factually distinguished the present case from C.C. Dillon and explained the logic in revisiting its holding in light of this case.

Respondents failed entirely to address these points and instead simply continue to parrot the holding in C.C. Dillon. Respondents do not explain how the rights of individuals are not infringed upon by this potential repeal and reenactment strategy, where the reenacted statute fails to take up for consideration the provision that was unconstitutionally enacted in the original statute. Nor do Respondents offer any insight into the appropriate mechanism for individuals to challenge procedural defects in a statute that has subsequently been repealed and reenacted – perhaps in some cases before any plaintiff would even have an opportunity to mount a challenge – in such a way that does not cure the procedural defect. They fail to address these issues because they have no good argument in response.

As Appellants and *Amicus* have set forth in their briefs and as is more fully set forth below, Appellants' challenge to SB 795 is not moot and the process in which SB 795 repealed and reenacted Section 273.327 to remove the exemption for animal shelters from paying licensing fees was in violation of Article III, section 21 of the Missouri Constitution.

ARGUMENT

I. The Trial Court erred in finding that Appellants' request for declaratory judgment challenging the constitutional validity of SB 795 was moot because the repeal and reenactment of Section 273.327, RSMo, through SB 161 did not eliminate the constitutional defects or the existing controversy.

Appellants' opening brief explained why the principles of mootness are not applicable to this case. See Appellants' Brief at 13-16. Appellants referred the Court to State v. Ward, 40 S.W.2d 1074, 1078 (Mo. 1931), which holds that statutes continually remain in force even after repeal and reenactment, and thus the removal of the exemption for animal shelters remains enacted by SB 795 even though it was later repealed and reenacted by SB 161. These principles are important to the case at bar. Appellants implore the Court to not only consider how these principles of law apply to the case at bar, but also request the Court to consider the adverse consequences that upholding the trial court's judgment would have on the public.

Respondents spend considerable time discussing In re Shaver, 140 F.2d 180 (7th Cir. 1944) and Haines v. Dept. of Employment, 270 P.2d 72 (Cal. Dist. Ct. App. 1954) in an attempt to defend their position that this case is moot, rather than critiquing the cases that Appellants actually turned to in their opening brief. In re Shaver and Haines, however, as Appellants have acknowledged, did not involve constitutional challenges based on procedural defects. Appellants cited those cases to lend additional support to the proposition discussed in Ward that "where the law on a particular subject is revised and rewritten, all provisions of the old law which are retained in the new act are regarded

as having been continuously in force and as not having been repealed." In re Shaver, 140 F.2d at 181. Notably, Respondents even concede that the procedural defects at issue in Ward survived despite the statute's repeal and reenactment. See Respondents' Brief at 13.

Moreover, Respondents erroneously claim that Appellants brief lacked any discussion of the substance of "section 273.327 in either its 2010 or 2011 form." See Respondents' Brief at 7. To the contrary, a discussion of mootness and an original purpose analysis cannot be accomplished without discussing the substance of section 273.327 in its 2010 and 2011 form. Appellants' entire challenge is based upon the way in which Section 273.327 was unconstitutionally amended to remove the exemption for animal shelters from paying a licensing fee. Appellants have also noted how SB 161 did nothing to cure the constitutional defects in Section 273.327 because while SB 161 increased the applicable licensing fees, it did nothing to call attention to and did not raise for debate the provision of SB 795 that is at issue here, i.e., the removal of the exemption for shelters.

Respondents' mootness argument amounts to nothing more than the argument that once Section 273.327 was repealed and reenacted, the existing controversy evaporated. However, as we have noted, the controversy created by the unconstitutional procedural defects of SB 795 was not retroactively cured by SB 161 because the animal shelters are still subject to a licensing fee caused by the unconstitutional promulgation of 273.327, and therefore Appellants' claim is not moot.

A. C.C. Dillon and the Cases It Relied Upon are Factually Distinguishable from the Present Case so as to Warrant Departure from its Holding.

A closer examination of the cases relied on by C.C. Dillon reveal that none of the facts presented in those cases pose the same question or legal issue as in the present case. Specifically, neither Bank of Washington nor Peebles concern a constitutional challenge to a statute that has subsequently been repealed and reenacted with the constitutional deficiencies embedded in the reenacted text. The timing of the events that distinguish the present case from the above is crucial to the analysis.

First, Respondents misstate the facts of Bank of Washington v. McAuliffe, 676 S.W.2d 483 (Mo. banc 1984). Bank of Washington has nothing to do with an Article III, section 21 challenge or any constitutional challenge as Respondents claim. Rather, the bank appealed from the affirmance of the grant of a certificate of incorporation of the First Missouri Bank of Washington and argued that the charter was void because under the law, the incorporators were prohibited from acting on behalf of a holding company. Id. at 484–85. However, while the case was pending, the statute at issue had been repealed and reenacted to allow incorporators to act on behalf of holding companies. Id. at 485. Therefore, the very issue at the center of Bank of Washington no longer existed because the repeal and reenactment of that statute eliminated the prohibition of incorporators acting on behalf of holding companies. Id. The circumstances in Bank of Washington are quite unlike the case at bar where the repeal and reenactment of section 273.327 did not abolish the unconstitutional removal of the exemption for animal shelters from paying licensing fees.

Second, State ex rel. Peebles v. Moore, 99 S.W.2d 17 (Mo. banc 1936) can also be distinguished from the present case. Mootness is not even discussed in Peebles and no Article III, section 21 analysis was undertaken by the court as Respondents suggest. In that case, E.K. Peebles was elected Recorder of Deeds of Christian County at the 1934 general election. Id. at 18. The Secretary of State refused to commission him because of an enactment of a law that provides that the circuit clerk act as ex officio recorder in counties containing less than 20,000 inhabitants. Id. Respondent L.L Moore was elected circuit clerk and qualified for ex officio duties under the new law. Id. Peebles challenged whether the law was constitutional based on Article III, section 23's one subject rule and also argued that the pertinent changes to the law constituted amendments rather than a repeal. Id. at 19. The court found these arguments without merit and affirmed the trial court's decision. Id. Peebles had nothing to do with a challenge to a statute that had been subsequently repealed and reenacted. The challenge in that case only concerned the last and most current version of the statute. Therefore, the legal principles discussed by the court in Peebles are inapplicable to the case at bar.

Thus, the C.C. Dillon court's reliance on Bank of Washington and Peebles was out of place because neither case concerned a constitutional challenge to a statute that was later repealed and reenacted. As Appellants explained in their opening brief, C.C. Dillon is also distinguishable from the present case because the court in C.C. Dillon was likely faced with a bill that was constitutionally enacted, unlike here. Now that this Court is faced with a circumstance in which a statute was unconstitutionally logrolled into passage

and the later repeal and reenactment of that statute did not cure those deficiencies, departure from the C.C. Dillon holding is warranted.

Moreover, C.C. Dillon has left us with a perverse outcome. The effect would be that legislative bills can avoid constitutional scrutiny by repealing and reenacting any statute that comes under procedural attack. In this case, it was the unconstitutional process of SB 795 that eliminated the animal shelter license fee exception and SB 161 raised the licensing fee on the already cash strapped animal shelters, but there was no consideration about the exemption, or the propriety of the fee being imposed on shelters in the first place, and thus no opportunity to debate that issue by the general public. That issue had already been decided by way of the unconstitutional SB 795. Thus, as explained in Appellants' Brief, when considering a bill which would increase the licensing fee through SB 161, the General Assembly was working with an already unconstitutionally modified statute. Therefore, a constitutional attack of 161 would not cure the fact that the exemption was removed in the first place in an unconstitutional manner by SB 795. An Article III, section 21 analysis of SB 161 would only address whether the increase in the licensing fee was procedurally constitutional. Consequently, that leaves Appellants with no recourse and ultimately infringes on an individual's right to bring such constitutional challenges. Essentially, the unconstitutional actions of the General Assembly are ignored and similar actions can be taken in the future without repercussion.

Respondents contend that Appellants' position would lead to an absurd result but provide no explanation as to what that absurd result would be. See Respondents' Brief at

14. Nor do Respondents offer any meaningful discussion on how individuals could successfully challenge any statute that has subsequently been repealed and reenacted without curing the constitutional deficiencies. Therefore, Appellants respectfully request this Court to find that the constitutional challenge to SB 795 was not mooted by the repeal and reenactment of SB.

I. The Trial Court erred in denying Petitioners' request for declaratory judgment because Senate Bill 795 as amended and enacted conflicts with the bill's original purpose in violation of Article III, section 21 of the Missouri Constitution.

As Appellants and *Amicus* have established in their briefs, SB 795 as passed, clearly violated Article III, section 21 of the Missouri Constitution because the bill was "so amended in its passage through either house as to change its original purpose." Respondents, however, have failed to show otherwise.

Respondents offer an extremely far-reaching description of the subject matter of SB 795 as originally introduced by asserting that the original purpose of SB 795 was to repeal and reenact "a section of the Missouri Blasting Safety Act in order to add a specific exemption for agriculture." See Respondents' Brief at 16. This is an entire rewrite of history, and Respondents' Brief ignores all relevant case law on this point. In addition, rather than actually looking at the specific text of the title of SB 795 as originally introduced, Respondents distort SB 795's original purpose by merely inserting, without foundation, the word "agriculture." This erroneous description of SB 795 will not save it from failing to pass constitutional muster.

Respondents request the Court to "look to well-established Missouri precedent for the circumstances under which a statute can be rendered unconstitutional for violating Article III, Section 21." *See* Respondents' Brief at 15. Yet, Respondents fail to address or distinguish the leading case law that analyzes "original purpose." See Appellants' Brief at 19-23 for a discussion of Missouri Ass'n of Club Executives v. State, 208 S.W.3d 885 (Mo. banc 2006) and Legends Bank, et al., v. State of Missouri, et al., 361 S.W.3d 383 (Mo. banc 2012). Instead, Respondents solely focus their attention on Stroh Brewery Co. v. State, 954 S.W.2d 323 (Mo. banc 1997). However, Stroh is easily distinguishable from the present case and the court's analysis actually supports Appellants' claim that SB 795 violates Article III, section 21.

The bill in Stroh focused solely on Chapter 311 of the Missouri Revised Statutes and when introduced to the General Assembly, the bill's initial language stated "an act to amend chapter 311 by adding one new section relating to the auction of vintage wine, with penalty provisions." Id. at 325. The amendments that were proposed and finally approved related only to Chapter 311 and intoxicating liquors. Id. As finally passed, the bill was entitled "an act to repeal sections 311.102, 311.176, 311.300, 311.330, 311.360, 311.680 and 311.691, RSMo 1994, and section 311.070, RSMo Supp.1995, relating to intoxicating beverages, and to enact in lieu thereof nine new sections relating to the same subject, with penalty provisions." Id.

During its analysis, the court in Stroh noted:

> By including the words, "an act to amend chapter 311, RSMo," without any further language of specific limitation, such as "for the sole purpose of," S.B. 933

> gave fair notice to all concerned that the amendment of Missouri's liquor control law, chapter 311, was the purpose of S.B. 933.

Id. at 326. As such, the court found that any amendment to chapter 311 was within the bill's original purpose. Id.

In the present case, the original language of SB 795 stated, "an act to repeal section *319.306* and to enact in lieu thereof *one new section* relating to blasting safety, with a penalty provision." (emphasis added). The fact that the legislature chose to specifically state the sole section of the statute it wanted to repeal is far more limiting than the bill considered in Stroh. The broader language in Stroh began with "an act to amend *chapter* 311…" rather than designate a specific section, as in the present case. (emphasis added). Even assuming the court takes a broader approach, it would follow that reasonable amendments to SB 795 would only concern chapter 319. However, unlike in Stroh, the General Assembly in this case specifically limited itself by deciding to originally title SB 795 with specific mention of one section rather than referencing a certain chapter.

By the time SB 795 was finally passed, the amendments concerned twelve different chapters in the Missouri Revised Statutes that cover an array of subject matters, only six of which fell under Title XVII Agriculture and Animals.[1] Even though a statute

[1] The amended chapters are the following: (1) Chapter 196 – Food, Drugs, and Tobacco; (2) Chapter 246 – Provisions Relating to All Drainage and Levee Districts; (3) Chapter 261 – Department of Agriculture; (4) Chapter 266 – Seeds, Fertilizers, and Feeds; (5)

enjoys a presumption of constitutionality, Stroh, 954 S.W.2d at 326, it is this type of legislative log-rolling that the Missouri Constitution aimed to prevent.

In addition, as *Amicus* notes, there is a legitimate distinction between a bill's subject matter versus a bill's purpose, which further narrows the legislature's ability to amend a bill. See Amicus Brief at 8-9. As we can see in Stroh, the court found that the bill's original purpose concerned Chapter 311. Id. This description is probably better suited for analyzing the bill's subject matter. However, even considering the broader approach undertaken by the court in Stroh, Missouri Ass'n of Club Executives, and Legends Bank in identifying the bill's purpose, even if flawed, the result is the same: the amendments of SB 795 fail the original purpose test set forth in Legends Bank. In fact, Respondents chose to completely ignore this test and failed to perform an analysis of the present case to explain how Respondents believe that SB 795 satisfies the original purpose test. The only possible argument that Respondents even attempt to make is that both blasting safety and animal shelters relate to agriculture. Yet, this comparison is a stretch and unsupported by Missouri law.

Chapter 270 – Animals Restrained from Running at Large; (6) Chapter 273 – Dogs and Cats; (7) Chapter 274 – Cooperative Marketing Associations; (8) Chapter 281 – Pesticides; (9) Chapter 311 – Liquor Control Law; (10) Chapter 319 – General Safety Requirements; (11) Chapter 393 – Case, Electric, Water, Heating, and Sewer Companies; and (12) Chapter 578 – Miscellaneous Offenses.

Appellants have undoubtedly established their burden of showing that SB 795 unconstitutionally repealed and reenacted Section 273.327.

CONCLUSION

Not only is the court faced with the question of whether the repeal and reenactment of Section 273.327 renders Appellants' challenge moot (even though the constitutional deficiencies created by SB 795 were not subsequently cured), but the Court also must consider how the C.C. Dillon holding adversely affects individuals with legitimate constitutional challenges to the legislative process. If individuals are barred from challenging statutes with obvious procedural deficiencies that have later been repealed and reenacted, wherein lies the recourse? Based on the foregoing, Appellants respectfully request this Honorable Court to find that Appellants challenge to SB 795 is not moot and that SB 795 as approved and finally passed violated Article III, section 21 of the Missouri Constitution.

Respectfully Submitted,

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RULE 84.06(c) CERTIFICATION AND CERTIFICATE OF SERVICE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Appellate Procedure. This brief was prepared in Microsoft Word 2007 and contains no more than 3,485 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 31,000 limit in the rules). The font is Times New Roman, double-spaced, 13-point type.

I hereby certify that a true and correct copy of the foregoing was served via the Missouri e-Filing System this 1st day of February, 2013, to:

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