IN THE SUPREME COURT OF MISSOURI

NO. SC95369

TIMOTHY S. PESTKA and RUDY M. CHAVEZ,

Appellants-Plaintiffs,

v.

THE STATE OF MISSOURI, and THE DIVISION OF EMPLOYMENT SECURITY and KEN JACOBS in his official capacity as Acting Director of said Division,

Respondents- Defendants.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
CAUSE NO. 15AC-CC00438
JUDGMENT DATED NOVEMBER 12, 2015
HONORABLE JON E. BEETEM
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from Appellants' motion for permanent injunction and Respondent's motion for judgment on the pleadings entered November 12, 2015 in the Circuit Court in Cole County, Missouri. The trial court held the Missouri Senate did not violate Article III, § 32 of the Missouri Constitution when it took up, voted upon and purported to pass Truly Agreed and Finally Passed House Bill 150 (hereinafter TAFP HB 150) during the "veto session" in September 2015.

The Senate lacked procedural and constitutional authority to override the Governor's veto of TAFP HB 150, therefore its provisions cannot stand. Hence, this case involves the "validity of a statute and interpretation of a provision of the Constitution of this State," and lies within the Supreme Court's exclusive jurisdiction. *Asbury v. Lombardi*, 846 S.W.2d 196, 198 (Mo. 1993).

Alternatively, jurisdiction is proper due to the general interest and/or importance of the issues raised. In *Clark Oil & Refining Corp. v. Ashcroft,* although jurisdiction under "Article V, § 3 [was] disputed," this Court will retain and decide cases "by reason of the general interest and importance of the other questions in the case." 639 S.W.2d 594, 595 (Mo. 1982). This case raises significant issues of statewide concern involving both the proper confines of the General Assembly's veto session and the continuing employment security benefits to Missouri families. This appeal meets the transfer standards and the Court may accept the case under Article V, § 10 of the Missouri Constitution. *See also, Breitenfeld v. Sch. Dist. of Clayton,* 399 S.W.3d 816, 820 (Mo. 2013).

STATEMENT OF FACTS

The General Assembly passed TAFP HB 150 on April 21, 2015. LF 025, ¶ 11; LF 105, ¶ 11. The Governor vetoed TAFP HB 150 on May 5, 2015; more than five (5) days before the General Assembly adjourned *sine die*. LF 026, ¶ 15-17; LF 106, ¶ 15-17. Before adjournment, and during the general legislative session, the Missouri House reconsidered TAFP HB 150, and overrode the Governor's veto. LF 026, ¶ 16; LF 106, ¶ 16. The Senate adjourned May 15, 2015 without voting to override the TAFP HB 150 veto. LF 026, ¶ 17; LF 106, ¶ 17. An unrelated bill vetoed after adjournment automatically convened the General Assembly for a veto session starting September 16, 2015. LF 123, ¶ 4-5. During the veto session, the Senate reconsidered TAFP HB 150 and voted to override the veto. LF 123, ¶ 5.

The trial court granted the Respondents' motion for judgment on the pleadings. LF 122-30. The trial court reasoned the Missouri Constitution supports the Senate's interpretation that voting upon TAFP HB 150 during the September 2015 veto session was proper. Id. This appeal follows.

POINT RELIED ON

THE TRIAL COURT ERRED IN FINDING HB 150 ENFORCEABLE AND CONSTITUTIONALLY PASSED OVER THE GOVERNOR'S VETO BECAUSE THE MISSOURI SENATE WAS WITHOUT AUTHORITY TO CONSIDER THE BILL IN VETO SESSION IN THAT THE MISSOURI CONSTITUTION RESERVES A VETO SESSION FOR CONSIDERATION OF ONLY THOSE BILLS VETOED WITHIN FIVE (5) DAYS OF, OR AFTER, THE REGULAR SESSION'S ADJOURNMENT.

Farmer v. Kinder, 89 S.W.3d 447, 452 (Mo. banc 2002)

State ex rel. Moore v. Toberman, 250 S.W.2d 701, 705 (Mo. 1952)

State ex rel. Jones v. Waterbury, 300 S.W.2d 806 (Mo. banc 1957)

Mo. Const. art. III, § 32

ARGUMENT

This case turns on a single issue: Does the Missouri Constitution allow the Missouri Senate to take up, vote upon, and override a bill during a veto session which the Governor vetoed more than five (5) days before the end of the regular legislative session and upon which the Senate had time, but failed, to act during the regular legislative session?

I. Standard of Review

Exclusive appellate jurisdiction to the validity of a state statute lies with the Missouri Supreme Court. Mo. Const. art. V, § 3. Constitutional challenges are reviewed *de novo. Franklin County ex rel. Parks v. Franklin County Comm'n,* 269 S.W.3d 26, 29 (Mo. banc 2008). The Supreme Court presumes a statute valid unless it clearly contravenes a constitutional provision. *Doe v. Phillips,* 194 S.W.3d 833, 841 (Mo. banc 2006). The challenger bears the burden to prove an act clearly and undoubtedly violates the constitution. *Trout v. State,* 231 S.W.3d 140, 144 (Mo. banc 2007). *Rentschler v. Nixon,* 311 S.W.3d 783, 786 (Mo. 2010), as modified on denial of reh'g (May 11, 2010).

II. The Constitution's Text Supports the Appellants' Position

a. Principles of Constitutional Interpretation

Missouri's political power is vested in and derived from the people and founded only upon their will. Mo. Const., art. I. The Court's primary goal when interpreting Missouri's Constitution is to "ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted." *Farmer v. Kinder,* 89 S.W.3d 447, 452 (Mo. banc 2002). This Court assumes every word in a constitutional provision has effect and meaning. However, the Constitution does not

contain surplusage. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 206 (Mo. banc 2008). "The grammatical order and selection of the associated words as arranged by the drafters is also indicative of the natural significance of the words employed" and "[t]o this extent the intent of the amendment's drafters is influential." *Mo. Prosecuting Attorneys v. Barton Cnty*., 311 S.W.3d 737, 742 (Mo. banc 2010).

Interpreting the Constitution requires the instrument to be read as a whole. *State ex rel. Moore v. Toberman*, 250 S.W.2d 701, 705 (Mo. 1952). As the Constitution is derived from the people of Missouri, not the General Assembly, the instrument's full reading is required insofar as some parts may enlighten other parts thereof. *State ex rel. Mathewson v. Board of Election Comm'rs of St. Louis County*, 841 S.W.2d 633, 635, (Mo. 1992). A construction nullifying a provision or disharmonizing the Constitution as a whole must be abandoned. *Moore v. Toberman* at 705, citing, *State ex rel. Cruthcer v. Koeln*, 61 S.W.2d 750 (Mo. 1933); *State ex rel. Crow v. Hostetter*, 39 S.W.270 (Mo. 1897). The Missouri's Supreme Court has affirmed:

> If a literal interpretation of the language used in a constitutional provision would give it an effect in contravention of the real purpose and intent of the instrument as deduced from a consideration of all its parts, such intent must prevail over the literal meaning. Where the spirit and intent of the instrument can be clearly ascertained, effect should be given to it, and the strict letter should not control if the letter leads to incongruous results clearly not intended. [The strict letter] should never be construed to work confusion and mischief, unless no other reasonable construction is possible. *State ex rel.*

> *Moore v. Toberman*, 363 Mo. 245, 257, 250 S.W.2d 701, 705 (1952) (internal citations omitted).*** "[d]ue regard [must be] given to the primary objectives of the provision in issue as viewed in harmony with all related provisions, considered as a whole. By following these rules, the fundamental purpose of constitutional construction is accomplished, to give effect to the intent of the voters who adopted the amendment." *Boone County Court v. State*, 631 S.W.2d 321, 324 (Mo. banc 1982). *Barnes v.* Bailey, 706 S.W.2d 25, 28 (Mo. 1986).

These dictates require reversing the trial court and entering judgment in Appellants' favor enjoining TAFP HB 150.

b. Article III, § 32 is a Limitation on the General Assembly's Powers to Reconsider a Vetoed Bill

Article III, § 32 of the Missouri Constitution places boundaries on the General Assembly's ability to reconsider vetoed bills. To that end, there is no discernable conflict regarding constitutional separation of powers. The issue presented is not one between the executive and the legislature. Instead, the General Assembly's passage of TAFP HB 150, the Governor's veto of the same, and the General Assembly's attempts to override said veto are all legislative acts. *See, State ex rel. Jones v. Waterbury*, 300 S.W.2d 806 (Mo. banc 1957) (recognizing the Governor approving or vetoing bills is a legislative, not executive, act). The conflict here is that of the General Assembly, the legislative branch, straying from the confines the people of Missouri have established.

The Appellants do not question the legislative branch's "plenary powers" within its confines. Instead, the Appellants question the legislative branch straying beyond the confines the people of Missouri have established. The Appellants do not question the General Assembly's power to enact the substance of TAFP HB 150, limiting employment security for Missouri families to as little as thirteen (13) weeks of meager benefits. Instead, the Appellants question the legislative branch's attempt to thwart the procedures the citizens of Missouri have commanded through their Constitution—procedures the General Assembly must follow to enact legislation.

The General Assembly's attempt to override a veto in veto session is limited to those vetoes issued near the end of the regular legislative session or later. In relevant part Article III, § 32 of the Missouri Constitution states:

> Every bill presented to the governor and returned with his objections shall stand as reconsidered in the house to which it is returned. If the governor returns any bill with his objections on or after the fifth day before the last day upon which a session of the general assembly may consider bills, the general assembly shall automatically reconvene on the first Wednesday following the second Monday in September for a period not to exceed ten calendar days for the sole purpose of considering bills returned by the governor.

The first quoted sentence above sets the context for interpretation, but the trial court's opinion ignores this context. LF 125-126. The trial court reasons that because the second sentence reads "bills returned by the governor," the General Assembly is not limited to what bills to reconsider during a veto session. Id. This is a strained reading. When read

in conjunction with the second sentence of Article III, § 32 of the Missouri Constitution, the first sentence's meaning, as Missouri's citizens understood, is obvious. A bill vetoed more than five days before the end of the general session cannot be considered during the veto session. The veto session's entire purpose is reconsidering the vetoes which brought it into existence—i.e., "late vetoes" described by Article III, § 32. All vetoes which are not "late vetoes" must be overridden before the end of the general session or the veto stands. Absent the five-day exception, when the General Assembly adjourns *sine die*, bills are tabled. Mo. Const. art. III, § 20(a).

The Appellants' interpretation of Article III, § 32's is textually the only logical reading for another reason. The General Assembly does not, and cannot, call its own veto session. Mo. Const. art. III, § 32. Examining the second sentence, a veto session is only available if the Governor issues a "late veto"; i.e. one within five days before the end of a general legislative session, or after adjournment. When the Governor issues a veto at *any time* before the five days prior to the end of session, the General Assembly, and the Governor, and most importantly Missouri's voters, are completely without knowledge of whether the Constitution will spring a veto session into existence. As a constitutional posture therefore, the trial court's determination reads one word out of context to create mischief in carefully ordered legislative procedures.

The facts in this appeal are undisputed. The Governor vetoed TAFP HB 150 on May 5, 2015, more than five days before the end of the 2015 general legislative session. LF 123, ¶ 2-3. The Governor's veto is not a "late veto" under Article III, § 32. As such, the Senate had to reconsider the returned TAFP HB 150 before the end of the general legislative

session or the veto would stand. The House voted to override TAFP HB 150 and sent it to the Senate for its consideration two (2) days before the General Assembly adjourned. LF 123, ¶ 2-3. The Senate failed to act and thus missed its chance to override the Governor's veto.

Having missed its opportunity, the Senate purports to have overridden TAFP HB 150 during the 2015 veto session. However the TAFP HB 150 veto did not trigger the 2015 veto session. Other unrelated bills caused the veto session to come into existence. LF 123, ¶ 4-5. A bill vetoed late in the general session affords the legislature a veto session to reconsider only those bills subject to a late veto. procedurally this makes sense.

Missouri's administrative agencies, residents, and voters are entitled to clarity and certainty in the legislative process. The Missouri Constitution creates definitive "rules of the road" which carefully govern the legislative branch. The bills the Governor vetoes are by definition either substantively controversial or constitutionally defective. If such controversial or technically deficient bills reach the Governor's desk near, or after, adjournment, the General Assembly is at a structural disadvantage to address those bills. Thus, Article III, § 32 was enacted to protect the General Assembly from "late vetoes." However, bills vetoed earlier in the session merit no such protection. The trial court's order opens the General Assembly to prolonged lobbying over both the substance of vetoed bills and when they those bills will be reconsidered or addressed in the regular or veto sessions.

For bills vetoed more than five days before adjournment *sine die*, the legislature has adequate time to reconsider a vetoed bill, or even reintroduce the same or similar bill for consideration and adoption. This is an example of the General Assembly exercising its

plenary power within the Constitution's parameters. Bills vetoed more than five days before adjournment, given the time to address issues the Governor deemed objectionable, must be reconsidered, if at all, during the general session. In this manner Missouri's agencies and citizens know what specific bills will be eligible for presentment in any veto session that may follow. The trial court's interpretation obfuscates this process. Instead the trial court's interpretation encourages extra-constitutional gamesmanship on bills that legislatively should have been promptly abandoned, corrected, or reconsidered.

If the Governor did not veto a bill after TAFP HB 150, there would not have even been a veto session. Because the Governor's veto of TAFP HB 150 was not a "late veto," any override attempts must have occurred during the general legislative session. The Missouri Senate's "override" was untimely and unconstitutional and any action to enforce TAFP HB 150 is therefore also unconstitutional. The trial court's decision not only makes the five (5) day allowance mere surplusage, it distorts the Constitution's procedural intents and purposes.

III. The Constitution as a Whole Supports the Appellants' Interpretation

The Missouri Constitution is replete with examples that its purpose, vis-a-vis the General Assembly, is to establish a preference for an orderly, considered, legislative process. The Missouri Constitution's fundamental structure and purpose is to require the legislature to consider each bill independently; for each bill to rise or fall on its own merit, for its own purpose. *See, e.g., Hammerschmidt v. Boone County, Missouri*, 877 S.W.2d 98, 101 (Mo. banc 1994). This preference is evident in the constitutional rules of both temporal and substantive presentment. When the Constitution's provisions are read as a whole, it is

apparent its purpose in this regard is to limit the Governor and General Assembly in a manner to prevent gamesmanship, horse-trading and logrolling. The people, through the Constitution, streamlined and organized the legislative process. The Appellants' interpretation supports this purpose.

The Missouri Constitution sets a number of temporal limits on the legislative process. For example, the General Assembly cannot introduce non-appropriation bills after the sixtieth legislative day. Mo. Const. art. III, § 25. Specifically relevant to this appeal, the Constitution expands the Governor's ability to veto a bill presented after adjournment. If presented during the regular legislative session the Governor has only fifteen (15) days to approve or reject a bill. Mo Const. art. III, § 31. However, upon adjournment the Constitution grants the Governor additional time, forty-five days, to veto and return a bill to the originating house. Id. This constitutional recognition, differentiating between actions occurring during and after the general session, mirrors the Appellants' position regarding those bills eligible for reconsideration during a veto session.

For the purposes of this case, however, the most important temporal restriction comes from reading Mo. Const. art. III, § 32 with Mo. Const. art. III, § 20 and § 20(a). The General Assembly's time to legislate is exacting, to the day. Mo. Const. art. III, § 20, § 20(a).This is the period of time for the General Assembly to conduct is business and exercise it plenary powers. During this regular session, under Mo. Const. art. III, § 32, a bill "presented to the governor and returned with his objection shall stand as reconsidered in the house to which it is returned.". Under Mo. Const. art. III, § 20(a), vetoed bills are immediately tabled if not passed over the Governor's veto prior to adjournment. The *only*

exception is for "late vetoes," bills returned "on or after the fifth day before the last day upon which a session of the general assembly may consider bills." Mo. Const. art. III § 32. The House honored the Constitutional restrictions and voted to override TAFP HB 150, the Senate did not complete the process as required. LF 123. The General Assembly then adjourned and TAFP HB 150 was tabled, the Senate had missed its chance to override. Id., Mo. Const. art. III, § 20(a). This is the only interpretation that does not read Article III, § 32's five day limitation as surplusage and adheres to the Constitution's purpose.[1]

In addition to temporal limitations, the Missouri Constitution also creates substantive limitations on the legislative process. Missouri Constitution Art. III, § 20(b) limits subject matters discussed during special sessions to those subjects for which the special session is called. The Constitution limits both a bills' purposes and abilities to be amended. Mo. Const. art. III § 21. The Constitution limits committee structures to hear bills. Mo. Const. art. § 22. Perhaps the most well-known restriction is the limit upon the number of subjects a bill may contain. Mo. Const. art. III, § 23.

Contrary to the trial court's holding, the Supreme Court has never considered the General Assembly's plenary power as authority to read these substantive or procedural,

[1] Interestingly, Mo. Const. art III, §§ 20, 20(a), 20(b), 22, 25 and 32 were all amended by referendum on November 8, 1988.

See, http://www.moga.mo.gov/mostatutes/ConstArticles/Art03.html, last accessed December 16, 2015.

restrictions out of the Constitution. *See*, *Hammerschmidt* regarding § 21 and § 23*; Missouri Coalition for Environment v. JCAR*, 948 S.W.2d 125 (Mo. banc 1997) regarding § 22. But this is essentially what the trial court held.

The trial court based its finding upon the principle that the General Assembly's "plenary power" is only limited by the Missouri Constitution. The Appellants agree with this proposition, but believe the trial court did not fully contemplate the limitation the people of Missouri, though their Constitution, placed upon the Generally Assembly. The trial court reasoned "an express enumeration of legislative powers and privileges in the Constitution cannot be considered as the exclusion of others not named unless accompanied by negative terms." LF 130, citing *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.3d 228 (Mo. 1997); and *Bohrer v. Toberman*, 227 S.W.2d 719, 723 (Mo. banc 1950).

The trial court's holding, however, is contrary to the Court's direction in constitutional construction. The Supreme Court reads the Constitution as a whole, in harmony, and where "the spirit and intent of the instrument can be clearly ascertained, effect should be given to it, and the strict letter should not control if the letter leads to incongruous results clearly not intended." *Barnes v. Bailey*, 706 S.W.2d 25, 28 (Mo. 1986).

When the Constitution is read as a whole, it limits the Governor and General Assembly to prevent gamesmanship in the interest of Missouri's citizens. The Constitution explicitly streamlines and organizes the legislative process. Appellants' interpretation of Article III, § 32 supports this purpose and harmonizes the Constitution as the canons of construction and precedent instruct.

IV. Historical Evolution Supports the Appellants' Interpretation

The trial court's decision is based upon a premise that the General Assembly's *legislative* power is synonymous with unfettered discretion to pass laws at any time, place, or manner it pleases. This is not the case. Missouri's political power is vested in and derived from the people, and founded only upon their will. Mo. Const., art. I. This is why interpreting the Missouri Constitution is not the same as interpreting a statute. *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. Banc 2002). Thus, the question is not what the Constitution's words mean without context. Instead, the question is what did the people of Missouri understand these words to mean when the provision was adopted. *Farmer* at 452. Reviewing Art. III § 32's historical evolution leads to the same result as reading the current constitution as a whole; the Senate was limited to reconsider TAFP HB 150 during the regular session.

In 1970 the people of Missouri, by popular vote and constitutional amendment, adopted a prior version of Art. III, § 32. The 1970 version specifically provided only bills vetoed after adjournment were eligible for reconsideration in either the following session or veto session, depending on the year. Only bills vetoed after adjournment were eligible for reconsideration beyond the general legislative session. Bills vetoed before adjournment were required to be introduced as a new bill in subsequent legislative sessions. LF 127.

In 1972 the people of Missouri, again by referendum, changed Art. III, §32. This iteration amended the timeframe for which specific bills could be reconsidered in the next session, or veto session, again depending on the year. The people of Missouri made this process available for bills vetoed after the General Assembly adjourned, and for those bills

vetoed on or after the fifth day before the last day. Those bills vetoed before the fifth day before the last day of session were required to be re-introduced as a new bill in a subsequent session. LF 128

Art. III, § 32's current iteration appeared in 1988, again by Constitutional amendment adopted by popular vote. The 1972 and current versions differ in removing the legislature's opportunity to take up vetoed bills in the legislative year after the veto, replacing it instead with a potential yearly veto session. When read in this light, the Missouri citizens' intent in adopting the current Art. III, § 32 is clear. The five-day limitation is to give the legislature the opportunity to reconsider bills vetoed near the end of, or after, adjournment, and for that purpose alone. When read in conjunction with the current Missouri Constitution as a whole, the only logical understanding of Art. III, § 32 is the creation of a yearly veto session for only those bills which were vetoed within five days of, or after, adjournment.

V. The Florida Case is Inapposite

The trial court likens its decision to that of a Florida Supreme Court decision interpreting the Florida Constitution. LF 129. In *Chiles v. Phelps*, the Florida governor vetoed a bill after a regular legislative session. 714 So. 2d 453, 455 (Fla. 1998). A special session followed, but the bill was not then reconsidered. Id. Instead, the bill was reconsidered during the next regular session and the veto was overturned. Id. The Florida Supreme Court found the Florida Constitution supported reconsideration. Id. at 460.

Chiles is inapposite. First, this Court is not bound by the interpretation of another state's constitution. *See, e.g., Conrad v. Waffle House, Inc.*, 351 S.W.3d 813, 822 (Mo.

App. 2011). Second, the Florida Constitution's provisions are significantly different than the provisions at issue here. The Florida Constitution merely requires that when the governor vetoes a bill when the legislature is not in session, the legislature will enter the bill into its journal at the next regular or special session. Fla. Const. art. III, § 8(b). The Missouri Constitution specifically requires that vetoed bills be reconsidered by the legislature during either the regular or veto session, depending on the timing of the veto. *See*, Mo. Const. art. III, § 32.

A further distinction is that *Chiles* dealt with whether a veto must be overturned during a *special* session, as opposed to a *veto* session at issue here. The Florida Constitution requires that the only topics considered during a special session are those called by the governor, unless two-thirds of the legislature votes to take up other issues. Fla. Const. art. III, § 3(c)(1). Therefore, *Chiles* found that requiring the legislature to overturn the veto during a special session was contrary to the constitutional provision governing special sessions. 714 So. 2d at 459. No such limitations are present in the Missouri Constitution under facts at issue here.

Finally, and perhaps most importantly, this Court's approach to interpreting the Missouri Constitution is fundamentally different from the Florida Supreme Court's approach to its Constitution. The Missouri Supreme Court takes pains to find the Constitution expresses the "spirit and intent" of its citizens' will. *Barnes v. Bailey*, 706 S.W.2d 25, 28 (Mo. 1986). The Florida Supreme Court does not. Instead, the Florida Supreme Court reviews constitutional provisions in a manner parallel to those of statutory

interpretation and does not move beyond explicit language. *Ford v. Browning*, 992 So.2d 132, 136 (Fla. 2008).

CONCLUSION

The Missouri Senate's override of the veto of TAFP HB 150 was untimely. As such, the passage of TAFP HB 150 is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to Rule 54.20 this Brief contains the information required by Rule 55.03 including maintenance of a signed original, and otherwise complies with the limitations in Rule 84.06(b) and contains 4,882 words and 609 lines, exclusive of the material identified in Rule 84.06(b), as determined using the word count program in Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2015, the foregoing was filed with the Clerk of the Court, to be served by operation of the Court's electronic filing system upon: Jeremiah J. Morgan, Deputy Solicitor General, Supreme Court Building, P.O. Box 899, Jefferson City, MO 65102. A signed original is also maintained in the files of the certifier below.

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