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' REPLY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

OTHER AUTHORITIES

REPLY ARGUMENT

In reply to Respondents' brief, and taking care to not reargue points previously made (Rule 84.04(g)), Appellants present this Reply.

I. The Trial Court's Plain Language Rationale Proves Too Much

In deciding the Missouri Senate properly overrode HB 150 during the most recent veto session, the Trial Court and Respondents reason that because Article III, § 32 uses the plural "bills," the veto session is not limited to reconsideration of those bills vetoed "on or after the fifth day before the last day upon which a session of the General Assembly may consider bills." Respondents' Brief, p. 4. This plain language argument fails when considering the Article III, § 32 in the context of the Constitution as a whole. Relying on the "plain language" argument as the Trial Court presents it simply proves too much.

A. Respondents' Interpretation Leads to Absurd Results

Appellants' interpretation of Article III, § 32 is logical, appropriate and textual. The Appellants' interpretation has the added value of interpreting § 32 in the context of the Constitution as a whole, as the Supreme Court has repeatedly directed. *State ex rel. Moore v. Toberman*, 250 S.W.2d 701, 705 (Mo. 1952).

The fact that Article III, § 32 phrases the veto session language for the "sole purpose of considering bills" as plural does not mean that any vetoed bill can be considered during a veto session. Instead, "bills" is used because any number of bills may be vetoed during the 5 day window before the end of session or after the close of session. In other words, "bills" simply relates back to the five day late veto window identified earlier in Article III, § 32.

The Respondents' position, which the Trial Court adopted, is that "bills" means any vetoed bill. In support of this position, the Respondents argue that the word "bills" is unmodified and thus is not limited by the late veto period identified in Article III, § 32. Taken to its logical conclusion, this interpretation creates absurd results. Indeed, do "bills" in Article III, § 32 include vetoed bills from a previous session of the current General Assembly? Do "bills" include vetoed bills from a prior General Assembly? Do "bills" include bills vetoed in an earlier term of the governor?

The Respondents' and Trial Court's particular application of "plain language" reasoning logically means any vetoed bill from any session of any General Assembly during a single governorship could be considered during any, or even successive, veto sessions. Under the Respondents' position, a veto session in 2016 could revisit vetoed bills from any session of any General Assembly since the current Governor Nixon assumed office in 2009. This cannot be the case.

Instead, the Respondents' focus on "plain language" does not resolve this case—it merely creates new problems, all of which conflict with the ordered and clear legislative procedure which the Constitution establishes. The Appellants' interpretation ends the parade of horribles: "bills" refers to late vetoed bills alone. As such, the Appellants' interpretation is the only one consistent with the Constitution's structure in ordered legislation.

Finally, the Respondents contend the Appellants' interpretation is not supported because the Constitution could have used terms like "such bill" or "the bill" but does not. Respondents' Brief, p. 15. This argument cuts both ways. The Constitution could similarly

have used terms like "the most recent session," the "current General Assembly" or the "then governor's term" but it does not. Therefore, it is ultimately pointless to focus on what language could have been used in drafting Article III, § 32. The focus must be upon the procedure and order the Constitution as a whole establishes.

B. Respondents' Position Ignores the "Fifth Day" Language

The Respondents contend their reading of Article III, § 32's "on or after the fifth day before the last day" language is not surplusage because "[b]ills vetoed on or after the fifth day before the end of regular session are the only bills that create an automatic veto session." Respondents' Brief, p. 11. However, this is not the only purpose of the "fifth day" language. Indeed, the "fifth day" requirement illustrates the Constitution's preference for reconsidering vetoed bills during the general legislative session. This is consistent with prior versions of Article III, § 32, which only created a veto session if a bill was vetoed after the General Assembly's adjournment.

When compared to its prior versions, the current Article III, § 32 expands the time period to trigger a veto session. However, nothing in the current version does away with the purpose underlying both versions: to create a preference that vetoed bills be considered during the general session. Only the Appellants' interpretation effectuates this purpose—it mandates the General Assembly to reconsider all vetoes during the general session except for those "late" vetoes. If the Respondents' position is accepted, the purpose behind the "fifth day" language is ignored.

C. Respondents' Position Ignores the Fact that the Missouri Senate Acted Alone

The Respondents' emphasis on the General Assembly's plenary powers in the sphere of legislation conveniently ignores a crucial aspect of the case. The matter before the Court is not that the General Assembly as a whole considered a vetoed bill during the automatic veto session. The matter before the Court is the Senate's action alone.

The General Assembly passed HB 150 on April 21, 2015. (LF 30). The Governor vetoed HB 150 on May 5, 2015, more than five days before the General Assembly adjourned *sine die*. (LF 31). During the general legislative session, the Missouri House reconsidered HB 150, and took the first step to override the Governor's veto. (LF 31). The Senate adjourned May 15, 2015 without voting to override the HB 150 veto. (LF 31). During the veto session, the Senate purported to reconsider HB 150 and voted to override the veto. (LF 31). But, when a General Assembly adjourns *sine die*, bills are tabled. Mo. Const. art. III, § 20(a).

When the General Assembly reconvened at the veto session on September 16, 2015, the record has no indication or inference that the Missouri House acted on HB 150. It did not. Instead, the House had previously acted upon HB 150 on May 5, 2015 (LF 31) before the Constitution tabled the remaining bills. The veto session is a reconvention of the General Assembly. Mo. Const. art. III, § 32. As such, there is a question of whether the Missouri Senate even properly had HB 150 before it as the Missouri House, the originating house, took no action on HB 150 during the veto session. The Respondents' focus on the

General Assembly's powers as a whole, rather than the facts of this case, does not adequately address the matter before the Court.

II. The Respondents Fail to Identify a Single Legislative Example Supporting Their Interpretation

In their historical analysis, the Respondents' theorize the Senate acted constitutionally because "[n]one of the earlier versions of Article III, § 32 limit the legislature to only consider timely vetoed bills during the regular session." Respondents' Brief, p. 17. From this position, Respondents' extrapolate that the Constitution's "failure to use specific limiting language . . . could not suffice to limit the legislature's power to consider only late vetoed bills during a veto session." Respondents' Brief, p. 17. If, however, as the Respondents' suggest, the Constitution has since 1875 granted the legislature the power to reconsider any vetoed bill, no matter when vetoed, at any time, the Respondents could certainly point to an instance where it occurred. They have not. The General Assembly's failures to act in this regard arguably amounts to a legislative interpretation of the Constitution supporting the Appellants' position. *See*, *Bohrer v. Toberman*, 227 S.W.2d 719, 722 (Mo. banc 1950).

Prior to this matter concerning HB 150, the Appellants are not aware of any instance of a veto session taking up a bill vetoed more than five days before the end of a legislative session. The Respondents have not brought one to the Court's attention. Instead the Respondents advocate for a constitutional interpretation that expands the time for veto override considerations and invites further opportunities for the types of lobbying, horse-trading and logrolling which the remaining portions of the Constitution are specifically

designed to avoid.

III. The General Assembly's Plenary Power is Not at Risk

The Respondents' would have the Court conclude the Appellants' position is an attack on the legislative branches' power to make, amend and repeal laws. Respondents' Brief, 18. It is not. The Appellants' position reserves every power to accomplish its law making responsibilities so long as the General Assembly follows the procedures the people of Missouri, through their Constitution, have established.

A. Authority to Call a Special Session Does Not Support Respondents' Position

The Respondents allude to procedures in the Missouri Constitution and a Senate Rule that preserve certain legislative powers in a special session outside the general and veto sessions. Respondents' Brief, p. 21-23. However, the record contains no support that the legislature called a special session pursuant to Mo. Const. Article III, § 20(b) or the Senate invoked Rule 75. Indeed, neither happened. The Respondents' reliance on the General Assembly's ability to call a special session, however, actually supports the Appellants' position.

A veto session automatically springs into existence and concerns itself with one question: the reconsideration of vetoed bills. Mo. Const. Art. III, § 32. A special session requires the General Assembly's members to affirmatively vote in favor of a special session after considering at a minimum (1) what is to be contained in petition for special session; (2) whether the matter or matters contained in the petition are necessary; and (3) whether the underlying matter in the petition justifies calling a special session (regardless of a

legislator's position on the matter therein). Mo. Const. Art. III, § 20(b).

Since a special session may be called to consider any vetoed bill, limiting a veto session to only those late vetoed bills cannot be viewed as an erosion of the plenary powers of the General Assembly. Indeed, the General Assembly could simply call a special session to reconsider non-late bills after the end of session. (As noted above, no such special session was called here.)

More substantively, the General Assembly's power to hold a special session to consider any vetoed bill affirmatively supports the Appellants' position. Indeed, the current version of Article III, § 32 and the provision granting the ability to hold a special session were adopted simultaneously on November 8, 1988. Given the simultaneous adoption, the people of Missouri would have logically intended that bills considered in a veto session be limited to only those late vetoed bills. In other words, there is no need for the expansive veto session argued by the Respondents where any vetoed bill can be considered in a special session. Any other construction disregards the context of Article III, § 32's enactment.

B. The Cases Respondents Cite Do Not Support Deference in this Case

Despite the plenary powers the Missouri Constitution grants the General Assembly, the Constitution is undoubtedly a restriction upon, not grant of, legislative power. *Bohrer v. Toberman*, 227 S.W.2d 719, 724, (Mo. banc 1950).

Each case the Respondents cite involves the Court recognizing the Missouri legislature's power to act in an authorized manner when it in fact had the power to act. Respondents' Brief, 19-20. *See, e.g., Bohrer*, 227 S.W.2d 719, 721 (holding special

referendum election not void because the legislature recorded its votes by roll call rather than recording members who voted favorably); *Heinkel v. Toberman*, 226 S.W.2d 1012 (Mo. banc 1950) (holding the referendum and bill in question was properly referred from the General Assembly because it was neither an appropriation bill nor for immediate preservation of health or safety); *Liberty Oil Co. v. Director of Revenue*, 813, S.W.2d 296, 298 (Mo. 1991) (holding a referred gas tax was not an appropriation bill so it was properly referred from the General Assembly); *Brown v. Morris*, 290 S.W.2d 160 (Mo. banc 1956) (holding the Speaker of the House's signature is a certification of the legislature's action passing a bill, not an indispensable step in final passage); *Bd. of Educ. of City of St. Louis v. City of St. Louis*, 879 S.W.2d 530, 532 (Mo. 1994) (holding the legislatures' grant of a second 25 year tax relief for blighted properly was proper where the property in question became re-blighted).

The case at hand—whether the Senate had power to act on HB 150 during the September 2015 veto session—is entirely different from the cases cited by the Respondents. But even if these cases were analogous to the matter now before the Court, they do not help the Respondents' cause. Indeed, *Liberty Oil* and *Bohrer* both hold the Courts will only refrain from nullifying a legislative action if there can be a reasonable construction of the action in conjunction with a reasonable construction of the Constitution. *Liberty Oil*, 813 S.W.2d at 297; *Bohrer*, 227 S.W.2d at 724. For the reasons explained above, the Respondents' "plain language" justification is not reasonable.

CONCLUSION

The Missouri Senate's override of the veto of HB 150 was untimely. As such, the passage of 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 2,448 words and 328 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 January 11, 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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