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' SUPPLEMENTAL REPLY BRIEF

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SUPPLEMENTAL REPLY ARGUMENT

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

REGARDING RESPONDENTS' REQUEST FOR ADDITIONAL ARGUMENT

Respondents have requested additional argument. Appellants take no position on whether additional argument is warranted. However, Appellants do take issue with Respondents' claim that the subject matter of the supplemental briefing was not addressed in the initial briefing. Respondents' Supplemental Brief at 1, 15. Indeed, the initial briefing addressed the issue of tabling and whether the Senate's action in overturning the veto of HB 150 was untimely. *See*, [L.F. 123]; Appellants' Opening Brief at 13, 16-17; Reply Brief at 7.

REGARDING THE GENERAL ASSEMBLY'S PLENARY POWER

Respondents again allege Appellants "fundamentally misunderstand" the General Assembly's "plenary power." Respondents' Supplemental Brief at 1. Respondents' repeated citation to the General Assembly's "plenary power" does not resolve this case. While the General Assembly (as a whole) is the depository of the state's legislative power, its "right to function in a legislative way is limited to the time when it is in regular or special session." *State ex rel. Jones v. Atterbury*, 300 S.W. 2d 806, 811 (1957) (also recognizing that legislative power "is jointly shared and cannot be independently exercised"). It goes without saying that the legislative branch may exercise its "plenary powers" within the confines of the Constitution. However, "plenary powers" cannot be used as an excuse to permit the General Assembly to act outside the temporal restrictions specifically mandated

by the Constitution.

1. Is a veto message a "bill" for purposes of article III, section 20(a)?

Respondents note several ways in which a vetoed bill is different from bills in other stages of the legislative process. Respondents' Supplemental Brief at 4. However, none of these distinctions remove a vetoed bill from coverage under Article III, § 20(a). That provision reads: "All bills in either house remaining on the calendar after 6:00 p.m. on the first Friday following the second Monday in May are tabled." (Emphasis added). Nothing in Article III, § 20(a) creates an exception for bills vetoed by the governor from the definition of "bill." Instead, Article III, § 20(a) requires the tabling of bills—unmodified—remaining on the calendar, which necessarily includes bills vetoed by the governor. Any other interpretation would be contrary to the plain meaning of Article III, § 20(a).

Further, the governor's veto message is more than an "official communication" as Respondents argue. Respondents' Supplemental Reply at 3. The veto message of a bill is a legislative act, just as any member of the General Assembly's vote on the bill is a legislative act. *Atterbury*, 300 S.W.2d at 817.[1]

[1] It is undisputed that the governor's veto of HB 150, a legislative act, was made within the temporal limitations of the Constitution. Indeed, the governor vetoed HB 150 within fifteen days of its presentment, as required by the Constitution. Article III, § 31; L.F. 84-85.

2. If it is a "bill," then pursuant to article III, section 20(a), for it to have been tabled is it necessary for the reconsideration of HB150 to appear on a Senate calendar in the Senate Journal on the first Friday following the second Monday in May?

a. HB 150 "Remained on the Calendar" for Purposes of Article III, § 20(a)

Respondents argue "there is no constitutional provision nor any House or Senate rule providing that bills returned by the governor are to be placed on any calendar." Respondents' Supplemental Brief at 6. Respondents' interpretation misunderstands Article III, § 20(a). Under that provision and reading Article III as a whole, "remaining on the calendar" means something broader than the official calendars maintained by the General Assembly. Instead, "remaining on the calendar" includes any bill not passed during the general legislative session. Any other interpretation leaves a tremendous number of bills active at the end of a regular legislative session. In other words, it cannot be seriously disputed that the hundreds of bills which were not fully enacted before the end of session were not tabled.

Respondents seem to argue that Article III, § 20(a) only applies to bills placed on an official calendar. Under this interpretation, it is difficult to tell when *any* bill would be subject to Article III, § 20(a). Indeed, the Constitution gives scant guidance as to when any

particular bill must be placed on an official calendar.[2] Respondents' interpretation essentially reads Article III, § 20(a) out of the Constitution. Indeed, under Respondents' interpretation, the General Assembly could sidestep Article III, § 20(a) altogether by simply refusing to put bills on an official calendar.

Moreover, Respondents' discussion of when a vetoed bill is "pending" under Article III, § 32 supports the conclusion that HB 150 was tabled pursuant to Article III, § 20(a). Respondents acknowledge that as soon as the House voted to override the veto of HB 150, it was "pending" before the Senate. Respondents' Supplemental Brief at 5. In relevant part, "pending" is defined as:

> **Pending** – *adj*. – 1. remaining undecided; not determined; not established
> But the Senate, along with the General Assembly, adjourned without acting;
> 2. impending.

Webster's new Twentieth Century Dictionary Unabridged, 2nd Ed., 1325 (1968);

[2] Aside from Article III, § 20(a), the only other relevant constitutional provision regarding calendars is Article III, § Section 22. That provision reads: "After it has been referred to a committee, one-third of the elected members of the respective houses shall have power to relieve a committee of further consideration of a bill and place it on the calendar for consideration." This provision only applies to bills that a house has voted to relieve the committee of hearing. This class of bills undoubtedly represents a small portion of the bills which are properly tabled under Article III, § 20(a).

- *adj.*, - Remaining undecided; awaiting decision <a pending case>.

Black's Law Dictionary, Seventh Edition, 1154 (1999).

In this context, when a vetoed bill is "pending" under Article III, § 32 it is "on the calendar" for purposes of Article III, § 20(a). Because the Senate failed to override the veto of HB 150 during the regular legislative session, HB 150 was tabled pursuant to Article III, § 20(a) at the end of that session. Any purported use of "plenary power" by the Senate to consider HB 150 during the veto session explicitly violated the temporal requirements of the Constitution.

b. Bills Vetoed by the Governor are Subject to Tabling Under Article III, § 20(a)

Respondents also argue that the automatic tabling requirements of Article III, § 20(a) were never intended to apply to vetoed bills. Respondents' Supplemental Brief at 7. In support of this argument, they intimate the current version of Article III, § 20(a) was enacted before Article III, § 32 had been amended to permit a veto session.[3] This argument lacks merit for several reasons.

i. The Plain Language of Article III, § 20(a) Requires Tabling of Vetoed Bills

Respondents' argument ignores the plain language of Article III, § 20(a), which requires the tabling of "bills." Bills vetoed by the governor undoubtedly retain their status

[3] The current versions of both Article III, § 20(a) Article III, § 32 were enacted as part of the changes the people of Missouri made to their Constitution in 1988.

as "bills." Therefore, nothing in Article III, § 20(a) exempts bills vetoed by the governor from automatic tabling.[4]

ii. The Historical Development Supports Appellants

Respondents' historical analysis of Article III, § 20(a) and Article III, § 32 does not support their conclusion. The precursor to the modern Article III, § 32, Article IV, § 39 of the Constitution of 1875, did not provide for any veto session to consider bills returned by the governor. In 1960, Article III, § 20(a) was amended to permit the automatic tabling of bills. At that point, every bill vetoed by the governor was subject to tabling pursuant to the newly enacted Article III, § 20(a).

However, the amendments to Article III, § 32 in 1970 and 1972 provided some protection to vetoed bills from the tabling requirements of Article III, § 20(a). In 1970 and 1972, bills subject to a "late veto" in odd numbered years rolled over to the next regular legislative session (and thus were not tabled). "Late vetoed" bills in even numbered years likewise avoided tabling in a different manner—they were considered during the veto session. In 1988, Article III, § 32 was amended again (to its current version) to allow "late

[4] The weakness of Respondents' argument is further evidenced by Respondents' reliance upon Senate Rules rather than the Missouri Constitution. Again, Respondents' position only makes sense if portions of the Senate Rules and Missouri Constitution are read in isolation. This is contrary to the manner in which this Court interprets the Constitution, which must be read as a whole.

vetoes" during any year (even or odd) to be considered during the veto session (and thus were not tabled).

As such, the historical analysis shows that the amendments to Article III, § 32 in 1970 and 1972 were meant to create limited exceptions to the tabling requirements of Article III, § 20(a) (enacted in 1960) with regard to bills vetoed by the governor. Therefore, the historical record shows that vetoed bills are in fact subject to tabling pursuant to Article III, § 20(a).

iii. The Practice of the Legislature Supports Appellants

Respondents cite to the 1945 version of Article III, § 32 for the proposition that the General Assembly, under prior versions, considered bills returned by the governor "at its convenience – including at the next session of the same General Assembly." Respondents' Supplemental Brief at 7. As noted above, vetoed bills became subject to tabling under Article III, § 20(a) in 1960 and the veto session was first created in 1970. Since the enactment of these provisions, Respondents have not presented one instance of a veto session considering a bill not subject to a "late veto." The absence of an analogous action is a "legislative interpretation" that is "persuasive of what was intended" by Article III, § 20(a) and Article III, § 32. *Atterbury*, 300 S.W.2d at 817.

Moreover, if Respondents' interpretation that vetoed bills are not subject to tabling is correct, there would be no need for a veto session. Indeed, the purpose of a veto session is for the General Assembly to be given extra time to reconsider bills subject to a late veto from the governor. If vetoed bills are not subject to tabling, then the urgency normally associated with a late veto is removed.

iv. It was Unnecessary for the 1988 Amendment to Article III, § 32 to Reference Tabling

Respondents also argue that the people of Missouri could have referenced the tabling provision of Article III, § 20(a) when enacting the current version of Article III, § 32 in 1988. This makes no sense given that the amendments to Article III, § 32 in 1970, 1972, and 1988 were designed to create exceptions to the tabling requirement of Article III, § 20(a). Moreover, it must be presumed that the people of Missouri were aware of the other provisions of the Constitution when enacting the current Article III, § 32. Indeed, the Constitution's provisions are to be considered in context of the document as a whole and interpreted as the people of Missouri understood it to be at the time of adoption (not as the referring legislature intended it to be understood, if that could ever be known). *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). Because the tabling requirement was already present in the Constitution at the time of the 1988 amendment to Article III, § 32, there was no need for that language to specifically reference tabling or Article III, § 20(a).

c. Senate Rule 75 Cannot Trump the Missouri Constitution

Respondents cite Senate Rule 75 in support of their interpretation of Article III, § 20(a). Senate Rule 75, which is hardly a model of clear drafting, reads as follows:

> When a question is laid on the table, it may not thereafter be considered except by vote of two-thirds of the senators elected, except that all measures, other than bills which stand as reconsidered having been returned by the governor with his or her objections, not finally acted upon on adjournment

> of the senate in odd-numbered years shall lie on the table and the subject matter of such measures may be taken from the table only by reintroduction of a measure at a subsequent session of the senate.

The language of Senate Rule 75 seems to track the language of the 1970 and 1972 versions of Article III, § 32, which permitted bills to subject to a late veto in odd numbered years to be rolled over into the next regular legislative session. Therefore, it seems that Senate Rule 75 is a relic of a prior version of Article III, § 32. Senate Rule 75's reference to "odd-numbered years" supports this conclusion because the distinction between even and odd-numbered years was made irrelevant by the 1988 amendment to Article III, § 32. To the extent that Senate Rule 75 conflicts with Article III, § 20(a) and Article III, § 32, the Constitutional provisions prevail. See Article III, § 18 (authorizing each house to determine the rules of its own proceedings, except as herein provided) (emphasis added); Senate Rule 70 ("Bills vetoed by the governor and returned to the senate by the governor or by the house shall stand as reconsidered and such action shall be taken thereon as prescribed by the constitution and by the Joint Rules of the Senate and House of Representatives.") (emphasis added).

Respondents rely upon *Greenbriar Hills Country Club v. Dir. of Revenue* to support their conclusion that Senate Rule 75 was passed under constitutional authority. 935 S.W.2d 36, 38 (Mo. 1996). However, *Greenbriar* is inapplicable to this case because it dealt with two conflicting statutes, not a conflict between a Senate rule and the Missouri Constitution. Indeed, some Senate rules have been found unconstitutional. *See*, *State ex inf. Danforth v.*

Carson, 507 S.W.2d 405, 416 (1973) (finding Senate Rule 11 conflicted with Article IV, § 10 of the Missouri Constitution).

Moreover, Respondents' reliance on Senate Rules raises a serious separation of powers question. *State ex rel Jones v. Atterbury*, 300 S.W.2d 806, 817 (1957).[5] Respondents essentially argue the Senate's rules definitively and ultimately interpret the Constitution. Such a suggestion invades not only the power of this Court, but is a power grab from the people which the Constitution prohibits. *See*, Article I, Mo. Const.

d. The General Assembly Cannot Ignore Constitutional Provisions, Even if They are Deemed "Procedural"

Respondents argue that even if the tabling provisions of Article III, § 20(a) apply to vetoed bills, they are disfavored procedural limitations on the legislature. Respondents' Supplemental Brief at 6-7. However, Respondents have not cited any authority that allows the General Assembly to read procedural requirements out of the Constitution. Indeed, the plenary authority of the General Assembly cannot trump the Constitution itself, regardless of whether the provision at issue is deemed "substantive" or "procedural." *Bd. of Educ. of City of St. Louis v. City of St. Louis*, 879 S.W.2d 530, 533 (Mo. 1994) ("[T]he legislative power of Missouri's General Assembly, under Article III, Section 1 of the Missouri

[5] Respondents' reliance on the Rules of the United States Senate in footnote one of their Supplemental Reply is similarly misplaced. The two bodies are not analogous for these purposes. *Atterbury*, 300 S.W.2d at 811-12.

Constitution, is plenary, unless, of course, it is limited by some other provision of the constitution.").

The General Assembly's power to act is "limited to the time frame" the Constitution authorizes it to act. *Atterbury*, 300 S.W.2d at 811. As such, Appellants reject Respondents' conclusion that this is a "procedural" case. Instead, this is a case about whether the General Assembly has acted within the limited time frame afforded to it by the Constitution. What is at stake is whether the General Assembly must follow the legislative "rules of the road" the people of Missouri have established through their adopted Constitution. Article I, Mo. Const. This Court regularly protects the structural exercise of power in Missouri. In *State ex rel. Royal Ins., v. Director of Missouri Dept. of Ins.*, an administrative rule was declared unconstitutional despite the fact the General Assembly arguably could have lawfully adopted the rule through another procedure. 894 S.W.2d 159 (1995). *See also, Hammerschmidt v. Boone County*, 877 S.W.2d 98 (1994); *Missouri Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 355 (2013) (Judge Fischer concurring and arguing for abolition of the judicially created doctrine of severance on the basis that the "procedural mandates of the Missouri Constitution are designed to create an open and transparent legislature" and to "help prevent logrolling").

Respondents' suggestion that the Senate's action regarding HB 150 was merely a procedural anomaly ignores the intentional and unprecedented action taken by the Senate. If HB 150 is upheld, the Court is opening up entirely new opportunities for political and partisan gamesmanship and legislative delays which the Constitution was specifically adopted to prevent.

2a. Article III, section 32 provides that, once the first house has overridden a veto, "the presiding officer of that house shall ... send the bill with the objections of the governor to the other house, in which like proceedings shall be had in relation thereto." What does the phrase "like proceedings" refer to, and what language in this provision (or elsewhere in section 32) allows the second or receiving house to alter those "proceedings" or the effect of article III, section 20(a) by refusing to promptly read in the message from the first or originating house?

Respondents argue that the phrase "like proceedings" in Article III, § 32 does not require the proceedings to occur during the same legislative session. Respondents' Supplemental Brief at 12. In other words, Respondents argue that the reconsideration of HB 150 by the House during the regular legislative session and the reconsideration by the Senate in the veto session is "close enough" for purposes of Article III, § 32. This cannot be the case. If there is no same session requirement to "like proceedings," then the temporal element cannot stop with Respondents' example. Under the logical conclusion to Respondents' interpretation, one house could revisit vetoed bills from any session of any General Assembly since Governor Nixon became "the governor" under Art. III, § 32 in 2009. As such, the phrase "like proceedings" is strained beyond meaning unless both houses act during the same session.

Here, the House entered the governor's objection into its journal and overrode the veto during the regular legislative session. Immediately thereafter, the question became pending in the Senate. Despite having ample time to do so, the Senate failed to enter the

objection into its journal until after constitutional adjournment[6] and failed to override the veto until the veto session. In other words, the Senate's override during the veto session occurred in an entirely different session from the House's override. Thus, the Senate's override was not a "like proceeding" and HB 150 was enacted unconstitutionally.

3. What action, if any, did the House or Senate have to take to remove HB150 from the table and place it before the Senate so as to enable the Senate to reconsider the bill in the September veto session?

In support of their argument that Article III, § 20(a) does not require the tabling of vetoed bills, Respondents cite the language in Article III, § 32 which states that bills returned by the governor with objections "stand as reconsidered." Respondents' Supplemental Brief at 13. This language does not support Respondents' position. Indeed, it is entirely possible that a vetoed bill "stand as reconsidered" but also be tabled if it is not finally acted upon within the timeframe established by Article III, § 20(a). Only a "late" vetoed bill is saved from tabling under Article III, § 32, which constitutionally is then specifically and automatically eligible to be considered during the veto session, a session only in existence because of those "late" vetoed bills. Because HB 150 was not subject to

[6] *Compare* the Senate Journal of May 15, 2015 *with* the Senate Journal of May 27, 2015:
senate.mo.gov/15info/Journals/RDay7105151691-1695.pdf#toolbar=1
senate.mo.gov/15info/Journals/RDay7205271696-1739.pdf#toolbar=1

a "late" veto, it was tabled pursuant to Article III, § 20(a).[7] The General Assembly's options were to call a special session to consider HB 150's substance as a new bill or to reconvene in the next even numbered year with a substantively identical bill.

[7] Respondents contest as unfounded Appellants' assertion that it is impossible to revive a bill under Senate Rule 75 or House Rule 80 after the regular session has ended. Respondents' Supplemental Brief at 14. The authority behind Appellants' proposition is Article III, § 20(a). Indeed, it makes no sense how the Senate Rules could allow the Senate to un-table a bill that has been tabled pursuant to the Constitution. Nevertheless, this is a moot point. It is undisputed that the Senate never voted to remove HB 150 from the table under Senate Rule 75.

CONCLUSION

The Missouri Senate's override of the veto of HB 150 was untimely. As such, for the reasons described herein and in Appellants' original brief, 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 4,042 words and 383 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 March 24, 2016, 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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