SC95369

IN THE SUPREME COURT OF MISSOURI

TIMOTHY PESTKA, et al.,

Appellants,

vs.

STATE OF MISSOURI, et al.,

Respondents.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Judge

RESPONDENTS' SUPPLEMENTAL BRIEF

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****Request for Oral Argument****

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Pursuant to the Court's Order of February 1, 2016, Respondents provide the following supplemental briefing as to the questions posed by the Court.

In answering the Court's questions, it bears repeating that the General Assembly has "plenary power;" which is to say, that it has power "to make, amend and repeal laws for Missouri and to have the necessary power to accomplish its law-making responsibility." *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 230 (Mo. 1997). In short, the General Assembly "has the power to do whatever is necessary to perform its functions except as expressly restrained by the Constitution." *Liberty Oil Co. v. Dir. of Revenue*, 813 S.W.2d 296, 297 (Mo. 1991). And where a constitutional limitation is in place, it "must be strictly construed in favor of" the plenary power of the General Assembly. *Bd. of Educ. of City of St. Louis v. City of St. Louis*, 879 S.W.2d 530, 533 (Mo. 1994).

Plaintiffs' arguments (which were not raised below), fundamentally misunderstand this plenary power, to say nothing of the constitutional provisions and interpretation that must be applied. "Absent a prohibition," which is both express and clear, the General Assembly is free to take legislative action consistent with its "plenary power." *Fust v. Attorney Gen. for the State of Mo.*, 947 S.W.2d 424, 430 (Mo. 1997).

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

No. A veto message is not a "bill." Article III, § 31 of the Missouri Constitution sets forth the governor's duties with respect to a bill passed by the General Assembly, and the plain language used in that provision (as well as other provisions of the Missouri Constitution), is both instructive and dispositive on this point. Furthermore, a bill returned by the governor is unique in its character, having already passed both houses of the General Assembly.

a. A veto message "accompanies" a returned bill, but is not a "bill."

The governor must be presented "[e]very bill which shall have passed the house of representatives and the senate." Art. III, § 30. The governor shall then "return such bill to the house in which it originated endorsed with his approval or *accompanied* by his objections." Art. III, § 30 (emphasis added). Similarly, if the General Assembly has adjourned or is in recess, the governor shall return "any bill . . . *with* his approval or *reasons* for disapproval." Art. III, § 30 (emphasis added). Thus, the Missouri Constitution distinguishes between the "bill" and the governor's veto message, never calling the veto message a "bill." *See also* Art. III, § 32 (repeatedly noting the return of bills "*with* his objections").

To be sure, the governor's veto message is an important official communication between the governor and the General Assembly. Indeed, the Missouri Constitution requires that "[t]he objections of the governor shall be entered upon the journal." Art. III, § 32. Similarly, when the General Assembly presents a bill to the governor "the secretary, or the chief clerk, of the house in which the bill originated shall present the bill in person to the governor on the same day on which it was signed and enter the fact upon the journal." Art. III, § 30.

The journal, of course, is an official record of the actions taken by the General Assembly, as well as official communications with the governor. *See* Art. III, § 26 ("Each house shall publish a journal of its proceedings."); Art. III, § 16 (providing that the "journal of the senate or house" show the presence of legislators); Art. III, §§ 30 & 32 (requiring the recording of official communications in the journal); Art. XII, § 2(a) (recording of votes in the journal); Art. XII, § 3b (same). But the journal does not control or direct the business of the General Assembly.

b. A bill returned by the governor with a veto message is unique in its character having already passed both houses of the General Assembly.

Although the veto message from the governor is not a "bill," it does accompany a bill. And it is worth understanding the unique character of that bill for purposes of this case. A typical bill in Missouri goes through several stages – introduction, multiple readings, committee hearings, potential substitutes and amendments, and ultimately perfection resulting in a truly agreed and finally passed bill. Once presented to the governor the bill is approved to become a law or becomes a law without the governor's signature, or it is returned to the General Assembly with the governor's objections.

But a bill returned by the governor does not go through the ordinary process of a bill, nor is it subject to readings, hearings, or amendments. Instead, as soon as it is returned, it "stand[s] as reconsidered." Art. III, § 32. The General Assembly, therefore, is not required to take any further action to bring the bill before it. The General Assembly need only vote yea or nay on the reconsidered bill. Indeed, the Missouri Constitution provides the very question to be used – "Shall the bill pass, the objections of the governor thereto notwithstanding?" – and characterizes the matter as already "pending." Art. III, § 32.

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 bill returned by the governor and accompanied by objections (*i.e.* the veto message) is not required to be on the calendar. In fact, the only requirement is that the "objections of the governor [not the bill] shall be entered upon the journal." Art. III, § 32. In contrast, the Missouri Constitution expressly provides that the bill shall "stand as reconsidered" and the matter is considered "pending." Therefore, the bill is automatically before the house to which it was returned and ready for a vote. *See* Art. III, § 32. That same process or status (what the constitution calls "like proceedings") is true of the second house of the General Assembly to consider the vetoed bill once the first house overrides the veto. *See* Senate Rule 70 (noting that "Bills vetoed by the governor and returned to the senate by the governor or by the house shall stand as reconsidered").

Article III, § 32 does not use the term "calendar," nor require that a bill returned by the governor be placed on a "calendar." And for good reason. Bills are placed on calendars as a result of routine legislative action during the initial passage of a bill, and the provision for automatic tabling of bills on the

calendar in Article III, § 20(a) was never intended to apply to bills returned by the governor.

The Missouri House and Senate can certainly put bills on their "calendars" for consideration during the initial passage of a bill, including the formal calendar, the informal calendar, and the consent calendar. *See* Senate Rules 6, 13, 45, 50, 53, and 65. But 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. Indeed, Senate Rule 70 specifically addresses bills returned by the governor and makes no mention of placing them on the "calendar." Instead, Senate Rule 70 – like the Missouri Constitution – provides that "[b]ills 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." Senate Rule 70 (citing Art. III, § 32) (emphasis added).

Even if the "calendar" and automatic tabling provisions in Article III, § 20(a) were limitations on the General Assembly in this case, they would be procedural limitations. And this Court does not favor attacks against legislative action based on constitutionally imposed procedural limitations. *See Hammerschmidt v. Boone Cty.*, 877 S.W.2d 98, 102 (Mo. 1994). "Therefore, this Court interprets procedural limitations liberally and will uphold the constitutionality of a statute against such an attack unless the act

clearly and undoubtedly violates the constitutional limitation." *Id.* Where there is doubt "as to the validity of the challenged legislative action," this Court resolves doubts "in favor of, and against nullifying, the action taken, if it is possible to do so by any reasonable construction of that action, or by any reasonable construction of the Constitution." *Bohrer v. Toberman*, 227 S.W.2d 719, 723-24 (Mo. banc 1950). Here, the law is already in force and unquestionably received the required votes to override the veto.

Furthermore, the provisions for automatic tabling of bills on the "calendar" in Article III, § 20(a) were never intended to apply to bills returned by the governor. Article III, § 20(a) was originally adopted in 1952 with the "calendar" and automatic tabling language added in 1960. At the time the language was added in 1960 and thereafter, Article III, § 32 provided that the General Assembly could "proceed at its convenience to consider" bills returned by the governor with objections. Mo. Const. Art. III, § 32 (1945 Constitution). This remained the state of the law until the 1970s. Thus, despite the "calendar" and automatic tabling provisions of Article III, § 20(a), the General Assembly could (and did) consider bills returned by the governor at its convenience – including at the next session of the same General Assembly.

Then, in the 1970s, Article III, § 32 was amended to expressly recognize that bills returned by the governor in odd-numbered years could be

reconsidered at the beginning of the next regular session (without the need to take off the table or any similar action) even if they had been returned before the end of the regular session. *See* Respondents' Appendix, A21. Had the people of Missouri or the General Assembly intended or even contemplated that the "calendar" and automatic tabling provisions of Article III, § 20(a) would apply to bills returned by the governor, they could have easily referenced those provisions in the new Article III, § 32. But they did not.

What is more, Senate Rule 75 makes the point absolutely clear – "all measures" that are "not finally acted upon on adjournment of the senate in odd-numbered years shall lie on the table" *except* "bills which stand as reconsidered having been returned by the governor with his or her objections." Senate Rule 75. This rule is specific, on point, and was passed under constitutional authority. *See Greenbriar Hills Country Club v. Dir. of Revenue*, 935 S.W.2d 36, 38 (Mo. 1996) (providing that "the more specific controls over the more general"); Art. III, § 18. As such, it is controlling because the Senate is authorized to determine the "rules of its own proceedings." Art. III, § 18.

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?

The starting point for the construction of any statutory or constitutional provision is the plain language of the provision. "Words used in constitutional provisions are interpreted to give effect to their plain, ordinary, and natural meaning." *Wright-Jones v. Nasheed*, 368 S.W.3d 157, 159 (Mo. 2012) (citing *Buechner v. Bond,* 650 S.W.2d 611, 613 (Mo. 1983))

What constitutes "like proceedings" can be determined from the plain language of the Missouri Constitution and does not require that the veto message of the governor be promptly read in or even that the veto message be "read in" at all. There is no reference to "prompt" or the timing that the veto message should be "read in." In fact, the Missouri Constitution merely requires that "[t]he objections of the governor shall be entered upon the

journal." Art. III, § 32. Furthermore, Article III, § 32 contemplates that legislative action on returned bills may not be prompt in any event. The Missouri Constitution, for example, provides that bills returned by the governor in May could be voted on in September during the automatic veto session – some four months later. *See* Art. III, § 32.

The following are the actual "proceedings" identified in the Missouri Constitution that inform what would constitute "like proceedings" in this case:

- Every bill "shall stand as reconsidered";
- "The objections of the governor shall be entered upon the journal";
- "[T]he house shall proceed to consider the question pending, which shall be in this form: 'Shall the bill pass, the objections of the governor thereto notwithstanding?' ";
- The vote "shall be taken by yeas and nays'";
- "[I]f two-thirds of the elected members of the house vote in the affirmative the presiding officer of that house shall certify that fact on the roll"; and

- "[S]end the bill with the objections of the governor to the other house".

Art. III, § 32. These were all done in this case, and there are no more "proceedings" suggested in the Missouri Constitution.

Even if the meaning of "like proceedings" could not be ascertained from the plain language of the Missouri Constitution, we look to definitions. In the absence of a constitutional or statutory definition, we turn to the dictionary for assistance. *See State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. 2007) (providing that "the plain and ordinary meaning of a term may be derived from a dictionary"); *Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. 1999).

"Like" is defined in the dictionary, in relevant part, as:

> ³**Like** – *adj.* – **1a:** the same or nearly the same (as in nature, appearance, or quantity <members of the cat family have ~ dispositions> <fabrics of ~ consistency> **:** equal or nearly equal . . . **:** corresponding **:** identical, indistinguishable **:** similar <hospitals and ~ institutions for the sick or disabled> . . . **b:** of a form, kind, appearance, or effect resembling or suggesting . . . **c:** faithful to a subject or original . . . .

Webster's Third New International Dictionary 1310 (1993).

"Proceedings," in turn, is defined in the dictionary, in relevant part, as:

> **Proceeding** – **2a:** a particular way of doing or accomplishing something . . . **b:** a particular action or course of action . . . **c:** a particular step or series of steps adopted for doing or accomplishing something . . . **d:** **proceedings** *pl* **:** doings, goings-on . . . .

Webster's Third New International Dictionary 1807 (1993).

With these dictionary definitions, it is clear that the Senate was required to follow the same or nearly the same – not identical – way of doing or accomplishing the veto override. The Senate did just that. Once the bill was sent over from the House it stood as reconsidered in the Senate. From there the question was presented exactly as described by the Missouri Constitution, and the required number and manner of voting was obtained. That is the very definition of "like proceedings." Nothing in the Missouri Constitution describes in what session the houses of the General Assembly must consider returned bills. And it must be remembered that the automatic veto session contemplated in Article III, § 32 was not intended to be a restriction on General Assembly but to make it easier to consider bills returned by the governor.

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?

None. As set forth in Senate Rule 75 – a constitutionally authorized rule – bills returned by the governor are not subject to tabling at the end of a session and do not require the two-thirds vote to take the matter off the table. *See also* Senate Rule 70. Furthermore, in accordance with Article III, § 32, bills returned by the governor with objections "stand as reconsidered." Thus, in order to vote on the bill and override the governor's veto in this case the General Assembly needed to do nothing more than enter the objections of the governor on the journal – which it did – and "proceed to consider the question pending, which shall be in this form: 'Shall the bill pass, the objections of the governor thereto notwithstanding?' – which it also did.

The provisions of Article III, § 20(a), and in particular the "calendar" and automatic tabling of bills, are not a limit on the plenary power of the General Assembly in this case. The provisions do not apply to bills returned by the governor, and even if they did apply, a "constitutional provision limiting or restricting legislative power is strictly construed so as to favor the power of the legislature and not to extend the limitation beyond its terms." *Brown v. Morris*, 290 S.W.2d 160, 166 (Mo. banc 1956).

Throughout its supplemental brief, the Plaintiffs assert all manner of unfounded restriction on the General Assembly. *See, e.g.,* Appellants' Supplemental Brief, pp. 6-7 (suggesting, without citation, that "neither the House nor the Senate could have taken any steps to remove HB 150 from the table so that it could be considered in the September veto session"). For example, they suggest that "it is impossible to revive a bill under Senate Rule 75 or House Rule 80 after the regular session has ended." Appellants' Supplemental Brief, p. 7. Plaintiffs, of course, provide no citation or authority for this supposed limitation on the General Assembly. And the argument ignores the plenary power of the General Assembly as well the plain language of Senate Rule 75, which states specifically that "bills which stand as reconsidered having been returned by the governor with his or her objections" are *not* tabled at the end of a regular session.[1/]

[1/] The argument also ignores the plain language of House Rule 80, which provides that a question once tabled *can* be removed from the table by "a vote of two-thirds of the members present." *See also Jefferson's Manual*, Sec. XXXIII, 4 ("When the House has something else which claims its present attention, but would be willing to reserve in their power to take up a proposition whenever it shall suit them, they order it to lie on their

The language of Article III, § 20(a) does not clearly express or imply that a bill returned by the governor is tabled. Because of the plenary power of the General Assembly, any such constitutional limitation must be express. *Bohrer v. Toberman*, 227 S.W.2d at 723 (quoting *Cushing,* Law and Practice of Legislative Assemblies, p. 221). Otherwise, many, if not most, bills that result in an automatic veto session would be automatically tabled even though Article III, § 32 contemplates that they stand as reconsidered and require nothing further to be voted upon by the General Assembly.

CONCLUSION

For the foregoing reasons, as well as those set forth in Respondent's opening brief, the trial court's judgment should be affirmed.

****As this supplemental briefing raises arguments and claims never advanced by Plaintiffs, Respondents request additional oral argument to further answer the questions of the Court.****

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table. It may then be called for at any time.") senate.gov/artandhistory/history/resources/pdf/SDoc103-8.pdf.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2016, a true and correct copy of Respondents' Supplemental Brief was served via Missouri CaseNet e-filing system to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 3,779 words.

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