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IN THE SUPREME COURT OF MISSOURI

MISSOURI COALITION FOR THE ENVIRONMENT	)	
	)	
and CAROLYN JOHNSON,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. SC97591
	)	
STATE OF MISSOURI et al.,	)	
	)	
Respondents.	)	

On Appeal from the Circuit Court of Cole County
Nineteenth Judicial Circuit, Division IV
The Hon. Patricia Joyce
No. 17AC-CC00062

APPELLANTS' REPLY BRIEF

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Electronically Filed - SUPREME COURT OF MISSOURI - April 16, 2019 - 04:04 PM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Missouri Constitution

Electronically Filed - SUPREME COURT OF MISSOURI - April 16, 2019 - 04:04 PM

Electronically Filed - SUPREME COURT OF MISSOURI - April 16, 2019 - 04:04 PM

ARGUMENT

I

The trial court erred in dismissing the case for want of standing because the Plaintiffs had standing under Section 516.500, RSMo, in that they filed their suit based on procedural defects in the enactment of HB 1713 before the adjournment of the next legislative session following the effective date of the bill, and no further "aggrieved" status was required to confer standing within that time.

Section 516.500 adopts this recommendation by the Court: "Where no individual substantive rights are at stake, a claim that the bill is defective in form should be raised at the first opportunity." *Hammerschmidt v. Boone County,* 877 S.W.2d 98, 105 (Mo. banc 1994). If no "individual substantive rights" are involved, then a person is not "aggrieved" as that word is usually defined. "An aggrieved party is one who suffers from an infringement or denial of legal rights," as by a judgment that operates "directly and prejudicially on the party's *personal or property rights* or interests." *Schroff v. Smart,* 120 S.W.3d 751, 754 (Mo.App. W.D. 2003)(emphasis added).[1] A citizen's interest in a legislature that obeys the constitution is not such a personal interest, but it does support standing in cases based on exactly that interest, as long as the citizen files by the end of the next legislative session.

[1] Aggrieved is not the standard for this Court's exercise of its Article V, § 3 jurisdiction to review the validity of statutes. The Court has held that a party may raise a constitutional issue even if it took the negative side of the issue in the court below. *Dye v. School District No. 32,* 355 Mo. 231, 195 S.W.2d 874, 875–6 (Mo. banc 1946).

Electronically Filed - SUPREME COURT OF MISSOURI - April 16, 2019 - 04:04 PM

Respondent rejoins that "The Coalition's position would allow anyone to challenge any legislation" (Resp. Br. p. 14). It argues that "'the generalized interest of all citizens in constitutional governance'" is not an injury that confers standing," citing U.S. Supreme Court cases decided under the federal constitution (Br. at 19). The State asserts that MCE must establish a "threatened or actual injury from the Commission's composition" (*id.*). Respondent misunderstands the nature of the interest at stake.

It is true, as Respondent points out, that not every legal wrong has a recourse, and that the courts seek to narrow the classes of citizens with standing to challenge public acts (Resp. Br. at 16). It does not follow that entire classes of legal wrongs should be without remedy or that narrowing the field of challengers is an end in itself.

Standing depends on the constitutional interest to be protected.

Respondent cites *Harrison v. Monroe County,* 716 S.W.2d 263 (Mo. banc 1986)(Resp. Br. 26). That case traces standing to the justiciability requirements of the "case or controversy" clause of the U.S. Constitution, Article III, § 2, and Article V, § 14(a) of the Missouri Constitution, which gives the circuit courts "original jurisdiction over all cases and matters, civil and criminal." 716 S.W.2d at 265–6.

Neither constitution speaks directly to the question of who may be a plaintiff. Standing is a judicial doctrine, though it is often defined by statute. It is "a matter for ad hoc determination by the courts under the given circumstances," *i.e.* a case by case determination. *Schweig v. City of St. Louis,* 569 S.W.2d 215, 220 (Mo.App. E.D. 1978).

The Court in *Harrison* referred to the federal doctrine that a complainant's position must arguably be "within the zone of interests to be protected or regulated by the

statute or constitutional provision in question." 716 S.W.2d at 266. Plaintiff Harrison had taxpayer standing, but the Court went beyond that:

> Furthermore, it is self-evident that appellant, as the party initiating this suit, is among the intended beneficiaries of the guarantee of art. I, § 14 that justice be administered "without sale, denial or delay." He is therefore a member of the class sought to be protected by the constitutional provisions in question.

716 S.W.2d at 267.

The rights conferred on both legislators and the public by Article III, §§ 21 and 23, are inherently procedural; as the *Hammerschmidt* concurrence says, a "defect in the form of a bill does not impact on an individual's substantive rights." 877 S.W. 2d at 105. Nevertheless, these rights define a zone of interest to be protected. In using time limits to narrow the class of plaintiffs, the *Hammerschmidt* court found a way to protect procedural rights in keeping with the constitutional provisions in question.

Taxpayer standing is only incidentally relevant to legislative procedure.

Respondent belabors taxpayer standing (Br. 14–6). Taxpayer standing applies to many subjects beyond legislative procedure. On the other hand, it is only incidentally applicable to one-subject, clear title and original purpose challenges to legislative enactments. There are many laws that touch on private conduct without occasioning expenditures of public money, and many more that cause expenditures for "general operating expenses" that are not cognizable for taxpayer standing because they would be incurred regardless of the challenged enactment. *Columbia Sussex Corp. v. Missouri Gaming Commission,* 197 S.W.3d 137, 145 (Mo.App. W.D. 2006).

Electronically Filed - SUPREME COURT OF MISSOURI - April 16, 2019 - 04:04 PM

Electronically Filed - SUPREME COURT OF MISSOURI - April 16, 2019 - 04:04 PM

Taxpayer status is extremely broad. Practically every Missouri citizen pays some kind of state tax, and a taxpayer plaintiff need not have "a direct, pecuniary injury different from that to other taxpayers." *Missourians for Separation of Church and State v. Robertson,* 592 S.W.2d 825, 840 (Mo.App. W.D. 1979). This kind of standing is not narrowed by the status of the person but by the nature of the challenged action, which must be one involving the direct expenditure of state tax revenue. Section 516.500 uses a different method of narrowing the class, time limits.

Respondent's contention that § 516.500 is strictly a statute of limitations and says nothing about standing is plainly wrong (Resp. Br. 23). The statute does, after all, use the word "aggrieved" for the standing test that comes into play after the first legislative session following enactment.

Respondent's ripeness argument mistakes the interest at stake.

Respondent repeatedly argues that the Coalition for the Environment and Ms. Johnson have no valid interest in the makeup of the Clean Water Commission (Resp. Br. 16–18) and stretches this into an argument that the case is not ripe (Br. at 28–33).

A constitutional challenge of this nature depends entirely on facts that occurred before passage of the bill. The facts being fully developed, the case may be adjudicated without further delay. *Missouri Health Care Ass'n v. Attorney General,* 953 S.W.2d 617, 621 (Mo. banc 1997). Declaratory relief need not await enforcement of the statute; it may be assumed that the state will enforce its laws. *Id.; Planned Parenthood v. Nixon,* 220 S.W.3d 732, 738–9 (Mo. banc 2007). The case was ripe when the legislature overrode the governor's veto and the law went into effect.

Electronically Filed - SUPREME COURT OF MISSOURI - April 16, 2019 - 04:04 PM

Respondent asserts that the composition of the Commission has not changed (Br. at 30–31). This is irrelevant, but Respondent has improperly brought in matter outside the record in the form of a state web page (Br. at 31). In fact, the composition of the Commission has changed; this is partly documented in one of the cases cited by the state, *In re Trenton Farms v. Hickory Neighbors United,* No. WD 81385, (slip op. pp. 20–23), 2019 WL 73232 (Mo. App. W.D. Jan. 2, 2019). The CWC membership list cited by Respondent does not necessarily prove anything more than that the web site has not been updated to change the classification of members to the one enacted by HB 1713.

Not "anyone" can bring a *Hammerschmidt* case.

Respondent cries that "anyone," even someone not a citizen of Missouri, could bring a case under this theory (Resp. Br. at 14, 26). Of course someone who does not live under our Constitution could not, for that reason alone, claim an interest in the enforcement of our legislative procedure. Beyond that, Judge Holstein's entire purpose in writing the *Hammerschmidt* concurrence was to prevent "expensive and, I believe, unnecessary litigation;" it is strange to argue that he did the opposite.

MCE and Ms. Johnson also claim an interest in clean water and in the proceedings of the Commission. This may not be sufficient to confer standing in itself, but it provides an extra measure of protection from excessive litigation. It is safe to say that few Missourians take an active interest in the Clean Water Commission. The fact that these plaintiffs do should count in their favor.[2]

[2] This Court has said in dicta that the Coalition lacks standing for "non-implementation of its preferred policy choices." *MCE v. JCAR,* 948 S.W.2d 125, 132 (Mo. banc 1997), cited

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II

The trial court erred in dismissing Count I because the amendment to § 644.021 in HB 1713 concerning the interests represented by members of the Clean Water Commission violated Article III, § 23 of the Constitution of Missouri by stepping outside the single subject defined by the title "regulation of water systems," in that the Commission's jurisdiction is at most tangentially germane to water systems but extends to the regulation of water contamination and the naturally occurring waters of the state in ways that go far beyond the subject of constructed water systems.

A title may be bad if it is either underinclusive so that some provisions fall outside the scope of the bill, or overinclusive, *i.e.* so broad and amorphous that it fails to give notice of the bill's content. *Home Builders Ass'n v. State,* 75 S.W.3d 267, 269–70 (Mo. 2002). Respondent treats the challenge to HB 1713 as overinclusiveness and argues for a "broad umbrella category" (Br. 34, 39). But Appellants' argument is expressly one of underinclusiveness. Petition, Count I, paragraph 27 (L.F. D2, p. 7).

Perhaps if the legislature had changed the original title to "water" or "regulation of water" the bill would be valid, but it's hard to see how a Commission that grants permits to concentrated animal feeding operations (CAFOs) (see *In re Trenton Farms,* No. WD 81385, slip op. pp. 2–3), can be contained within the title "regulation of water systems." The field surveyed by the CWC is much broader.

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in Resp. Br., pp. 19, 21–2. By its nature a not-for-profit corporation has no pecuniary interest, and for the same reason a small non-profit is usually restrained from litigation by lack of resources. Opening the door to non-profits should not greatly expand standing.

Electronically Filed - SUPREME COURT OF MISSOURI - April 16, 2019 - 04:04 PM

The fact that the other eight sections of HB 1713 can arguably be seen as relating to water systems (Resp. Br. 35–7) says absolutely nothing about the propriety of making it the vehicle for amending § 644.021. The fact that Respondent can find another kind of statutorily defined "water system" that has nothing to do with the CWC (§ 444.825(13), RSMo; Resp. Br. 39, fn. 11) does not help their case. Using non-statutory terms in titles on a theory of "plain meaning" is at best risky when the legislature has, contrary to Respondent's argument (Br. 38), consistently **not** used "system" to refer to natural water bodies. These are "waters of the state," *e.g.* at § 644.011, RSMo. They are within the jurisdiction of the Commission but beyond the scope of the subject of HB 1713.

III

The trial court erred in dismissing Count II because the amendment to § 644.021 in HB 1713 concerning the interests represented by members of the Clean Water Commission violated Article III, § 21 of the Constitution of Missouri by departing from the original purpose of the bill, in that the purpose of regulating water treatment systems or water systems is too narrow to accommodate the much broader regulatory and supervisory role of the Clean Water Commission over water pollution and naturally occurring waters of the state.

Respondent says, "Consistent with the final bill's subject, the Coalition argues that H.B. 1713's original purpose was the "regulation of water systems. App. Br. 25." (Resp. Br. 42). For the sake of clarity, the Coalition and Ms. Johnson disagree. Their point relied on assumed for the sake of argument that both the original and final titles were too

narrow to encompass § 644.021. They then said, on page 26 of their opening brief, "We will assume that the expanded bill with the title 'water systems' adhered to the original purpose **except for** § 644.021" (emphasis added).

Under the Argument on the previous point, Appellants have already replied to the argument about the scope of the term "regulation of water systems" (Resp. Br. 42–3).

CONCLUSION

WHEREFORE, Missouri Coalition for the Environment and Ms. Johnson pray the Court to reverse the decision of the trial court and remand the case for entry of judgment in their favor.

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Electronically Filed - SUPREME COURT OF MISSOURI - April 16, 2019 - 04:04 PM

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CERTIFICATION

This brief complies with the limitations of Rule 84.06(b), containing 5,852 words.

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Certificate of Service

Counsel for Appellants has made service of this brief on all other counsel of record by way of electronic filing on this 16th day of April, 2019.

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