IN THE SUPREME COURT OF MISSOURI

SC92455

MISSOURI ROUNTABLE FOR LIFE, INC., FREDERIC N. SAUER, MISSOURI RIGHT TO LIFE, PAM FICHTER, and LAWYERS FOR LIFE, INC.,

Respondents,

v.

STATE OF MISSOURI, et al.,

Appellants.

From the Circuit Court of Cole County,
The Honorable Daniel R. Green.

BRIEF OF APPELLANTS

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STATEMENT OF FACTS

This appeal addresses the validity of S.B. 7 (Legal File ("LF"), pp. 201-226; Appendix ("App."), pp. 12-37), enacted by the First Extraordinary Session of the 96th General Assembly in 2011. S.B. 7 is titled a bill to "repeal sections 196.1109, 196.1115, 348.251, 348.253, 348.256, 348.261, 348.262, 348.263, 348.264, 348.271, and 348.300, RSMo, and to enact in lieu thereof fourteen new sections relating to science and innovation, with a contingent effective date." It has two sections: Section A contains all the substantive provisions; Section B addresses only the effective date.

Section B cross-references "senate bill no. 8." But the General Assembly did not enact S.B. 8, a bill "relating to taxation." LF, pp. 841-955; App., p. 3.

S.B. 7 was signed by the governor on October 21, 2011. LF, p. 11; App., p. 2. The extraordinary session ended on October 27, 2011. LF, p. 11; App., p. 2. Pursuant to Art. III, § 29, Mo. Const., S.B.7 would normally have become effective on January 25, 2012.

When various agencies began to implement S.B. 7, Plaintiffs sued to stop that implementation and to reverse the steps already taken. LF, p. 5, App., p. 3. The Circuit Court held that Section B was unconstitutional, but that because Section B could not be severed from Section A, the entire act was invalid. LF pp. 1087-1097; App., pp. 1-11. The court enjoined further

implementation of S.B. 7 and ordered that actions already taken be reversed. LF, p. 1097; App., p. 11.

POINT RELIED ON

The circuit court erred in refusing to sever Section B, instead entering a judgment striking S.B. 7 in its entirety, because severance is appropriate in that Section A of S.B. 7 is complete and fully capable of being executed without Section B, which is unconstitutional.

Legends Bank v. State, 361 S.W.3d 383 (Mo. banc 2012)

§ 1.140

ARGUMENT

The circuit court erred in refusing to sever Section B, instead entering a judgment striking S.B. 7 in its entirety, because severance is appropriate in that Section A of S.B. 7 is complete and fully capable of being executed without Section B, which is unconstitutional.

This case was brought as a challenge to the implementation of S.B. 7, based on a claim that because of the unusual language in Section B with regard to the effective date, the act never became effective despite the constitutional mandate that a bill becomes law if presented to and signed by the governor. The Defendants argued that Section B was unconstitutional – but that because it could be severed, Section A became effective. The Defendants appeal the circuit court's refusal to sever Section B. Before addressing severance, however, we address the unconstitutionality of Section B, which makes severance necessary.

A. Section B is unconstitutional because it infringes on the governor's constitutional authority to make a bill law by his signature, and because it added a second subject to S.B. 7.

S.B. 7 has two sections. Section A contains all the substantive provisions. Section B does just one thing: it purports to change the effective date of Section A.

> Section B. Section A of this act relating to science and innovation shall not become effective except upon the passage and approval by signature of the governor only of senate bill no. 8 relating to taxation and enacted during the first extraordinary session of first regular session of the ninety-sixth general assembly.

Section B looks much like an "emergency clause" that modifies the effective date of a statute. *Cf. State v. Downing*, 359 S.W.3d 69, 72 (Mo. App. W.D. 2011), and Section B of H.B. 1715 (2008) quoted therein.

"Emergency clauses" have a constitutional basis; the Constitution gives specific authorization and sets out procedural requirements for moving up an effective date:

> No law passed by the general assembly, except an appropriation act, shall take effect until ninety days

> after the adjournment of the session in either odd-numbered or even-numbered years at which it was enacted. However, in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly by a two-thirds vote of the members elected to each house, taken by yeas and nays may otherwise direct; and further except that, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of the recess.

Art. III, § 29. Section B did not, of course, cite an emergency. And it was not endorsed "by a two-thirds vote of the members elected to each house, taken by yeas and nays." Yet it purported, like an emergency clause, to change the constitutionally-mandated, 90-day standard.

Section B purported to make the effective date of the statute contingent on enactment of S.B. 8, introduced but not passed in the First Extraordinary Session of the 96th General Assembly in 2011. S.B. 8 was not, like S.B. 7, a bill "relating to science and innovation." Its title demonstrated that it was a tax bill: "To repeal sections 32.115, [etc.], RSMo, and to enact in lieu thereof

forty-two new sections relating to taxation, with an emergency clause." LF, p. 1089; App., p. 3.

The Plaintiffs brought to the circuit court, then, a question of first impression: Can the General Assembly present a bill to the Governor for signature, but change (or here, eliminate entirely) the impact of that signature? The circuit court correctly held that the General Assembly cannot add to one bill a provision that makes the effective date of that bill contingent on the passage of another bill, one still pending before the General Assembly. Doing so would both deprive the Governor of the full effect of his veto authority under Art. III, § 31, and allow the General Assembly to enact legislation in effect containing more than one subject, contrary to Art. III, § 23.

Veto authority

The Missouri Constitution gives the Governor the authority, through his veto power under Art. III, § 31, to decide whether a bill passed by the general assembly will become law:

> Every bill which shall have passed the house of representatives and the senate shall be presented to and considered by the governor, and, within fifteen days after presentment, he shall return such bill to the house in which it originated endorsed with his

> approval or accompanied by his objections. **If the bill be approved by the governor it shall become a law.**

(Emphasis added.) Section B of S.B. 7 purports to merely address when the bill would become law. But it does so in a way that retains for the General Assembly the authority to decide not just when but whether a bill "approved by the governor … shall become a law." If section B is valid, then the legislature has the ability to pass a bill, present that bill to the Governor for his signature, have him sign the bill, yet have the bill *not* "become a law." Section B thus purports to retain to the General Assembly the ability to decide *after* the Governor signs a bill whether that signature does what the constitution expressly declares.

The separation of powers provision of the Missouri Constitution, Art. II, § 1, divides the "powers of government [among] three distinct departments– the legislative, executive and judicial," and declares that "no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted." To allow the legislative branch to itself retain veto power over a bill, as Section B does, would violate that prohibition.

Here, if the General Assembly had chosen not to pass S.B. 7 and present it to the Governor for his signature, S.B. 7 would never become law. If section B is given effect, then the General Assembly was also allowed to *pass* S.B. 7, yet have precisely the same impact by failing to enact S.B. 8. That is, quite simply, a power that the Missouri Constitution does not give to the General Assembly. Under the Constitution, the effect of the Governor's signature on a bill, is final, not contingent.

Single subject

One method that the Missouri Constitution uses to preserve the full scope of the governor's veto authority is the "single subject" rule – which also serves purposes in the legislative process itself, policing that process by barring "Christmas tree" bills that allow "logrolling." *See Legends Bank,* 361 S.W.3d at 389. The "single subject" requirement is found in Art. III, § 23: "No bill shall contain more than one subject which shall be clearly expressed in its title…." To allow the approach taken in Section B would permit the General Assembly to incorporate by reference one subject into a bill dealing with another – that is, to create legislation that ties together two subjects.

This Court discussed the relationship between the "single subject" rule and the veto authority in *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1994), the Court's seminal "single subject" opinion. There, the

court observed that such procedural requirements are imposed, in part, to prevent the legislature from manipulating the Governor's choices:

> Because the governor may not employ a line item veto over legislation generally, the effect of the Constitution's single subject rule is to prevent the legislature from forcing the governor into a take-it-or-leave-it choice when a bill addresses one subject in an odious manner and another subject in a way the governor finds meritorious. Thus, by limiting the subjects a bill may address to one, the Constitution maintains appropriate checks by the governor over legislative action and effectively provides a line item analog for general legislation.

877 S.W.2d at 102. Making the effective date of one bill contingent on the passage of another eliminates "appropriate checks" – not just the one created by the veto provision, but the one created by the "single subject" requirement itself.

And that "single subject" problem is raised here. S.B. 7 and S.B. 8 deal with different subjects: S.B. 7 deals with science and innovation; S.B. 8 deals with taxation. To effectively incorporate the subject of S.B. 8 into S.B. 7 via Section B of S.B. 7 would violate the single-subject provision; S.B. 7 simply

does not have a scope broad enough to encompass the tax credit reform that was in S.B.8 – much less to encompass whatever other tax-related provisions might be added to S.B. 8 as it worked its way through the legislative process. The "single subject" provision cannot be evaded by putting multiple subjects in multiple bills, then tying them together as Section B attempts to do.

Prior contingent clause litigation.

We do not suggest that there is no constitutionally permissible way to make some portion of a new law contingent on subsequent events, including the passage of some prerequisite legislation in a future bill. Indeed, some contingent clauses in legislation have been upheld. But in prior cases, such as *Akin v. Dir. of Revenue*, 934 S.W.2d 295, 299 (Mo. banc 1996), and *State ex rel. Barrett v. Dallmeyer*, 245 S.W. 1066, 1068 (Mo. banc 1922), the contingencies at issue were different from the one at issue here. In neither *Akin* nor *State ex rel. Barrett* did the General Assembly place a bill on the Governor's desk for signature but retain for itself the option of deciding whether that signature would be effective. In neither case did the legislature have two pieces of legislation dealing with two different subjects and tie them together into a single package that the Governor had to veto or accept in its entirety.

In *State ex rel. Barrett,* the court was considering "two statutes [that were] in pari material and must be considered together": statutes that

provided, in turn, for "the abolition of one office and the transfer of powers and duties of the office being abolished to another" – statutes that were "inseparable." 245 S.W. at 1068. The provisions of S.B. 7 and S.B. 8 are certainly not "inseparable." Their connection is not one of substance but of legislative strategy–the very kind of strategy the "single subject" rule is there to prevent.

Akin may be closer to the situation faced here, for Section C of S.B. 380 made the effectiveness of a particular part of the bill contingent on a referendum, and Section D made the referendum contingent on a future event. The Court noted two rules from prior cases:

> The first is that the power of the General Assembly to make laws may not be delegated. … The second rule is that the legislature may enact laws to take effect on the happening of a future event, including a vote of the people.

934 S.W.2d at 299 (citations omitted). As to the first rule, the court distinguished between the power to make law and the authority or discretion to execute law:

> The true distinction is between a delegation of a power to make law, which involves a discretion as to what the general law will be, and conferring an

> authority or discretion as to how the law shall be executed.

Id. The Court held that although the General Assembly can impose contingent requirements on when or how a "law shall be executed," it cannot delegate "the power to make law" – in that circumstance, delegate to the people whether to make law, and to the judiciary whether to allow the people to make that choice. Where, as in *Akin*, the General Assembly delegates the "power to enact or repeal a general" law, that delegation "is void in the absence of constitutional authorization." *Id.* The Court thus declined to allow the General Assembly to use the referendum process to alter the constitutionally established means of enacting statutes.

Akin does not support the proposition that the legislature could modify the constitutionally-established enactment process by keeping for itself the power, after presenting a bill to the governor, to effectively invalidate the resulting statute by declining to pass another. Again, the Constitution bars the legislature from exercising the power granted to the governor, and the veto power belongs solely to him. The legislature can direct the governor in how to execute a law, even by making aspects of his authority or particular requirements contingent on particular circumstances or events. But *Akin* cannot be reconciled with the premise that the legislature can infringe on the

governor's own constitutional authority with regard to whether something becomes a law to be executed.

The circuit court correctly held, then, that section B was invalid. This Court should affirm that decision – which requires that the Court then address severance.

B. Section B can be severed from S.B. 7, leaving section A intact – and in effect.

This Court's most recent precedent with regard to severance, *Legends Bank v. State*, 361 S.W.3d 383 (Mo. banc 2012), demonstrates two competing approaches to deciding whether a bill that contains one provision (or more) that violates the Missouri Constitution should still be valid as to the other provisions. The circuit court erroneously chose the approach urged by Judge Fischer in his concurring opinion.

In *Legends Bank*, the majority set out a test based on the content of the legislation at issue:

> When the procedure by which the legislature enacted a bill violates the constitution, severance is appropriate if this Court is convinced beyond a reasonable doubt that the specific provisions in question are not essential to the efficacy of the bill. … Severance is inappropriate if the valid provisions of

> the statute are so essentially and inseparably connected with, and so dependent on, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one. … Severance is also inappropriate if the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. …

Legends Bank, 361 S.W.3d at 387 (citations omitted.) Whether this paragraph articulates three complementary tests or three complementary ways of stating the same test, the three statements have one key, common element: they direct courts to look at the bill itself – at its language, content, and structure – and decide, quite simply, whether if the invalid provision is eliminated, the rest constitutes a bill that the General Assembly logically could have enacted.

That approach has been mandated by the General Assembly itself. In § 1.140, RSMo 2000, the legislature used language that was presumably the source of this Court's three-statement approach in *Legends Bank*:

> The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining

> provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

§ 1.140, RSMo 2000. This Court has frequently cited that section with approval.[1]

In addition to the generally applicable statutory rule, the General Assembly included similar language in S.B.7 itself:

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[1] *E.g.*, *Planned Parenthood of Kansas v. Nixon, 220 S.W.3d 732, 741-42 (Mo. banc 2007); Missouri Ass'n of Club Executives v. State*, 208 S.W.3d 885, 888-91 (Mo. banc 2006)*; Rizzo v. State*, 189 S.W.3d 576, 581 (Mo. banc 2006)*; Trout v. State*, 231 S.W.3d 140, 147-48 (Mo. banc 2007)*; City of Springfield v. Sprint Spectrum L.P.*, 203 S.W.3d 177, 187-88 (Mo. banc 2006)*; Home Builders Ass'n of Greater St. Louis v. State*, 75 S.W.3d 267, 272 (Mo. banc 2002).

> If any provision of this act or the application thereof is held invalid, the invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable. …

§ 348.269.5, App., p. 33.[2]

Posing here the questions posed in *Legends Bank* leads to the same answer – *i.e.*, to upholding the provisions of the bill that are not held to be constitutionally void:

- Is Section B "essential to the efficacy of the bill"? Hardly. It has no substance, nothing to affect the efficacy of any portion of Section A.
- Are the provisions in Section A "incomplete and … incapable of being executed in accordance with the legislative intent" without Section B?

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[2] This Court has recognized that such self-inserted severability provisions are not controlling. *Preisler v. Calcaterra*, 243 S.W.2d 62, 66 (Mo. banc 1951). But that does not mean the severability provision is irrelevant, as the circuit court claimed (LF, p. 1096; App., p. 10), nor does it render the statutory language unpersuasive.

No. Section A is complete legislation; Section B does not affect it one whit – other than as to the issue presented here.

- Are the provisions of Section A "so essentially and inseparably connected with, and so dependent on" Section B that "it cannot be presumed the legislature would have enacted" Section A without Section B? Again, there is nothing at all that connects any portion of Section A "essentially or inseparably" with Section B.

Here, as in *Legends Bank*, "severance is appropriate." *Legends Bank*, 361 S.W.3d at 387. The provisions of Section A are "complete and are capable of being executed in accordance with the legislative intent."

Instead of following the majority analysis from *Legends Bank*, the circuit court looked to Judge Fischer's concurrence.[3] Instead of focusing on

[3] The circuit court began by noting Judge Fisher's suggestion that severance is, in essence, never constitutionally appropriate. LF, p. 1094; App., p. 8 ("As stated in Judge Fischer's concurring opinion in *Legends Bank*, the judicially created practice of severance effectively violates the separation of powers protected by the United States Constitution and by Article II, § 1, of the Missouri Constitution."). That blanket bar is, of course, contrary to this Court's longstanding precedent and practice – precedent and practice on which the General Assembly relies.

the language, structure, and most important the content of the bill itself, the circuit court attempted to divine what the legislature ultimately would have done, were the unconstitutional Section B omitted. Thus instead of deciding whether Section B was "essential to the efficacy of the bill," the circuit court instead asked, as the concurring opinion proposed, "[whether] the legislature would have passed the bill without the additional provisions." *Legends Bank*, 361 S.W.3d at 391, (Fischer, J. concurring), quoted, LF, p. 1095; App., p. 9. The circuit court demanded that it be convinced "beyond a reasonable doubt" (language the majority also used, but that was omitted from § 1.140 and from the severability provision in S.B. 7) that Section A would have passed without Section B.

That led the circuit court to look beyond S.B. 7 itself, the focus of the *Legends Bank* majority rule, to the legislative history of S.B. 7 – *i.e.*, to skeletal facts found in the legislative journals. *See* LF, pp. 1095-1096; App., pp. 9-10. But the fact that S.B. 7 without Section B did not pass earlier in the session does not prove that it would not have passed later without Section B. There are myriad reasons that a bill might fail one day and pass the next – even if the language did not change. Those reasons include things that are not directly tied to that bill itself, but to the ebb and flow of legislative strategy and maneuvering.

To actually know why a bill passed one day but failed on another would require testimony from enough legislators to constitute a majority of each house. And testimony from legislators is something that this Court has never demanded – indeed that it has never suggested it would countenance, and that could not be compelled. Art. III, § 19 (Senators and representatives … shall not be questioned for any speech or debate in either house in any other place."). Ultimately, in trying to ascertain from legislative history whether a bill might or would have passed absent a particular provision (Section B here or the provision giving legislators keys to the Capitol dome in *Legends Bank*) all a court could ever do is guess.

As Justice Scalia observed when speaking of what he considers to be misplaced attempts to divine Congressional intent from a much more robust legislative record: "Judges interpret laws rather than reconstruct legislators' intentions." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (U.S. 1987) (Scalia, J. concurring). The approach urged in the *Legends Bank* concurrence and applied by the circuit court here is what Judge Scalia decried: an attempt to "reconstruct legislators' intentions."

Under the *Legends Bank* test, properly focused on what S.B. 7 would look like without Section B, the unconstitutional portion is severable. Thus, S.B. 7, having been signed by the Governor, became law 90 days after the

session ended, despite the unconstitutional attempt in Section B to reserve to the General Assembly its own veto power over the bill.

CONCLUSION

For the reasons stated above, the judgment of the circuit court with regard to severing Section B of S.B. 7 should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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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 3,946 words.

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