IN THE SUPREME COURT OF MISSOURI

No. SC98879

NO BANS ON CHOICE, ET AL.,

PLAINTIFFS-RESPONDENTS,

VS.

JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE,

DEFENDANT-APPELLANT.

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

BRIEF OF AMICUS CITIZENS IN CHARGE IN SUPPORT OF PLAINTIFFS-RESPONDENTS FILED WITH CONSENT OF PARTIES

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INTEREST OF AMICUS AND AUTHORITY TO FILE

The Citizens in Charge Foundation files this amicus brief with the consent of all the parties. *See* Rule 84.05(f)(2). Citizens in Charge is a 501(c)(3) not-for-profit organization which advocates in favor of direct democracy throughout the country. It supports Missouri's referendum process.

Filing this brief is consistent with Citizens in Charge's mission. It regularly participates as a friend of the court in appeals related to initiative petitions and referenda. Some examples include:

- *Citizens for Tax Reform v. Deters*, where the courts struck Ohio's ban on paying petition circulators on a per signature basis. 518 F.3d 375 (6th Cir. 2009), *cert. denied*, 555 U.S. 1031 (2008).[1]
- *Coalition to Defend Affirmative Action v. Granholm*, urging the court to allow the Michigan Civil Rights Initiative Committee to intervene in the challenge to their successful initiative because state officials handling the suit publicly opposed the initiative. 473 F.3d 237 (6th Cir. 2006).
- *State ex rel. LetOhioVote.org v. Brunner*, calling for Ohio to abide by its constitutional requirement that new gambling allowances be put to a statewide vote. 928 N.E.2d 1066 (Ohio 2010).

Citizens in Charge also advocates for direct democracy by litigating, as a party, on important issues in the area including:

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[1] That brief was authored by Missouri attorney and former United States Attorney for the Western District of Missouri, Todd Graves.

- *Citizens in Charge v. Miller*, challenging Nevada's narrow interpretation of the single-subject requirement for initiatives. 626 F.3d 1097 (9th Cir. 2010).
- *Citizens in Charge v. Brunner*, challenging Ohio's arbitrary referendum title-setting process. No.2:08-cv-1014, 2009 WL1969886 (S.D. Ohio).
- *Citizens in Charge Foundation, Inc. v. Gale*, challenging Nebraska's residency requirement, county-based distribution requirement, and requirement that petitions indicate whether circulators are paid or volunteer. 810 F. Supp. 2d 916 (D. Neb. 2011).
- *Citizens in Charge, Inc. v. Husted*, concerning a requirement that all initiative petition signature gatherers be in-state residents. 810 F.3d 437 (6th Cir. 2016).

Citizens in Charge has also published its own review of state voter initiative rights.[2]

[2] *Of the People, By the People, For the People: A 2010 Report Card on Statewide Voter Initiative Rights*, CITIZENS IN CHARGE FOUNDATION (Jan. 2010), http://www.citizensincharge.org/files/2010_State_Grades_Full_Final.pdf.

INTRODUCTION

As a friend of the Court, Citizens in Charge asks the Court to use this opportunity to explain clearly the framework for analyzing legislative attempts to interfere in the initiative and referendum process. The legislature may, of course, enact minor procedural rules to guide the process. But those rules should be scrutinized with the utmost rigor to protect the rights of the people. In prior cases, the Court has avoided making a specific pronouncement on the level of scrutiny that should be applied. But the time has come to make that specific pronouncement—strict scrutiny applies to statutes that infringe on the referendum process.

This is a good case to do so, because Sections 116.180 and 116.334.2, RSMo impose a requirement not found in the Constitution. The legislature requires the Secretary of State to affix a ballot title (summary) to a referendum petition before the proponents of the referendum can gather signatures. The legislature prohibits the exercise of the referenda right—the gathering of signatures—until the State has drafted its own summary of the measure. The State has no serious interest in this ballot summary—particularly at the signature-gathering phase—and the requirement is on its face an unreasonable, un-tailored interference with the rights of the people.

Furthermore, a referendum—unlike its sibling right to adopt laws by initiative—involves a bill already passed by the legislature. Already enacted bills have their own titles—adopted by the legislature—and publicly available summaries from professional legislative research staff. Yet, the legislature says the Secretary may take up to 51 days to complete the pre-signature summary/title drafting. When coupled with the requirement

that referendum proponents have only 90 days to gather signatures, Sections 116.180 and 116.334.2, as a practical matter, extinguish the referendum right altogether.

The Missouri Constitution doesn't countenance such a result. "[A]ll political power is vested in and derived from the people . . . [and] all government of right originates from the people, [and] is founded upon their will only . . . ." Mo. Const. art. I, § 1. The people "have the inherent, sole and exclusive right to regulate the internal government." Mo. Const. art. I, § 2. To that end, the people specifically "reserve power to propose and enact or reject laws . . . *independent of the general assembly*." Mo. Const. art. III, § 49. So the referendum right is a fundamental right, specifically reserved in the Missouri Constitution. As a result, it is also protected by the First Amendment to the Constitution of the United States. "[W]here the people reserve the initiative or referendum power, the exercise of that power is protected by the First Amendment applied to the States through the Fourteenth Amendments." *See Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999) (citing *Meyer v. Grant*, 486 U.S. 414, 420 (1988).

Both the pre-signature-gathering ballot title requirement and the mandate against counting referendum signatures gathered before the Secretary of State gets around to drafting a ballot title on their face infringe on this fundamental right. The Court should take this opportunity to acknowledge "strict scrutiny" as the appropriate analytical framework for evaluating the validity of such laws. Applying that analysis, the Court will first realize that the State has no compelling interest in having a ballot title before or during signature gathering. And, even if the State had some small interest in *re-*

summarizing the General Assembly's legislation to show to prospective petition-signers, these statutes are not narrowly tailored to advance that interest.

ARGUMENT

I. The referendum power is a fundamental right in a democratic system because it enables citizens to engage in direct democracy by petitioning their government to block the enactment of a law.

The referendum is a powerful form of direct democracy which gives the people a check on legislative power. Through a referendum "those who have no access to or influence with elected representatives may take their cause directly to the people." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990) (internal citations omitted). The "purpose of referendum is to suspend or annul a law which has not gone into effect and to provide the people a means of giving expression to a legislative proposition, and to require their approval before it becomes operative as a law." *Stickler v. Ashcroft*, 539 S.W.3d 702, 713 (Mo. App. 2017) (quoting *State ex rel. Moore v. Toberman*, 250 S.W. 2d 701, 706 (Mo. banc 1952)). It is the primary embodiment of the reservation of power by the people.

A. The right to the referendum is widely available, but scarcely utilized.

The fundamental right to a referendum is embedded in the American system, particularly in the more recently-formed states. The constitutions of about half the states provide for a popular referendum. *Initiative and Referendum Process,* National Conference of State Legislatures (March 18, 2021), https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx#/. Perhaps realizing their awesome power, voters have been judicious in their use of this important tool. For example, "[i]n Montana, the popular referendum device has been in place since 1907, but was used only 10 times prior to the summer of

1993. The last time it was used occurred in 1958 when the voters refused to repeal an increase in the state liquor tax." Jerry W. Calvert, *The Popular Referendum Device and Equality of Voting Rights-How Minority Suspension of the Laws Subverts "One Person-One Vote" in the States*, 6 Cornell J.L. & Pub. Pol'y 383, 389 (1997). And not all laws are subject to the referendum process. Every state that allows for the referendum "[has] an exception for legislative declarations of urgency, and often, a second exception for certain appropriations measures." Dale A. Oesterle, *The South Dakota Referendum on Abortion: Lessons from A Popular Vote on A Controversial Right*, 116 Yale L.J. Pocket Part 122, 123 (2006).

It is usually hard to call a referendum. And that is likely by design—the referendum is, and ought to be, a big deal. "A principle reason for this rare usage is that those who wish to force a suspension and public vote are constrained by short deadlines in gathering the required number of signatures." Calvert, *supra* at 385.

Those signature requirements are a fundamental feature, but they vary from state to state. The signatures must usually be from different parts of the state and must be gathered from a percentage of the overall voters—usually varying from one to ten percent *Id.* at 387. Missouri falls in the middle, requiring "five percent of the legal voters in each of two-thirds of the congressional districts." Mo. Const. art. III § 52(a). States also differ in the amount of time citizens have to file a referendum petition. "In most states, petitions with the required number of signatures must be filed with the county clerk between 60 and 90 days after a legislative enactment[.]" Calvert, *supra* at 385. In Missouri, it's 90 days. Mo. Const. art. III § 52(a).

B. Citizens engaging in direct democracy through the referendum process has a long history in the United States.

The fundamental right to a referendum on laws is also supported by the history of the referendum. The referendum tradition is long-standing with roots in both the Populist and Progressive Movements. *See* Molly E. Carter, *Regulating Abortion Through Direct Democracy: The Liberty of All Versus the Moral Code of A Majority*, 91 B.U. L. Rev. 305, 310–12 (2011). "[T]he Progressives sought to use the initiative to enhance the responsiveness, professionalism, competence, and expertise of government. By contrast, the Populists sought, then as now, to substitute the wisdom of the people . . . for the deliberations of elected officials." *Id.*

The referendum (and the more popular initiative petition process) is a uniquely midwestern and western concept. "It is largely an artifact of the Progressive Movement in central and western states" Ronald Steiner, *Understanding the Prop 8 Litigation: The Scope of Direct Democracy and Role of Judicial Scrutiny*, 14 Nexus: Chap. J.L. & Pol'y 81, 84 (2009). And it is likely to stay that way. "A number of…states have considered direct democracy processes over the past forty years, but no additional state has adopted the initiative or referendums since the 1970s." Molly E. Carter, *Regulating Abortion Through Direct Democracy: The Liberty of All Versus the Moral Code of A Majority*, 91 B.U. L. Rev. 305, 310–12 (2011).

C. The referendum has been available to Missourians since the early 20th century.

Missouri joined the movement early. In 1907, after two previously failed attempts, the Missouri Direct Legislation League secured legislative and popular approval for a

Missouri Constitutional provision authorizing both the initiative and the referendum. Nicholas R. Theodore, *We the People: A Needed Reform of State Initiative and Referendum Procedures*, 78 Mo. L. Rev. 1401, 1406-1407 (2013). In the years immediately following, the referendum was widely used. David C. Valentine, *Constitutional Amendments, Statutory Revision and Referenda Submitted to the Voters by the General Assembly or by Initiative Petition, 1910-2008,* Report 25-2008, (available at https://mospace.umsystem.edu/xmlui/bitstream/handle/10355/2524/ConstitutionalAmendmentsStatutoryRevision.pdf?sequence=1&isAllowed=y).

After that, it has been used more sparingly. Since 1914, only 27 referenda have been put before voters. *Id.* But when it is used, the people speak definitively in favor of protecting their powers. Between 1914 and 2008, "[f]ully 24 of these proposals have been rejected by the voters; that is, the voters disapproved the bill enacted by the General Assembly." *Id.* Since 2008, only one referendum, "right to work" was put before voters. Voters overturned the legislative enactment there as well. Scott Neuman, *Missouri Blocks Right-to-Work Law*, NPR, Aug. 8, 2018 (available at https://www.npr.org/2018/08/08/636568530/missouri-blocks-right-to-work-law).

II. Historically, this Court's main tool to protect the initiative/referendum was the doctrine of constitutional avoidance.

Along the way, this Court was sometimes called upon to review the laws governing Missouri's direct democracy provisions. When deciding those cases, the Court has traditionally relied on the doctrine of constitutional avoidance. "[T]his Court will avoid deciding a constitutional question if the case can be fully resolved without reaching

it." *State ex rel. SLAH, L.L.C. v. City of Woodson Terrace*, 378 S.W.3d 357, 361 (Mo. banc 2012). The courts will similarly opt to "reject an interpretation of a statute that would render it unconstitutional, when the statute is open to another plausible interpretation by which it would be valid." *State ex rel. Neville v. Grate*, 443 S.W.3d 688, 693 (Mo. App. 2014). Deploying these principles, courts were often able to interpret suspect statutes governing the initiative and referendum processes so as to protect these rights without striking the statutes.

For example, the seminal case of *United Labor Committee of Missouri v. Kirkpatrick* considered whether deviations from statutory requirements concerning petition circulator signatures and notarization voided the signed petitions. 572 S.W.2d 449 (Mo. banc 1978). The statutes imposed requirements, but did not specifically say that non-compliant signatures would not count. As a result, the Court avoided deciding whether these statutes infringe on the people's right to the initiative process and instead concluded the irregularities were not fatal to the petitions. *Id.* at 454.

The Court hinted at the potential to strike down statutes that infringe on the right to the initiative, but worked to avoid that outcome. "Minor details may be left for the legislature without impairing the self-executing nature of constitutional provisions . . . but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purposes, and must not in any particular attempt to narrow or embarrass it. In a contest between the two if the statute restricts a right conferred by the Constitution, the latter prevails." *Id.* (quoting *State ex rel. Randolph Cty. v. Walden*, 206 S.W.2d 979, 986 (Mo. banc 1947)).

Much later, in *Boeving v. Kander*, this Court considered provisions in Chapter 116 that required the Secretary of State to reject signatures gathered using a ballot title the courts eventually rewrote. This Court chose to avoid the constitutional question in that case as well. Because the initiatives had a valid title at the time the signatures were gathered, the Court said the finding that the title was unfair was not fatal to the signatures unless the statute clearly specified that result. "In the absence of such a clear and unequivocal requirement, the Court has no occasion to consider whether the effect of such a requirement on Proponents—who bear no fault for the flaw in the January 5 official ballot title identified by the Court of Appeals on July 15—unconstitutionally burdens Proponents' right to seek to amend the Missouri Constitution using the initiative petition process specifically reserved to the people of this state in article III, section 49 of the Missouri Constitution." *Boeving v. Kander*, 496 S.W.3d 498, 505 (Mo. banc 2016).

But sometimes the Court can't avoid the conflict. In those cases, this Court acknowledges the supremacy of the constitution without specifying the framework for analysis. *Rekart v. Kirkpatrick* involved a statute that allowed individuals to withdraw their signatures from an initiative after signatures were submitted to the Secretary. That statute conflicted with the constitutional right to gather signatures for a ballot measure.

> It must be presumed that when someone signs an initiative petition, he is aware of its contents. The importance of an exercise of constitutional power of initiative precludes any other presumption. Consequently, absent fraud, deceit, misrepresentation, duress, etc., no party may be allowed to withdraw his name from an initiative petition after it has been filed.

639 S.W.2d 606, 609 (Mo. banc 1982). The statute had to fall, but the *Rekart* Court gave little analysis except to say that there was a conflict.

The Court took the same approach in *State ex rel. Upchurch v. Blunt*, where it invalidated a provision that prohibited the circulation of an initiative petition more than one year before an election. It concluded the State's arguments must "necessarily fail" and chose to strike the statute "because the constitution does provide a period in which the petitions can be circulated. Any limitation of the period authorized is in conflict and invalid." 810 S.W.2d 515, 517 (Mo. banc 1991).

Through it all, this Court has acknowledged and protected direct democracy as embodied in the constitution. In *Missourians to Protect the Initiative Process v. Blunt*, the Court recognized the need to strike down statutes that infringe those constitutional rights.

> Nothing in our constitution so closely models participatory democracy in its pure form. Through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the people. The people, from whom all constitutional authority is derived, have reserved the "power to propose and enact or reject laws and amendments to the Constitution." . . . Constitutional and statutory provisions relative to initiative are liberally construed to make effective the people's reservation of that power. Statutes that place impediments on the initiative power that are inconsistent with the reservation found in the language of the constitution will be declared unconstitutional.

Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 827 (Mo. banc 1990) (internal citations omitted). The Court should make clear that—from now on—all Missouri courts should conduct a strict scrutiny analysis of statutes infringing on constitutionally-protected direct democracy.

III. Laws infringing on the right of the people to petition their government through the referendum process should be subject to strict scrutiny.

Here, the Court cannot avoid the constitutional issues. Sections 116.180 and 116.334.2 combine to disallow collection of referendum signatures until the Secretary's ballot summary is affixed, so the *United Labor*—find an interpretation that doesn't conflict—analysis doesn't apply. The Court might, as it did in *Rekart* and *Upchurch*, simply say there is a conflict and declare the statutes unconstitutional. After all, nothing in the Constitution references a ballot title for a referendum. And, as discussed below, the absence of a title reference for referenda is in direct contrast to proposed constitutional amendments, which shall have an "official ballot title as may be provided by law." Mo. Const. art. XII, § 2(b).

But the more appropriate course here would be to specify the framework through which all legislative enactments that impact the constitutional rights will be analyzed. Doing so would provide important guidance to future litigants, the lower courts, and—perhaps most important—the legislature about how to analyze a statute impacting the referendum.

A. Strict scrutiny analysis is appropriate when there is an infringement on a fundamental right.

The proper framework is strict scrutiny. That's because "[b]oth the United States and Missouri constitutions guarantee both equal protection of law and of fundamental rights." *Weinschenk v. State*, 203 S.W.3d 201, 210–11 (Mo. banc 2006). Under both constitutions, Courts utilize a two-part analysis to determine whether a statute is constitutional. "The first step is to determine whether the statute . . . impinges on a

fundamental right explicitly or implicitly protected by the Constitution." *Id.* (internal citations omitted). If the statute infringes on a fundamental right, then it is subject to strict scrutiny. *See Id.* "In order to survive strict scrutiny, a limitation on a fundamental right must serve compelling state interests, and must be narrowly tailored to meet those interests." *Id.* (internal citations omitted).

"The fundamental rights requiring strict scrutiny are the rights to interstate travel, to vote, free speech, and other rights explicitly or implicitly guaranteed by the constitution." *Labrayere v. Bohr Farms, LLC*, 458 S.W. 3d 319, 331-332 (Mo. banc 2015). Courts do not simply "pick out particular human activities, characterize them as fundamental, and give them added protection." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973) (internal citations omitted). Rather, courts recognize those rights protected by the Constitution give them the level of protection "the Constitution itself demands." *Id.*

B. The people of Missouri have a fundamental right to engage in the referendum.

The people's right to the referendum process is explicitly guaranteed by the Missouri Constitution. Mo. Const. art. III, § 49. That makes it a fundamental right. As a result, it is also guaranteed by the United States Constitution. *Stone v. City of Prescott*, 173 F.3d 1172, 1175–76 (9th Cir. 1999). No statute may unconstitutionally burden that right. *See Meyer v. Grant*, 486 U.S. 414 (1988); *see also Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) ("A unanimous Court concluded that although the right to an initiative is not guaranteed by the federal

Constitution, once an initiative procedure is created, the state may not place restrictions on the exercise of the initiative that unduly burden First Amendment rights."); *Stone*, 173 F.3d at 1175 ("True, states may not place overly restrictive conditions on citizens attempting to exercise initiative or referendum rights."). "Thus, a State may not impermissibly burden the exercise of the right to petition the government by initiative or referendum…even if the burden is imposed by the State constitution itself." *Stone*, 173 F.3d at 1172.

Whether the right was in the Missouri or the United States Constitution, burdening citizens' ability to engage in the referendum process infringes on their political expression and right to petition their government. "Legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Meyer*, 486 U.S. at 428. "That principle applies equally to the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Id.* (internal citations omitted). The right petition the government was designed to protect advocacy, in all of its forms, including the referendum. "The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 421. Sections 116.180 and 116.334.2 impermissibly burden the referendum right.

The drafters of the Missouri Constitution recognized that the people may, at times, require a mechanism to right a wrong done by their government. "Initiative and referendum make it possible for the people, by direct vote, to repeal "bad laws" or enact beneficial measures that their representatives refuse to consider." *See Brown v.*

Carnahan, 370 S.W.3d 637 (Mo. banc 2012) (Fischer, J., concurring). But the legislature has a self-serving interest in erecting roadblocks to make it difficult to undo their work. Therefore, any statute passed by the general assembly that imposes a burden on the referendum right should be viewed with skepticism. *See Pippens v. Ashcroft*, 606 S.W.3d 689, 701 (Mo. App. 2020) (stating that judicial review of a ballot title for a legislature-proposed ballot initiative is particularly important because of the inherent conflict of interest the legislature has in passing the measure and drafting the ballot title).

IV. Ballot titles are not required on referendum petitions and the statutes imposing such a requirement infringes on the fundamental right to the referendum.

"Under strict scrutiny, [the State] bears the burden of proving [laws] (1) advance a compelling state interest and (2) are narrowly tailored to serve that interest." *Wersal v. Sexton*, 674 F.3d 1010, 1020 (8th Cir. 2012). "In general, strict scrutiny is best described as an ends-and-means test that asks whether the state's purported interest is important enough to justify the restriction it has placed on the speech in question in pursuit of that interest." *Id.*

Here, the State's claimed interest in the ballot title requirement is that voters would be unable to ascertain the subject of a referendum petition and therefore could not sufficiently determine whether they wanted to sign a referendum petition. The State has no compelling interest in this process and even if there is some interest in providing voters information on the referendum, Sections 116.180 and 116.334.2 are not narrowly tailored to achieve that interest. Any conceivable interest the State may have in promoting informed decision-making can be fully protected by supplying a ballot title at

the time of election, without shortening referenda proponents' already-narrow window to gather signatures.

A. The State has no compelling interest in the requirement that a ballot title be affixed to a referendum petition.

The legislatively-imposed requirement that the Secretary affix a ballot title to the people's referendum petition before it is circulated for signatures cannot be found in the text of the constitution. Nor is there even a hint that the constitution envisions one. The legislature simply decided to intervene in the process and burden the referendum right by artificially imposing this requirement. Worse, they expressly prohibited the people from exercising their right to gather signatures until the Secretary provided a ballot title by saying that any signatures gathered pre-title may not be counted.

1. The constitution does not require a referendum petition have a summary statement or ballot title.

The constitution says nothing about summary statements or ballot titles on a referendum – at any stage of the process. It certainly doesn't say State officials can hold up proponents' ability to collect signatures from their fellow citizens while they prepare a summary statement. Of course, the intent of the constitution's framers should be given effect as reflected in the plain language of the provision at issue. *See Fred Weber, Inc., v. Dir. of Revenue*, 452 S.W.3d 628 (Mo. banc 2015). "Constitutional provisions are subject to the same rules of construction as statutes except that consideration should be given to the broader purposes and scope of constitutional provisions." *Brown v. Morris*, 290 S.W.2d 160, 167 (Mo. banc 1956). In ascertaining the meaning of a constitutional provision, "the court must first undertake to ascribe to the words the meaning which the

people understood them to have when the provision was adopted." *Mo. Prosecuting Attorneys v. Barton Cty*., 311 S.W.3d 737, 741 (Mo. banc 2016) (citation omitted). We interpret the words in the constitutional provision "to give effect to their plain, ordinary, and natural meaning." *Wright-Jones v. Nasheed*, 368 S.W.3d 157, 159 (Mo. banc 2012).

Article III, Section 52(a) provides the framework for exercise of the referendum power:

> A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either by petitions signed by five percent of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded.

Mo. Const. art. III, § 52(a). This one-sentence provision tells us everything we need to know about the drafters' intent. It is meant to provide the people with a simple method for petitioning their government in the event the general assembly passes an undesirable law. It contains only three restrictions: (1) referenda may not be ordered on a limited and specified set of laws; (2) a referendum petition must be signed by five percent of the legal voters per congressional district in 2/3 of the districts; and (3) the petition must be turned into the Secretary of State within 90 days of the final adjournment of the legislative session.

This last provision makes it important that the process not be unduly burdensome. The framers understood that the ramifications of the people undoing the work of the general assembly could be significant. Therefore, they imposed the 90-day requirement to ensure that the people could not easily veto every law passed and diminish the power of the elected representatives of the body politic. However, the framers also made a clear choice not to further burden the referendum right with other, unnecessary requirements.

Compare that to the restrictions the Constitution places on initiatives proposing new laws. Article III, Section 50 provides:

> Initiative petitions proposing amendments to the constitution shall be signed by eight percent of the legal voters in each of two-thirds of the congressional districts in the state, and petitions proposing laws shall be signed by five percent of such voters. Every such petition shall be filed with the secretary of state no less than six months before the election and shall contain an enacting clause and the full text of the measure. Petitions for constitutional amendments shall not contain more than one amended and revised article of the constitution, or one new article which shall not contain more than one subject and matters properly connected therewith, and the enacting clause thereof shall be "Be it resolved by the people of the state of Missouri that the Constitution be amended:". Petitions for laws shall contain no more than one subject which shall be expressed clearly in the title, and the enacting clause thereof shall be "Be it enacted by the people of the state of Missouri:".

Mo. Const. art. III, § 50. There are stark differences between these two provisions.

The initiative power is subject to many limitations the framers opted not to impose on the referendum power. Initiative petitions must contain an enacting clause and the full text of the constitutional or statutory amendments. Initiative petitions amending the constitution must adhere to single subject requirements. Unlike the referendum clause,

there is at least a reference to a "title" for an initiative, although it is not clear who drafts that title. And that makes good sense. While referenda are extremely limited—just requesting an up or down vote on legislation already debated and passed by the general assembly—initiatives are more complex, requiring people to consider a statute or constitutional amendment for the first time that did not have the benefit of open, public debate by their elected representatives.

Now compare those two provisions to the constitutional language on how to propose voter-adopted amendments to the constitution itself:

> All amendments proposed by the general assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto, at which he may submit any of the amendments. No such proposed amendment shall contain more than one amended and revised article of this constitution, or one new article which shall not contain more than one subject and matters properly connected therewith. If possible, each proposed amendment shall be published once a week for two consecutive weeks in two newspapers of different political faith in each county, the last publication to be not more than thirty nor less than fifteen days next preceding the election. If there be but one newspaper in any county, publication for four consecutive weeks shall be made. If a majority of the votes cast thereon is in favor of any amendment, the same shall take effect at the end of thirty days after the election. More than one amendment at the same election shall be so submitted as to enable the electors to vote on each amendment separately.

Mo. Const. art. XII, § 2(b).

Most relevant here is the requirement for an official ballot title "as may be provided by law." The constitution's framers understood and were aware of the concept

of a ballot title. It is evident they believed it is necessary to provide a ballot title to voters when voting on a new amendment to the constitution. Had they believed it was necessary to give voters a ballot title when they are asked to sign a referendum petition, they plainly knew how to impose such a requirement.

The State relies on a cherry-picked exchange from the Constitutional Convention debates to assert that the legislature has free reign to pass any and all statutes relating to the initiative and referendum process as long as they do "not violate its specific constitutional provisions." State's Br. at 38. This suggests that the framers would have blessed statutes that make it impossible for the people to exercise their referendum right. This is not the case. Rather, the framers imposed clear restrictions on both the initiative and referendum right, as discussed above. While these restrictions may be clarified by the general assembly, they are not to be used as a way to completely impede the people's right to the referendum or initiative.

The State also relies on *State ex rel. Upchurch v. Blunt* for a similar proposition. State's Br. at 34. The Court in *Upchurch* in a passing phrase notes that "reasonable implementation" of a constitutional provision may be necessary. But, the Court in *Upchurch* invalidated the provision at issue that prohibited the circulation of an initiative petition more than one year before an election. It chose to strike the statute "because the constitution does provide a period in which the petitions can be circulated. Any limitation of the period authorized is in conflict and invalid." 810 S.W.2d 515, 517 (Mo. banc 1991). In the limited instances where the Court has reviewed the constitutional validity of statutes that regulate the initiative and referendum process, the Court has invalidated the

laws. *See State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515 (Mo. banc 1991); *Rekart v. Kirkpatrick* 639 S.W.2d 606 (Mo. banc 1982).

Another case cited by the State, *State ex rel. Moore v. Toberman*, also fails to support their argument. State's Br. at 29. *Toberman* addresses a rare situation where a law is passed early in the legislative session and the legislature then recesses for thirty days, making the law effective 90 days after the legislature's recess rather than 90 days after the end of the legislative session. *Toberman* does not undermine the constitutional mandate for a 90-day window to collect signatures, as the State contends. *Id.* Rather, what *Toberman* makes clear is that there is a 90-day window, it is just a matter of when that 90- day window begins. "It seems clear that the intendment of the framers of the Constitution was that all laws, except those declared non-referable, should be subject to referendum if petitions to refer them were duly filed before their effective date, which under the provisions of § 29 is either ninety days after adjournment of the session or ninety days after the beginning of the recess and adoption of the resolution therein provided." *State ex rel. Moore v. Toberman*, 250 S.W.2d 701, 706 (Mo. banc 1952).

2. The State's purported interest in the ballot title requirement is far from compelling.

The Constitution's framers did not provide for a ballot title requirement for referendum. And courts are not generally in the business of engrafting onto provisions language their drafters did not include. *Hill v. Ashcroft*, 526 S.W.3d 299, 209 (Mo. App. 2017) (internal citations omitted). The Court should likewise not permit the General

Assembly to engraft burdensome requirements onto the referendum process that the Constitutional framers didn't see fit to include.

It is logical for the framers to have omitted a ballot title requirement for referenda because a referendum simply asks voters whether they want to repeal or maintain a recently passed statute. Nothing more, nothing less. It is reasonable to presume that voters are aware of what their legislature is doing and what statutes have been passed in a given session. And legislation enacted by the general assembly already has a title, so there is no need for the Secretary of State to draft another one. *See* Mo. Const. art. III, §§ 21 ("Every bill shall be read by title on three different days in each house.") and 23 ("No bill shall contain more than one subject which shall be clearly expressed in its title.") Consequently, any law eligible for a referendum should be referred to the people as long as it meets the minimal requirements imposed by Article III, Section 52(a).

The State contends referenda ballot titles are necessary to maintain an orderly election process, provide voters information, and prevent voter confusion. State's Br. at 34-35. As to voter information and preventing confusion, the people can and should be presumed to know the actions taken by the general assembly. Their history of using the referendum infrequently, but decisively is certainly evidence for the proposition. Further, the subject of the petition, the legislation itself, is attached to the petition being circulated for signatures.

There is no need, much less a compelling one, to provide a summary of legislation that is available to voters prior to signing the petition. This legislation was publicly debated by the people's duly elected representatives. This is more than sufficient notice

of what is in the legislation for the purpose of signing a petition. At this stage, voters are not being asked to finally support or oppose the measure. Instead, they are just being asked whether they want to sign a petition to put the referendum question to a statewide vote. Some voters may be willing to sign any petition regardless of its subject, while other voters may never sign an initiative or referendum petition. It is unlikely at the petition signing stage that voters are aided in any material way by the ballot title. Fundamentally, the State is saying that voters cannot be trusted to read and understand the legislation at issue prior to signing the referendum petition. The State has no interest in serving as an intermediary explaining the substance of legislation subject to a referendum petition. After all, the people reserved the referendum power to *themselves*, not to executive branch officials.

As to the orderly election process, a referendum petition could be easily circulated without a ballot title. Other statutes require the full text of the measure be attached to the signature pages and that signatures not be counted if they are not. § 116.050, RSMo. This provides a voter the opportunity to read the measure, if they so desire. In other words, the text of the measure provides more reliable and complete information than does a ballot title. A ballot title may, even unwittingly, mislead voters as to the substance of the measure. The State provides no support for the proposition that a ballot title is essential to an orderly election process. Elections that include referendum questions on a ballot would be no more disorderly without a ballot title. Simply put, the electorate would be able to vote to enact or reject a statute at issue regardless of whether there is a ballot title or not.

In *Meyer v. Grant*, the U.S. Supreme Court invalidated Colorado laws imposing requirements on petition circulators. "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." 486 U.S. at 421. Missouri's ballot title requirements make it likely impossible for certain petitions to ever be circulated. If a Secretary of State chooses to take the full 51 days allowed under the statutes to draft the ballot title (for whatever reason), the proponents of the referendum never have time to circulate the petition. Even one day of infringement on political speech is unconstitutional. *See id.* ("Appellees seek by petition to achieve political change in Colorado; their right to freely engage in discussions concerning the need for that change is guarded by the First Amendment.") The 51 days allowed by these laws is unconstitutional.

Sections 116.180 and 116.334.2 impermissibly infringe on an individual's right to circulate a referendum petition. "As mentioned previously, statutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed." *Id.* at 423. As discussed below, when balanced against the State's minimal interest in the ballot title requirement, Sections 116.180 and 116.334.2 cannot survive strict scrutiny.

B. Sections 116.180 and 116.334.2 are not narrowly tailored and should be held unconstitutional.

Even if a ballot title requirement can be read into the constitution, that is not a reason to uphold sections 116.180 and 116.334.2. The State's argument that the legislature in certain instances may impose requirements on constitutional provisions is

also unpersuasive in this instance. "Furthermore, it is irrelevant that the statutory restriction is based upon a constitutional provision enacted by petition." *Am. Const. L. Found., Inc. v. Meyer*, 120 F.3d 1092, 1100 (10th Cir. 1997), *aff'd sub nom. Buckley v. Am. Constr. L. Found., Inc.*, 525 U.S. 182, 187 (1999) (internal citations omitted). "The voters may no more violate the United States constitution by enacting a ballot issue than the general assembly may by enacting legislation." *Id.* (internal citations omitted).

The statutes here are not narrowly tailored to any state objective. First, ballot titles at the signature-gathering stage are simply unnecessary for all the reasons discussed above. Voters can read and understand legislation for themselves. Or signature gatherers can explain it to them, which is almost certainly what happens even when a ballot title is present. Second, even if the ballot title requirement is maintained, the statutes give the Secretary of State too much time to draft the ballot title. The subject of the referendum has been debated in the general assembly and the legislation itself includes a title. The Secretary does not need 51 days to review, draft, and provide a ballot title for a piece of legislation.

And at the petition signing stage, voters are not being asked to make a choice whether to accept or reject the measure. They are being asked whether to put such a question to a statewide vote. The substance of the legislation is almost beside the point for many voters. Rather, many of potential petition signers will decide whether or not they want to put a question on the ballot. Then, at a later date, they will make a determination about how they wish to vote on the measure.

If the State's interest is that voters be informed prior to voting, that interest is achieved by including a summary on the ballot itself—not on the signature pages. Voters will have the opportunity to review the summary on sample ballots and on election day. That summary can be written at the same time as the proponents gather signatures rather than before so as not to infringe on the referendum right. The ballot title requirement for referenda petitions is not narrowly tailored to serve the State's purported interest in voter education.

There is also no reason the Secretary of State should write the summary. When the general assembly refers a measure to the voters, the general assembly (the proponent of the measure) can write its own summary. *See* § 116.155, RSMo ("The general assembly may include the official summary statement and a fiscal note summary in any statewide ballot measure it refers to the voters."). The members of the general assembly who are the proponents of a ballot measure effectively stand in the same shoes as the individuals who choose to circulate a referendum petition.

Both groups have an interest in ensuring the measure is approved or, in the case of a referendum, rejected. The right to the referendum should not be infringed because a statute impermissibly authorizes too much time to complete an administrative task. If a ballot title must be part of the referendum petition, then the proponents themselves should be free to write it, just like the general assembly.

Sections 116.180 and 116.334.2 are not narrowly tailored to any compelling state interest and cannot survive strict scrutiny review. They should be deemed

unconstitutional, and no referendum petition should be required to have a ballot title before it is circulated to gather signatures.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 24h day of May, 2021, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 7257 words.

/s/Charles W. Hatfield