SC98879

IN THE SUPREME COURT OF MISSOURI

No Bans on Choice, et al.,

Plaintiffs-Respondents,

v.

John R. Ashcroft, Missouri Secretary of State,

Defendant-Appellant.

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

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This case involves a constitutional challenge to the validity of two Missouri statutes, §§ 116.180 and 116.334.2, RSMo, brought by Plaintiffs-Respondents Sara Baker, the ACLU, and No Bans on Choice ("Plaintiffs"). This Court has exclusive appellate jurisdiction under Article V, § 3 of the Constitution because this is a case "involving the validity … of a statute … of this state." MO. CONST. art. V, § 3.

INTRODUCTION

This case presents the question whether the General Assembly can validly require proponents of a referendum petition that seeks to overturn recently enacted legislation to include an official ballot title on the petition when circulating it to voters for signature. The answer to that question is yes. This Court has recognized the Legislature's authority to enact "reasonable implementations" of the referendum process. The ballot-title requirement provides clarity and consistency, prevents voter confusion, and promotes informed decision-making by voters considering whether to sign a referendum petition.

Since 1948 the Missouri Constitution has proscribed a deadline by which a proponent of a legislative referendum must submit sufficient signatures for the measure to be placed on the ballot: "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). To provide order to the referendum process and promote informed voter choices about the referendum, §§ 116.180 and 116.334.2, RSMo, require the Secretary of State to develop an official ballot title containing a summary of the referendum before the measure's proponent can solicit signatures. The circuit court held that this requirement is facially invalid because, on its view, it is unconstitutional for the General Assembly to interpose a single day of delay into the time frame for proponents to collect signatures. The circuit court

erred in declaring §§ 116.180 and 116.334.2 facially unconstitutional for at least four reasons.

First, the circuit court's judgment lacks support in the plain language of the Constitution or in this Court's case law. Article III, §§ 49 and 52(a) contain broad language authorizing the referendum process, but they do not purport to provide detailed implementations of the process. Rather, the framers of the 1945 Constitution left that task to the legislature, which has engaged in a "reasonable implementation" of the referendum process by adopting the ballot-title requirement for referendum petitions on the same footing as other ballot proposals. The ballot-title requirement creates order and consistency, prevents voters from being confused or misled by complex bills, and promotes informed voter choices about whether to sign referendum proposals. It is a valid exercise of authority that the Constitution deliberately left to the legislative branch.

Second, even if there were some conceivable application of the ballot-title requirement that raised constitutional problems, the circuit court erred by holding that the requirement is facially unconstitutional. A facial challenge requires the plaintiff to demonstrate that there is "no set of circumstances . . . under which the statute may be constitutionally applied.'" *State v. Jeffrey*, 400 S.W.3d 303, 308 (Mo. banc 2013). Plaintiffs came nowhere near meeting this demanding standard. The ballot-title requirement has many plainly valid applications. Even in the shortest-

case scenario, proponents would have 39 days in which to collect signatures for a referendum petition, and Plaintiffs' own evidence demonstrated that signature collection is feasible in 35, 38, or 40 days. Moreover, the time to collect signatures is typically longer than the shortest-case scenario. And proponents of a right-to-work-repeal referendum recently qualified a referendum petition for the ballot while complying with the ballot-title requirement.

Third, Plaintiffs' claims were barred by the related doctrines of *res judicata* and waiver, as well as the availability of an adequate remedy at law for the current declaratory-judgment action. Plaintiffs Sara Baker and the ACLU could have brought their constitutional claims in a prior lawsuit they filed in 2019—indeed, they *did* attempt to raise these claims as-applied in that case, albeit belatedly, asserting them for the first time in their motions for transfer to this Court after the Court of Appeals' final decision in that case. They are thus barred from raising the same claims again in this later lawsuit. And Plaintiff No Bans on Choice is in privity with Ms. Baker and the ACLU, since those two plaintiffs were instrumental in setting up and funding No Bans on Choice, and there is a complete unity of interest and action among the three plaintiffs with respect to this lawsuit.

Fourth, the circuit court should have dismissed Plaintiffs' claims as unripe and non-justiciable. Plaintiffs requested no relief with respect to their past attempt to seek a referendum on a bill passed in 2019, and they never identified any specific

future bill that they intend to seek to overrule by referendum. Almost two full legislative sessions have passed since Plaintiffs filed this lawsuit, and they have never sought a referendum against any other bill. Accordingly, their claims were unripe and non-justiciable, and the declaratory judgment that they sought (and obtained) was a quintessential advisory opinion.

STATEMENT OF FACTS

I. Since 1997, the Missouri General Assembly required initiative and referendum petitions to have an official ballot title during signature collection.

The ballot-measure process for both initiative and referendum petitions begins when a proponent submits the measure and a "sample sheet . . . in the form in which it will be circulated" to the secretary of state. § 116.332.1, RSMo. The Secretary of State has the ultimate authority to approve or reject a measure as to form, and he must do so within 15 days after the petition was first submitted to his office and following the Attorney General's independent review of the petition's form. § 116.332.3, .4, RSMo.

If the petition is approved, the Secretary of State "shall prepare and transmit . . . a summary statement of the measure." § 116.334.1, RSMo. Meanwhile, after the secretary of state receives the initial sample sheet, the state auditor "shall prepare a fiscal note and a fiscal note summary." § 116.175.2; *see also* § 116.332.1. The

attorney general issues an opinion on the form and legal content of the fiscal note summary and the summary statement. § 116.175.4; § 116.334.1.

Within three days after receiving the attorney general's approvals for the summary statement and fiscal note summary, the secretary of state combines those summaries to create the official ballot title. § 116.010(4); § 116.180. The official ballot title promotes the State's and the public's interest in ballot measure transparency, as it provides fair and accurate information about a measure. *State ex rel. Shartel v. Westhues*, 9 S.W.2d 612, 618 (Mo. banc 1928); *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. App. W.D. 2008).

These statutes have largely remained unchanged in their current form since 1985. And the general requirement that initiative and referendum petitions contain some sort of official ballot title has been in the Revised Statutes for at least a century. *See* § 49.5910, RSMo 1919; *State ex rel. Shartel v. Westhues*, 9 S.W.2d 612 (Mo. banc 1928). In 1997, the General Assembly enacted the relevant language in §§ 116.180 and 116.334.2 that enables voters to see the official ballot title during the petition signature-gathering process, not just at the ballot box.

II. Plaintiffs submit their referendum petition on House Bill 126, file litigation against the Secretary, and receive an official ballot title for their referendum petition.

In 2019, the Missouri General Assembly overwhelmingly passed House Bill 126. D95, p.2; *see* also May 15, 2019 Senate Journal, S 1252; May 17, 2019 House

Journal, H 2728-2729. The bill contained an emergency clause in Section C for the amended section 188.028, which was passed by two-thirds of the members of each House, as required by Article III, § 29 of the Constitution. *See* MO. CONST. art. III, § 29 (requiring "a two-thirds vote of the members elected to each house" to declare an emergency). Governor Parson signed HB 126 on May 24, 2019. D95, p.2. Under Article III, § 29 of the Missouri Constitution, HB 126's amendments to section 188.028, which were subject to the emergency declaration in Section C, became effective immediately, while the remaining provisions of HB 126 were scheduled to become effective on August 28, 2019. Because the bill contained an emergency clause as to part of the bill, the entire bill was exempt from the referendum process under Article III, § 52(a) of the Constitution. MO. CONST. art. III, § 52(a); *see also Murray v. City of St. Louis*, 947 S.W.2d 74, 80 (Mo. App. E.D. 1997) ("The Missouri Constitution does not provide for a referendum as to part of a bill.").

Nevertheless, on May 28, 2019, Sara Baker on behalf of the ACLU submitted to Secretary Ashcroft a referendum petition numbered 2020-R001, to repeal the entirety of HB 126. D95, p.3. Under § 116.120.1, Secretary Ashcroft was required to review the proposal for compliance with the Constitution as the first step in the approval process. § 116.120.1, RSMo ("When an initiative or referendum petition is submitted to the secretary of state, he or she shall examine the petition to determine whether it complies with the Constitution of Missouri and with this chapter."). On

June 6, 2019, Secretary Ashcroft notified Ms. Baker and the ACLU he was rejecting the proposed Referendum Petition based on constitutional grounds, because the bill contained and emergency clause and was thus not subject to referendum under Article III, § 52(a). D95, p.3.

That same day, Ms. Baker and the ACLU sued Secretary Ashcroft, alleging that the constitutional grounds were not a sufficient basis for rejection of the proposed referendum petition on HB 126. *Id.* The circuit court ruled in favor of Secretary Ashcroft, but on July 8, 2019, the Court of Appeals reversed the circuit court and ordered Secretary Ashcroft to approve the referendum petition for circulation. *Id.*; *see also ACLU v. Ashcroft*, 577 S.W.3d 881 (Mo. App. W.D. 2019) (hereinafter "*ACLU I*"). The Court of Appeals did not reach the question whether HB 126 was subject to referendum even though it contained an emergency clause; instead, the Court of Appeals held that the Secretary of State had no authority to review the proposal for constitutionality until *after* signatures had been collected. *Id.* at 899; *but see Brown v. Carnahan*, 370 S.W.3d 637, 645-46 (Mo. banc 2012) (stating that the Secretary's review of the proposal for constitutional compliance under § 116.120.1 occurs *before* the petition is circulated for signatures).

In their appellate brief in *ACLU I*, the ACLU had requested (without citing authority) that the Court of Appeals shorten the time frame for preparing the ballot title to offset the delay due to the emergency litigation, but the Court of Appeals

noted in its judgment that "we have no authority to modify the provisions of that statute, including the times therein permitted for performance." 577 S.W.3d at n.21. Ms. Baker and the ACLU represented to the Court of Appeals that if an official ballot title were certified by July 18, 2019—leaving 40 days to collect signatures before the August 28, 2019 deadline—it would be feasible for them to collect sufficient signatures. *Id.* ("The ACLU also requested that we compel the Secretary of State to certify an official ballot title by July 18, 2019, a date the ACLU deems significant to its ability to gather the requisite number of signatures to be able to timely submit a referendum petition.").

After the Court of Appeals' decision in *ACLU I*, the ACLU filed emergency transfer motions in the Court of Appeals and this Court, where they contended for the first time that the statutory timeframes for state officials to prepare the ballot title were unconstitutional as applied in that case. *See, e.g.,* Appellants' Application for Transfer to Supreme Court of Missouri and Emergency Motion for Interim Relief, No. SC97997, at 10; *see also* Respondents' Response to Appellants Emergency Motion for Interim Relief and Application for Transfer, No. SC97997, at 10-12 (noting that Ms. Baker and the ACLU raised this constitutional challenge to the ballot-title timeframes for the first time in their transfer applications, and thus failed to preserve it for review). Those transfer motions were denied.

After the appellate court's decision, the Secretary of State, Attorney General, and State Auditor developed the official ballot title. On August 14, 2019, in accordance with the Court of Appeals decision, Secretary Ashcroft approved the HB 126 Referendum Petition for circulation. D95, p.3.

III. Plaintiffs file a new lawsuit against the Secretary for additional constitutional claims concerning their referendum petition.

Over one week after Secretary Ashcroft certified the official ballot title, on August 22, 2019, Plaintiffs filed the instant lawsuit claiming that the pre-circulation official ballot title requirement in §§ 116.180 and 116.334.2 is facially unconstitutional. On August 29, 2019, Plaintiffs filed their Amended Petition. D88. Defendants moved to dismiss the case for failure to state a claim and for lack of justiciability given the *ACLU I* litigation. D90. The circuit court denied the Secretary's motion. D92. The parties engaged in limited discovery, including the depositions of Ms. Baker and Chris Gallaway, Plaintiff's signature-gathering consultant. D105; D106. The circuit court tried the case on joint stipulated facts and exhibits.

The trial record establishes several critical points. First, at least one successful referendum effort has taken place in Missouri since the pre-circulation official ballot title requirement was enacted in 1997. Official Manual, State of Missouri 2019-2020, p.666. Second, Plaintiffs' own evidence and witnesses demonstrate that it is feasible to collect signatures on a referendum effort even if the state officials take

all the time allotted to develop an official ballot title. *See, e.g.*, D106 at 26:14-17, 42:13-20; D102; D103. Third, Plaintiffs have identified no other bill on which they have sought or intend to seek a referendum. And finally, Plaintiffs were aware of their constitutional claims against §§ 116.180 and 116.334.2 during the *ACLU I* litigation—in fact, they had belatedly sought to raise the same claim as-applied in their transfer applications in that case.

The circuit court entered a judgment finding §§ 116.180 and 116.334.2 facially unconstitutional. D110, pp.12-14. The court held that "every day the time for signature collection on a referendum petition is reduced, the cost of gathering enough signatures to get the referendum before voters will go up." D110, p.9. Thus, the circuit court's judgment invalidates *any* pre-circulation ballot-title requirement, regardless of whether it takes one day or 90 days to develop. *Id.* at 13-14. The circuit court rejected the State's and public's interest in promoting informed voter choices by providing a clear, succinct, unbiased ballot title during all stages of a referendum effort, reasoning that "[t]he contents of a referendum petition are known: they are exactly whatever the legislature passed." D110, p.13. The court found that the parties have standing to bring the case because Ms. Baker and the ACLU were not in privity with No Bans on Choice, and because the Plaintiffs might someday decide to seek a referendum on a future, unspecified bill. D110, pp.9-10. Based on its review of the record and analysis of the law, the circuit court concluded that "[n]o

pre-circulation presentment to the government is contemplated by the Constitution." D110, p.14.

The Secretary timely appealed the judgment to this Court. D111.

POINTS RELIED ON

I. The circuit court erred in holding that Chapter 116's pre-circulation official ballot title requirement is unconstitutional, because the Missouri Constitution does not guarantee a 90-day window in which to circulate a referendum for signatures, in that Article III, § 52(a) sets only an outermost deadline to tender signatures, Chapter 116's official ballot title requirement is a reasonable implementation of the referendum process, and the circuit court's judgment lacks support in the plain language of the Constitution or in this Court's case law.

- Mo. Const. art. III, § 49.
- Mo. Const. art. III, § 52(a).
- *State ex rel. Moore v. Toberman*, 250 S.W.2d 701 (Mo. banc 1952).
- *State ex rel. Shartel v. Westhues*, 9 S.W.2d 612 (Mo. banc 1928).
- *State ex rel. Mathewson v. Bd. of Election Comm'rs of St. Louis Cty.*, 841 S.W.2d 633 (Mo. banc 1992).

II. The circuit court erred in holding that Sections 116.180 and 116.334.2, RSMo, are facially invalid, because Plaintiffs failed to demonstrate that no set of circumstances exists under which those statutes may be constitutionally applied, in that the undisputed evidence showed that the statutes leave sufficient time to gather signatures under all or virtually all circumstances,

and at least one referendum petition has successfully qualified for the ballot under the ballot-title requirement.

- § 116.180, RSMo.
- § 116.334.2, RSMo.
- *State v. Jeffrey*, 400 S.W.3d 303 (Mo. banc 2013).
- *Beatty v. State Tax Comm'n*, 912 S.W.2d 492 (Mo. banc 1995).

III. The circuit court erred in holding the case was not barred by the doctrines of *res judicata* and waiver, because Plaintiffs failed to bring their constitutional claims at the earliest possible opportunity, in that they failed to timely assert their constitutional claims despite being aware of them during their previous litigation against Secretary Ashcroft, and Plaintiffs Baker and ACLU are in privity with the additional Plaintiff, No Bans on Choice, that they added to this case in an attempt to evade these bars.

- *Schaefer v. Koster*, 342 S.W.3d 299 (Mo. banc 2011).
- *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315 (Mo. banc 2002).
- *ACLU v. Ashcroft*, 577 S.W.3d 881 (Mo. App. W.D. 2019).

IV. The circuit court erred in holding that the case was ripe and justiciable, because Plaintiffs' case was not ripe when filed or at the time of trial and they sought an advisory opinion, in that there was no remedy the circuit court could

have provided that would allow Plaintiffs to seek a referendum on HB 126, and Plaintiffs failed to identify any specific future bill that they would seek to overturn by referendum.

- *Mo. Health Care Ass'n v. Attorney Gen. of the State of Mo.*, 953 S.W.2d 617 (Mo. banc 1997).
- *County Court of Washington County v. Murphy*, 658 S.W.2d 14 (Mo. banc 1983).

ARGUMENT

I. The circuit court erred in holding that Chapter 116's pre-circulation official ballot title requirement is unconstitutional, because the Missouri Constitution does not guarantee a 90-day window in which to circulate a referendum for signatures, in that Article III, § 52(a) sets only an outermost deadline to tender signatures, Chapter 116's official ballot title requirement is a reasonable implementation of the referendum process, and the circuit court's judgment lacks support in the plain language of the Constitution or in this Court's case law.

Standard of Review. The facial validity of Sections 116.180 and 116.334.2, RSMo, presents a question of law that this Court reviews *de novo*. *Trenton Farms RE, LLC v. Hickory Neighbors United, Inc.*, 603 S.W.3d 286, 290 (Mo. banc 2020). "A statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision. The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates constitutional limitations." *Id.*

Preservation. The Secretary preserved this issue for appeal. D89, p.15; D94, p.3.

Section 116.180 provides that "[p]ersons circulating the petition shall affix the official ballot title to each page of the petition prior to circulation and signatures

shall not be counted if the official ballot title is not affixed to the page containing such signatures." § 116.180, RSMo. Section 116.334.2 provides that "[s]ignatures obtained prior to the date the official ballot title is certified by the secretary of state shall not be counted." § 116.334.2, RSMo. The circuit court held that these provisions are facially unconstitutional because the Legislature lacks authority to impose even a *single day* of delay before authorizing the circulation of a referendum petition to the voters. D110, p.13 ("The State may not constitutionally delay the circulation of a referendum petition for the purpose of certifying a ballot title."); *see also id.* at 9 (holding that "*every day* the time for signature collection on a referendum petition is reduced, the cost of gathering enough signatures to get the referendum before voters will go up") (emphasis added). In essence, the circuit court held that the Constitution guarantees at least a 90-day window of time to collect signatures. *See id.*

Though the circuit court acknowledged that "[t]he General Assembly is permitted to enact 'reasonable implementations' that supply a mechanism for the exercise of a constitutional right, including the right of referendum," *id.*, the court nevertheless held that the State has no valid interest in ensuring that potential signers are presented with a clear, succinct, and accurate ballot title and summary with a referendum petition. *Id.*

This reasoning was in error. The circuit court's holding lacks support in the plain language of the Constitution or in this Court's cases, and it disregards the important public purposes served by the ballot-title requirement. As Missouri courts have often recognized, the ballot-title requirement creates order and consistency, eliminates voter confusion, and promotes informed voter participation in the referendum process—including by potential signers of a referendum proposal. The ballot title advances, rather than undermines, the democratic values of the referendum process, and it thus constitutes a "reasonable implementation[] of a constitutional directive." *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991).

A. The Circuit Court's Holding Lacks Support in the Plain Language of the Constitution or in This Court's Cases.

The circuit court declared §§ 116.180 and § 116.334.2 unconstitutional because the pre-circulation official ballot title requirement "interferes with and impedes the referendum right." D110, p.14. The court's ruling necessarily extends to *any* official ballot title requirement before signature circulation, whether the title takes 1 day or 90 days to develop. *See id.* at 13. Though the circuit court held that this result was mandated by the "plain language" of the Constitution, D110, p.14, in

fact this holding lacks support in the plain language of the Missouri Constitution or in this Court's cases.

1. The circuit court's holding lacks support in the plain language of the Article III, §§ 49 and 52(a).

"This Court's primary goal in interpreting Missouri's constitution is to 'ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted.'" *State v. Honeycutt*, 421 S.W.3d 410, 415 (Mo. banc 2013) (citing *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002)). Words in the Constitution should be given their "plain and ordinary meaning" at the time the relevant provision was adopted. *Cope v. Parson*, 570 S.W.3d 579, 584 n.4 (Mo. banc 2019).

The circuit court cited two constitutional provisions in support of its holding. D110, p.14 (holding that "delaying the certification of an official ballot title is contrary to the plain language of art. 3, §§ 49 and 52(a)"). First, Article III, § 49 provides: "The people reserve power to propose and enact or reject laws and amendments to the constitution by the initiative, independent of the general assembly, and also reserve power to approve or reject by referendum any act of the general assembly, except as hereinafter provided." MO. CONST. art. III, § 49. Article III, § 49 is thus a general provision that reserves the right of referendum to the

people, without specifying whether (or on what timeline) the General Assembly may provide for ballot titles for referendum petitions.

Likewise, Article III, § 52(a) states that "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). Again, by its plain terms, this provision merely sets a mandatory deadline for the filing of referendum petitions that seek to overturn laws passed by the General Assembly; it does not purport to address whether (or when) the General Assembly may provide for a ballot title for such referendum petitions. *See id.*

By their plain and ordinary meaning, and by intentional design, these are broad provisions not laden with procedural detail. The Constitution enables a referendum to be sought after the General Assembly has passed a law. But Article III, §§ 49 and 52(a) guarantee neither a particular starting date nor a 90-day window for a referendum proponent to solicit signatures.

To that end, Article III, § 49 does not contain any language concerning deadlines, signature gathering, or any other procedural requirements; it merely grants Missourians the right to exercise the referendum power. The statutory ballot-title requirement does not preclude the people of Missouri from exercising that power under Article III, § 49. Likewise, nothing in Article III, § 52(a) mandates a

minimum length of time during which petitions can be circulated. Rather, the provision sets only an outermost deadline by which signatures must be submitted to the Secretary of State: 90 days after the General Assembly adjourns. The pre-circulation official ballot title requirement does not alter the 90-day post-adjournment deadline for signature submission under Article III, § 52(a).

Beyond the plain text of these provisions, the official ballot-title requirement is consistent with this Court's definitive interpretation of them in *State ex rel. Moore v. Toberman*, 250 S.W.2d 701 (Mo. banc 1952), which was decided only seven years after Missouri voters adopted the 1945 Constitution. "Weight should be given to cases interpreting constitutional provisions at or near the time the constitution was adopted because contemporaries of the drafters had the greatest opportunity to fully understand the meaning and intent of the language used." *Honeycutt*, 421 S.W.3d at 415. Here, the circuit court's holding that the Constitution mandates at least a 90-day window of time to collect signatures for a referendum petition cannot be squared with *Toberman*.

In *Toberman*, this Court held "Section 52(a) *merely fixes the latest date in which referendum petitions may be filed*." 250 S.W.2d at 706 (emphasis added). *Toberman* involved a law passed early in the legislative session that became effective 90 days after the legislature recessed for 30 days, as opposed to the more common effective date of 90 days after the end of the legislative session. *Id.* at 702-

03. Citizens who sought a referendum on that law argued Article III, § 52(a) effectively gave them more than 90 days to collect signatures because the law was passed prior to the legislature's final adjournment. *Id.* In other words, at issue was whether signatures could be submitted in the window between 90 days after the recess concluded and 90 days after the legislative session finally adjourned. This Court rejected the proponents' argument because it would have enabled a referendum on a law after it already became effective. This Court reasoned that "the referendum provided for in 52(a) is not intended to apply to laws that have become effective." *Id.* at 706.

Toberman thus teaches two relevant lessons about Article III, § 52(a): first, the provision requires proponents to submit signatures by a certain date; second, it does not mandate a minimum 90-day window to gather signatures. *See id.* Though *Toberman* represents this Court's authoritative decision about timelines for referendum petitions, the circuit court did not cite it in its judgment. This Court should apply *Toberman* to this case and hold that Article III does not preclude the General Assembly from enacting a pre-circulation official ballot title requirement for referendum petitions.

2. This Court's cases do not support the circuit court's holding.

The circuit court's holding also lacks support in this Court's cases. The circuit court cited three cases to support its holding that "[t]he State may not constitutionally

delay the circulation of a referendum petition for the purpose of certifying a ballot title." D110, p. 13 (citing, without further discussion, *Boeving v. Kander*, 496 S.W.3d 498, 507 (Mo. banc 2016), *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402, 406 (Mo. banc 1984), and *United Labor Comm. of Mo. v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. banc 1978)). None of these cases supports the circuit court's holding.

First, in *Boeving*, initiative proponents collected some signatures using the official ballot title certified by the Secretary, and then collected additional signatures using a modified ballot title with court-ordered changes. *Boeving*, 496 S.W.3d at 506. Opponents argued that the earlier-collected signatures—which had been obtained using a petition that included the then-official ballot title—should be invalidated. *Id.* This Court rejected this argument, holding that no statute "purports to invalidate signatures already gathered and submitted to the Secretary in full compliance with these requirements when the Secretary ***later*** certifies a different ballot title in compliance with a court order under section 116.190.4." *Id.* *Boeving* held, as a matter of statutory interpretation, that "there is no statutory language explicitly compelling" the invalidation of the signatures collected using the earlier version of the ballot title, "and the Court will not infer such a requirement." *Id.*

To be sure, in support of its holding, *Boeving* noted that "[t]here is no … express constitutional authorization for statutes to impose a requirement that an 'official ballot title'—or a title of any sort—must be displayed on the pages of

initiative petitions proposing constitutional amendments before they may be circulated for signatures." *Id.* at 507. In other words, the Court correctly noted that the Constitution does not *require* a ballot title before an initiative proposing a constitutional amendment may be circulated. *Id.* But the Court did *not* hold that it would be unconstitutional for the General Assembly to adopt such a requirement—on the contrary, the Court explicitly noted that that question was not presented in the case: "Proponents do not claim that sections 116.180 and 116.120.1 are unconstitutional because they required Proponents to 'affix' an 'official ballot title' authored by executive branch officials to their initiative petition prior to circulating it for signatures." *Id.* at 508. Because of the Court's decision on statutory interpretation, "the Court has no occasion to address Proponents' constitutional claim." *Id.* *Boeving*, therefore, pointedly declined to address this question and does not support for the circuit court's constitutional holding in this case.

Similarly, *Union Electric Company v. Kirkpatrick* does not support the circuit court's holding. In *Union Electric*, the trial court had held that an initiative proposing a law that would provide electric ratepayers with certain protections was invalid because it violated the clear-title requirement for such initiatives for such proposals under Article III, § 50 of the Constitution. *Union Electric*, 678 S.W.2d at 405. The Court rejected this argument, noting that the petitions "on their face said 'Electric Ratepayers' Protection Project,'" and that the full text of the measure was

included with the petitions. *Id.* The Court noted that "[t]he important title test is whether the official ballot title prepared by the Attorney General pursuant to § 116.160.2 … fairly and impartially summarizes the purposes of the measure, so that the voters will not be deceived or misled," and that "[t]his question is not before us." *Id.* Thus, *Union Electric* is inapplicable because it did not purport to address the question whether a ballot-title requirement is unconstitutional for referendum petitions, and the clear-title requirement that it did address does not apply to referendum petitions. *See id.*; *see also* MO. CONST. art. III, § 50. Accordingly, it, too, fails to provide support for the circuit court's holding.

Third, the circuit court cited *United Labor Committee of Missouri v. Kirkpatrick*, but this case also fails to support its holding. *United Labor Committee* involved a ballot proposal where a notary had notarized the signatures of certain petition circulators "without the affiants being before him." *United Labor Comm.*, 572 S.W.2d 453. The evidence in the trial court demonstrated that the affected sheets contained valid voter signatures, which had been cross-checked against voter rolls, and there was no evidence of any forged or fictitious signatures. *Id.* at 452-53. Opponents challenged the improperly notarized signature sheets, but this Court rejected this argument, holding that the improper notarization was cured by the evidence showing that "the underlying petition signatures were … valid and genuine." *Id.* at 453. In so holding, the Court emphasized that "[t]he ability of the

voters to get before their fellow voters issues they deem significant should not be thwarted in preference for technical formalities." *Id.* at 454 (citing *State ex rel. Voss v. Davis*, 418 S.W.2d 163, 167 (Mo. banc 1967)).

Like *Boeving* and *Union Electric*, *United Labor Committee* did not purport to address whether the ballot-title requirement for referendum petitions is constitutional. On the contrary, it addressed a different topic—whether a technical violation of the notarization requirement for petition sheets should invalidate the genuine signatures of voters who had committed no wrongdoing in signing the petition. This Court correctly held that it should not. Moreover, to the extent that the circuit court believed that a ballot title is a mere "technical formalit[y]" for referendum petitions, *id.*, that holding was not based on any evidence, and it contradicted well-established authority recognizing the importance of ballot titles to promote clarity, consistency, and informed voter participation in the ballot-initiative process. *See infra* Point I.B.

B. The Pre-Circulation Requirement of an Official Ballot Title Is a Reasonable Implementation of the Referendum Process.

In *Upchurch*, this Court held that "a legislative body's power to enact *reasonable implementations* of a constitutional directive is generally recognized." *Upchurch*, 810 S.W.2d at 516 (emphasis added). The pre-circulation requirement of an official ballot title is just such a "reasonable implementation[]," *id.*, of the

referendum process, because it creates clarity and consistency, prevents voter confusion, and promotes informed participation in direct democracy.

1. The General Assembly may enact laws to implement constitutional provisions.

It is common for constitutional provisions to be unencumbered by procedural details. *State ex rel. Mathewson v. Bd. of Election Comm'rs of St. Louis Cty.*, 841 S.W.2d 633, 636 (Mo. banc 1992) (holding that "where the constitution is silent, the legislature may properly address the issue"). The General Assembly's authority to do so is unquestioned, and its "statutes are presumed to be constitutional and will not be invalidated unless they clearly violate a constitutional provision." *Care & Treatment of Schottel v. State*, 159 S.W.3d 836, 841 (Mo. banc 2005). Like any statute, statutes governing the ballot measure process "carr[y] a presumption of constitutional validity." *Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608 (Mo. banc 1982). Thus, this court held, with specific reference to initiative petitions, that "a legislative body's power to enact reasonable implementations of a constitutional directive is generally recognized." *Upchurch*, 810 S.W.2d at 516.

In fact, the Missouri Constitution provides few requirements for the procedure, form, and content of statewide ballot measures. Just six sections in Article III relate to ballot measures, and only three of those exclusively relate to referendum petitions. As discussed above, Article III, §§ 49 and 52(a) are broad provisions not laden with procedural detail. The voters who adopted the 1945

Constitution left it to the General Assembly to enact specific legislation implementing the referendum process.

The federal government faced an analogous problem with deadlines in connection with the ratification process of constitutional amendments. Article V of the U.S. Constitution provides that Congress shall propose amendments and direct them to the states, and the amendment shall become effective when ratified by three-quarters of the states. U.S. CONST. Art. V. In *Dillon v. Gloss*, 256 U.S. 368 (1921), the U.S. Supreme Court observed:

> It will be seen that this article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress. What then is the reasonable inference or implication? Is it that ratification may be had at any time, as within a few years, a century or even a longer period, or that it must be had within some reasonable period which Congress is left free to define? Neither the debates in the federal convention which framed the Constitution nor those in the state conventions which ratified it shed any light on the question.

Id. at 370. The Court discussed the circumstances surrounding the enactment of the Eighteenth Amendment and agreed that Congress had the power, "keeping within reasonable limits, to fix a definite period for ratification." *Id.* at 375-76. While not controlling for this Court's analysis, *Dillon*'s conclusion that broad constitutional language confers authority on the legislature to specify implementing deadlines is highly persuasive here. In fact, *Dillon*'s teachings on deference may apply with

greater force here, because the Missouri General Assembly has plenary legislative authority whereas the U.S. Congress is a body of enumerated powers.

Indeed, the drafters of the present Missouri Constitution expressed their intent that the document contain statements of principle and that implementation of details should be left to the General Assembly. "This Court has long referred to the constitutional debates when interpreting the language of a constitutional provision 'in order to arrive at the reason and purpose of the Constitution.'" *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 924 (Mo. banc 2016) (Fischer, J., concurring) (quoting *State ex rel. Aquamsi Land Co. v. Hostetter*, 79 S.W.2d 463, 469 (Mo. 1934)). As one drafter commented during deliberations on procedures concerning the initiative process, "I thought we were going to draft a document that would be as short as possible and I know from the hearings at our various committees we have left a great many matters up to the General Assembly." 2 DEBATES OF THE 1943–1944 CONSTITUTIONAL CONVENTION OF MISSOURI 557.

In fact, the Convention considered a constitutional amendment prohibiting the circulation of initiative and referendum petitions for signatures and instead requiring that petitions be placed in convenient locations in each county. *Id.* at 535-65. Members of the convention expressed great concern about signature circulators committing fraud and misrepresentation of measures, referencing specific examples of such conduct. *Id.* at 541 (comments by delegate Morton); *id.* at 543 (comments

by delegate McReynolds). Though the amendment failed, the debate featured significant commentary and assurances that the General Assembly would have the prerogative to enact such a law. An exchange between two delegates is especially instructive:

> MR. WILLIAMS: Mr. Phillips, is it your opinion that if this amendment is defeated, the Legislature would have the power to enact a law of similar importance?
>
> MR. PHILLIPS (OF JACKSON): I am very much of the opinion that the Legislature can direct any matter concerning the circulation of the petitions just so that it does not violate its specific constitutional provisions.

Id. at 550. The Convention debates thus contain strong evidence of the General Assembly's authority to regulate the initiative process through reasonable procedures designed to ensure that potential signers are not confused or misled.

Moreover, the General Assembly frequently enacts time limits to implement constitutional provisions. Missouri election law is replete with implementing statutes similar to the ones for initiative and referendum petitions. For example, Article VIII, § 2 does not make registration at any particular time a prerequisite for voting, but § 115.135.1 requires that most prospective voters register not later than the fourth Wednesday prior to election. And Article VIII, § 7 authorizes absentee voting but sets no particular time for applying for an absentee ballot. Section 115.279.3, however, requires that absentee ballot applications submitted by mail be received by a local election authority no later than the second Wednesday prior to

an election. As statutes implementing constitutional provisions, these statutes are analogous to a pre-circulation official ballot title requirement. They have been part of the Revised Statues for decades without serious question of their constitutionality.

2. The official ballot title requirement is a reasonable implementation of the referendum process that promotes the democratic purposes of the referendum power.

When the circuit court declared §§ 116.180 and 116.334.2 facially unconstitutional, it necessarily ruled that *any* pre-circulation official ballot requirement for referendum petitions is unconstitutional, without regard to the length of time it takes to develop the ballot title. Indeed, Plaintiffs did not challenge any of the specific timelines that other parts of Chapter 116 grant to the secretary of state, state auditor, or attorney general to complete their respective components of the official ballot title's development. The court's sweeping judgment held that "***No*** pre-circulation presentment to the government is contemplated by the Constitution." D110, p.14 (emphasis added).

While the circuit court correctly acknowledged the presumption of constitutionality given to statutes, it failed to note that courts may "not invalidate a statute unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution." *Trenton Farms RE, LLC v. Hickory Neighbors United, Inc.*, 603 S.W.3d 286, 293 (Mo. banc 2020)

(citation omitted). Sections 116.180 and 116.334.2 do not "clearly and undoubtedly" violate any constitutional provision or "palpably affront" Article III. *Id.*

The statutes are part of a comprehensive statutory scheme that provides order and consistency to the ballot measure process, prevents voter confusion, and promotes informed participation by voters in the referendum process. Three of Missouri's constitutional officers play a vital role in that process—the attorney general, state auditor, and secretary of state. By performing their duties under Chapter 116, each official ensures that voters are educated about a ballot measure before they decide to sign their name in support of a measure's placement on a statewide election ballot. Once the secretary of state certifies the official ballot title, the proponent of the referendum measure can begin circulating it for signatures. §§ 116.180, 116.334.2, RSMo. These are entirely permissible, straightforward practical rules governing the ballot measure process.

Through the summary statement and fiscal note summary, for decades the official ballot title requirement has provided voters critical information about a ballot measure—both at the signature stage and in the ballot box. The summary statement promotes an informed electorate by stating the "legal and probable effects of the proposed [measure] . . . without bias, prejudice, deception, or favoritism." *Brown v. Carnahan*, 370 S.W.3d 637, 654 (Mo. banc 2012). Similarly, the purpose of the state auditor's fiscal note summary is to "inform the public of the fiscal

consequences of the proposed measure." *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573, 582 (Mo. App. W.D. 2010). Together, these two statements ensure "that voters will not be deceived or misled," *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999), and the official ballot title requirement "thus provides that both the proponent's proposal and the summaries prepared by the state officers must be made available with each petition page used in the solicitation process." *Missouri Roundtable for Life v. Carnahan*, 676 F.3d 665, 669 (8th Cir. 2012).

The official ballot title aims to educate voters so they can make an informed decision whether to sign their name in support of a measure and ultimately vote for it on the ballot. *See Cures Without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. App. W.D. 2008) (noting that the ballot title helps "to promote an informed decision of the probable effect of" a measure). Nearly a century ago, in a case involving a referendum petition, this Court held that "the necessity for some ballot title for such measures, in order to give information of the character and purpose of the measure to those voters who have not read the full text and as a ready and accurate means of identifying the particular proposal in the minds of those voters who have read the full text, would readily occur to the General Assembly." *State ex rel. Shartel v. Westhues*, 9 S.W.2d 612, 618 (Mo. banc 1928).

The "necessity" of the ballot title discussed in *Westhues* applies with equal force during the signature circulation process as it does at the ballot box. The circuit

court erred by discounting that importance when it reasoned that "it is unlikely a potential signer will be misled when the referred measure (and its full text) are right in front of him." (D110, p.13). The circuit court did not cite any evidence to support this assertion, and there is none in the record. Many legislative bills are lengthy and complex to read and digest for the average voter approached on a street corner. Even trained lawyers sometimes struggle to parse them. Although the full text of a measure is present during the signature-circulation process for initiative petitions, it is unlikely that a potential signer will read the full text of the measure, or the bill to be repealed, during the quick pace associated with signature drives. By contrast, a clear, succinct, unbiased ballot title is ideal for such interactions.

In fact, the ballot title requirement is important throughout the election process, from the time of signature collection until election day. "There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983)). Giving the public a source of information, in addition to the traditional electioneering from proponents and opponents accompanying the ballot measure process, increases awareness and participation in democratic governance. It is a vital source of ballot-measure information in the broader marketplace of ideas. Unbiased and accurate information preserves and

promotes democracy and the integrity of the electoral process. The Secretary of State develops the official ballot title to promote those aims, and its language is subject to judicial review. *See* § 116.190, RSMo. The circuit court's judgment prevents voters from seeing this information during the referendum process.

Thus, by enacting §§ 116.180 and 116.334.2, the General Assembly recognized the valuable role that the official ballot title plays in the initiative and referendum process. *Westhues*, 9 S.W.2d at 618.

Not only does the pre-circulation official ballot title requirement not preclude the exercise of the referendum power, it does not unduly burden that right. The General Assembly enacted in §§ 116.180 and 116.334.2 in 1997. Before 1997, the last time a referendum appeared on a Missouri ballot was nearly two decades earlier, in 1980.[1] And after the General Assembly enacted the pre-circulation official ballot title requirement, a successful referendum effort was held in 2018—*i.e.*, Proposition A, or the "right to work" repeal referendum. Official Manual, State of Missouri 2019-2020, p.666. With this history of successful referendum efforts before and

[1] *See* https://www.sos.mo.gov/elections/petitions; 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, at 12 (available at https://mospace.umsystem.edu/xmlui/bitstream/handle/10355/2524/ConstitutionalAmendmentsStatutoryRevisio?sequence=1&isAllowed=y). This Court can also take judicial notice of the State of Missouri Official Manual for prior election information. *See In re Hill*, 8 S.W.3d 578, n.3 (Mo. banc 2000); *Kindred v. City of Smithville*, 292 S.W.3d 420, 425 (Mo. App. W.D. 2009).

after the General Assembly enacted §§ 116.180 and 116.334.2, the pre-circulation official ballot title requirement cannot clearly and undoubtedly violate any constitutional provision. And as discussed in Appellants' second point on appeal, Plaintiffs have failed to meet their burden to "demonstrate that no set of circumstances exists under which the statute may be constitutionally applied." *State v. Jeffrey*, 400 S.W.3d 303, 308 (Mo. banc 2013).

In fact, the record in this case demonstrates that the ballot-title requirement does not impose any prohibitive obstacle to the pursuit of a referendum petition. As the circuit court recognized, the shortest-case scenario under current law occurs when the law to be challenged is enacted on the final day of the legislative session, and the state officials take the full 51 days to prepare the ballot title. D110, pp.3-4. Even in that shortest-case scenario, Sections 116.180 and 116.334.2 still provide 39 days for signature collection for a referendum, which the record in this case demonstrates is sufficient time to collect signatures and qualify a referendum petition. As discussed further below, *see infra* Point II, the Plaintiffs' own expert, Chris Gallaway, proposed collecting sufficient signatures for the referendum petition in 38 days and 35 days, and he "expressed confidence" that a period of six or seven weeks would suffice, though he emphasized the necessity of advance preparation on such "tight" timeframes. D102; D103; D106, 42:8-21, 43:14-44:21. Moreover, 39 days is the *narrowest* window of time for signature collection under current law.

Many bills are enacted before the last day of the legislative session, and as the circuit court found, "[t]he average time" to prepare a ballot summary is less than 51 days, but "ranges from 35 to 47 days." D110, p.7. Here, Plaintiffs did not seek, and the circuit court did not grant, a more limited judgment providing a minimum window of time for signature-gathering greater than 39 days. On the contrary, the circuit court held that *any* time spent in preparing the ballot title is *per se* unconstitutional. D110, pp.13-14.

If this Court were to affirm the circuit court's judgment, the referendum signature-gathering process would be treated as an outlier in the broader ballot-measure order. Under Chapter 116, there are four settings where voters may see an official ballot title: 1) on initiatives appearing on the ballot; 2) on initiative petitions during signature gathering; 3) on referendums appearing on the ballot; and 4) on referendum petitions during signature gathering. But to the circuit court, only in this last setting will the ballot title be unavailable to voters. The Constitution does not require treating that one setting differently than all the others, especially when Plaintiffs did not meet their burden to show that the pre-circulation requirement for referendums is facially unconstitutional.

This Court should reverse the circuit court and hold that the pre-circulation ballot-title requirement for referendum petitions is not *per se* unconstitutional.

II. The circuit court erred in holding that Sections 116.180 and 116.334.2, RSMo, are facially invalid, because Plaintiffs failed to demonstrate that no set of circumstances exists under which those statutes may be constitutionally applied, in that the undisputed evidence showed that the statutes leave sufficient time to gather signatures under all or virtually all circumstances, and at least one referendum petition has successfully qualified for the ballot under the ballot-title requirement.

Standard of Review. The facial validity of Sections 116.180 and 116.334.2, RSMo, presents a question of law that this Court reviews *de novo*. *Trenton Farms RE, LLC v. Hickory Neighbors United, Inc.*, 603 S.W.3d 286, 290 (Mo. banc 2020).

Preservation. The Secretary preserved this issue for appeal. D89, p. 15; D94, p.3.

Even if there were some conceivable applications of the ballot-title requirement for referendum petitions that would be unconstitutional—and there are not, for the reasons discussed above in Point One—that would not support the circuit court's judgment that Sections 116.180 and 116.334.2 are *facially* unconstitutional. To support a facial challenge, the Plaintiffs had the burden to "demonstrate that *no set of circumstances exists* under which the statute[s] may be constitutionally applied." *State v. Jeffrey*, 400 S.W.3d 303, 308 (Mo. banc 2013) (emphasis added). Because the ballot-title requirement presents no plausible constitutional problem in the vast majority—if not all—of its conceivable applications, it is not facially unconstitutional under *Jeffrey*. In effect, the circuit court facially invalidated the entire ballot-title requirement because the circuit court thought it might have some

conceivable *unconstitutional* application, perhaps based on the unique and idiosyncratic circumstances surrounding HB 126. D110, pp.12-14. This is the exact opposite of what *Jeffrey* requires. If there is any conceivable *constitutional* application, the ballot-title requirement is not facially invalid. *Jeffrey*, 400 S.W.3d at 308. And in fact, all or virtually all conceivable applications are valid.

This Court has adopted the U.S. Supreme Court's exacting standard for facial challenges to statutes. A facial challenge "is, of course, the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Because Plaintiffs brought a facial challenge, they had the burden to "demonstrate that no set of circumstances exists under which the statute[s] may be constitutionally applied." *Jeffrey*, 400 S.W.3d at 308 (applying the no-set-of-circumstances framework for a facial challenge while holding that the challenging party also must demonstrate that a statute "clearly and undoubtedly" violates the Constitution). This framework imposes the burden of demonstrating that a statute has no valid applications on the Plaintiffs. *Donaldson v. Missouri State Bd. of Registration for the Healing Arts*, 615 S.W.3d 57, 66 (Mo. banc 2020) (holding that a party's evidence of his individual circumstances was not sufficient under the no-set-of-circumstances framework). To that end, "[i]t is not enough to show that, under some conceivable circumstances, the statute might operate unconstitutionally." *Id.* (quotation omitted). Rather, Plaintiffs were required to demonstrate that the ballot-

title requirement is unconstitutional in *every* circumstance. *Id.* They failed to do so here.

First, the fact that there has been at least one successful referendum petition after the pre-circulation ballot-title requirement was enacted forecloses any argument that there are *no* circumstances in which the requirement can be constitutionally applied. In fact, the 2018 right-to-work-repeal referendum was the only concerted attempt to qualify a referendum petition for the ballot in recent memory, and it succeeded. As discussed above, that referendum effort gathered sufficient signatures for placement on the ballot with the pre-circulation official ballot title requirement. "Where a party attacks the facial validity of a statute, a court may declare that statute unconstitutional only if there are no possible interpretations of the statute that conform to the requirements of the constitution." *Beatty v. State Tax Comm'n*, 912 S.W.2d 492, 495 (Mo. banc 1995) (citing *Salerno* 481 U.S. at 745). Sections 116.180 and 116.334.2 have been applied constitutionally in a previous referendum effort, and thus they are not facially invalid.

Second, the evidence in the record shows that Secretary Ashcroft takes less time than the statutes allow him to take to develop an official ballot title, so the shortest-case scenario does not occur. Chapter 116 provides that the development of an official ballot title may take up to 51 days. But evidence from the 2016, 2018, and 2020 election cycles indicates that the process, on average, does not take that

long. For example, the average time to develop an official ballot title for the 2018 election cycle under Secretary Ashcroft was 41.7 days—shorter than the 47-day average taken by his predecessor, Secretary of State Kander. D96, p.2. In other words, even assuming that the average length of time is spent by Secretary Ashcroft on future measures, and further assuming that bills to be challenged are enacted on the final day of the legislative session, referendum proponents still have approximately 49 days—or seven weeks—to collect signatures under Secretary Ashcroft's practice. As discussed throughout this brief, there is uncontradicted evidence in the record, from Plaintiffs' own consultant, that this is an ample time to collect sufficient signatures in a modern-day referendum effort.

Third, Plaintiffs conceded to the Court of Appeals in *ACLU I* that they were prepared to gather sufficient signatures in 40 days. They requested that the Court of Appeals order Secretary Ashcroft to certify an official ballot title by July 18, 2019, which was 40 days before the constitutional deadline for signatures.[2] That is within one day of the shortest-case scenario of 39 days, and it is within the time given to

[2] This Court can take judicial notice of Plaintiffs' filings at the Court of Appeals in the related *ACLU I* litigation. *See* n.7, *infra*. In their brief on appeal, they argued that the Court of Appeals should direct that "an official ballot title be certified on or before July 18, 2019." App. Br., p.27, June 24 2019. And in their motion for rehearing, they complained that the Court of Appeals decision gives "only 14 days to collect signatures and may well prevent the people from exercising their constitutional right to referendum," which "can be cured by . . . accepting Appellant's referendum petition as to form so that a ballot title is prepared no later than July 18, 2019." Mot. for R'hrg, p.8, July 9, 2019.

referendum proponents assuming that state government officials take all the time allotted to them to develop an official ballot title.

Fourth, evidence from Plaintiffs' own signature-gathering consultant proves that a successful referendum effort can take place even on relatively short time frames such as five weeks. Chris Gallaway, the co-owner of FieldWorks, LLC, provided consulting services to Plaintiffs in 2019 during their efforts to seek a referendum on HB 126. Mr. Gallaway testified that his company takes into account the amount of time circulators have to collect signatures: "we usually do a budget or a plan for the longest amount of time possible providing that we want to end a couple of weeks before the actual deadline so that we don't cut it too close." D106, 26:14-17. He testified that "having . . . 12 to 14 weeks, we believe we can qualify a drive anywhere under any conditions." *Id.* at 42:11-13. But even under shorter timelines, such as "six to seven weeks," Mr. Gallaway "expressed confidence that we could get it done in that timeline," though he acknowledged that shorter time frames are "tight" and that it would be helpful to have people on the ground a week in advance. *Id.* at 42:13-20.

Further, Mr. Gallaway's first budget for Plaintiffs proposed collecting signatures over a 38-day period with 70 shifts of paid circulators per day. D102. His second budget proposed a 35-day signature-gathering period with 96 shifts of paid circulators per day. D103. The second budget included getting staff ready and

trained starting July 14, 2019—after the Court of Appeals' decision in *ACLU I*. Mr. Gallaway testified he could not remember Plaintiffs' ability to pay for a signature-gathering effort being an issue for the signature drive. D106, 49:17-21. Indeed, Plaintiff Sara Baker testified they were "ready to go" and engaged in conversations with donors for financial contributions towards the signature effort. D105, 41:24.

In fact, Mr. Gallaway noted that in large signature-gathering efforts, it is helpful to have operations ready to go before the signature drive commences. He testified that "in cases with tight timelines, we've often suggested to the client that they get us on the ground a week early before they expect the Secretary of State or a county to approve a petition so that we can open an office and set up the signage and start recruiting, those kinds of things, but that's really about starting a week early or ten days early or something like that." D106, 43:24-44:6. Doing so "cuts down the growth timeline a little bit," and "any time we can spend opening the office and getting the electricity turned on for a few days before the first shift goes out is helpful." *Id*. at 44:13-21. However, Plaintiffs did not ultimately set up any formalized field operation or infrastructure so that they would be able to begin collecting signatures after the official ballot title was certified. *Id.* at 42:22-24. This is significant because assuming a bill is passed on the last day of legislative session, a successful referendum effort would likely require set-up operations—when no

signatures are being collected—during the very time when the official ballot title is being developed.

Even if an official ballot title is certified in the maximum 51 days allowed by statute (and presuming the HB 126 referendum was not rejected due to constitutional concerns), that still would have left Plaintiffs 39 days to collect signatures. Mr. Gallaway presented budgets for Plaintiffs to be able to collect signatures in as many as 38 days and as little as 35 days. Plaintiffs requested 40 days from the Court of Appeals in *ACLU I*. And Mr. Gallaway testified that it may be feasible to collect sufficient signatures under even tighter timelines, albeit at greater expense: "if someone is willing to spend $3 million, $4 million to try to get a drive done in three weeks, I'm happy to do it for them if that's their decision." D106, 55:2-5.

What is more, Mr. Gallaway's budgets and plans included details that are not strictly necessary for a successful signature drive. Though he testified that each day matters for a signature drive, *see* D106 at 42:20-21, his firm provides services that are duplicative of services the Secretary of State's Office provides, such as audit control and signature validation. He testified that this process "is entirely duplicative of the process that the counties do and the Secretary of State does in terms of validation." *Id.* at 64:7-10. Nevertheless, these services are included in his budgets, though they take additional time away from signature gathering. In the case of the HB 126 referendum, Mr. Gallaway's second budget assumed that signature

gathering would end on August 22, 2019—a full week *before* the turn-in deadline. D103; D106 at 57:19-58:8.

In sum, the only evidence in the record concerning signature-gathering efforts for referendum petitions in general, and for the HB 126 referendum specifically, proves that §§ 116.180 and 116.334.2 are constitutional in all or virtually all circumstances. The circuit court considered this evidence but nevertheless based its judgment on its finding that "every day the time for signature collection on a referendum petition is reduced, the cost of gathering enough signatures to get the referendum before voters will go up." D110, p.9. But some minimal burden is necessarily contemplated by any "reasonable implementation" of a constitutional provision. *Upchurch*, 810 S.W.2d at 516. The existence of marginal burdens alone cannot sustain the circuit court's judgment. Plaintiffs plainly failed to carry their heavy burden of "demonstrat[ing] that no set of circumstances exists under which the statute[s] may be constitutionally applied." *Jeffrey*, 400 S.W.3d at 30. The circuit court thus erred in holding §§ 116.180 and 116.334.2 facially unconstitutional.

III. The circuit court erred in holding the case was not barred by the doctrines of *res judicata* and waiver, because Plaintiffs failed to bring their constitutional claims at the earliest possible opportunity, in that they failed to timely assert their constitutional claims despite being aware of them during their previous litigation against Secretary Ashcroft, and Plaintiffs Baker and ACLU are in privity with the additional Plaintiff, No Bans on Choice, that they added to this case in an attempt to evade these bars.

Standard of Review. The question whether the doctrine of *res judicata* and waiver barred Plaintiffs' claims presents a question of law that is subject to *de novo* review. *Cornerstone Mortg., Inc. v. Ponzar*, -- S.W.3d --, No. ED108758, 2021 WL 865275, at *7 (Mo. App. E.D. Mar. 9, 2021) ("We review de novo whether a claim was barred by res judicata or collateral estoppel as a matter of law.").

Preservation. The Secretary preserved this issue for appeal. D89, p.8; D92, p.7; D94, p.19.

The circuit court erred by not dismissing Plaintiffs' case as barred by *res judicata* and waiver. Two of the three Plaintiffs filed litigation against Secretary Ashcroft concerning their ability to seek a referendum on HB 126. They were aware of the pre-circulation official ballot title requirement during that litigation, and were aware of its potential impact on their time to gather signatures, but they failed to timely assert their constitutional claims in that case. The circuit court should have rejected Plaintiffs' effort to attempt the bar of *res judicata* bar by adding a third party to the instant lawsuit—No Bans on Choice—because that party is in privity with the other two Plaintiffs, Ms. Baker and the ACLU.

A. The doctrines of *res judicata* and waiver prohibit Plaintiffs from bringing their constitutional claims in this lawsuit because they failed to pursue them in previous litigation, and Plaintiffs failed to pursue an adequate remedy at law.

Missouri's courts have recognized the appropriateness of dismissal for failure to state a claim when the face of the petition reveals that the petition's claims are barred by *res judicata*. *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 n.1 (Mo. banc 2002); *see also King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 498 (Mo. banc 1992) (observing that "defenses of res judicata and issue preclusion are in essence defenses alleging the plaintiff has failed to state a claim upon which relief may be granted.").

Res judicata "is a judicially created doctrine to inhibit multiplicity of lawsuits." *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32, 42 (Mo. banc 1999). *Res judicata* promotes the goals of "(1) relieving parties of the cost and vexation of multiple lawsuits; (2) conserving judicial resources; and (3) encouraging reliance on adjudications. The doctrine is based upon the principle that a party should not be able to relitigate, in a second proceeding, a claim which was, or which should have been, litigated in a previous proceeding." *Jordan v. Kansas City*, 929 S.W.2d 882, 885 (Mo. App. W.D. 1996) (citations omitted). Under this doctrine, "[c]laims that could have been raised by a prevailing party in the first action

are merged into, and are thus barred by, the first judgment." *City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. banc 2002).

For similar reasons, Missouri courts will consider a constitutional claim waived if a party could have, but chose not to, raise it in previous litigation. "It is firmly established that a constitutional question must be presented at the earliest possible moment that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived." *Meadowbrook Country Club v. Davis*, 384 S.W.2d 611, 612 (Mo. banc 1964). "For a party to properly raise and preserve a constitutional argument, the litigant must: (1) raise the constitutional argument at the first opportunity; (2) specify the sections of the Constitution (federal or state) claimed to have been violated; (3) state the facts demonstrating the violation; and (4) preserve the argument throughout the appellate process." *Willits v. Peabody Coal Co., LLC*, 400 S.W.3d 442, 449 (Mo. App. E.D. 2013) (concluding that a party waived a constitutional argument when it failed to raise the claim in prior litigation).

The underpinnings of the *res judicata* and waiver doctrines apply with equal force to declaratory judgment actions, like Plaintiffs' action here. "Under Missouri law, no action for declaratory judgment will lie where an adequate alternative remedy exists." *People ex rel. Small v. Harrah's N. Kansas City Corp.*, 24 S.W.3d 60, 66 (Mo. App. W.D. 2000). A party has an adequate remedy at law if its claim

could have been raised in separate litigation. *Schaefer v. Koster*, 342 S.W.3d 299, 300–01 (Mo. banc 2011). "Where the alternative remedy is a pending suit, there is even greater justification to apply the rule against allowing declaratory judgment actions." *Id.* at 300 (affirming dismissal of declaratory judgment petition when plaintiffs could have raised the same issues as defenses in a separate action). "[O]ne of the purposes of the Declaratory Judgment Act is to reduce litigation. Allowing two suits with the same purpose would run contrary to the purpose of the Act." *People ex rel. Small v. Harrah's N. Kansas City Corp.*, 24 S.W.3d 60, 66 (Mo. App. W.D. 2000) (affirming dismissal of declaratory judgment action because the same issues were pending in an action in a different court).

Plaintiffs' constitutional claims are foreclosed under all these doctrines. The circuit court should have dismissed Plaintiffs' suit because Plaintiffs could have raised their constitutional arguments in the *ACLU I* litigation. And because Plaintiffs could have raised their constitutional claims in the *ACLU I* case, they had an adequate remedy at law they chose not to pursue, foreclosing their declaratory-judgment action here. Throughout the *ACLU I* litigation—at the circuit court, in the Court of Appeals, and before this Supreme Court—Plaintiffs repeatedly acknowledged they could not collect signatures until the official ballot title was

circulated, and they emphasized the importance of quick adjudication in order to allow as much time as possible for collecting signatures.[3]

In June 2019, two of the plaintiffs here—Sara Baker and the American Civil Liberties Union—filed the *ACLU I* lawsuit claiming that the Secretary exceeded his authority by rejecting their proposed referendum on constitutional grounds. They acknowledged their potential constitutional concern with the statutes' official-ballot title requirement as early as their Petition in that case. In their Petition, the plaintiffs alleged that the official-ballot title requirement in § 116.334.2 prevents them from circulating the proposed referendum for signatures and therefore the Secretary "cut off the referendum process and blocked Plaintiffs from collecting signatures in a manner that ensures they will be counted." *ACLU I* Petition, ¶ 32.

[3] This Court can and should take judicial notice of the pleadings and decisions in the *ACLU I* lawsuit. *See, e.g.*, *Williston v. Vasterling*, 536 S.W.3d 321, 342 (Mo. App. W.D. 2017); *Lauber-Clayton, LLC v. Novus Properties Co.*, 407 S.W.3d 612, 617 (Mo. App. W.D. 2013). In particular, this Court should take judicial notice of the following submissions in the *ACLU I* lawsuit at the Circuit Court (Case No. 19AC-CC00246): Plaintiffs' Petition; Plaintiff's Motion for Temporary Restraining Order and Suggestions in Support; Defendant Ashcroft's Suggestions in Opposition of Plaintiffs' Motion for Temporary Restraining Order; and Circuit Court Judgment. This Court should take judicial notice of the following submissions at the Western District Court of Appeals (Case No. WD82880): Circuit Court Transcript; Motion to Expedite; Appellant's Brief; Respondent's Brief; Reply Brief; Appellants' and Respondent's Motion for Rehearing or Transfer; Court of Appeals decision. Finally, this Court should take judicial notice of the following submissions at the Missouri Supreme Court (Case No. SC97997): Application for Transfer; Motion for Emergency Interim Relief Pending Appeal; Suggestions in Opposition of Motion to Appellants' Motion for Interim Relief and Application for Transfer; Supreme Court decision denying transfer.

The same day, in a memorandum in support of their request for a temporary restraining order, the plaintiffs highlighted "the strict deadlines under Missouri's referendum process." *ACLU I*, Plaintiffs' Suggestions in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, p.9. They contended that the Secretary's rejection of the referendum petition "is nothing less than the deprivation of the right to vote on a citizen-referred ballot measure," and they listed the dates by when the attorney general, state auditor, and secretary of state must complete their statutory duties under Chapter 116. *Id.* at 8-9. On June 17, 2019, counsel for the ACLU told the Circuit Court during the hearing on Plaintiffs' Motion for Temporary Restraining Order:

> Your Honor, if I may just add in our view, the status quo is that signatures are due on August 28th and that has not changed. If everything is done on schedule, which would take a TRO, July 18th would be the date the petition would be circulated, our petition would be approved for circulation, leaving only one month and 10 days to gather a large number of signatures. So, in fact, in this case denying a TRO is judgment on the merits. *It will prohibit the peoples' right to referendum from being effectuated even if we are successful on the merits*.

(*ACLU I* June 17, 2019 Hearing Transcript, p.12) (emphasis added).

At the Court of Appeals, too, the plaintiffs emphasized their concerns with the statutory deadlines. In their appellate brief, they argued that "by statute, before proponents may begin obtaining petition signatures the Secretary of State must certify the official ballot title. Per statute, no signature obtained before the Secretary

of State certifies the official ballot title will be counted." *ACLU v. Ashcroft*, Case No. WD82880, App. Br. pp.6-7. The plaintiffs requested that the Court of Appeals compel the Secretary to issue an official ballot title by July 18, 2019. *Id.* at 13, 27.

The Court of Appeals reversed the Secretary's administrative decision to reject the referendum petition. The Court instructed the Secretary and the Attorney General to take a series of actions consistent with their statutory duties under Chapter 116. *ACLU v. Ashcroft*, 577 S.W.3d 881, 889-900 (Mo. App. W.D. 2019). First, the Court ordered the Secretary to "immediately send written notice to the ACLU approving the Sample Sheet as sufficient as to form pursuant to section 116.332.4." *Id.* at 899. Following that, the Secretary and the Attorney General were to "proceed with the performance of their obligations as contemplated by section 116.334.1," which includes preparing and reviewing a summary statement. *Id.* at 900. The Secretary and the Attorney General both fully complied with the Court's orders.

The Court of Appeals addressed the remaining time during which plaintiffs could circulate the referendum petition for signatures. In Footnote 21 to the opinion, the Court held that it has "no authority to modify the provisions of [§ 116.334.1], including the times therein permitted for performance," thus rejecting the plaintiffs' request that the Court of Appeals order the Secretary to prepare an official ballot title by July 18, 2019. *Id.* at 900 n.21. The Court stated that "if the Secretary of State and the Attorney General take all of the time permitted by section 116.334.1 to

perform the obligations therein described, little time may remain for the ACLU to collect signatures on a referendum petition." *Id.*

After the Court of Appeals issued its decision, the plaintiffs moved for rehearing or transfer based solely on the Court's Footnote 21. For the first time in that transfer application, they raised a constitutional challenge to the timeframes for preparing the ballot title. The plaintiffs noted "tension between the constitutional provisions reserving the referendum right to the people . . . and the timelines in the referendum statutes." *ACLU v. Ashcroft*, Case No. WD82880, Mot. for Rehearing or Transfer, p.4. Plaintiffs argued again that the Court of Appeals has "not only the authority but the obligation" to strike down a statute if it serves as a barrier to making Article III, §§ 49 and 52(a) effective. *Id.* They specifically claimed that "if the Court does not grant Appellants' motion for rehearing as to that portion of its opinion, Respondents will be permitted to shrink the signature-collection period from the 90 days contemplated by the Constitution." *Id.* The Court of Appeals denied the motion for rehearing or transfer. This Court, too, denied the plaintiffs' motion for rehearing or transfer that sought to raise the same issue. *ACLU v. Ashcroft*, Case No. SC97997.

At any time during the *ACLU I* case, Plaintiffs could have squarely raised their claim that §§ 116.180 and 116.334.2 are unconstitutional. But they attempted to raise the issue for the first time in their motions for rehearing or transfer in the Court

of Appeals and this Court. By the time they finally filed their lawsuit in this case, Plaintiffs had known for months that the statutes prohibit ballot measure proponents from circulating measures for signatures prior to the certification of the official ballot title, and that the ballot-title requirement affects the window of time for collecting signatures. Plaintiffs emphasized the statutory deadlines throughout *ACLU I*. They even requested that the Court of Appeals judicially modify the statutory official ballot title deadlines. Thus, they could have, but did not, timely raise these constitutional claims during the *ACLU I* litigation. Instead, they forfeited them in that litigation by raising them for the first time in motions for transfer to this Court.

Thus, Plaintiffs did not raise their constitutional claims against §§ 116.180 and 116.334.2 at the earliest possible opportunity. Here, the circuit court erred in permitting Plaintiffs to have a second bite at the apple in a *second* lawsuit that raised the same claims that they had forfeited in the first lawsuit. Under the doctrines of *res judicata*, waiver, and the availability of an adequate remedy at law, this Court should find that Plaintiffs were barred from bringing their claims in this case.

B. Plaintiff No Bans on Choice is in privity with Plaintiffs Baker and the ACLU, so it is subject to the same bars as those plaintiffs.

Plaintiff No Bans on Choice was not a party in the *ACLU I* lawsuit. However, that does not exempt No Bans on Choice from the doctrines of res judicata, waiver, and the availability of an adequate remedy at law. *See Lomax v. Sewell*, 50 S.W.3d 804, 807 (Mo. App. W.D. 2001) (holding that res judicata "precludes the same

parties from relitigating issues previously adjudicated between the same parties or those in privity with them."); *Stine v. Warford*, 18 S.W.3d 601, 605 (Mo. App. W.D. 2000) ("Privity, as a basis for satisfying the 'same party' requirement of res judicata, is premised on the proposition that the interests of the party and non-party are so closely intertwined that the non-party can fairly be considered to have had his or her day in court."). The circuit court erred in finding that, based on the evidence in the record, No Bans on Choice was not in privity with the other two plaintiffs.

No Bans on Choice was formerly a campaign committee registered with the Missouri Ethics Commission formed for the specific purpose of supporting the referendum on HB 126. D98.[4] In fact, more than half of the contributions reported by No Bans on Choice prior to its termination as a campaign committee came from the ACLU. D100, p.6. Ms. Baker testified in her deposition that she herself is an officer in No Bans on Choice, where she was "intricately involved in volunteer recruitment, communications and all the … machinations you need to run a ballot campaign[.]" D105, 28:4-7; 29-21-23. She was later involved in the decision to transfer funds from the No Bans on Choice campaign committee to a 501(c)(4) organization called No Bans on Choice, Inc. *Id.*, 63:9-13. She testified in detail

[4] No Bans on Choice and the ACLU interacted during *ACLU I*; in early July 2019, while the appeal in *ACLU I* was still being litigated, the ACLU contributed more than $7,500 in an in-kind donation to No Bans on Choice. D99, p.3.

about the efforts to organize No Bans on Choice, in which she was a principal player. *See id.*, 25:6-30:19. She testified that she was speaking on behalf of herself, the ACLU, and "can also speak on behalf of No Bans." *Id.*, 30:24-25; 31:23-32:1.

Ms. Baker testified that she "would have been involved in the initial decision to make the initial contribution of around $10,000 and negotiate what that would look like between cash donation and in kind contribution [to No Bans on Choice]." D105, 50:14-17. The in-kind contribution from the ACLU previously discussed and reported on the Missouri Ethics Commission statements, according to Ms. Baker, represented "primarily [her] time as a staffer and that of our organizers and staffers as well, and then some of their transportation costs around the state to do the public and events that we had about the referendum, and I believe we had some printing expenses as well." *Id.* 52:1-7.

In addition, Plaintiffs' Petition makes clear that all Plaintiffs here share the same goals—*e.g.*, calling a referendum on HB 126 and circulating the measure for signatures. D88, ¶ 12. No Bans on Choice is thus closely intertwined and indistinguishable from Plaintiffs Baker and the ACLU. There is a complete unity of both interest and action among the three Plaintiffs with respect to these claims. Ms. Baker's own testimony supports this, as well:

> Q: As far as the referendum petition and HB 126, can you think of any interest not shared by you, No Bans On Choice, or the ACLU?

A: No, there was uniform opposition to that legislation.

D105, 67:9-13. During HB 126's passage through the General Assembly, Ms. Baker testified on behalf of the ACLU. *Id.*, 66:3-4. She was unable to articulate any identifiable goal that would not be shared between herself, the ACLU, and No Bans on Choice, testifying only generally and speculatively that "there are measures that No Bans on Choice might chose to engage in that would fall outside of the purview of what the ACLU is interested in. We have not confronted that issue yet, but there is a wide sphere of reproductive freedom work, not all of which the ACLU . . . engages with." *Id.* at 66:25-67:8.

The circuit court erred finding that the parties are not in privity with each other. The circuit court acknowledged that while "Plaintiffs share some goals," "the evidence . . . is nonetheless insufficient to show that No Bans on Choice has control over Baker and ACLU-MO, which is what would be required to show privity." D110, pp.11-12. The circuit court focused exclusively on the amount of control exerted by Ms. Baker and the ACLU over No Bans on Choice, but the evidence in the record clearly demonstrates that the two parties exercised substantial control over No Bans on Choice. Ms. Baker was an officer of No Bans on Choice, served as a critical employee in the ACLU, directed volunteer efforts in both No Bans on Choice and the ACLU, and oversaw financial transfers between No Bans on Choice and the ACLU. Because the ACLU and Ms. Baker exercised sufficient control over No

Bans on Choice, they are in privity with No Bans on Choice, subjecting the organization to the same claim bars as the other two plaintiffs.

IV. The circuit court erred in holding that the case was ripe and justiciable, because Plaintiffs' case was not ripe when filed or at the time of trial and they sought an advisory opinion, in that there was no remedy the circuit court could have provided that would allow Plaintiffs to seek a referendum on HB 126, and Plaintiffs failed to identify any specific future bill that they would seek to overturn by referendum.

Standard of Review. The question whether Plaintiffs' claims were ripe and justiciable presents a question of law that this Court reviews *de novo*. *Mercy Hosps. E. Communities v. Missouri Health Facilities Rev. Comm.*, 362 S.W.3d 415, 417 (Mo. 2012).

Preservation. This argument has been fully preserved for appeal. D89, p.4; D92, p.8; D94, p.18.

At the time of the circuit court's judgment, there was no presently existing controversy between Plaintiffs and the Secretary. No action from the circuit court could have provided Plaintiffs with the practical relief they requested to enable them to seek a referendum on HB 126, and Plaintiffs failed to identify any future bill that they would seek to overturn by referendum.

In pursuing a declaratory judgment action, plaintiff must have standing, and to have standing they "must present a real and substantial controversy admitting of *specific relief* through a decree of *conclusive character*, as distinguished from a decree which is merely advisory as to the state of the law upon purely hypothetical facts." *County Court of Washington County v. Murphy*, 658 S.W.2d 14, 16 (Mo.

banc 1983) (emphases in original) (quoting *State ex rel. Chilcutt v. Thatch*, 221 S.W.2d 172, 176 (Mo. banc 1949)). "Actions . . . are merely advisory when the judgment would not settle actual rights." *Id.* (quoting *Chilcutt*, 221 S.W.2d at 176). "Plaintiff must present a state of facts . . . against those he names as defendants with respect to which he may be entitled to some *consequential relief* immediate or prospective." *Id.* (emphasis in original) (quoting *Chilcutt*, 221 S.W.2d at 176).

The prohibition against advisory opinions is one of the most deeply rooted principles of American jurisprudence, extending back to the administration of President George Washington and the Chief Justiceship of John Jay. "[I]t is quite clear that the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quotation omitted). The same is true under Missouri law. When a plaintiff seeks only an advisory opinion, the trial court has "no jurisdiction to enter any order whatever or to take any action in the declaratory judgment suit, other than to dismiss the same." *County Court of Washington County*, 658 S.W.2d at 16 (quoting *Chilcutt*, 221 S.W.2d at 176). A judgment that is "merely an advisory opinion" is "a nullity." *Local Union 1287 v. Kansas City Area Transp. Auth.*, 848 S.W.2d 462, 464 (Mo. banc 1993).

"The Declaratory Judgment Act does not authorize the issuance of advisory opinions." *Witty v. State Farm Mut. Auto. Ins. Co.*, 854 S.W.2d 836, 838 (Mo. App.

S.D. 1993); *Carpenter-Vulquartz Redevelopment Corp. v. Doyle Dane Bernbach Advertising, Inc.,* 777 S.W.2d 305, 309 (Mo. App. W.D. 1989) ("The Declaratory Judgment Act does not authorize the issuance of advisory opinions."); *Harris v. State Bank & Trust Company of Wellston*, 484 S.W.2d 177, 178 (Mo. 1972) (holding that "the declaratory judgment act . . . is not a general panacea for all real and imaginary legal ills, nor is it a substitute for all existing remedies"). When confronted with a request for an advisory opinion in a declaratory judgment action, the court must dismiss the suit. *County Court of Washington County*, 658 S.W.2d at 16 (quotation omitted).

Here, Plaintiffs' declaratory judgment action ultimately sought an advisory opinion from the courts. Article III, § 52(a) fixes a hard deadline by which referendum proponents must submit sufficient signatures to 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." The deadline to submit any signatures on Plaintiff's referendum petition came and went on August 28, 2019, and Plaintiffs failed to submit any signatures to the Secretary. As such, they have never claimed that the Secretary failed to certify their petition as insufficient for placement on the ballot under § 116.200.

The circuit court's ultimate decision had no impact on Plaintiffs' referendum petition for HB 126. They filed their litigation only because of concerns related to

their specific referendum petition on HB 126. Article III, § 52(a) clearly prohibited Plaintiffs from turning in new signatures to the Secretary after August 28, 2019. The circuit court was not asked to, and did not, provide any relief that would have allowed Plaintiffs to submit new signatures. Therefore, the validity of §§ 116.180 and 116.334.2 did not bear on any current, concrete dispute at the time the circuit court entered its judgment. Its judgment was an impermissible advisory opinion on the pre-circulation official ballot title requirement. And while Plaintiffs speculatively alleged that they "intend to submit Referendum Petitions in the future related to abortion legislation by the Missouri General Assembly," Pet. ¶ 40, they failed to identify any future bill that they would seek to overturn by referendum. In fact, nearly two full legislative sessions have passed since this case was filed and Plaintiffs have not sought a referendum on any legislation.

For similar reasons, Plaintiffs' claims were not ripe when filed or at the time of judgment. "A court cannot render a declaratory judgment unless the petition presents a controversy ripe for judicial determination." *Lebeau v. Comm'rs of Franklin Cnty., Mo.*, 422 S.W.3d 284, 290-91 (Mo. banc 2014) (quoting *Mo. Health Care Ass'n v. Attorney Gen. of the State of Mo.*, 953 S.W.2d 617, 621 (Mo. banc 1997)). "A ripe controversy exists if the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict

that is presently existing, and to grant specific relief with a conclusive character." *Mo. Health Care Ass'n*, 953 S.W.2d at 621.

There was no presently existing controversy between Plaintiffs and the Secretary over which the circuit court could have granted meaningful relief. The deadline to turn in signatures for their referendum petition had long passed by the time the circuit court issued its judgment. In addition, the evidence demonstrates that Plaintiffs had not sought a referendum on another bill, nor have they ever identified any specific bill on which they will seek a referendum in the future. At minimum, Plaintiffs' claims would not be ripe unless, and until, they seek a referendum on another bill passed by the General Assembly. Their Petition only identifies one bill—HB 126—for which they sought a referendum. Additional factual development would be needed for a future referendum petition to determine whether §§ 116.180 and 116.334.2 prevent Plaintiffs from exercising their constitutional rights. Throughout the litigation below, it was entirely hypothetical and speculative whether Plaintiffs intended to be the proponents for another referendum petition. As such, the circuit court should have dismissed their suit as unripe and non-justiciable.

CONCLUSION

For the reasons stated, this Court should reverse the circuit court's decision.

April 9, 2021

Respectfully submitted,

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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 9th day of April, 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 16,049 words.

/s/ *D. John Sauer*