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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Respondents' defense of the judgment below rests neither on a principled application of tools of constitutional interpretation nor the facts in the record, but mere conjecture that the official ballot title requirement might, at some point in the future, abridge signature collection for a hypothetical referendum effort. Their arguments are contrary to this Court's own precedents and the original public meaning of Article III, §§ 49 and 52(a). Those provisions do not mandate a minimum window for signature collection, and the drafters of the Missouri Constitution contemplated that the General Assembly would enact rules to prevent misrepresentation of ballot measures. And Respondents fail to address the significant evidence from their own witnesses demonstrating that referendum proponents can collect sufficient signatures on a measure under the timelines for the official ballot title process provided by §§ 116.180 and 116.334.2, RSMo.

Respondents thus turn the accepted doctrine for facial constitutional challenges on its head; a party challenging a statute on facial grounds must prove it "clearly and undoubtedly" violates the Missouri Constitution because "there are no set of circumstances . . . under which the statute may be constitutionally applied.'" *State v. Jeffrey*, 400 S.W.3d 303, 307-08 (Mo. banc 2013). They failed to meet their burden. This Court should reject Respondents' arguments and reverse the circuit court's judgment.

ARGUMENT

I. Chapter 116's pre-circulation official ballot title requirement is a reasonable regulation of the referendum process supported by the plain text of the Constitution, the original public meaning of Article III, §§ 49 and 52(a), and the evidence in the record. (Supports Appellant's Points I and II).

A. Respondents fail to rebut controlling legal authorities.

Respondents' brief offers no convincing argument that the official ballot title process is anything less than a constitutional procedural rule governing the ballot measure process. They fail to rebut, and sometimes failed to address, persuasive or controlling legal authorities.

First, Respondents altogether fail to address the authority the drafters of the Missouri Constitution expressly delegated to the General Assembly to manage ballot referendums and prevent misrepresentation of measures. Respondents do not dispute that the General Assembly may enact reasonable implementations of a constitutional provision. Resp. Br. 21-22; *see State ex rel. Mathewson v. Bd. of Election Comm'rs of St. Louis Cty.*, 841 S.W.2d 633, 636 (Mo. banc 1992); *Upchurch v. Blunt*, 810 S.W.2d 515, 519 (Mo. banc 1991). But what Respondents do not address is a principal method for determining what constitutes a reasonable implementation. To answer that question, this Court regularly looks to what the drafters of the Missouri

Constitution said about the constitutional provision at stake. *See, e.g.*, *State v. Honeycutt*, 421 S.W.3d 410, 415–16 (Mo. banc 2013); *State v. Jackson*, 384 S.W.3d 208, 215 (Mo. banc 2012).

Appellant provided this Court with a considerable discussion of what the drafters of Article III, §§ 49 and 52(a) intended those provisions to authorize by way of future legislation. App. Br. 36-39. From the Constitutional Convention debates—and Respondents' failure to address them—it is undisputed that the drafters sought to prevent misrepresentation about ballot measures during signature-gathering and contemplated the General Assembly's authority to enact legislation promoting that interest. *See* 2 DEBATES OF THE 1943–1944 CONSTITUTIONAL CONVENTION OF MISSOURI 535-65. Accordingly, in 1997, the General Assembly exercised its authority and enacted the pre-circulation official ballot title requirements for initiative and referendum petitions in §§ 116.180 and 116.334.2. They are constitutional rules for implementing the referendum process.

Second, because they ignore the original public meaning and understanding of Article III, §§ 49 and 52(a), Respondents also fail to counter the State's interest in promoting ballot-measure transparency through the use of official ballot titles. An amicus party attempted to counter the State's interest, alleging that the State "cherry-picked" language from the Constitutional Convention, but the amicus fails to explain how the language was selectively chosen or offer any counter-testimony from the

Convention. Amicus Br. 21. In fact, for the reasons explained in Appellant's brief, the drafters of the Missouri Constitution thought it paramount to prevent fraud and misrepresentation in the ballot measure process, including during signature-gathering. App. Br. 37-38.

There can be no doubt that placing unbiased language summarizing a referendum petition on the signature sheet—language which is statutorily guaranteed to be fair and sufficient under Chapter 116—wards against circulators misrepresenting exactly what voters are being asked to sign. It is not enough to say, as the amicus argues, that referendum-petition signers can still read the entire piece of legislation before placing their name on a signature sheet. Amicus Br. 23. Certainly the Constitution does not require voters to read an entire legislative enactment before deciding whether to sign their name on a petition, and it does not prohibit the General Assembly from giving voters more information. The quick-paced nature of the petition-signing process makes it an ideal interaction for an official ballot title.

Third, Respondents disregard the plain text of Article III, §§ 49 and 52(a), which does not guarantee a minimum window for collecting signatures. Instead, they suggest that any pre-circulation official ballot title requirement is presumptively unconstitutional, which is exactly what the circuit court improperly held by declaring §§ 116.180 and 116.3342 unconstitutional even if the official ballot title takes just

one day to develop. D110, p.13. This upends the presumption of constitutionality this Court must give to legislative enactments. *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994) (An act of the General Assembly "approved by the governor carries with it a strong presumption of constitutionality.").

And there is an entirely permissible, constitutional reading of §§ 116.180 and 116.334.2. That reading simply requires recognizing that Article III is silent on the exact length of time proponents must enjoy to gather signatures on a referendum petition. Article III, § 49 includes no mention of deadlines, and § 52(a) speaks only to the signature turn-in date. Article III's silence means that the legislature can regulate in the sphere. *See State ex rel. Mathewson*, 841 S.W.2d at 636 (holding that "where the constitution is silent, the legislature may properly address the issue").

This permissible, plain-text reading draws further support from the canon of constitutional avoidance, under which "if one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838–39 (Mo. banc 1991). Choosing between competing interpretations, this Court must choose the one supported by the drafters of Article III, §§ 49 and 52(a) and their plain text. *See Blaske*, 821 S.W.3d at 838-39. Contrary to Respondents' take on that standard, *State ex rel. Randolph Cty. v. Walden*, 206 S.W.2d 979 (Mo. 1947), does not require

invalidating §§ 116.180 and 116.334.2 simply because the statutes may "restrict[] a right conferred by the Constitution." *Id.* at 986. *Walden* affirms that the General Assembly may enact reasonable limitations on constitutional directives. *Id.* at 987 (upholding statute that provided "a convenient and reasonable procedure to determine and protect the right secured to any county by placing a safeguard around the exercise of that right"). For all the reasons set forth in Appellant's brief, §§ 116.180 and 116.334.2 are reasonable regulations that do not, in fact, restrict any fundamental constitutional right. They promote the aims of the drafters of Article III, protect the integrity of the referendum process, and safeguard the rights of Missouri voters and petition signers.

Finally, the principal cases cited by Respondents support reversing the circuit court. *State ex rel. Moore v. Toberman*, 250 S.W.2d 701 (Mo. banc 1952) is controlling, and it requires reversing the circuit court's judgment. Contrary to Respondents' brief, *Toberman* definitively interpreted the scope of Article III, § 52(a). This Court held that "Section 52(a) *merely fixes the latest date in which referendum petitions may be filed*." 250 S.W.2d at 706 (emphasis added). This Court in *Toberman* allowed 90 days for the circulation of a ballot measure because the underlying bill was passed early in the legislative session, and there was yet no statute requiring the placement of an official ballot title. This Court correctly concluded that Article III, § 52(a) sets only a deadline on signature submission; it

expressly did not hold that the provision opens a minimum 90-day window for every referendum measure.

Boeving v. Kander, 496 S.W.3d 507 (Mo. banc 2016), does not support Respondents' argument. *Boeving* concerned the application of a statute that an opponent to a ballot measure contended should invalidate signatures. *Id.* at 507. Here, Respondents expressly chose not to challenge any statute that might operate to invalidate collected signatures in violation of initiative rights under Article III, § 48. In fact, Respondents elected not to collect any signatures at all for their proposed referendum on HB 126. And the *Boeving* court declined to address the constitutional question, holding that the challenged statutes did not purport "to invalidate signatures already gathered and submitted to the Secretary in full compliance with these requirements[.]" *Id.* at 506. As *Boeving* demonstrates, to "zealously guard," *id.*, the ballot measure process does not require invalidating every procedural rule governing the process.

B. Respondents failed to demonstrate that no set of circumstances exists under which the statute may be constitutionally applied, and Appellant adequately preserved for appeal the facial validity of §§ 116.180 and 116.334.2.

This Court has unequivocally set forth the standard of review for facial constitutional challenges. The challenges are reviewed de novo, and the "the party challenging the statute must 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). Respondents' brief fails to demonstrate how §§ 116.180 and 116.334.2 are unconstitutional in every possible circumstance.

First, contrary to Respondents' argument, Appellant adequately preserved the constitutionality of §§ 116.180 and 116.334.2 below. This case was decided after a bench trial on stipulated facts and evidence, not summary judgment or other dispositive motion. Appellant defended the constitutionality of these statutes, asserting their constitutionality as an affirmative defense (D92, p.8), in a motion to dismiss (D89), and in a pre-trial brief (D93). The issue raised in Appellant's second point on appeal is the circuit court's improper facial declaration of unconstitutionality based on the evidence in the record; that issue was adequately preserved, as demonstrated through the submission of stipulated evidence and Appellant's submissions to the circuit court. Furthermore, this Court reviews all constitutional challenges *de novo*. *Trenton Farms RE, LLC v. Hickory Neighbors United, Inc.*, 603 S.W.3d 286, 290 (Mo. banc 2020). Respondents have cited no authority holding that every legal case supporting a defense must be cited to the circuit court at trial. No such authority exists.

Properly applying the "no set of circumstances" framework, Respondents entirely failed to meet their burden to prove that §§ 116.180 and 116.334.2 are unconstitutional. Their argument rests on invalidating the statutes because they *might* have a *conceivably* unconstitutional application. But that is the inverse of the

"no set of circumstances" test. If there is any conceivable constitutional application, the ballot-title requirement is not facially invalid. *Jeffrey*, 400 S.W.3d at 308; *see also Blaske*, 821 S.W.3d at 838-39 (with two competing interpretations of a statute, the constitutional interpretation must be chosen). There is good reason why the burden is so high for facial challenges: the challenge seeks to invalidate the statute in all possible applications. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (A facial challenge "is, of course, the most difficult challenge to mount successfully.").

Respondents advocate for an inverse application of that test despite citing none of the critical, actual evidence in the record showing that the official-ballot-title requirement can be constitutionally applied in all, or certainly most, applications. As discussed in Appellant's brief, Respondents had resources and budgets to gather signatures for their referendum effort under a variety of timelines, including if state officials took all the time permitted by Chapter 116 to develop an official ballot title. *E.g.*, D102; D103; D106, 42:8-21, 43:14-44:21, 55:2-5. Critically, Respondents' brief fails to reference any of that evidence or acknowledge that they would have been able to collect signatures for their proposed referendum on HB 126 were it not for their previous litigation. To the extent HB 126 was a unique circumstance given Respondents' previous litigation against the Secretary of State, a party's evidence of his individual circumstances is not sufficient to invoke a

wholesale facial declaration of unconstitutionality. *See Donaldson v. Missouri State Bd. of Registration for the Healing Arts*, 615 S.W.3d 57, 66 (Mo. banc 2020).

Finally, it makes no difference, as Respondents contend, that no court has applied the *Jeffrey* standard in constitutional petitioning-rights cases. Resp. Br. 31-32. The parties agree that there have been few referendum efforts in Missouri since the adoption of the 1945 Constitution.[1] And few of the cases in the ballot-measure universe have involved both allegations and declarations of a statute's facial unconstitutionality. The one notable case involving both—*e.g.*, *Rekart v. Kirkpatrick*, 639 S.W.2d 606 (Mo. banc 1982)—was decided before this Court's decision in *Jeffrey* and the United States Supreme Court's decision in *Salerno*. This Court has applied the "no set of circumstances" test to facial challenges in other constitutional dimensions, *e.g., Donaldson*, 615 S.W.3d at 66 (due process rights), and there is no principled basis to exclude applying that test from one limited category of cases.

[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).

C. Strict scrutiny analysis does not apply.

The amicus brief argues that this Court should apply strict scrutiny analysis to invalidate §§ 116.180 and 116.334.2. (Amicus Br. 6-8, 13-14, 16). However, Plaintiffs-Respondents have not argued to the trial court or to this Court strict scrutiny analysis should apply, and therefore the issue is not properly presented to this Court or preserved for review.

To the extent this Court takes up amicus's argument on the merits—which it should not—the referendum right, though important, does not trigger strict scrutiny under this Court's precedents. Rights that trigger strict scrutiny are those "objectively, deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *State ex rel. Nixon v. Powell*, 167 S.W.3d 702, 705 (Mo. banc 2005) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)); *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.3d 503, 512 (Mo. banc 1991) (listing rights that trigger strict scrutiny, which "include the rights to free speech, to vote, freedom of interstate travel, the right to personal privacy and other basic liberties."). Not every right enumerated in the Constitution triggers strict scrutiny under this approach. "[A]lthough Missouri's Constitution may contain additional protections, Missouri courts have followed the general federal approach to defining fundamental rights" under Article I, § 2. *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 490

(Mo. banc 2009). The federal approach is similar to Missouri's approach. *See Powell*, 167 S.W.3d at 705. Thus, even though Article IX, § 1 of the Missouri Constitution protects educational rights, *Committee for Educational Equality* held that educational rights do not trigger strict scrutiny under either federal or state law. *Id.*

The same as true with the referendum right. While enumerated in the Missouri Constitution, it is not deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty. *See Comm. For Educ. Equal.*, 294 S.W.3d at 490. It is not a right recognized under federal statutes or the United States Constitution, and it is not recognized under the laws of many other states. And as amicus acknowledges, only about half the states offer some form of a citizen's referendum. Amicus Br. at 6 (citing *Initiative and Referendum Process*, National Conference of State Legislatures, https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendumprocesses.aspx#). Missouri itself did not make the referendum available as a constitutional right for nearly the first half of its history as a state. Amicus Br. at 8 (citing Nicholas R. Theodore, *We the People: A Needed Reform of State Initiative and Referendum Procedures*, 78 Mo. L. Rev. 1401, 1406-1407 (2013)).

Though certainly an important constitutional right, its relatively new status in Missouri and history around the country means that it is not "implicit in the concept

of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." No Missouri Supreme Court has applied strict scrutiny to referendum cases, and Respondents here have not advocated for it. As discussed above, the proper test for analyzing Respondents' facial attacks against §§ 116.180 and 116.334.2 is whether the statutes "clearly and undoubtedly" violate the Missouri Constitution because there are "there are no set of circumstances . . . under which the statute[s] may be constitutionally applied.'" *Jeffrey*, 400 S.W.3d at 307-08.

II. Respondents' case is barred by *res judicata*. (Supports Appellant's Point III).

Respondents fail to demonstrate that this case is justiciable. The case is barred by *res judicata* and similar doctrinal bars to repetitive litigation.

The circuit court erred by not dismissing Respondents' case as barred by *res judicata*. Respondents contend that their case here is different from their previous litigation against Secretary Ashcroft because the earlier case alleged the Secretary failed to comply with a statute, not the validity of those statutes. Resp. Br. 36. That may be true, but the doctrine of *res judicata* applies to bar claims that a party could have raised, but chose not to raise, in previous litigation. *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); *Jordan v. Kansas City,* 929 S.W.2d 882, 885 (Mo. App. W.D. 1996) (*res judicata* is

based on 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.").

Respondents do not argue that they were not aware of their claims against §§ 116.180 and 116.334.2 at the time they brought their initial lawsuit. Nor could they credibly do so, given that they represented their awareness of their constitutional concerns to the Court of Appeals in their previous litigation and asked the Court to modify the statutory official-ballot-title deadlines. *See* App. Br. 58-59. Respondents knew of their claims during their previous litigation, and yet they failed to bring this case until August 22, 2019—just days before the signature-submission deadline, a full week after Secretary Ashcroft certified the official ballot title, and over six weeks after the Court of Appeals' final decision in the previous case. In other words, Respondents plainly could have raised their claim in the prior lawsuit, but they did not do so.

Respondents also fail to show that the No Bans on Choice party is not in privity with the remaining parties, the ACLU and Ms. Baker. Privity is based on the concept of two parties having "closely intertwined" interests. *Stine v. Warford*, 18 S.W.3d 601, 605 (Mo. App. W.D. 2000). The high degree of financial and organizational connection between the parties clearly demonstrates that No Bans on Choice is in close privity with the ACLU and Ms. Baker. *See* App. Br. 62-66.

The two cases Respondents cite in support of their position actually undermine it. For example, in *Kinsky v. 154 Land Co., LLC*, 371 S.W.3d 108 (Mo. App. E.D. 2012), the court of appeals found privity between an attorney and his client because their interests were closely aligned for purposes of collateral estoppel, not *res judicata*. *Id.* at 113. And in any event, the Court looked to the parties' motivations in bringing a case and whether a party assumes control "to protect a similar interest." *Id.* at 114. Here, No Bans on Choice shares the same motivations as the ACLU and Ms. Baker, and they joined together in this lawsuit to protect the same interests—securing a referendum on HB 126. D105, 67:9-13; D88, ¶ 12.

And in *James v. Paul*, 49 S.W.3d 678 (Mo. banc 2001), this Court cautioned against applying a "formalistic definition of the word 'privity,'" concluding that the thrust of the analysis is "where the party sought to be precluded has interests that are so closely aligned to the party in the earlier litigation that the non-party can be fairly said to have had its day in court." *Id.* at 683. There, this Court found privity between a promisee and a third-party beneficiary because the third-party beneficiary "makes no claim that his rights exist independent of the terms of [the promisee's] liability policy." *Id.* at 684. The same is true here: No Bans on Choice has made no convincing claim that their relevant rights exist independent of those of the ACLU and Ms. Baker. The parties' common interests, motivations in bringing the lawsuits, intermingled finances, and shared personnel resources, are such that No Bans on

Choice should be subject to the same claim bars as the ACLU and Ms. Baker. No Bans on Choice had its day in court in the previous litigation, and all parties were aware of the potential claims against §§ 116.180 and 116.334.2 during that litigation.

This Court should hold that Respondents' claims are subject to *res judicata* and dissuade parties from adding purportedly-new entities simply to surpass claim-preclusion bars.

III. Respondents' case did not present a ripe or live controversy at the time of trial. (Supports Appellant's Point IV).

Finally, Respondents have failed to demonstrate that their case either was ripe or presented either a live controversy at the time of trial. As an element of justiciability, a case must be ripe at all stages of litigation, including the time of trial. *See S.C. v. Juvenile Officer*, 484 S.W.3d 160 (Mo. banc 2015) (a constitutional challenge to a sex-offender life-time registration statute was not yet ripe in part because there was no "immediate, concrete dispute at this time"); *Missouri Retired Tchrs. Found. v. Estes*, 323 S.W.3d 100 (Mo. App. W.D. 2010) (case involving tax exemption for a specific tax year not ripe at the time of trial because the contested tax assessment did not pertain to an issue relevant in that tax year).

Respondents' challenge arises out of a referendum effort on a bill passed by the General Assembly in a prior year. But under Article III, § 52(a), no referendum proponent could submit signatures for bills passed in the 2019 legislative session

after August 28, 2019. At the time of trial, there was no immediate concrete dispute between the Secretary of State and Respondents concerning the referendum on HB 126 over which a court could grant meaningful relief. 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. At most, the court's declaration would apply to future—but presently unripe and nonjusticiable—controversies.

The principal case Respondents cite in support of their position is not apposite. In *Vowell v. Kander*, 451. S.W.3d 267 (Mo. App. W.D. 2014), the court of appeals held a candidate-qualification dispute was ripe at the time of trial in part because the candidate's "qualifications for candidacy were not at issue in the underlying declaratory judgment action." *Id.* at 271. Unlike the candidate's qualifications in *Vowell*, here, Respondents' case is tethered to their failed referendum effort on HB 126 and related litigation. But there was no action the circuit court could have taken at the time of trial in June 2020 that would provide Respondents any relief for their referendum effort.

Finally, Respondents are wrong when they argue their case remains justiciable because "impairment of Respondents' constitutional referendum right will continue to accrue." Resp. Br. at 42. First, §§ 116.180 and 116.334.2 do not burden their referendum rights under Article III for the reasons discussed in Appellant's first and second points on appeal. App. Br. 24-53. Second, because of the mandatory

signature-submission deadline in Article III, § 52(a), no court could provide relief to remedy any alleged injury. To the extent Respondents had any injury, it ceased to be redressable on August 28, 2019. Third and finally, Respondents have identified no other bill on which they intend to seek a referendum, despite Ms. Baker's testimony that No Bans on Choice tracked over 20 bills during the 2020 legislative session. D105, pp. 17-18. And the record contains significant evidence that Respondents have sufficient time after the development of an official ballot title to collect signatures on future referendum efforts. D102; D103; D106, 42:8-21, 43:14-44:21, 55:2-5.

CONCLUSION

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

June 8, 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 8th day of June, 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 4,627 words.

/s/ *D. John Sauer*