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.

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

BRIEF OF RESPONDENTS

ANTHONY E. ROTHERT, #44827
JESSIE STEFFAN, #64861
KAYLA DeLOACH, #72424
MOLLY CARNEY, #70570
ACLU of Missouri Foundation
906 Olive Street, Ste. 1130
St. Louis, Missouri 63101
(314) 652-3114 telephone

GILLIAN R. WILCOX, #61278
ACLU of Missouri Foundation
406 West 34th Street, Ste. 420
Kansas City, Missouri 64111
(816) 470-9933 telephone

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STATEMENT OF FACTS

I. Introduction

Missourians have a longstanding constitutional right of referendum. That means, with some exceptions, they may call for a re-examination of a bill passed by the legislature. Missourians can exercise this right by collecting a certain number of signatures. The Constitution requires petitioners to submit their signatures to the government within 90 days of the end of the relevant legislative term. If enough valid signatures are timely gathered, the bill will be put before the voting public to affirm or reject.

Plaintiffs-Respondents are a Missouri resident (Sara Baker) and two Missouri nonprofit corporations (No Bans on Choice and the ACLU of Missouri). They brought this action under the Declaratory Judgment Act after they attempted to refer a bill for referendum but were being stymied by two statutes. The statutes, enacted in 1997, prevent Missourians from circulating a referendum petition until after they present that petition to the government for attachment of an "official ballot title," which comprises a summary statement and a fiscal note summary. By statute, the government may take up to 51 days to complete the self-imposed steps required to affix a ballot title. The uncontroverted evidence before the circuit court showed that, in fact, the government actually takes between 35 and 47 days to do so. The statutes at issue prevent petitioners from collecting signatures until the government acts, eating up much of their time for circulation and effectively extinguishing the constitutional referendum right.

While this case was pending, Respondents were unable to collect sufficient signatures in the time allotted after implementation of the statutes; moreover, while Respondent No Bans was created for the prospective purpose of permitting the people to review legislative overreach by referendum (D97, p. 2; D105, pp. 16–18), it appears to Respondents that the operation of the statutes in the future will make futile any efforts exercise the right of referendum. (*See* D96, pp. 1–2; D105, pp. 18–19; D110, pp. 7–10.)

Respondents filed suit against Appellant Secretary of State to resolve the conflict between the Constitution, which reserves a right of referendum to the people, and the two statutes, which curtail that right. (D88.) The trial court concluded that the statutes impermissibly impede and interfere with the constitutional referendum right and declared unconstitutional the challenged portions. (*See generally* D110.)

II. The constitutional provisions at issue

Art. III, § 49 of the Missouri Constitution provides that: "**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**." (emphasis supplied).

Art. III, § 52(a) of the Missouri Constitution provides that:

> **A referendum may be ordered** (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either **by petitions signed by five percent of the legal voters in each of two-thirds of the congressional districts in the state**, or by the general assembly, as

> other bills are enacted. **Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded**.

(emphasis supplied).

These are the only constitutional provisions that describe the right of referendum. Section 49 sets forth the right in general terms and provides that its contours are determined by the Constitution ("as hereinafter provided"). Section 52(a) provides that a certain number of signatures (currently 107,510, D106, pp. 24–25) must be gathered, and it sets forth a hard deadline for when a referendum petition and its signatures must be submitted to the Secretary of State.

Neither provision contemplates that the people must also present their petition for government approval before circulation for signatures. Neither provision mentions an "official ballot title," unlike the constitutional provisions relating to initiative petitions and proposed constitutional amendments.[1]

III. The statutes at issue

The two statutes at issue are RSMo §§ 116.180 and 116.334.[2] Although—as Appellant points out—implementing statutes concerning the right of referendum have long existed, the challenged language was not added until 1997. Since then, only one

[1] *See* Mo. Const. Art. XII, § 2(b) ("All amendments proposed by the general assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law").

[2] Respondents challenged the constitutionality only of subpart 2 of RSMo § 116.334, and only that subpart was held unconstitutional by the trial court. (D110, p. 14.) The text of subpart 1 is included here for context.

referendum petition has resulted in a bill being sent to voters for approval or disapproval. (Official Manual, State of Missouri 2019-2020, p. 666; *see also* D110, p. 9; D106, p. 21.) That bill, commonly referred to as a "right-to-work" measure, had been passed in January, very early in the legislative term. The uncontroverted evidence before the circuit court showed that fact made the difference in its getting on the ballot. (D106, p. 21.)

Section 116.180 provides:

> Within three days after receiving the official summary statement, the approved fiscal note summary and the fiscal note relating to any statewide ballot measure, the secretary of state shall certify the official ballot title in separate paragraphs with the fiscal note summary immediately following the summary statement of the measure and shall deliver a copy of the official ballot title and the fiscal note to the speaker of the house or the president pro tem of the legislative chamber that originated the measure or, in the case of initiative or referendum petitions, to the person whose name and address are designated under section 116.332. Persons 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.

Section 116.334 provides, in relevant part:

> If the petition form is approved, the secretary of state shall make a copy of the sample petition available on the secretary of state's website. For a period of fifteen days after the petition is approved as to form, the secretary of state shall accept public comments regarding the proposed measure and provide copies of such comments upon request. Within twenty-three days of receipt of such approval, the secretary of state shall prepare and transmit to the attorney general a summary statement of the measure which shall be a concise statement not exceeding one hundred words. This statement shall be in the form of a question using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure. The attorney general shall within ten days approve the legal content and form of the proposed statement.

> Signatures obtained prior to the date the official ballot title is certified by the secretary of state shall not be counted.

In other words, these two statutes require petition circulators to affix an "official ballot title" to each page of a referendum petition and prohibit the counting of any signature collected before the official ballot title is certified.

The certification of an official ballot title is the last in a series of administrative tasks that the statutes commit to various government officials, all of which must be completed before any signatures are collected. All in all, the statutes set aside up to 51 days for the completion of these tasks. *See* §§ 116.180; 116.334; *see also* D96, p. 1.

IV. Procedural history relating to HB126, the bill Respondents attempted to refer

On Friday, May 17, 2019, the Missouri General Assembly passed HB126, which *inter alia* imposed new abortion restrictions. (D95, p. 2.) On Friday, May 24, 2019, HB126 was signed into law by Governor Parson. (*Id*.) The following Tuesday, May 28, 2019, Respondent Sara Baker, on behalf of Respondent ACLU of Missouri, submitted a proposed Referendum Petition to Secretary of State Ashcroft seeking to place HB126 on the ballot for the 2020 general election. (D95, p. 3.)

On June 6, 2019, Secretary of State Ashcroft notified the ACLU of Missouri that the proposed Referendum Petition was being rejected on constitutional grounds he considered applicable. (*Id*.) That same day, the ACLU of Missouri filed suit alleging that the proffered constitutional grounds were not a sufficient basis for rejection of the proposed Referendum Petition. (*Id*.)

In that suit, on July 8, 2019, the Missouri Court of Appeals, Western District, agreed that the Secretary of State had improperly rejected the proposed Referendum Petition and ordered him to approve it for circulation. (*Id*.) This Court denied transfer. (*See* SC97997, July 12, 2019.) After 4 PM on August 14, 2019—in accordance with the appellate court order but after using all of his statutorily allotted time to certify the official ballot title—Appellant approved the HB126 Referendum Petition for circulation. (D95, p. 3.) At that point, Respondents attempted to circulate the petition for signatures. (D110, p. 8; D105, pp. 15–16.)

In a deposition submitted to the circuit court, Baker testified about the steps she and the other Respondents had taken to exercise their referendum right, including creating a coalition of organizations that wanted to participate in the referendum effort; establishing a website to educate interested individuals; committing a substantial amount of time and money; seeking commitments of contributions from donors who wished to assist in the referendum effort and were "ready to go" with the funds required to pay a signature-collection firm; organizing more than 800 volunteers to collect signatures; designating team leads for the signature collection effort to work in different congressional districts; recruiting notaries public to ensure that the signed petition pages could be notarized in accordance with state law; and continually adjusting their plans as the certification of the ballot title ate up more and more of the time the coalition was counting on for signature collection. (*E.g.*, D110, p. 8; D105, pp. 12–14.) Nonetheless, by the time Appellant affixed the official ballot title and returned the petition to Respondents to circulate, only 14 days remained of the time allotted under Mo. Const. art. III, § 52(a).

(D110, p. 7.) Although Respondents circulated the petition, they did not collect 107,510 signatures. (D110, p. 7; D105, pp. 15–16.)

V. Procedural history of this lawsuit

Respondents filed this suit on August 22, 2019, seeking a declaration that the statutes that had prevented their circulation of the proposed Referendum Petition from July 8 to August 14, 2019, were unconstitutional because they conflicted with the Constitution's reservation to the people of the referendum right under Mo. Const. art. III, §§ 49 and 52(a). (D110, p. 4.) Shortly thereafter, Appellant pointed out publicly that the government had acted "faster than . . . average" in approving an official ballot title for Respondents' proposed Referendum Petition on HB126. (D110, p. 7; D96, p. 1.)

The constitutional time to present signatures to the government passed on August 28, 2019, while this suit was pending—90 days after the last day of the 2019 legislative session. (D105, pp. 15–16.) Respondents did not succeed in getting HB126 placed on the ballot. (*Id.*)

In September 2019, Appellant moved to dismiss this action on multiple justiciability grounds and as a claim upon which relief could not be granted. (D89, p. 1; D90.) In February 2020, the circuit court denied his motion. (D91, p. 5.)

The case proceeded to trial in June 2020 upon stipulated evidence, including stipulated facts, exhibits, and testimony from Plaintiff-Respondent Sara Baker and Chris Gallaway, the co-founder of a signature-collection firm with significant experience in Missouri. (D95, pp. 3–4; *see also* D96–D106 (joint exhibits and depositions).) Among other things, Baker and Gallaway testified about how the statutes—by shrinking the time

available to collect signatures—affected would-be petitioners' ability to collect signatures on a referendum petition. (D110. p. 9; D105, pp. 13–16; D106, pp. 22–23, 30, 42–43.)

In December 2020, the trial court issued an order and judgment granting Plaintiffs' petition. (D110, p. 14.) The court declared that "that the provisions of Sections 116.180 and 116.334.2, RSMo., that prohibit the counting of signatures collected before the certification of an official ballot title are unconstitutional because they conflict with Mo. Const. art. 3, §§ 49 and 52(a) and interfere with and impede the referendum right reserved to the people by the Constitution." (D110, p. 14.) Appellant appealed to this Court because this case involves the validity of a statute. (D111, p. 1.)

ARGUMENT

I. Response to First Point Relied On

Point Relied On: 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.

When a statute conflicts with a constitutional provision, the Constitution prevails, even though a statute is presumed valid. *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991) ("If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid."); *see also Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608 (Mo. banc 1982) ("When duly enacted, [implementing] legislation carries a presumption of constitutional validity. However, when such statutes interfere

with or impede a right conferred by the constitution, the statute must be held unconstitutional."). Here, as the trial court recognized, there is a clear, definite conflict between the constitutional provisions that reserve the right of referendum to the people and the pair of statutes at issue, which significantly curtail that right.

The state Constitution reserves the right of referendum to the people. To meaningfully exercise that right, Missourians must have some time to collect signatures from voters interested in referring a bill. But of course at some point legislative enactments must be finalized. To balance those competing interests, art. III, § 52(a) of the Constitution sets forth a deadline for presenting a signed referendum petition to the government: 90 days after the term in which the legislature passed the bill to be referred. Nowhere does the Constitution contemplate that the people be required to present their petition to the government *before* the collection of signatures.

Contrary to the Constitution, language added to §§ 116.180 and 116.334.2 in 1997 compels pre-circulation presentment. That statutory language prohibits signature collection while the government creates and affixes an official ballot title, allowing the government to eliminate a meaningful chunk of the people's signature-collection time. The uncontroverted evidence before the circuit court showed the government actually uses much of that time.

That statutorily mandated delay undermines §§ 49 and 52(a) of the Constitution, which do not countenance government approval of referendum petitions about to be circulated. Further, § 52(a) contemplates a signature circulation period of at least 90 days, and § 49 does not authorize the legislature to enact additional restrictions on the exercise

of the referendum right. The statutes, which run roughshod over these constitutional limitations, impede and interfere with the referendum right in violation of the Constitution and this Court's case law. The circuit court was correct to declare them unconstitutional.

A. The circuit court gave appropriate consideration to the primary objective of §§ 49 and 52(a).

In his briefing, Appellant gives short shrift to the primary objective of the constitutional provisions at issue. In accordance with case law from this Court, the circuit court appropriately considered that their primary objective is to reserve the right of referendum to the people, and that the provisions therefore must be read in a way that makes that right effective. *See State ex rel. Voss v. Davis*, 418 S.W.2d 163, 167 (Mo. 1967) ("Provisions reserving to the people the powers of initiative and referendum are given a liberal construction to effectuate the policy thereby adopted. Such provisions should be construed so as to make effective the reservation of power by the people." (internal citation omitted)); *State ex rel. Moore v. Toberman*, 250 S.W.3d 701, 706 (Mo. banc 1952) ("the intendment of the framers of the Constitution was that all laws, except those declared non-referable, should be subject to referendum if petitions to refer them were duly filed before their effective date"); *State ex rel. Kemper v. Carter*, 165 S.W. 773, 779 (Mo. 1914) (holding that referendum right is self-enforcing).

Of course, constitutional provisions can be short on detail, so the General Assembly is permitted to enact "reasonable implementations" that supply a mechanism for the exercise of a constitutional right. *Upchurch*, 810 S.W.2d at 516. But when the

legislature has, by dint of implementing legislation, subverted the primary objectives of a constitutional provision, a statute must be struck down regardless of the presumption in favor of statutory validity. *See id.* at 516 ("This Court is required to give due regard to the primary objectives of the constitutional provision under scrutiny, as viewed in harmony with all related provisions. If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid."); *accord State v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002); *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990) (discussing initiatives). *See also Brown v. Carnahan*, 370 S.W.3d 637, 647–48 (Mo. banc 2012) (holding that constitutional provisions interpreted the same way as other laws except that they "are given a broader construction due to their more permanent character" and it is particularly important to give due regard to their primary objectives); *Musser v. Conrod*, 496 S.W.2d 8, 11 (Mo. banc 1973) ("Minor details may be left for the legislature without impairing the self-executing nature of constitutional provisions . . . but all such legislation must be subordinate to the constitutional provision and in furtherance of its purposes, and must not in any particular attempt to narrow or embarrass it.") (quoting *State ex rel. City of Fulton v. Smith*, 194 S.W.2d 302, 305 (Mo. banc 1946)).

Appellant does not even attempt to explain how the pre-filing requirement and the resulting contraction of the signature-collection period can be reconciled with the primary

objective of Mo. Const. art. III, §§ 49 and 52(a). Instead, he suggests that certifying an official ballot title is important to the integrity of the electoral process.[3]

B. The Court's caselaw on petitioning rights, including *Boeving*, makes clear that any perceived need for a ballot title cannot constitutionally forestall signature collection on a referendum petition.

Respondents agree that fair ballot language is important—for ballots. But there is nothing in the Constitution that allows Appellant to delay the circulation of a referendum petition for the purpose of certifying a ballot title. To the contrary, other statutes make clear that every page of a referendum petition must contain required language about what is to be referred and when; be accompanied by a copy of the full text of the bill to be

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[3] Appellant emphasizes the importance of the official ballot title in part by relying on *State ex rel. Shartel v. Westhues*, 9 S.W.2d 612, 618 (Mo. 1928). Although *Shartel* indeed involved a referendum petition, as Appellant points out, its holding supports the circuit court judgment.

In that case, the Court considered whether a state official should continue to publish the contents of ballot measures in local newspapers (and more importantly, spend State money to do so), given a then-new statute requiring the Attorney General to draft a ballot title to appear on the official ballot. *Id.* at 617–18.

The Court held that publication should continue because the statute had not, and could not, undermine a pre-existing constitutional provision (now modified and part of art. 12, § 2(b)) requiring newspaper publication. It recognized that ballot titles were indeed useful to help inform the electorate, but:

> By merely requiring a ballot title, [the statute] purports to provide neither an especial nor an exclusive method of submission. If it did, such requirement would be of doubtful constitutional validity, to say the least, because the Legislature has no power to enact a provision in conflict with a constitutional provision or a requirement clearly implied therefrom.

Id. at 618, *citing State ex rel. Elsas v. Mo. Workmen's Comp. Comm'n*, 2 S.W.2d 796, 801 (Mo. banc 1928) ("If the constitutional provision is self–executing, as is [what is now art. 52], then the legislation must be to facilitate the enforcement of the Constitution, and must not curtail or limit any right created and conferred by the Constitution.").

referred; and, as Appellant is aware, create a mechanism for ensuring that text is complete and accurate. *See* RSMo §§ 116.030, 116.050, 116.332.

There is no reasonable possibility that a voter considering whether to sign a petition will be misled as to its contents absent an official ballot title—he can simply flip the page and review the text of the bill at issue. Appellant faults the circuit court for saying so, but it is nothing more than this Court said in *Union Electric Co. v. Kirkpatrick*, 678 S.W.2d 402, 406 (Mo. banc 1984) (reversing trial court, which it said had been "unduly concerned about the title and content of the circulated [initiative] petitions," as the "full act appeared on the back of each petition" so the court could "not see how the signers could have been deceived or misled at this stage of the initiative process"; instead, "[t]he important title test" was whether ballot title would prevent "voters [from being] deceived or misled"). *See also Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608–09 (Mo. banc 1982) (stating that "[t]he importance of an exercise of the constitutional power of initiative" requires a "presum[ption] that when someone signs an initiative petition, he is aware of its contents" and that any presumption to the contrary could "jeopardize the exercise of the constitutional right itself."). What is supplied to a petition signer stands in contrast with what is supplied to a voter entering a voting booth: a ballot title *only*.

This Court has recognized the distinction between petitions and ballots in the initiative process. In *Boeving v. Kander*, 496 S.W.3d 498, 507 (Mo. banc 2016), the official ballot title for an initiative petition was modified after some signatures were collected. The Court rejected the argument that those signatures should be invalidated, holding that such a "harsh result" would be contrary to the commandment that "the

[c]ourts of this state must zealously guard the power of the initiative petition process that the people expressly reserved to themselves." *Id.* at 506; *see also Missourians to Protect the Initiative*, 799 S.W.2d at 827 ("Constitutional and statutory provisions relative to initiative are liberally construed to make effective the people's reservation of that power."); *see also Voss*, 418 S.W.2d at 167. The Court recognized that there was a "clear requirement" that ballot measures be identified by official ballot title when put before the voters, but no such requirement existed for a petition being circulated for signatures:

> [Mo. Const. art. 12, § 2(b)] ***only*** authorizes legislation detailing the requirement for an "official ballot title" at the time the proposed constitutional amendment is put before the voters. There is no similar 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.

Boeving, 496 S.W.3d at 507. (emphasis in original). This Court held that there was no statutory reason to invalidate these signatures and then continued that "more importantly," the argument that they ought not be counted "r[an] counter to the language of the constitutional provisions that expressly reserve the power of the initiative petition process to the people." *Id.*

Boeving makes clear that the Constitution does not require the certification of an official ballot title before a voter-initiated petition is circulated for signatures. That requirement is a creature of statute alone. If that statutory requirement had no effect on the people's ability to exercise their referendum right, it could perhaps be justified as reasonable implementing legislation. But it does. The statutory requirement does in fact

impede and interfere with the constitutional referendum right, by drastically and artificially reducing the time available for the circulation of a referendum petition.

Appellant points out that *Boeving*, *Union Electric*, and *Union Labor* did not decide the precise question presented by this case. True enough. Nonetheless, this Court's guidance in those cases supports the circuit court's judgment: *Boeving*, which built on *Union Electric* and *Union Labor*, reiterated that courts should "zealously guard" the petitioning rights the people reserved to themselves and that where a petition signer has the full text of the proposal in front of him, he must be presumed to be aware of its contents and understand the legal significance of his decision to sign. *See Boeving*, 496 S.W.3d at 506; *Union Elec. Co.*, 678 S.W.2d at 406; *United Labor Comm. of Mo. v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. banc 1978) ("[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"). The circuit court appropriately recognized these principles when it issued its judgment.

C. Merely calling a statute "implementing legislation" is insufficient to insulate it from constitutional scrutiny.

Boeving tested how reasonable implementing legislation should be read and ultimately interpreted a statute narrowly so it would not interfere with a right of petition. Of course, not every statute that the General Assembly enacts ostensibly to implement a right of petition can be interpreted as reasonable. No one disputes that the legislature may enact procedural statutes to carry out broad constitutional provisions. But this Court's case law is clear: merely calling a statute "implementing legislation" is insufficient to

insulate it from constitutional scrutiny. This Court consistently strikes down so-called implementing laws when their actual effect is to impede and interfere with the very right they are ostensibly intended to implement. Like in those cases, the Court should uphold the circuit court's judgment that the statutes here do the same.

In *Rekart*, 639 S.W.2d at 607, this Court considered the constitutionality of a statute said to implement the initiative right by creating a process for petition signers to withdraw their signatures after an initiative petition had been submitted to the Secretary of State. *Id.* at 608. Acknowledging the presumption of constitutionality in favor of legislative enactments, the Court nonetheless struck down the statute as unconstitutional. In so doing, it explicitly rejected the kind of argument Appellant makes here:

> Respondents contend that [the statute] is merely procedural legislation to implement the provisions of the initiative and referendum process, and point out that procedures for initiative and referendum are generally provided by legislation. When duly enacted, such legislation carries a presumption of constitutional validity. However, when such statutes interfere with or impede a right conferred by the constitution, the statute must be held unconstitutional.

Id. at 608.

The *Rekart* Court held that the statute permitting signers to withdraw signatures after submission of the petition interfered with and impeded the initiative power. *Id.* at 608. Although a signer could withdraw *until* the filing deadline, a statute permitting him to do so afterward had the effect of making valid signatures unreliable, and petition circulators had to be able to count on the valid signatures they obtained. The Court stated that, "[t]he importance of an exercise of the constitutional power of initiative" required a "presum[ption] that when someone signs an initiative petition, he is aware of its

contents"—any presumption to the contrary could "jeopardize the exercise of the constitutional right itself." *Id.* at 608–09 (quoting last clause from *Uhl v. Collins*, 17 P.2d 99, 100 (Cal. 1932)).

Rekart is not the only case in which this Court has been confronted with a so-called implementing law which actually obstructs a constitutional right. In *Upchurch*, 810 S.W.2d at 516, this Court struck down another statute that interfered with the initiative right. The *Upchurch* Court rejected the idea that the legislature may limit by statute the time available for the circulation of petitions when the Constitution contemplates a different result. *Id.*

In *Upchurch*, a voter sought to circulate an initiative petition proposing a new constitutional amendment. *Id.* at 515. The Secretary of State rejected his sample sheet in accordance with a statute that limited proposed petitions from being filed more than a year before their deadline for submission. *Id.* at 515–16.

In a subsequent declaratory-judgment action filed by the would-be petitioner, the Court struck down that statute. Where the Constitution had set out a filing deadline (then four months before an election) and had provided that amendments proposed by initiative would be put before the voters "at the next general election," it was plain that the Constitution had limited the time to submit a sample sheet to "the period between general elections." *Id.* at 516. The contrary statute was therefore invalid because it "shorten[ed] the time authorized by the constitution during which the constitutional amendment petition may be circulated for signatures." *Id*. at 517; *see also Missourians to Protect Initiative*, 799 S.W.2d at 827; *United Labor*, 572 S.W.2d at 454 ("Previous decisions of

this court have discussed the importance of the initiative and referendum, emphasizing that procedures designed to effectuate these democratic concepts should be liberally construed to avail the voters with every opportunity to exercise these rights."). This Court reached this result unanimously, despite acknowledging that the start date was not "semantically explicit." *Upchurch*, 810 S.W.2d at 517.

Upchurch makes Appellant's reliance on the United States Supreme Court's decision in *Dillon v. Gloss*, 256 U.S. 368 (1921), somewhat nonsensical. That case concerned whether Congress could fix an *end date* for the ratification of proposed federal constitutional amendments. *Id.* at 371. Whether the Missouri state legislature may artificially delay the *start date* for signature collection would not be analogous even if the governing constitutional provisions were the same. *Upchurch* makes clear that the state legislature may not shorten the signature-collection period in a way that is inconsistent with the meaning of the Missouri Constitution—even when that meaning is implicit.

D. *Toberman* supports the circuit court's judgment.

Appellant also suggests that *State ex rel. Moore v. Toberman*, 250 S.W.2d 701, 706 (Mo. banc 1952), undermines the circuit court's judgment. To the contrary, *Toberman* supports the judgment. Its foundational principle is that signature collection on a referendum petition may begin as soon as there is an identified act to be referred—something that the statutes at issue make impossible.

In *Toberman*, the legislature had passed a bill and then taken a long recess. The governor, as permitted under those circumstances, did not sign the bill until 45 days after its passage. Once the bill was signed, a citizen began circulating a referendum petition to

refer that bill. However, he failed to file enough signatures by August 28, so the bill went into effect. After that, he collected the remaining signatures necessary to place the bill on the ballot. In subsequent litigation, he took the position that late-filed signatures should have suspended the bill's operation. Opponents argued, to the contrary, that not only could the bill not be suspended but it also had never been referable since the Constitution allowed long recesses without providing for a petitioning period relative to a long recess. (Instead, § 52(a) sets the petition filing deadline based on "final adjournment" of the legislative session in which the targeted bill was passed.)

This Court charted a different course. The Court agreed with the opponents that a law already in effect could not be referred, but it rejected their argument that the recess power could deprive a petition circulator of time to collect signatures. That the law could not be suspended once in effect did "not mean that Senate Bill 267 was not subject to referendum prior to its effective date." *Id.* at 706. To the contrary, to hold otherwise would allow the General Assembly to use its recess power to "defeat the purpose of 52(a)" and deprive citizens of their constitutionally reserved referendum power. *Id.* The Court went on to interpret § 52(a) to allow a 90-day signature collection period for bills passed before long recesses, even though none was explicitly provided. It did so on the presumption that the Constitution *did* provide for 90 days as to bills passed before adjournment, rather than recess:

> It seems clear that the intendment of the framers of the Constitution was that all laws, except those declared non-referable, should be subject to referendum if petitions to refer them were duly filed before their effective date, which under the [recess power provision] is either ninety days after adjournment of the session or ninety days after the beginning of the recess

> and adoption of the resolution therein provided. True, § 52(a) does not expressly so provide, but it is obvious its failure to do so is a mere oversight.
>
> Unless it is so construed, the [recess power provision] is nothing more than a breeder of confusion and mischief. There can be no sound reason for not construing § 52(a) to mean that referendum petitions as to referable bills passed under the proviso of § 29 may be filed within ninety days after the beginning of the recess. It will afford ***the same amount of time, ninety days, for the circulation of the petitions and procurement of signatures***.

Id. at 706–07 (emphasis added).[4] It is true enough *Toberman* did not decide the issue at hand, but the presupposition that circulators of referendum petitions have 90 days to collect signatures permeates this Court's opinion. The text of the Constitution and its meaning are clear.

What the *Toberman* Court recognized is that the start date for signature collection may not be "semantically explicit" in the Constitution, but it is just as obvious from the text as the start date for initiative submission was in *Upchurch*. The start date is the date on which there is an act of the general assembly to refer:

> The people . . . reserve power to approve or reject by referendum any act of the general assembly, except as hereinafter provided.

[4] Appellant takes a line from *Toberman* out of context. (*See* App. Br. at 29, quoting "Section 52(a) merely fixes the latest date in which referendum petitions may be filed.") Appellant uses this statement to suggest that the *Toberman* Court endorsed his view that the Constitution has nothing to say about when petition circulation may begin. But in so stating, the Court is actually suggesting the opposite. It is in the middle of rejecting the opponents' argument that the Constitution forbade petition circulation during the legislative recess. The "merely" does not mean the Court thinks that is the only function of section 52(a); rather, it is pointing out why earlier petition circulation was constitutionally permissible.

Art. III, § 49. The plain meaning of that provision is that the referendum power is reserved in full except as thereinafter provided. *See State ex rel. Westhues v. Sullivan*, 224 S.W. 327, 334 (Mo. banc 1920) (commenting that readers should "note the comprehensive term 'any act' as used" in earlier version of § 49). The only other constitutional provisions that relate to the referendum right are art. III, §§ 52(a) and 52(b), which place no further time limitation on petition circulation nor on whose signatures should count, other than that they must be "legal voters":

> A referendum may be ordered . . . by petitions signed by five percent of the legal voters in each of two-thirds of the congressional districts in the state . . . . 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); *see also id.* § 52(b) (providing that "elections on measures referred to the people shall be had at the general state elections, except when the general assembly shall order a special election"). These provisions must be read liberally. *United Labor*, 572 S.W.2d at 454; *Voss*, 418 S.W.2d at 166; *Missourians to Protect Initiative*, 799 S.W.2d at 827. The circuit court's judgment should be upheld because it aligns with this Court's caselaw and the text of the Constitution itself.

E. The pre-circulation presentment requirement is not reasonable implementing legislation.

Even if the Constitution did not plainly set out a start date for the collection of countable signatures on referendum petitions, the statutes at issue nonetheless conflict directly with §§ 49 and 52(a). That is because they require pre-circulation presentment of a petition to the very government whose act the people are, by the nature of a referendum,

attempting to undo. Bestowing on State officials the authority to derail the petition process flies in the face of both the plain language and primary objectives of the reservation of the referendum power. Further, as Appellant's actions have made clear, the statutes do not just create a theoretical possibility that a right may be impeded. To the contrary, they are operating in such a way that Missourians have been and continue to be presently deprived of their referendum right.

Section 52(a) describes exactly when referendum petitions must be presented to the government: "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." It does not contemplate *pre*-circulation presentment at all, much less countenance the notion that State officials could delay circulation while they do preliminary tasks triggered by that presentment. Respondents do not quibble with the General Assembly's authority to enact legislation obliging State officials to carry out administrative tasks that facilitate the referendum process. But to require a citizen to wait for those tasks to be completed—in essence, to wait for government approval—before circulating her referendum petition is inconsistent with the plain language of the referendum provisions, which reserve the whole referendum right other than what is explicitly delimited in the Constitution itself. *See Voss*, 418 S.W.2d at 167; *Musser v. Conrod*, 496 S.W.2d 8, 11 (Mo. banc 1973) ("Minor details may be left for the legislature without impairing the self-executing nature of constitutional provisions but all such legislation must be subordinate to the constitutional provision and in furtherance of its purposes . . . .").

Almost a century ago, this Court considered the effect of a constitutional commandment forbidding changes to the *end* of the referendum process in *State ex rel. Elsas v. Missouri Workmen's Compensation Commission*, 2 S.W.2d 796 (Mo. 1928). The Court's analysis in *Elsas* also supports the circuit court's judgment. *See id.* at 799–802.

In *Elsas*, a citizen-referred ballot measure creating a workers' compensation system was approved by the voters on November 2, 1928. The Constitution (in what is now art. III, § 52(b)), provided that "[a]ny measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise." However, the legislature had enacted a statute creating "the legal machinery" needed to "make more fully effective" the constitutional referendum right, *id.* at 801, which included post-vote administrative tasks for counting and verifying votes on ballot measures. The last of those tasks was assigned to the governor, who was charged with "declaring such measures as are approved by majority of those voting thereon to be in full force and effect as the law of the state of Missouri from the date of said proclamation." *Id*. In accordance with the statute, the governor proclaimed the workers' compensation law to be in effect on November 16, 1928. In that two-week interim, a construction worker had died on the job. His widowed spouse sought benefits from the new commission. The legal question was whether the referred workers' compensation law had gone into effect on November 2, in which case the spouse was entitled to benefits, or November 16, in which case she was not. *Id.* at 798.

The Court held that "not otherwise" language from the Constitution had to control. *Id.* at 801. Quoting *State ex rel. Drain v. Becker*, 240 S.W. 229, 235 (Mo. banc 1922), it

pointed out that "[n]o exception is written in this law." Therefore, the referred bill had gone into effect as soon as it was approved and the proclamation of the governor had no effect whatsoever:

> This statute, relied upon by counsel, undertakes to make the date of the Governor's proclamation the effective date of the referred law. It undertakes to give force to the Governor's proclamation. In so far as this section undertakes to give the Governor, or any other person, the power to say when the referred law shall be the law of this state, it conflicts with the Constitution, and must fall.

Id. at 802. In other words, a statute that narrows the constitutional referendum right must be struck down, even if it concerns a mere matter of timing. That is the compelled result despite the usefulness of the statute at issue: "That the lawmakers may fix a date for counting the votes, and a publication of the result by proclamation, is not questioned. . . . Such would give to the public information of just what happened upon election day. . . ." *Id.* Nonetheless, the legislature could not overcome a "constitutional provision [that] confers no right upon the Governor to fix an effective date for a referred law." *Id.*

Just like the legislature in *Elsas*, the legislature here is perfectly entitled to enact potentially useful statutes that give information to the public, such as the certification of an official ballot title. But in furtherance of setting up the legal machinery needed to effectuate the referendum right, the legislature may not "narrow or embarrass" that right. *United Labor*, 572 S.W.2d at 449; *see also Musser*, 496 S.W.2d at 11. The statutory prohibitions on the collection of countable signatures until a ballot title is certified do precisely that. To permit the legislature to appropriate to State officials 51 of the 90 days contemplated by the Constitution for petition circulation is wholly inconsistent with the

primary objectives of the reservation of the referendum right. *See Westhues*, 224 S.W. at 333 ("The right [of referendum] is not only constitutional, but one of vital importance and of large proportions."); *Drain*, 240 S.W. at 231–32 ("It is not reasonable to conclude, in the absence of words of limitation, that the power thus reserved was intended to be other than complete. Held to be otherwise, it would fail to effect the purpose of its creation, which, as we have shown, was to lessen the limits of legislative power as theretofore possessed by the General Assembly.").

The statutes at issue, by requiring petitioners to present their petition to the government before circulation, are inconsistent with both the plain language and the primary objective of §§ 49 and 52(a). Like in *Elsas*, they must fall. For these reasons, the circuit court's judgment was appropriate and should be upheld.

II. Response to Second Point Relied On

Point Relied On: The circuit court erred in holding that §§ 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.

Appellant failed to preserve his "no set of circumstances" argument. While this standard is inapplicable to the referendum right, it would nonetheless be satisfied because the statutory language at issue impedes and interferes with the referendum right under all circumstances.

A. This issue has not been preserved.

Appellant did not raise any "no set of circumstances" issue in the circuit court. Neither of the record citations (D89, p. 15; D94, p. 3) discusses the basis of this claim of error. Appellant never made the argument that Respondents were required to prove the statute could not be constitutionally applied under any circumstance. (*See generally* D94.) Indeed, Appellant never even cited *State v. Jeffrey*, 400 S.W.3d 303, 308 (Mo. banc 2013). This issue has therefore not been preserved. *Desai v. Seneca Specialty Ins. Co.*, 581 S.W.3d 596, 599 n.4 (Mo. banc 2019) ("Generally, when there is no argument in the record concerning an issue or when an issue is not presented to the circuit court, it has not been preserved for appellate review."); *McMahan v. Missouri Dep't of Soc. Servs., Div. of Child Support Enf't*, 980 S.W.2d 120, 126 (Mo. App. E.D. 1998) ("Even in a court-tried case, . . . the appellant must make some effort to bring the alleged error to the trial court's attention. An issue not advanced at all in the trial court is not preserved for appellate review.") (internal citations omitted)).

B. No court has held that the *Jeffrey* standard applies to constitutional petitioning rights.

The facial-challenge standard Appellant relies upon, articulated in *Jeffrey*, has never been applied in a referendum case and should not be applied here for the first time on appeal. This Court has issued multiple decisions concerning the petitioning rights reserved to the people by the Constitution, many of which were discussed by the parties in briefing, including *Rekart*, *Boeving*, *Upchurch*, *Elsas*, *Westhues*, *Toberman*, *Musser*, *Voss*, *Union Electric*, and *United Labor.* Yet the Court never held in any of those cases

that the party challenging a statute alleged to impede a petitioning right had to show the statute could not be constitutionally applied under any set of circumstances.

Indeed, the "no set of circumstances" standard has not been universally applied to all constitutional challenges. For example, in *Jeffrey*, 400 S.W.3d at 308, this Court recognized that litigants may challenge a statute as overbroad in violation of First Amendment speech right even if statute could be constitutionally applied under some circumstances. But perhaps more closely related to the case at hand, this Court has also repeatedly considered constitutional challenges to voting-related statutes even where the statutes have been alleged to curtail the rights of only some voters. *See Weinschenk v. State*, 203 S.W.3d 201, 212–13 (Mo. banc 2006) (acknowledging that statute creating photo ID requirement could affect rights of some 3% to 4% of Missouri voters); *Priorities USA v. State*, 591 S.W.3d 448, 453 (Mo. banc 2020) (striking voter-affidavit statute as unconstitutional despite fact that only small percentage of Missouri voters lacking certain form of identification would be subject to statute).

Likewise, in *Upchurch*, this Court heard a constitutional challenge from a would-be initiative petitioner without applying the "no set of circumstances" test.[5] The *Upchurch* Court considered the conflict between the Constitution's start time for initiative-petition circulation and the statute delaying that start time without considering whether *some* initiative petitioners could meet that artificial statutory time frame.

[5] The *Upchurch* challenger filed a petition for a writ of mandamus as well as an appeal, and this Court "review[ed] the matter as an appeal from the dismissal of relator's petition for declaratory judgment." *Id.* at 515.

This analysis makes sense based upon the applicable constitutional test, which Appellant misstates. The constitutional question is not whether "the statutes leave sufficient time to gather signatures" under some circumstances for would-be petitioners with millions of dollars at their disposal. The question is, as this Court held in *Rekart*, whether so-called implementing laws "interfere with or impede" a petitioning right that the people have reserved to themselves. *Rekart*, 639 S.W.2d at 608 (citing *United Labor*, 572 S.W.2d at 455, and *State ex rel. Randolph Cty. v. Walden*, 206 S.W.2d 979, 986 (1947)). Here, the answer is plainly yes.

C. The circuit court's declaration of unconstitutionality should be affirmed because the language at issue impedes and interferes with the right of referendum under all circumstances.

Assuming this claim of error had been preserved *and* that the "no set of circumstances" test applies to facial challenges to statutes that interfere with the referendum right, it would nonetheless be meritless. Respondents met the test. There is no set of circumstances under which RSMo §§ 116.180 and 116.334.2 may be constitutionally applied. As such, the statutes interfere with and impede the referendum right no matter the circumstances. Indeed, even if a would-be petitioner benefited from the serendipitous January passage of a bill, the statutes would still conflict with the Constitution by requiring pre-circulation government presentment, artificially shrinking the time available for signature collection, and placing a new restriction on the referendum right that is not part of the Constitution itself. Those are not mere "marginal burdens" like Appellant suggests.

In *Walden*, one of the cases on which *Rekart* relies, this Court set out what it considered reasonable implementing legislation to include: "Such legislation may be enacted as will facilitate operation, prescribe a practice to be used for enforcement, provide a convenient remedy for the protection of the right secured or the determination thereof, or place reasonable safeguards around the exercise of the right." *Walden*, 206 S.W.2d at 986. The Court went on to stress what implementing legislation does *not* include:

> Yet such legislation 'cannot limit or restrict the rights conferred by the constitutional provision.' In *State ex rel. City of Fulton v. Smith, State Auditor*, [194 S.W. 2d 305], we said: 'Minor details may be left for the legislature without impairing the self-executing nature of constitutional provisions * * * but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purposes, and must not in any particular attempt to narrow or embarrass it.

Id. (internal citations omitted).

The *Walden* Court then explained what happens if there is a conflict between a constitutionally protected right and a statute that narrows it: "In a contest between the two if the statute *restricts a right* conferred by the Constitution, the latter prevails and the statute falls." *Id.* (emphasis in original). Sections 116.180 and 116.334.2, which erect a pre-circulation presentment requirement and artificially delay the start of signature collection by many weeks, unequivocally impede and interfere with the referendum right. Under *Rekart* and *Walden*, they must fall. The circuit court was correct to recognize this, and its judgment declaring those statutes unconstitutional should be affirmed.

Since the statutes at issue were enacted in 1997, just a single referendum has squeezed through to the ballot—and its subject bill (popularly known as "right-to-work")

had been signed 113 days before the end of the 2018 legislative session, a full 203 days before signatures were due. Appellant essentially hangs his hat on the right-to-work bill. (D110, p. 9; D106, p. 21.) But the Constitution does not limit the referendum right to bills passed early in the legislative session, nor does one instance of success obviate the circuit court's finding that the statutes are unconstitutional. The availability of a constitutional right cannot depend on fortuitous timing. And for most of Missouri history, it has not.

Except for right-to-work, the circulation of every referendum petition in Missouri history could begin before an official ballot title was certified. Until twenty-two years ago, RSMo § 116.334.3 explicitly *endorsed* the counting of signatures collected before official ballot title certification. (*See* 1997 Mo. Legis. Serv. S.B. 132, *quoted at* D90, p. 2; *State v. Massey*, 219 S.W.2d 326, 328 (Mo. 1949 (taking judicial notice of records of General Assembly).) When the pre-circulation ballot-title requirement did not exist for most of the State's history, it is hard to take seriously Appellant's contention that an official ballot title is crucial for the preservation of electoral integrity—*even if* that were sufficient to insulate the statutes from constitutional muster. *Cf. Elsas*, 2 S.W.2d at 802. Particularly in light of this history, Appellant presents no compelling interest in the statutory restrictions.

III. Response to Third Point Relied On

Point Relied On: 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.*

In this claim of error, Appellant suggests Respondents ought to have sued him before he even took the complained-of action. This point should be denied for two independent reasons: (1) the prerequisites for *res judicata* and waiver are not met and (2) not all Respondents are the same as the parties in the prior litigation, nor is there privity.[6]

A. This case arises out of a different act.

The claim in the earlier litigation and the claim here do not arise out of the same act, which is required for the application of *res judicata*. *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 319 (Mo. banc 2002) (characterizing *res judicata*, now called claim preclusion, as prohibition against splitting a cause of action and holding that operative question is whether the two claims "arise[] out of the same act, contract or transaction"). The earlier lawsuit rested on the premise (held valid) that Appellant had failed to do something he was statutorily required to do under RSMo § 116.332 in June 2019. *See ACLU of Mo. v. Ashcroft*, 577 S.W.3d 881 (Mo. App. W.D. 2019).

This lawsuit, on the other hand, does not challenge Appellant's lack of compliance with RSMo § 116.332. Rather, it challenges the *validity* of *different statutes*, RSMo §§ 116.180 and 116.334, premised on Appellant's reliance on those statutes in July and August 2019 as well as his insistence of apply the statutes in the same way prospectively. *See id.* (holding that to assess whether a claim is precluded, "a court looks to the factual bases for the claims" and implying that if there are "some ultimate facts[] unknown or

[6] Although Appellant references "waiver," he does not discuss it as a distinct doctrine from *res judicata*; thus, the discussion of the concepts is combined in this response.

yet-to-occur at the time of the first action," that will form the basis of a new claim for relief); *accord Stegner v. Milligan*, 523 S.W.3d 538, 543 (Mo. App. W.D. 2017) ("*res judicata* does not bar subsequent claims based on facts that are unknown to plaintiff or yet-to-occur at the time of the first action").

Appellant's reliance on RSMo §§ 116.180 and 116.334.2 to delay certification of the official ballot title had not happened yet when the earlier action was filed. Indeed, even by the time the appellate court in the prior lawsuit issued its decision, it was still not yet known whether Appellant would seize all the time allotted to him by statute and, by operation of RSMo § 116.334.1 and 116.180, thereby impede the referendum right. The court acknowledged this: "We recognize 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. That predicament underscores why it is beyond the Secretary of State's authority under [the other statute] to derail the referendum process by reviewing a sample sheet for anything other than its sufficiency as to form . . . ." *Ashcroft*, 577 S.W.3d at 900 n.21 (emphasis added).[7] Because Appellant had not yet undertaken the act

[7] In opposing the ACLU and Baker's motion for transfer in the earlier lawsuit, Appellant emphasized that the Supreme Court should not take the case because the act forming the crux of *this* lawsuit had not yet happened. For example, he argued that as of July 2019, "the ACLU has not presented any evidence that its right to collect signatures for its referendum petition is unconstitutionally burdened by the deadlines imposed by section 116.332 or 116.334. The ACLU has until August 28, 2019, to collect sufficient signatures to place its referendum petition on the ballot. . . . the ACLU has not offered any evidence that it will be unable to meet that deadline." Respondents Secretary of State Ashcroft and Attorney General Schmitt's Response to Appellants' Emergency Motion for

Respondents complain of at the time that earlier lawsuit was happening, it is nonsensical to say there was an earlier opportunity to present this constitutional claim—particularly where, in his next claim of error, Appellant argues this claim is unripe.

B. In addition, there is a party to this lawsuit that was not party to the earlier case about a different act.

Because the earlier case involves a different act and the harm here had not yet occurred when Respondents filed that case, *res judicata* does not apply and no conclusion on privity is required. However, No Bans on Choice, which Appellant acknowledges was not a party to that prior lawsuit, is not in privity with Baker and ACLU-MO. Under Missouri law, "[t]he qualifying element [to find privity] is control, not merely a proprietary or financial interest in the outcome of the litigation." *Kinsky v. 154 Land Co., LLC*, 371 S.W.3d 108, 112 (Mo. App. E.D. 2012) ("adopt[ing] the Restatement [(Second) of Judgments']s theory of privity through control"); *see also James v. Paul*, 49 S.W.3d 678, 683 (Mo. banc 2001) ("privity exists 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"). The evidence, which supports the fact that Respondents share certain goals, is nonetheless insufficient to show that No Bans on

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Interim Relief and Application for Transfer (submitted at the Western District Court of Appeals, Case No. SC97997), at 16. Appellant continued: "Seven weeks remain between the current date and the deadline for submission of signatures on August 28, which provides significant time both for the completion of the ballot title and for the collection of signatures . . . ."). *Id.* at 23. Of course, relying on §§ 116.180 and 116.334.2, Appellant did go on to delay certification of a ballot title for five of those seven weeks in July and August 2019. (D95, p. 3.) Appellant ought not to be permitted to contradict his successful argument in prior litigation to evade review of the constitutionality of the statutes now.

Choice has control over Baker and ACLU-MO, as would be required to find privity. Appellant argues that maybe Baker or ACLU-MO has some level of organizational control over No Bans on Choice, but the connections do not constitute the type of control required to find privity for claim-preclusion purposes. Instead, the point of privity doctrine is to ensure that the new party has effectively already had a day in court—in other words, that the new party controlled or "substantially participate[d] in the control of the presentation" of the old lawsuit. *Kinsky*, 371 S.W.3d at 113. Appellant does not (and could not) make such an assertion.

IV. Response to Fourth Point Relied On

Point Relied On: 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.

The Declaratory Judgment Act is a broad, remedial statute authorizing trial courts to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." *See* RSMo §§ 527.010–527.130; *id.* § 527.120 ("This law is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights . . . and is to be liberally construed and administered."); *see also* Mo. Sup. Ct. R. 87.01–.11 (Declaratory Judgments); *Teat v. Dir. of Rev.*, 806 S.W.2d 754, 757 (Mo. App. W.D. 1991) ("Because the legislature intended that section as a remedial law affording relief from uncertainty, courts must interpret it liberally.").

The Act expressly permits any person whose rights "are affected by a statute" to "have determined any question or construction or validity arising under" that statute and

to "obtain a declaration of rights" as thereto. RSMo § 527.020 (emphasis added). Respondents alleged and proved that their referendum right has been, and will continue to be, affected by RSMo §§ 116.180 and 116.334.2. They requested that the circuit court determine the validity of those statutes in light of their conflict with the constitutional provisions reserving and delineating the referendum right. As such, Respondents' claim is exactly the kind of claim the Act was intended to capture. *See City of Joplin v. Jasper Cty.*, 161 S.W.2d 411, 412–13 (Mo. 1942) ("The [declaratory judgment] act furnishes a particularly appropriate method for the determination of controversies relative to the construction and validity of statutes and ordinances."); *accord Regal-Tinneys Grove Special Road Dist. of Ray Cty. v. Fields*, 552 S.W.2d 719, 722 (Mo. banc 1977).

There are four requirements to maintain a declaratory-judgment claim, and Appellant takes issue with two of them: (1) the existence of a "justiciable controversy" that "presents a real, substantial, presently-existing controversy as to which specific relief is sought, as distinguished from an advisory decree offered upon a purely hypothetical situation" and (2) ripeness. *Northgate Apartments, LP v. City of N. Kansas City*, 45 S.W.3d 475, 479 (Mo. App. W.D. 2001); *see also Grewell v. State Farm Mut. Auto. Ins. Co., Inc.*, 102 S.W.3d 33, 36 (Mo. banc 2003). The circuit court correctly determined that all of the requirements were met here, including the existence of a justiciable, ripe controversy. (*See* D110, pp. 10–12; D91, pp. 3–4.)

A. Where the harm has already occurred, as here, a situation cannot be said to be "purely hypothetical" so as to call for an advisory opinion.

First, there is a justiciable controversy that presents a "real, substantial, presently-existing controversy"—whether Respondents may collect signatures on a referendum petition prior to the certification of an official ballot title—that is in no way "purely hypothetical." *Id.* To the contrary, the harm was ongoing at the time the action was filed, continues now as Appellants are unable to rely on the right of referendum to secure the people's review of a bill that makes it through the legislative process, and will continue in the future. Respondents were in fact unable to collect enough signatures in their referendum effort because of Appellant's reliance on the statutes at issue, filed this action based upon Appellant's ongoing reliance on those statutes in denial of their referendum right, and will be similarly impacted in future attempts to collect referendum signatures so long as the statutes remain in force. Any one of those facts would be sufficient to make this controversy real, substantial, and presently existing; all three together put it beyond dispute. *See Miller v. City of Manchester*, 834 S.W.2d 904, 905–06 (Mo. App. E.D. 1992) (holding that plaintiff who had previously fur-trapped in city could maintain declaratory-judgment action seeking determination of validity of city's ordinance banning fur-trapping because of prospective economic detriment if ban stood, without considering whether he was trapping at that instant); *Mo. Alliance for Retired Americans v. Dep't of Labor & Indus. Relations*, 277 S.W.3d 670, 677 (Mo. banc 2009) (holding that "[i]n the context of a constitutional challenge to a statute, a ripe controversy generally exists when the state attempts to enforce the statute" and even before enforcement, in certain circumstances); *Higday v. Nickolaus*, 49 S.W.2d 859, 863 (Mo. App. K.C. 1971) (holding that where defendant city had "embarked upon a course of action, subscribed by the

electorate, as will ultimately and inevitably culminate in damage to plaintiffs," declaratory judgment action could lie even though harm had not yet occurred). *See also State ex rel. Chilcutt v. Thatch,* 221 S.W.2d 172, 176 (Mo. banc 1949) (commenting that declaratory-judgment action was appropriate to establish "present legal rights against [the] defendants with respect to which [plaintiff] may be entitled to some consequential relief immediate or prospective").

B. Harm to Respondents has already occurred and is likely to occur in the future because Appellant will continue to rely on the statutes to take between 35 and 47 days to certify an official ballot title on future referendum petitions, so this action is ripe.

Although impairment of Respondents' constitutional referendum right will continue to accrue, one harm occurred via the operation of the statutes in 2019. Because Respondents were already deprived once of that right, the claim has ripened. *See Lebeau v. Comm'rs of Franklin Cty.*, 422 S.W.3d 284, 290–91 (Mo. banc 2014) ("A controversy is ripe if the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that presently exists, and to grant specific relief of a conclusive character."). Some other infirmity could have arisen,[8] but Respondents' claim cannot now be deemed "premature."

[8] The other side of the ripeness coin is mootness. Although through the course of this case Appellant catalogued every other justiciability doctrine, he has been silent on mootness. That may be because—even if the action were otherwise moot—it would clearly fit within an exception to that doctrine. *See State ex rel. Walton v. Blunt*, 723 S.W.2d 405 (Mo. App. W.D. 1986) (holding that declaratory-judgment challenge to procedure by which Secretary of State accepted declarations of candidacy for public office was moot because particular election had passed but was nonetheless susceptible to

Nor does the success or failure of Respondents' referendum attempt make a difference to the justiciability of their declaratory-judgment claim. The appellate court's decision in *Vowell v. Kander*, 451 S.W.3d 267, 272 (W.D. Mo. 2014) is instructive. In that case, the appellate court considered whether a political candidate could bring a declaratory-judgment action challenging the Secretary of State's determination that she was not qualified to seek public office. The trial court dismissed the case, concluding that the candidate was indeed unqualified and reasoning that she therefore had no real stake in a justiciable controversy. The appellate court reversed, holding that the candidate's qualifications for office were "wholly irrelevant" to the declaration she sought, which concerned the Secretary's authority to adjudicate candidate qualifications under a particular statute. *Id.* at 273. Further, where the parties disputed which statute or constitutional provision bounded the Secretary's authority, that "disagreement" was

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judicial review because situation was "capable of repetition yet evading review" (citing *Gramex Corp. v. Von Romer*, 603 S.W.2d 521, 523 (Mo. banc 1980)).

See also State ex rel. Dienoff v. Galkowski, 426 S.W.3d 633, 639–40 (Mo. App. E.D. 2014) (holding that public-interest mootness exception applied in action seeking declaration on whether court had authority to rewrite ballot language where that situation was likely to apply in next election and time would be too short to review); *Loving v. City of St. Joseph*, 753 S.W.2d 49, 52 (Mo. App. W.D. 1988) (same in action seeking declaration on whether city constitutionally barred from collecting certain fees could contract with third party to collect those fees and remit them later, despite expiration of contract, because "[i]f so motivated, the City could enter into any number of similar agreements, and by the time the issue of validity of one agreement reached [appellate] court, that agreement would have expired. This is a question of a recurring nature and is of public interest and importance."); *Knight v. Carnahan*, 282 S.W.3d 9, 17 (Mo. App. W.D. 2009) ("Appellants' claims that the measure violated the constitutional and statutory requirements for initiative petitions are not rendered moot . . . by the election").

"sufficient to establish a substantial controversy exist[ed]" regardless of whether the candidate was actually qualified. *Id.* at 272.

Likewise, here, Respondents' claim concerns the Appellant's authority to enforce statutes relating to an election process. Like in *Vowell*, where Secretary Kander had already taken an action that affected the candidate's candidacy right, Appellant has already taken an action that affected Respondents' referendum right. (*See* D95, pp. 1–3.) In addition, here, the circuit court also found that Respondents had plausibly shown they were likely to be subjected to future harm because they wish to refer bills in the future. (D110, pp. 9–10.) For example, Baker testified that during the 2020 regular legislative session, No Bans on Choice tracked 21 bills relating to reproductive health that she and No Bans for Choice considered for referendum. (*Id.* at 9; *see also* D105, pp. 17–18.) Appellant has already confirmed that he will continue to enforce RSMo §§ 116.180 and 116.334.2 (*e.g.*, D96, pp. 1–2), and the circuit court found that the government's certification of a ballot title on future referendum petitions will continue to take away a meaningful portion of the people's time for signature collection. (D110, pp. 9–10.) Regardless of whether Respondents' referendum attempt was ultimately successful—and regardless of whether Respondents have identified specific bills they wish to refer in the future, the harm here has already occurred and is likely to occur again. For those reasons, this action remains ripe and the circuit court's judgment was appropriate.

Conclusion

For the foregoing reasons, Respondents respectfully request that this Court uphold the circuit court's order declaring the provisions of §§ 116.180 and 116.334.2, RSMo,

that prohibit the counting of signatures collected before the certification of an official ballot title to be unconstitutional. These portions of the statutes conflict with Mo. Const. art. III, §§ 49 and 52(a) and interfere with and impede the referendum right reserved to the people by the Constitution, in violation of the Constitution and this Court's case law. Appellants failed to preserve their "no set of circumstances" argument, which does not apply to the rights at issue but would nonetheless be satisfied. Appellant's arguments regarding *res judicata*, waiver, and privity also fail. A declaratory judgment is appropriate because there is justiciable, ripe controversy at issue. As such, the circuit court's order should be affirmed.

Respectfully submitted,

/s/ Anthony E. Rothert
Anthony E. Rothert, #44827
Jessie Steffan, #64861
Kayla DeLoach, #72424
Molly Carney, #70570
American Civil Liberties Union
of Missouri Foundation
906 Olive Street, Ste. 1130
St. Louis, MO 63101
Phone: (314) 652-3114
Fax: (314) 652-3112
arothert@aclu-mo.org

Gillian R. Wilcox, #61278
American Civil Liberties Union
of Missouri Foundation
406 West 34th Street, Ste. 420
Kansas City, MO 64111
Phone: (816) 470-9933
Fax: (314) 652-3112
gwilcox@aclu-mo.org

Attorneys for Respondents

Certificate of Service and Compliance

The undersigned hereby certifies that on May 24, 2021, the foregoing brief was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that the brief complies with the limitations in Rule 84.06 and contains 12,732 words. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert