IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

NO BANS ON CHOICE, AMERICAN CIVIL LIBERTIES UNION OF MISSOURI, and SARA E. BAKER, Plaintiffs, v. JOHN R. ASHCROFT, in his official capacity as Missouri Secretary of State, Defendant.	Case No. 19AC-CC00382 Division: I

ORDER AND JUDGMENT

This matter came before the Court on June 25, 2020. Plaintiffs and Defendant appeared through counsel and agreed to admit joint stipulated facts, along with two deposition transcripts and nine paper exhibits. The Court received the evidence and heard argument from the parties. Having reviewed the record and considered the issues, the Court finds for Plaintiffs and issues a declaratory judgment that RSMo. § 116.180 and 116.334.2 are unconstitutional because they conflict with Mo. Const. art. 3, §§ 49 and 52(a) and impede and interfere with the referendum right reserved to the people through the Missouri Constitution.

Introduction

At issue is whether two statutory provisions challenged by Plaintiffs impede and interfere with the referendum right. The citizens of Missouri, when adopting their constitution in 1945, reserved to themselves the right of referendum, an opportunity to review most measures passed by the legislature and circulate a referendum petition on a measure they wish to present to voters. If enough valid signatures are collected on the petition, the measure passed by the legislature will

not go into effect but instead will be put on the ballot for a vote of the people. The people can vote yes or no on the measure.

In this declaratory-judgment action, Plaintiffs have challenged two statutes that purport to implement the referendum right but which Plaintiffs claim actually interfere with and impede that right. *See Rekart v. Kirkpatrick*, 639 S.W.2d 606 (Mo. banc 1982) (holding that "when [implementing] statutes interfere with our impede a right conferred by the constitution, the statute must be held unconstitutional").

The statutes, §§ 116.180 and 116.334.2, prohibit the collection of countable signatures on a referendum petition until after the Secretary of State has certified that referendum's official ballot title. The certification of the official ballot title is the last in a series of preparatory tasks that the legislature has required of various State officials. Collectively, the legislature has provided 51 days to the State government to complete those tasks. During the time the government is completing those tasks, a person who wishes to circulate a referendum petition cannot do so. The signatures they collect during that interim do not count toward the total required for a measure to appear on the ballot.

The period for signature collection on a referendum petition is, by design, rather short. Under the Missouri Constitution, petitioners must turn in their signatures for counting and validation no later than 90 days following the last day of the session in which the law to be referred was passed. In practice, because the legislative session typically ends in May, the deadline will typically be in August. For a measure passed early in the legislative term, a would-be petitioner may have up to six or seven months for the circulation of a referendum petition. For a measure passed late in the term, a petitioner will have much less time. The Constitution does not distinguish between these situations; the constitutional deadline for the presentment of

signatures is the same regardless of when the measure passed. For a measure passed the last day of session, the full signature-collection period may be as little as 90 days. The challenged statutes, which prohibit petitioners from collecting signatures until after the official ballot title is certified, permit the government to take away 51 of those days.

Plaintiffs, who wished to refer a measure passed by the General Assembly late in the 2019 legislative session, allege they were stymied by the challenged statutes. They wish to have a realistic opportunity to refer measures in this future and fear that the statutes will again bar them from circulating a referendum petition. As such, they brought this declaratory-judgment action seeking a declaration that the statutes conflict with the Missouri Constitution's reservation of the referendum right to the people of the State.

Procedural History and Prior Ruling on Motion to Dismiss

This action was filed in August 2019. Secretary of State Ashcroft, sued in his official capacity, filed a motion to dismiss the suit in September 2019. Secretary Ashcroft argued that the statutes do not interfere with the referendum right and do not conflict with the Constitution. He also argued that Plaintiffs' lawsuit was barred by waiver and res judicata and was unripe, and that any ruling would constitute an improper advisory opinion. In February 2019, this Court denied Secretary Ashcroft's motion to dismiss, ruling that Plaintiffs had stated a claim that is justiciable and upon which relief may be granted.

As to the Secretary's justiciability arguments, the Court held that there was no res judicata or waiver because: (1) one of the Plaintiffs, No Bans on Choice, was not a participant in the prior lawsuit in which the Secretary argued this claim ought to have been litigated and was not in privity with the other Plaintiffs, and (2) that earlier lawsuit was filed—and had indeed been reviewed by the appellate court—before the occurrence Plaintiffs now complain about. In

other words, the delay caused by the challenged statutes had not happened yet when the lawsuit was going on so it could not have been made part of that lawsuit. Then taking Plaintiffs' allegations as true as it was required to do, the Court held that Plaintiffs had already experienced harm (the interference with and impediment of their ability to exercise their referendum right) and had plausibly alleged a threat of future harm, and as such, that a ruling would not constitute an advisory opinion. Finally, the Court held that the action was ripe because, taking their allegations as true, the challenged laws had already been enforced against Plaintiffs.

As to whether Plaintiffs had stated a claim, the Court held that they had. The Court took as true Plaintiffs' allegation that the delay in the certification of the official ballot title for the measure Plaintiffs wished to refer last term had caused them not to be able to exercise their referendum right, despite putting forth significant effort to attempt to do so. The Court also took as true Plaintiffs' allegations that the certification of the official ballot title had, over multiple administrations, taken on average between 35 and 47 days, that the Secretary had stated he would continue to enforce the challenged statutes, and that Plaintiffs would attempt to refer bills in the future. Assuming these facts as true and applying the *Nazeri* standard, the Court denied the motion to dismiss, holding that the simplicity of the referendum process and the 90-day time limit for signature presentment meant that "virtually any requirement that reduces the time allowed to collect signatures could impair the right of referendum described in Art. III § 52(a)."

Findings of Fact

The following facts were stipulated by the parties or supported by competent evidence admitted without objection at trial:

Parties

1. Plaintiff No Bans on Choice is a 501(c)(4) nonprofit organization created and operating under the laws of the State of Missouri.

2. Plaintiff American Civil Liberties Union of Missouri (ACLU-MO) is a 501(c)(4) nonprofit organization created and operating under the laws of the State of Missouri.

3. Plaintiff Sara E. Baker is a resident of the State of Missouri, an officer of No Bans on Choice, and an employee of ACLU-MO.

4. Defendant John R. Ashcroft is the Missouri Secretary of State.

Certain Relevant Law

5. 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."

6. 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.

7. Pursuant to state statute, Secretary of State Ashcroft is responsible for certifying the official ballot title of a proposed referendum petition. Under § 116.180, RSMo, and other provisions of Chapter 116, RSMo, the official ballot title contains a summary statement, which is prepared by the Secretary of State, and a fiscal note summary, which is prepared by the State

Auditor. Under those statutes, the official ballot title is certified after the summary statement and fiscal note summary have been prepared and approved.

8. Section 116.180, RSMo, provides that for statewide ballot measures, "[p]ersons circulating the petition shall affix the official ballot title to each page of the petition prior to circulation and signatures shall not be counted if the official ballot title is not affixed to the page containing such signatures."

9. Section 116.334.2, RSMo, provides that "[s]ignatures obtained prior to the date the official ballot title is certified by the secretary of state shall not be counted."

Timeline Concerning H.B. 126[1]

10. HB126, which *inter alia* imposes new abortion restrictions, is the measure Plaintiffs wished to refer for a vote of the people following the 2019 legislative term.

11. On Friday, May 17, 2019, the Missouri General Assembly passed HB126.

12. On Friday, May 24, 2019, HB126 was signed into law by Governor Parson.

13. On Tuesday, May 28, 2019, Sara E. Baker, on behalf of ACLU-MO, submitted a proposed Referendum Petition to the Missouri Secretary of State's Office seeking to place HB126 on the ballot for the 2020 general election.

14. On Thursday, June 6, 2019, Secretary Ashcroft notified ACLU-MO that he was rejecting the proposed Referendum Petition on constitutional grounds.

15. That same day, Baker and ACLU-MO filed suit alleging that the constitutional grounds were not a sufficient basis for rejection of the proposed Referendum Petition on HB126. In that suit, on July 8, 2019, the Missouri Court of Appeals, Western District, ordered Secretary Ashcroft to approve the proposed Referendum Petition for circulation.

[1] While the instant example of HB126 deals with the issue of abortion, the legal analysis regarding the timelines apply to **any** issue that the People desire to submit to a referendum vote.

16. However, between July 8 and August 14, 2019, Plaintiffs could not circulate their Referendum Petition because Secretary Ashcroft had not yet certified an official ballot title and RSMo §§ 116.180 and 116.334.2 prevented them from collecting countable signatures until that had been done.

17. After 4 PM on August 14, 2019, in accordance with the appellate court decision, Secretary Ashcroft approved the Referendum Petition for circulation.

18. On or about August 26, 2019, Secretary Ashcroft issued a press release about the Referendum Petition. That press release was admitted into evidence in this case. In the press release, Secretary Ashcroft is quoted as saying, "The maximum number of days to approve a petition is 51." He is also quoted as saying, "We approved this referendum in just 42 days – faster than our average." The accuracy of these statements was not disputed.

19. Also in the press release, Secretary Ashcroft takes the position that "the clock stopped" on the processing of the Referendum Petition while the ACLU-MO's June 2019 lawsuit was pending that that the clock "started anew" after the Court of Appeals issued its ruling. The accuracy of this statement was not disputed.

20. Finally, the press release includes a graphic showing the average time for a petition's ballot title to be certified between 2016 and 2020 (under three different governors). The average time ranges between 35 and 47 days. The accuracy of this data was not disputed.

21. Currently, based on the population of the State of Missouri, proponents must present 107,510 valid signatures to the Secretary of State for a referred measure to appear on the ballot, and a certain percentage of those signatures must come from each of six of the State's eight congressional districts.

Plaintiffs' Efforts to Circulate Their Proposed Referendum Petition on HB126

22. In this action, the parties deposed Plaintiff Baker as well as Christopher Gallaway, the co-owner of FieldWorks, LLC. FieldWorks is a company that specializes in signature-gathering at the state and local levels, including on prior ballot initiatives in Missouri. The parties jointly offered for admission the transcripts of these depositions at the June 25 bench trial. The Court received them without objection.

23. In her deposition, Baker described the efforts she and others undertook to attempt to circulate the HB126 Referendum Petition. She requested budgets and logistical plans from FieldWorks when she was working on the HB126 referendum effort. A letter from Gallaway to Baker dated May 24, 2019 was admitted into evidence without objection and shows that these efforts were already underway at least as soon as Governor Parson signed the measure into law.

24. In addition, Baker testified that she and others took the following steps to exercise their referendum right: created a coalition of organizations that wanted to participate in the referendum effort; established a website to educate interested individuals; committed a substantial amount of time and money; sought 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 firm like FieldWorks; organized more than 800 volunteers to collect signatures; designated team leads for the signature collection effort to work in different congressional districts; recruited notaries public to ensure that the signed petition pages could be notarized in accordance with state law; continually adjusted 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; and collected signatures after August 14, 2019, when Secretary Ashcroft certified the official ballot title for the HB126 Referendum Petition. This testimony was not controverted.

25. Gallaway, who started at FieldWorks in 2004, testified that he and his company had successfully qualified "well over 75" ballot initiatives at the state level since the company was founded. He had personally been involved in the referendum on the "right-to-work" law passed by the Missouri General Assembly in 2017. This testimony was not controverted.

26. Since the challenged statutes were enacted in 1997, the only referendum petition that collected enough signatures for its referred measure to be placed upon the ballot was the "right-to-work" bill. As Gallaway testified, people interested in exercising their referendum right as to that measure were "very lucky" because that law was "the very first bill signed by the governor in that legislative session, so it happened very, very early. . . . So in addition to the normal timeline to collect once the legislature adjourned, it happened early enough that we had extra time overall." This testimony was not controverted.

27. Based on Gallaway and Baker's uncontroverted testimony and the exhibits received into evidence, including budgets FieldWorks prepared for Baker on different dates, the Court finds that every day the time for signature collection on a referendum petition is reduced, the cost of gathering enough signatures to get the referendum before voters will go up.

Allegations of Future Harm

28. The Court finds based on the evidence submitted at trial that Plaintiffs have plausibly shown they are likely to be subjected to future harm because they will wish to refer measures passed by the General Assembly to a vote of the people in the future and the statutes will interfere. 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. Furthermore, she testified that Plaintiff ACLU-MO, which has a

"wider issue portfolio," tracked 674 bills during the 2020 regular legislative session, some subset of which Plaintiff ACLU-MO opposed and might have wished to refer for a vote of the people.

29. Further, based on Baker's testimony, Secretary Ashcroft's press release, and the other evidence admitted at trial, the Court finds that Secretary Ashcroft plans to continue to enforce §§ 116.180 and 116.334.2, that it is substantially likely that the certification of an official ballot title on future referendum petitions will continue to take at least between 35 and 47 days, as it has in the past, and that therefore the time for signature collection will be significantly reduced and it will cost more money to exercise the referendum right.

Conclusions of Law

Justiciability and Propriety of Declaratory-Judgment Claim

30. Missouri has enacted 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 (Declaratory Judgment Act). The Act 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.

31. Plaintiffs' 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.").

32. For the reasons previously stated in the Court's order denying Secretary Ashcroft's motion to dismiss, the Court concludes that Plaintiffs' claim is both justiciable and amenable to resolution through a declaratory-judgment action.

33. None of the evidence admitted at trial calls into question the Court's prior conclusions that the claim is ripe, that it is not barred by res judicata or waiver, and that the Court's ruling will not constitute an improper advisory opinion. Indeed, the evidence shows that even Secretary Ashcroft acknowledged that the clock "started anew" on the ballot-title certification timeline after the Court of Appeals decision in the prior lawsuit and that, therefore, the delay Plaintiffs complain of in *this* lawsuit had not yet occurred when the prior lawsuit was filed. *See 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").

34. At the same time, the harm to Plaintiffs—the impediment to and interference with their ability to exercise their referendum right—has now already occurred (in July and August 2019) and the challenged statutes have been enforced against them, so their claim is ripe. *See Mo. Alliance for Retired Americans v. Dep't of Labor & Indus. Relations*, 277 S.W.3d 670, 677 (Mo. banc 2009); *Miller v. City of Manchester*, 834 S.W.2d 904, 905–06 (Mo. App. E.D. 1992).

35. Because the alleged harm had not yet occurred when Plaintiffs filed the June 2019 case in which Secretary Ashcroft argues this claim ought to have been litigated, res judicata does not apply and no conclusion on privity is required. However, No Bans on Choice, which was not a party to that prior lawsuit, is not in privity with Plaintiffs 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"). The evidence, which does support the fact that the Plaintiffs share

some goals, is nonetheless insufficient to show that No Bans on Choice has control over Baker and ACLU-MO, which is what would be required to show privity.

The Scope of the Referendum Right

36. Through Art. 3, §§ 49 and 52(a), the Missouri Constitution reserves the right of referendum to the people, and the Court is required to construe those constitutional provisions liberally to secure that right. *State ex rel. Voss v. Davis*, 418 S.W.2d 163, 166 (Mo. 1967) (stating that, in referendum, "the people are exercising power reserved to them and the provisions under which they proceed should be construed liberally to the end that their right to determine all proper questions by free and open elections shall be secure"); *id.* at 167 ("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."); *United Labor Comm. of Mo. v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. banc 1978) ("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."); *see also Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990) ("Constitutional and statutory provisions relative to initiative are liberally construed to make effective the people's reservation of that power."); *Musser v. Coonrod*, 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 . . . .").

37. The General Assembly is permitted to enact "reasonable implementations" that supply a mechanism for the exercise of a constitutional right, including the right of referendum. *Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991).

38. However, when an implementing statute subverts the primary objectives of a constitutional provision, it must be struck down regardless of any presumption in favor of statutory validity. *See id.* at 517; *Brown v. Carnahan*, 370 S.W.3d 637, 647 (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).

39. The State may not constitutionally delay the circulation of a referendum petition for the purpose of certifying a ballot title. *See Boeving v. Kander*, 496 S.W.3d 498, 507 (Mo. banc 2016); *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402, 406 (Mo. banc 1984); *United Labor Comm. of Mo. v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. banc 1978). The contents of a referendum petition are known: they are exactly whatever the legislature passed. The simplicity of the referendum petition process is reflected in the form petition set forth in § 116.030, RSMo., which simply refers to the bill number to be voted on by the people. It is unlikely a potential signer will be misled when the referred measure (and its full text) are right in front of him.

40. Sections §§ 116.180 and 116.334.2, RSMo., require a referendum petitioner to pre-submit her petition to the Secretary of State and then to wait for the certification of an official ballot title before she may begin collecting countable signatures. These statutes operate

to dramatically reduce the time available for the circulation of a referendum petition, both in theory and in practice.[2]

41. That significant reduction of the time available for the circulation of a referendum petition interferes with and impedes referendum right.

42. No pre-circulation presentment to the government is contemplated by the Constitution. Bestowing on State officials the authority to derail the referendum petition process by delaying the certification of an official ballot title is contrary to the plain language of art. 3, §§ 49 and 52(a) and the primary objectives of the reservation of the referendum power.

43. It is hereby declared 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.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Amended Petition for Declaratory Judgment is **GRANTED**. Plaintiffs' conditional motion to amend is denied as moot.

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[2] During argument at the stipulated bench trial, Secretary Ashcroft asserted for the first time that the relief Plaintiffs seek here—declaratory judgment that the provisions of §§ 116.180 and 116.334.2 that prohibit the counting of signatures collected before certification of an official ballot title are unconstitutional as applied to referendum petitions—would be meaningless and ineffectual because, in his view, signatures collected on pages without the certified official ballot title on their face *also* cannot be counted because of § 116.120(1). Plaintiffs disagree but have conditionally moved to amend the pleadings "to conform to the evidence and to raise these issues," Rule 55.33, and ask this Court to declare § 116.120(1) unconstitutional. Following the Supreme Court's analysis of § 116.120(1) in *Boeving v. Kander*, 496 S.W.3d 498 (Mo. banc 2016), the Court concludes that § 116.120(1)'s requirement applies only after an official ballot title has been certified and, thus, the provision's application need not be reached to afford relief to Plaintiffs. Alternatively, for the reasons explained in *Boeving*, § 116.120(1) would be unconstitutional if interpreted otherwise. This Court will not declare a statutory provision unconstitutional where a reasonable interpretation of that very statute allows it to avoid doing so.

SO ORDERED this 4th day of December, 2020.

JON E. BEETEM, CIRCUIT JUDGE