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VIA HAND-DELIVERY

The Honorable John R. Ashcroft
Secretary of State
600 West Main Street
Jefferson City, MO 65109

Re: Referendum Petitions 2020-R002 and 2020-R003

Dear Secretary Ashcroft:

I filed the above-referenced referendum petitions on behalf of the Petitioner David Humphreys. I have seen media reports suggesting that the referendum procedure set forth in Article III, §§ 49 and § 52(a) of the Missouri Constitution cannot be used in the case of House Bill 126. That suggestion in incorrect under Missouri law, and I am writing to explain why.

First, the plain text of section 52(a) permits the referendum as to House Bill 126. The referendum is available in all cases, with four exceptions in a parenthetical. The only one of the exceptions that could apply here is "except as to laws necessary for the immediate preservation of the peace, health, or safety." House Bill 126 is not such a law. It is true that there is an emergency clause, but that clause only applies to section 188.028, as amended in House Bill 126. Section 188.028 constitutes about two-and-a-half pages of a thirty page bill, less than ten percent. Thus, the proper textual analysis is that the section 52(a) exception as to "laws" has not been triggered. What happened here (at most) is that a "section" has been deemed by the legislature to be necessary for the immediate preservation of the peace, health or safety. A "law" has not been so deemed.

Second, the exception in section 52(a) must be read narrowly. All constitutional power derives from the People: "[A]ll political power is rested in and derived from the People; . . . all government of right originates from the People." *Mo. Const., art. I, § 1.* The initiative and referendum procedures are a reservation of rights by the People against the government. *See Mo. Const., art. III, § 49.*

The Supreme Court of Missouri was crystal clear on this point in *Boeving v. Kander*, 496 S.W.3d 498, 506 (Mo. banc 2016):

> The courts of this state must zealously guard the power of the initiative process that the people expressly reserved to themselves in article III, § 49. To that end, "[c]onstitutional and statutory provisions relative to initiative are liberally construed to make effective the people's reservation of that power." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990).

This principle applies equally to a referendum. Both referendum and initiative are established by article III, § 49, and that section permits no distinction between the two: "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..."

Indeed, there is evidence that the legislature tried to do exactly what *Boeving v. Kander* prohibits. A proponent of House Bill 126 was quoted this week as saying "What we did in the bill is actually preempt that type of situation [a referendum] by putting an emergency clause in there. So there can't be a referendum." (copy attached). The use of the word "preempt" is telling, indicating a conscious effort to eliminate the constitutional power of the People.

Third, it is not within the powers of the Secretary of State to reject these referenda on the basis of the partial emergency clause. In *Attorney General Opinion No. 131 (April 15, 1971)* (copy attached), Attorney General Danforth opined on an emergency clause. That opinion made clear: "[w]hether the legislature has declared in the act itself facts which is true, constitute an emergency, and whether such facts as stated are true is a matter for the courts to decide. The declaration made by the legislature in the Act is not conclusive." *Id.* p. 4. This case fits squarely within that language. The legal issue here is the legal effect of a partial emergency clause. That is, to use the language of the *Danforth* opinion, a question of "whether they declared in the act itself facts [that] . . . constitute an emergency." Moreover, there is a question of fact, resolvable only by a court as to whether the emergency clause was placed there to nullify the constitutional right of referendum.

For all these reasons, the emergency clause in House Bill 126 cannot lawfully be read to preempt or override the referendum right of the People. Just as the courts must "zealously guard" that right (*see Boeving*), so must the executive branch and its elected

officials. Respectfully, I submit that the Secretary has no authority to reject the referendum as to form based on the emergency clause.

Please contact me or have your staff do so if you have questions.

Sincerely,

Lowell Pearson

LOWELL PEARSON

LDP:ss
Attachment
cc: Attorney General Eric Schmitt (with attachment, via hand-delivery)
Frank Jung (with attachment, via email)
Khris Heisinger (with attachment, via email)