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 is 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

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)
Missouri Abortion Ban Opponents Could Face Referendum Snag

By JASON ROSENBAUM (PEOPLE/JASON-ROSENBAUM) • JUN 3, 2019

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Sticky notes left by protesters outside Missouri Gov. Mike Parson's office.

CAROLINA HIDALGO | ST. LOUIS PUBLIC RADIO
After Gov. Mike Parson signed an eight-week abortion ban into law, opponents vowed to put the measure up for a statewide vote — similar to a successful effort in 2018 to repeal Missouri’s right-to-work law.

But there could be an obstacle: A clause making one part of the proposal go into effect right away.

Missouri’s Constitution sets up a process (http://www.moga.mo.gov/MoStatutes/ConstHTML/A03052a1.html) to put any piece of legislation signed into law up for a statewide referendum. However, the constitution prohibits referendums for laws that are “necessary for the immediate preservation of the public peace, health or safety.”

“Public peace, health or safety” is boilerplate language usually used in what’s known as “emergency clauses,” which make either an entire law or part of a law go into effect immediately after a governor signs it. In the bill Parson signed last month, there’s an emergency clause for a provision requiring notification to both parents in some circumstances if a minor is seeking an abortion.

For Sen. Andrew Koenig, that should be enough to derail efforts from the American Civil Liberties Union of Missouri and Joplin businessman David Humphreys to put the measure, known as HB 126, up for a referendum.
“What we did in the bill is actually preempt that type of situation by putting an emergency clause in there,” said Koenig, referring to a potential referendum of the legislation he handled in the Senate. “So there can’t be a referendum.”

Maura Browning, a spokeswoman for Secretary of State Jay Ashcroft, said her office is researching the issue.

Not an emergency?

Maia Hayes joined dozens of abortion rights advocates downtown in protesting the potential shuttering of Missouri’s last abortion provider. May 30, 2019

CREDIT CAROLINA HIDALGO | ST. LOUIS PUBLIC RADIO

ACLU of Missouri’s legal director and interim Executive Director Tony Rothert said while a referendum is not available for laws that are emergencies, “the bulk of [the abortion bill] did not invoke emergency provisions, and the Legislature cannot steal the right of referendum from the people simply by attaching non-emergency provisions to a piece of legislation with an emergency provision.”

“In any event, courts, not the Legislature, determine whether there is an emergency, and nothing in HB 126 comes close to satisfying the requirements,” Rothert said. “Any attempt to deprive the people of the constitutional right to referendum is a sad and cynical ploy, but it is not surprising given that HB 126
entire purpose is to elevate the Legislature above constitutional rights."

A 1952 decision known as Inter-City Fire Protection District of Jackson County v. Gambrell found that "a mere declaration by a legislative body that an act which is passed is an emergency measure cannot make it so, but it is for a court in a judicial proceeding to determine whether act is in fact an emergency measure within the meaning of the constitutional provisions."

Back in 1920, opponents of a workers compensation bill with an emergency clause sought to put the measure up for a referendum. A court ultimately ruled there wasn't a legitimate emergency and allowed the measure to go up for a public vote.

If either the ACLU or the Humphreys referendum were stymied, it doesn't mean that opponents of the abortion ban couldn't take the issue to voters. They could seek an initiative petition repealing all or some of the law.

But opponents of the abortion ban may prefer the referendum route, since that process requires Missourians to vote 'no' in order to repeal a bill. That may be an easier message to sell than an initiative petition, where people have to vote 'yes' in order to repeal HB 126.

Humphreys surprise
Sen. Andrew Koenig, R-Manchester, was the Senate handler of the abortion bill that at least two groups want to repeal.

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Perhaps the most politically notable development from the bid to repeal HB 126 is the involvement of Humphreys, who for years has been one of the Missouri Republican Party’s biggest donors.

Humphreys urged Parson to veto the bill, honing in on the lack of exceptions for women who become pregnant because of rape or incest. He said he has to believe “that the politicians in Jeff City that voted for this bill would themselves support their wives or daughters’ right to choose if their loved ones were raped.”

He sent out another statement last week saying that he supported efforts to repeal HB 126, adding he invites “other like-minded people to join in the committee’s efforts and with financial and personal support of its signature gathering and campaign.”

Koenig, who received financial backing from Humphreys in his 2016 bid for Senate, said the statement was surprising — but not enough to shift his opinion on the matter.

“I think everybody knew that he’s more libertarian,” said Koenig, R-Manchester. “Though I would argue with libertarians that protecting life is a libertarian position to have. But most libertarians would say that they’re pro-choice. And so, I was surprised by how strong his language was. But there was no doubt in my mind that he wasn’t going to change anybody’s mind on it.”
Follow Jason on Twitter: @jrosenbaum (http://twitter.com/jrosenbaum)

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ture, would be an emergency within the meaning of that term under Article III, Section 52(a) of the Constitution of Missouri which would exempt such bill from being subject to a referendum. 2. Whether the facts stated are true is a matter of fact which must be determined by evidence submitted in support thereof in a proper court procedure.

OPINION NO. 131

April 15, 1971

Honorable Don Owens
State Senator
Room 432, Capitol Building
Jefferson City, Missouri 65101

Dear Senator Owens:

This is in response to your request for an opinion from this office on whether the legislature has the right to prevent a referendum on any tax proposal as outlined in the recent tax measure. The tax measure to which you refer is House Bill No. 3 of the Fourth Extraordinary Session of the Seventy-fifth General Assembly which repealed Sections 143.010 and 143.030, RSMo, relating to the income tax law, and enacting two new sections relating to the same subject with an emergency clause.

The question submitted is whether House Bill No. 3 is subject to a referendum under Article III, Section 52(a) of the Constitution of Missouri.

House Bill No. 3 repeals Sections 143.010 and 143.030, RSMo, which provided for the collection of an income tax on individuals and corporations and enacted two new sections providing for the collection of an income tax from individuals and corporations. It provides for a graduated income tax according to the net income. It provides an emergency clause as follows:

"Because there is a serious and immediate need for additional funds to adequately finance the necessary functions and programs of state government, this act is
necessary for the immediate preservation of the public peace, health and safety, and an emergency exists within the meaning of the constitution. This act shall become effective January 1, 1971, or upon final passage and approval, whichever occurs latest."

Article III, Section 52(a) of the Constitution of Missouri provides:

"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."

Article III, Section 29 of the Constitution of Missouri provides:

"No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."
Honorable Don Owens

All laws passed by the legislature are subject to referendum under Article III, Section 52(a) unless they come within one of the exceptions as provided therein. The above constitutional provisions must be considered together in determining whether the statute comes within one of the exceptions. Before an act comes within exception the legislature must declare, and set forth in the preamble or body of the act, the fact or facts that bring it within the exception. The mere declaration by the legislature that an act is an emergency measure cannot make it so, but it is for a court in a traditional procedure to determine whether the act in fact is an emergency measure within the means of these constitutional provisions. State ex rel. Pollock v. Becker, 289 Mo. 660, 233 S.W. 641 (1921). State ex rel. Westhuys v. Sullivan, 283 Mo. 546, 224 S.W. 327 (1920). State ex rel. Tyler v. Davis, 443 S.W.2d 625 (1969).

In discussing jurisdiction the court in these matters in Westhuys v. Sullivan, supra, the court stated, l.c. 589-599:

"The reason of the thing lies with this rule. By the referendum provision of our Constitution, as we have construed it, supra, no measure subject to the referendum can be withdrawn therefrom by a mere emergency clause. Nor should the people be denied their constitutional right of referendum, by a mere declaration of 'immediate preservation of the peace, health or safety,' unless such declaration is borne out by the face of the measure itself. The courts have the right to measure the law by the yardstick of the Constitution, and determine whether or not the law-makers breached the Constitution in making the declaration. In the recent case of Attorney General v. Lindsay, 178 Mich. l. c. 531, the court said:

"Courts have never refused to review acts of the Legislature in the exercise of a discretion, unless it explicitly appears that the grant of such discretion was exclusive, and the right to determine, in such a case, the question as to whether the exercise of such discretion by the Legislature has been a proper one is inherent in the court as the final arbiter of consti-
Honorable Don Owens

tutional and statutory construction. This case is no other or different from any other case which involves constitutional construction, and it must be decided upon well-known principles of law and the application of the ordinary rules of such construction."

No one can seriously contend that the act under consideration is an appropriation act and exempt from referendum for that reason. The act repeals two statutes which provided for the rate of income tax to be paid by individuals and corporations, and enacted two new sections which increased the income tax rate to be paid by individuals and corporations. Taxes collected by virtue of these statutes are not levied or collected for any particular purpose or agency of the state but become general revenue. The act does not appropriate any money for any particular purpose or agency of the state. Therefore, it is not exempt from referendum as an appropriation act under Article III, Section 52(a), supra. State ex rel. Harvey v. Linville, et al., 318 Mo. 698, 300 S.W. 1066 (1927).

The question is whether the act is exempt from referendum under the above constitutional provision as a "law necessary for the immediate preservation of the public peace, health and safety."

The legislature declared in the emergency provision that there is a serious and immediate need for additional funds to adequately finance the necessary functions and programs of the state government, and that the act is necessary for the immediate preservation of the public peace, health and safety. As heretofore stated, whether the legislature has declared in the act itself facts, which if 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. State ex rel. Westhues v. Sullivan, supra.

In Board of Regents v. Palmer, 204 S.W.2d 291, the Supreme Court of Missouri said l.c. 295:

". . . Section 10 of the act expresses the emergency thus: 'Because of the great increase in the number of students enrolled in state educational institutions as a result of conditions existing after World War II, there is an immediate need for the authority granted by this Act, and this Act being necessary for the immediate preservation of the public peace, health and safety, an emergency
Honorable Don Owens:

exists within the meaning of the Constitution of the State of Missouri...

In deciding this was a sufficient statement of facts which, if true, would constitute an emergency, the court stated l.c. 295:

"...Certainly it cannot be said that this declaration is such a mere conclusion as to invalidate the act as an improper expression of an emergency..."

We believe the declaration made by the legislature in the Act under consideration that there is a serious and immediate need for additional funds to adequately finance the necessary functions and programs of the state government is a sufficient declaration of fact, which if true, would create an immediate emergency within the meaning of the above constitutional provision.

Whether the declaration made by the legislature in the Act under consideration is true and correct cannot be determined from the face of the Act itself but must be determined by evidence and other information submitted in support thereof. All that this office is authorized to do under the present circumstances is to express our opinion, which, we have done, on whether the emergency declaration in the Act states facts, and which facts, if true, would be an emergency within the meaning of that term as used in Article III, Section 52(a) of the Constitution.

CONCLUSION

It is the opinion of this office that:

1. The facts stated in the emergency clause of House Bill No. 3 of the Fourth Extraordinary Session of the Seventy-fifth General Assembly if true, would be an emergency within the meaning of that term under Article III, Section 52(a) of the Constitution of Missouri which would exempt such bill from being subject to a referendum.

2. Whether the facts stated are true is a matter of fact which must be determined by evidence submitted in support thereof in a proper court procedure.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

[Signature]

JOHN C. DANFORTH
Attorney General