No. 99-929

In The

Supreme Court of the United States

REBECCA McDOWELL COOK,

Petitioner,

v.

DON GRALIKE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE, MISSOURI TERM LIMITS ON BEHALF OF PETITIONER, REBECCA McDOWELL COOK AS SECRETARY OF STATE FOR THE STATE OF MISSOURI

STEPHEN J. SAFRANEK
Counsel of Record
Professor of Law
Ave Maria School of Law
3475 Plymouth Road
Ann Arbor, MI 48105-2550
(734) 827-8096

Legal Counsel for Amicus Curiae Missouri Term Limits

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

STATUTES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF OF MISSOURI TERM LIMITS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS CURIAE

Missouri Term Limits is the local grassroots organization that drafted, sponsored and successfully qualified the initiative (the "informed voter law") that was enacted by the voters of Missouri, is now part of the Missouri Constitution, and is being challenged before this Honorable Court.[1] This case involves the right of the people of Missouri to instruct their elected officials and inform themselves as voters. No more precious right exists in the United States.

Like other state-sponsored voting cues – political party designations, party emblems, residency, and incumbency designations – the informed voter law assists voters in the voting booth. And, like other information, the informed voter law will influence some voters. This Honorable Court has only once struck down information that was provided on a state's election ballots. *See Anderson v. Martin*, 375 U.S. 399 (1964) (striking down on equal protection grounds a Louisiana statute requiring ballots to designate the "race" of the candidates).

The informed voter law fosters a "legitimate governmental interest in informing the electorate as to candidates." *Anderson v. Martin*, 375 U.S. at 403. The informed voter law instructs candidates and informs the citizenry regarding a candidate's voting intentions or record thereby allowing voters to assess that candidate's qualifications. Missouri Term Limits modeled the informed

---

[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party to these proceedings authored, in whole or in part, this Amicus Curiae Brief. Furthermore, no other entity or person, aside from Amicus Curiae, made any monetary contribution for the preparation or submission of this brief to this Honorable Court.

voter law after the ballot language used by states to adopt the Seventeenth Amendment.

An intense political debate surrounded the adoption of the informed voter law. That debate led the citizenry of Missouri to include the informed voter law in their Constitution.

The power of the people to regulate the content of their election ballots through the initiative should certainly not be more circumscribed than the legislature's power to control the contents of and access to the ballot. Missouri Term Limits seeks to protect its interests and the interests of the millions of Missouri voters that are at stake in this case.

SUMMARY OF ARGUMENT

The citizenry has a right to instruct candidates and to provide themselves with truthful ballot information about candidates. Since the creation of the modern ballot, states, essentially the two major parties, have regulated candidates' ability to access the election ballot and the contents of such ballots by a multitude of multi-faceted statutes. State election codes are extensive. In this case, the citizens, not the legislators have regulated the election ballot.

Missouri Term Limits, as Amicus Curiae in support of the Petitioner, will show how the informed voter law is consistent with our country's history of ballot instruction and information. It will do so in three ways. First, Amicus Curiae will provide this Honorable Court with an historical perspective on the adoption of the "Australian ballot" as part of electoral reforms during the Nineteenth Century. Second, Amicus Curiae will demonstrate that the information under consideration in this case is accurate and true, and therefore more important than the information used by the two major parties to electioneer on the ballot. Finally, Amicus Curiae will show this Honorable Court how states have traditionally used the ballot to "instruct" and inform. Amicus Curiae will show how

Missouri Term Limits modeled the informed voter law after other ballot information, specifically the ballot instructions used to promote the adoption of the Seventeenth Amendment. In addition, Amicus Curiae will show that the vast array of state ballot information constitutes "issue discrimination" that is constitutional.

The informed voter law, Article VIII, §§15-22 of Missouri's Constitution, is constitutional. It is more informative and less discriminatory than virtually any other information that appears on ballot. The informed voter law provides information that is informative and truthful. It is far more useful for the citizenry than party labels. Indeed, given the huge differences among members of the same political party, and given the fact that candidates often explicitly reject issues in party platforms, the informative value of party labels is questionable.[2] Party affiliations traditionally represented specific political beliefs and provided the voters with a "shortcut" "that economize[d] on information about issues."[3] However, due in part to the two-party political system together with single-member electoral districts, there has been a "convergence of the parties with respect to their positions on issues . . . Because political parties seek to gain widespread support, they phrase their political commitments in general terms so they can attract candidates and voters of diverse ideologies."[4]

In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), this Honorable Court stated,

> To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters

---

[2] Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533, 1548-50 (1999).

[3] *Id.* at 1548.

[4] *Id.* at 1548-49.

> inform themselves for the exercise of the franchise.

Id. at 220. More importantly, as one commentator has explained,

> Information provided by informed voter ballot notations, assuming that the information is accurate, could allow the electorate to take advantage of a shortcut to candidates' ideologies, which in turn would help voters predict the behavior of candidates once they are elected. By allowing both incumbents and challengers a credible precommitment opportunity and preventing candidates from taking different positions for different audiences, ballot notations could provide voters with a more accurate signal of ideology than current campaign tactics. Moreover, the information is more likely to reveal ideology in a more precise way than cues on which voters now rely, such as party affiliation.[5]

ARGUMENT

I. INTRODUCTION

Over twenty states provide citizens with some form of statewide direct democracy.[6] "Initiatives generally allow the public to bypass the legislature and reserve direct lawmaking power in the voters of the state."[7] They

[5] *Id.* at 1550.

[6] States that currently have some form of statewide direct democracy are: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wyoming, and the District of Columbia.

[7] P.K. Jameson and Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 418 (1995).

are "the means by which voters can correct legislative sins of omission and the popular referendum [is] the means of correcting legislative sins of commission."[8]

Initiative and referendum laws were passed on a theory of trusting the individual and distrusting politicians and political parties, as well as legislatures.[9] These laws emphasize that it is the people who govern in the United States.[10] In this case, the citizens of Missouri approved a ballot initiative that instructs legislators regarding the citizens' desire for term limits, and informs voters how legislative candidates intend to act or have acted on a specific term limits amendment. The ballot language challenged in this case is the citizens' insurance policy for keeping federal and state legislative candidates honest in their electioneering practices before the people.

II. BRIEF HISTORY OF THE ADOPTION OF THE "AUSTRALIAN BALLOT" IN THE UNITED STATES

Prior to the use of the paper ballot in the electoral process, public officials were elected by viva voce or by a show of hands. This precluded secrecy and provided the proper atmosphere for bribing and intimidating voters.[11] By the Revolutionary period, however, most of the states' constitutions required paper ballots.[12] Voters themselves wrote their own ballots, filled them out at home, and took

[8] DAVID B. MAGLEBY, DIRECT LEGISLATION VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 35 (1984).

[9] *Id.* at 20.

[10] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1819) (Marshall, C.J.) ("The government of the Union . . . is emphatically and truly, a government of the people.").

[11] *See Burson v. Freeman*, 504 U.S. 191, 200 (1992).

[12] *Id.* at 200; L.E. FREDMAN, THE AUSTRALIAN BALLOT 20 (1968).

them to the polling places.[13] Beginning in the 1820's, several court decisions affirmed the use of printed paper ballots, and Maine became the first state, in 1831, to enact legislation governing the paper and ink to be used for ballots.[14]

By the mid-Nineteenth Century, many people viewed the voting process in the United States as meaningless because political parties pre-printed their own ballots that were given to the voters at the polls.[15] The parties' ballots were typically printed with bright colors, and unique designs and emblems so that the ballot could be identified by the parties from a distance.[16] This contributed to the problem of voters being bribed and intimidated by party machines.[17]

Distinctly colored paper ballots allowed "ballot peddlers" to determine that voters used the ballot by following voters to the ballot box. Peddlers would wait outside of the polling place for voters to come out at which time voters would be paid for using the ballot.[18] This situation lead to "scuffling and intimidation." Oftentimes the scuffling and intimidation were artificially created by the parties in order to scare away "decent people and magnify the coerced vote."[19]

---

[13] *Burson v. Freeman*, 504 U.S. at 200.

[14] FREDMAN, *supra* note 12, at 21-22.

[15] *Id.* at ix.

[16] *Burson v. Freeman*, 504 U.S. at 200.

[17] FREDMAN, *supra* note 12, at ix; and Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need not Apply*, 28 HARV. J. ON LEGIS. 167, 172 (1991) ("[E]ach party typically printed ballots in the color of its choice, which made secret balloting all but impossible and allowed for regular episodes of bribery, coercion, and intimidation.").

[18] FREDMAN, *supra* note 12, at 22.

[19] *Id.* at 24.

Other countries experienced similar problems with their electoral systems. To address these problems, Britain, in 1872, replaced its system of oral voting with the "Australian ballot" so named for the system that had been first created in Australia in the 1850's. Under this system, the government determined what constituted "nomination", what was printed on ballots, and distributed ballots to the voters. In addition, the government ballot included all of the candidates' names, political advertising in the forms of legends or symbols and provided for polling booths in which only election officials, "scrutinees" for the candidates, and voters could enter. These measures were designed to improve the secrecy of the voting process.[20] Belgium was the next to follow in adopting the "Australian ballot" system in 1877.[21]

By 1882, the Philadelphia Civil Service Reform Association advocated the adoption of the "Australian ballot" in the United States.[22] The first Australian ballot law passed in the United States in 1888 when Louisville, Kentucky incorporated the "Australian ballot."[23] Louisville provided voters an official blanket ballot at the city's expense. Candidates were nominated by petition and were required to pay a twenty-dollar filing fee. Candidates' names were arranged alphabetically under the office for which they were running, and a "write-in" vote was provided.[24]

Massachusetts was the first state to adopt the "Australian ballot" system in 1888 followed by New York.[25] By the end of 1889, ten states had adopted the "Australian

---

[20] *Id.* at ix; and *Burson v. Freeman*, 504 U.S. at 202.

[21] *Burson v. Freeman*, 504 U.S. at 202.

[22] *Burson v. Freeman*, 504 U.S. at 203.

[23] FREDMAN, *supra* note 12, at 31.

[24] *Id.* at 31, 46, 47.

[25] *Burson v. Freeman*, 504 U.S. at 203; Smith, *supra* note 17, at 172.

ballot" system,[26] and by 1900, that number had increased to thirty-nine.[27] Under Article I, §4, the States exercised their plenary power to determine the "manner" of elections subject to alteration by the federal legislature. Indeed, today, the states have a variety of ballot types. Although the States have adopted dissimilar "Australian ballot" systems, two major aspects of the system have remained: the maintenance of secrecy while voting and an official ballot that included all of the candidates' names printed and distributed at the states' expense.[28]

The introduction of the "Australian ballot" system throughout the United States minimized the threat of visible fraud and bribery during the electoral process.[29] However, a consequence of the "Australian ballot" system was that the government, specifically state government, heavily regulated the electoral processes, including which candidates, parties and political symbols and legends would have access to the ballot.[30] This marked the beginning of the two major parties' dominance over the States' electoral processes.[31] The parties regulate the electoral process to exclude any threat to them by third-party and independent candidates. In addition, in some instances, the majority party in the state legislature would use the legal system to create obstacles in the

---

[26] FREDMAN, *supra* note 12, at 46.

[27] *Smith, supra* note 17, at 172.

[28] 26 AM. JUR. 2D *Elections* §299 (1996).

[29] *Burson v. Freeman*, 504 U.S. at 206.

[30] Kevin Cofsky, Comment, *Pruning the Political Thicket: The Case for Strict Scrutiny of State*, 145 U. PA. L. REV. 353, 359 (1996); Smith, *supra* note 22, at 173.

[31] Cofsky, *supra* note 30, at 360; Smith, *supra* note 12, at 173-74 ("By the mid-1920's, state laws governing access to the general election ballot were heavily weighted in favor of the existing major parties.").

electoral process for the other major party in order to secure its own dominance.[32]

The case before this Court poses a challenge to the major parties' control over states' electoral process because it is the citizens, not the legislators, who want to provide ballot information. The citizens of Missouri want to provide voters with truthful information regarding candidates running for federal and state office. Citizens want to hold the candidates who are seeking their votes accountable for their promises and actions.

III. THE BALLOT INFORMATION PROVIDED UNDER MISSOURI'S INFORMED-VOTER LAW IS TRUE, AND MORE ACCURATE THAN OTHER VOTING CUES

The major political parties, acting through state legislatures, have determined state electoral regulations; i.e., ballot access restrictions, as well as ballot content. In this case, however, the citizens have exercised legislative power via the initiative to control, in part, what information is provided on the ballot to help them make an informed choice. The two major parties' control over the voting process is jeopardized by the citizens' desire to

---

[32] Cofsky, *supra* note 20, at 355, 360; Smith, *supra* note 12, at 173 ("However, 'within' a very few years these laws underwent a number of changes that are difficult to justify as furthering the government's mandate to conduct efficient and honest elections.' The partisan political interests of legislators writing the ballot-access laws seem likely to have been the reason behind these changes."). *See also Graves v. McElderry*, 946 F.Supp. 1569 (W.D.Okla. 1996) (striking down on equal protection grounds an Oklahoma statute that always printed, in partisan elections, the Democratic Party candidates' names in the top position on the ballots). This Oklahoma statute was enacted by a Democratically-controlled state legislature and signed into law by Oklahoma's then elected Governor, David Walters, who was also a Democrat. *Graves v. McElderry*, 946 F.Supp. at 1573.

make an informed decision through the use of a voting cue chosen by voters that gives them accurate information about the candidates. This information supplements traditional voting cues such as political party labels.

Although some states provide voters with a candidate's political party affiliation as a voting cue on the ballot and this Court recognized the role that party labels play in the role by which voters inform themselves,[33] such information has lost its informative value for the voters. Candidates' "voiced positions" on a particular issue are often as numerous as the groups of voters the candidates face.[34] Also, political campaigns have become "candidate-based" so that political party cues have become less relevant.[35] One author explained that fewer voters " 'have such affiliation and fewer of those with affiliation follow it. The individual voter evaluates candidates on the basis of information and impressions conveyed by the mass media, and then votes on that basis.' "[36]

---

[33] *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986).

[34] Garrett, *supra* note 2, at 1547 ("Public pledges revealed through ballot notations make the politician's stance visible to all voters, removing the politically attractive option of making clear and inconsistent statements to private groups and providing the public with ambiguous platitudes."). *See also* Donald E. Daybell, Note, *Guarding the Treehouse: Are States "Qualified" to Restrict Ballot Access in Federal Elections*, 80 B. U. L. Rev. 289 n.1. A Massachusetts independent voter explained that she could not tell the major parties apart. A "Letter to the Editor" was entitled, "Those Wavering Party Lines; Democrats and GOP Would Rather Stand for Nothing than Risk Votes."

[35] Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 Sup. Ct. Rev. 331, 360.

[36] *Id.* (quoting Norman H. Nie, et al., The Changing American Voter 346 (1979)).

Nevertheless, as this Court pointed out in its opinion in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986), party labels provide voters with a "shorthand designation of the views of party candidates on matters of public concern," and they play a role in how voters educate themselves before voting.[37] Party labels are undoubtedly a form of political advertising. Lower courts have recognized the value of party labels. See *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992) (court struck down an Ohio statute that provided partisan candidates with labels but not petition process candidates). In fact, in striking down the provision in *Rosen* the Sixth Circuit relied on expert witness testimony presented by the plaintiffs. In affidavits, two of plaintiffs' experts explained that party labels were the single most influential factor on political opinions and voting. One affidavit explained that

> Voting studies conducted since 1940 indicated that party identification is the single most important influence on political opinion and voting. Almost two-thirds of the electorate has some form of party loyalty, and the tendency to vote according to party loyalty increases as the voter moves down the ballot to lesser known candidates seeking lesser known offices at the state and local level. Without a designation next to an Independent's name on the ballot, the voter has no clue as to what the candidate stands for. Thus, the state affords a crucial advantage to party candidates by allowing them

---

[37] *See also id.* at 363 ("A party label provides a shorthand way for voters, who have little incentive to invest time into learning about the positions of candidates, to identify at least some of the candidate's beliefs. It provides the candidate with a 'brand' name."); and Garrett, *supra* note 2, at 1534 (name and party affiliation provide voters with the strongest cues).

> to use a designation, while denying the Independent the crucial opportunity to communicate a designation of their candidacy.[38]

If parties are allowed to influence voters with the most influential information, the citizens should be allowed to include what they consider the most important information regarding candidates. The informed voter law provides true information and information that the people think is more important than party labels.

Certainly, printing the informed voter law's ballot information next to some candidates' names will have some influence on some voters. However, party labels, symbols of elephants or donkeys, profiles of presidents and other information printed next to or with a candidate's name or in a column under which a candidate's name appears also influence voters, almost exclusively to the advantage of the two major parties. Yet, neither this Court, nor any court, has ever considered party labels unconstitutional.

The major parties have controlled who obtains access to the ballot and how and what information is printed there. Indeed, as some writers have explained, parties recognized the significance of the ballot as a means for speaking to the voters. They were able to get states to adopt the party-column ballot format; a format that fosters straight-ticket voting.[39] Party-columns hardly were designed to foster informed and thoughtful voting. Instead, they are meant to foster straight ticket voting, an advantage to the two major political parties.

---

[38] *Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992). "According to DeSario, Independent candidates are handicapped by their inability to communicate a political designation on the ballot. However, party candidates are afforded a 'voting cue' on the ballot in the form of a party label which research indicates is the most significant determinant of voting behavior." *Id.*

[39] *See* Garrett, *supra* note 2, at 1535-36.

By enacting the informed voter law, Missouri citizens provided themselves with specific, accurate, and truthful information on the ballot. It is a laudable attempt by the citizens of Missouri to require accountability from candidates.

IV. STATES REGULARLY PROVIDE VOTERS WITH INFORMATION AT THE "CLIMACTIC MOMENT OF CHOICE"

Nearly all of the states provide voters with information on the ballot including party labels, residence, office sought, incumbency, and/or nicknames to be used with a candidate's name on the ballot. Missouri's informed voter law is the most important of the multitude of regulations governing the content of election ballots.

This Honorable Court recognized that states have an interest in an informed and educated electorate. *Anderson v. Celebreeze*, 460 U.S. 780, 796 (1983). Indeed, this Court explained that, "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). The informed voter law is being attacked so vigorously by politicians precisely because of its power to "inevitably shape the course that we follow as a nation." *Id.*

Opponents contend that the informed voter law allows states to isolate an issue for public debate and then single out certain candidates who do not take particular actions on that issue. The Eighth Circuit Court of Appeals explained that

> The only 'information' the Missouri Amendment adds to the ballot is derogatory labels for candidates who do not do what it requires. Furthermore, the labels are particularly harmful because they appear on the ballot, an official document produced by the state. Thus, the

> labels appear to be an official denunciation of certain candidates who are singled out by the state for their failure to speak in favor of term limits or take all action that §17 requires.

Gralike v. Cook, 191 F.3d 911, 918-19 (8th Cir. 1999).

Yet, states regularly single out candidates on their election ballots by printing party labels, residency, nickname, incumbency designations, and other "information" with candidates' names. Each of these regulations determine that some issue is the most important one, and are meant to harm or help a candidate.

Indeed, some labels, such as party affiliation, are "outcome determinative" in many electoral districts. It is the party label, not the candidates' particular character or positions, that determines scores of elections. Likewise, candidates may lose votes because of ballot information that is not printed by their names.[40] Yet, this Court has only once struck down ballot information.[41] This Honorable Court and lower courts have consistently recognized the historical richness of our ballot laws and the amplitude of information that states may give to or withhold from candidates. The informed voter law has a direct analogue – the ballot language used to foster support for the Seventeenth Amendment – where such amplitude was exercised.

A. The Seventeenth Amendment To The United States Constitution Provides An Analogy For Missouri's Voter-Approved Informed Voter Law.

Missouri's informed voter law may appear unusual. However, passage of the Seventeenth Amendment to the United States Constitution was dependent upon a process

[40] *See Clough v. Guzzi*, 416 F.Supp. 1057, 1068 (D.Mass. 1976); *Peterson v. Stafford*, 490 N.W.2d 418, 423 (Minn. 1993), *cert. denied*, 507 U.S. 1033 (1993).

[41] *Anderson v. Martin*, 375 U.S. 399 (1964).

of providing ballot information indistinguishable from that being used in the informed voter law. The Seventeenth Amendment precedent was relied upon by the drafters of the informed voter law because that amendment, like term limits, posed a direct conflict between the interests of the citizens and the interests of elected officials.

Article I, §3 of the United States Constitution provides that United States Senate is to be composed of two Senators from each State "chosen by the Legislature thereof".[42] Because of the role that Senators play in proposing amendments to the Constitution, a law allowing the election of Senators by the people seemed incapable of passage – Senators faced a conflict of interest because they were elected by legislatures. This direct conflict is also present in the case of term limits.

Despite the direction of Article I of the Constitution, Oregon, in 1904, through the initiative process, passed a primary election law that allowed one of two statements to be printed with a state legislative candidate's nominating petitions. The statements informed the voters whether the candidate promised to vote for the people's choice for United States Senator. Statement Number 1 read:

> I further state to the people of Oregon, as well as to the people of my legislative district, that during my term of office, I shall always vote for that candidate for United States Senator in Congress who has received the highest number of the people's vote for that position at the general election next preceding the election of a Senator in Congress without regard to my individual preferences.

[42] U.S. Const. art. I, §3, cl. 1, states, "The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,]." (The words in brackets were changed by the adoption of the Seventeenth Amendment which was ratified by the States on April 8, 1913).

Statement Number 2 read:

> During my term of office I shall consider the vote of the people for United States Senator in Congress as nothing more than a recommendation which I shall be at liberty to wholly disregard if the reason for doing so seems to be to be sufficient.[43]

To make the people's choice for Senator more secure, the voters of Oregon circulated pledges among themselves. The voters pledged not to sign any nominating petition or vote for the nomination of any candidate who did not sign Statement Number 1.[44] Finally, the "candidates" for United State Senate were allowed to include on their petitions a statement not to exceed one hundred words, and on the ballot after the candidates' name, a statement not to exceed twelve words which would convey to the voters the candidates' "measures or principles he especially advocates."

Besides Oregon, other states enacted primary election laws allowing for information to be printed on the election ballots with the candidates' names. For example, Idaho enacted a primary law in 1909 that allowed candidates for state legislative office to sign a "declaration" with their nomination papers which stated, in part, that if elected to the state legislature, the candidate would "always vote for the candidate for the United States Senator who has received a majority for the first choice votes upon my party ticket . . . "[45] If the candidate made such a declaration on the nomination papers, on the official primary ballot near the candidate's name would

---

[43] GEORGE H. HAYNES, 1 THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 101-103 (Houghton, Mifflin Co. 1938) (reissued Russell & Russell 1960).

[44] *Id.* at 101-102.

[45] Idaho Session Law, House Bill No. 16, §41 (1909).

appear, "Pledged to vote for party choice for U.S. Senator."[46] *See* Appendix at 1a.

Similarly, Nebraska's primary election law allowed candidates for the state legislature to submit with their nomination application a Statement Number 1 or a Statement Number 2 that was practically identical to Oregon's primary election law. On that part of the official primary election ballot that contained the names of the candidates for legislative nomination would be printed immediately following their names "Promises to vote for people's choice for United States Senator" or "Will not promise to vote for people's choice for United States Senator" depending on which statement the candidate submitted with their nomination application.[47] *See* Appendix at 2a-3a.

The State of Washington also provided a statute governing the nomination of candidates for public office that any candidate running for state senator or for the state house could, if they wanted to, sign and file with their declaration of candidacy or nomination papers a declaration stating,

> I hereby declare to the people of the State of Washington, and particularly of my legislative district, that during my term of office I will always vote for the candidate for United States Senator who has received the highest number of votes upon my party ticket for the position at the primary election next preceding the election of United States Senator; and in such case there shall be printed on the official primary ballot, opposite or just below said candidate's name the following: Pledged to vote for party choice for United States Senator.[48]

See Appendix at 4a.

---

[46] *Id.*

[47] 1909 Laws of Nebraska, ch. 51, §2 at 253 (emphasis added).

[48] Washington Session Laws, 1907, ch. 209, §37, at 475-76.

As the above examples demonstrate, even though the United States Constitution invested state legislatures with the power to select Senators, citizens were able to convey to their state legislators their choice for Senator in two ways. First, they were allowed to vote for "candidates" for the United States Senate. In addition, they placed language on the ballot regarding what action a legislator intended to take on the citizens' non-binding vote. Likewise, the informed voter law permits the citizens of Missouri to have readily available while voting information regarding what action their state and federal legislative candidates intend to take or took with respect to a specific amendment.

The Seventeenth Amendment was promoted in a virtually identical manner as the informed voter law. The statutory provisions mentioned above ultimately led to the proposal and ratification of the Seventeenth Amendment. The fact that the ballot information provided in Missouri's law may be rare is not an argument for unconstitutionality. The Seventeenth Amendment provides this Honorable Court with direct historical precedent for upholding the validity of the informed voter law.

B. "Binding" Instructions To Delegates At A State Constitutional Convention Are Constitutional.

States have also used the ballot to instruct delegates to state ratifying conventions. The Alabama Supreme Court has ruled that even "binding" instructions to the delegates to a state convention called to consider the ratification or rejection of the Twenty-first Amendment to the United States Constitution[49] did not violate Article V

[49] The Twenty-first Amendment to the United States Constitution was ratified by state conventions on December 5, 1933. It repealed the Eighteenth Amendment which prohibited the "manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes . . . " *See* U.S. Const. amend. XVIII.

of the United States Constitution.[50] In *In re Opinion of the Justices*, 148 So. 107 (Ala. 1933), the Alabama Supreme Court advised the Governor that a ballot providing for the election of delegates to a state convention called to consider the adoption of the Twenty-first Amendment would not violate Article V of the United States Constitution.

On these ballots, voters indicated whether they were "for" or "against" repeal of the Eighteenth Amendment and ratification of the Twenty-first Amendment. *In re Opinion of the Justices*, 148 So. at 109. The candidates for delegates to this convention were then required to subscribe to an oath[51] that if elected as a delegate to the

[50] U.S. Const. art. V provides, in part, that

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; . . .

[51] The oath that convention delegates were required to subscribe to stated, in relevant part,

> I,___, do solemnly pledge myself, in the event of my election to a convention to be held in Montgomery for the purpose of considering the ratification or rejection of the proposed 21st amendment to the Constitution of the United States, to abide by the result of the referendum in the State on the question of the ratification or rejection of the proposed 21st Amendment to the Constitution of the United States;

ratifying convention, they would abide by the result of the referendum vote taken of the people regarding the ratification or rejection of the Twenty-first Amendment. *Id.* at 108. The issue for the court to consider was "D[id] the Constitution forbid a state law providing for an instructed delegation to such convention, a delegation pledged to voice the consent of the governed, ascertained by the method recognized throughout our system, namely, the ballot?" *Id.* at 110.

Conceding that "conventions" were representative bodies, the Alabama Supreme Court explained,

> [I]t is more truly representative when expressing the known will of the people. Keeping in view the fundamental doctrine of a government of the people, by the people, and for the people, we are unable to see in the Federal Constitution any purpose to prohibit a direct and binding instruction to the members of the convention voicing the consent of the governed . . . The direct pledge given to abide instructions can scarcely be more sacred than the solemnly implied pledge of electors to voice the choice of the people of their respective states for President and Vice President . . . The prescribed contents of the ballot merely inform the voter more fully as to the meaning and effect of his vote.

---

and should a majority of votes cast in said election be for ratification, then I pledge myself to vote for the ratification of the proposed 21st amendment in the convention, but should a majority of the votes cast in said election be for rejection of the proposed 21st amendment, then I pledge myself to vote for the rejection of the proposed 21st amendment to the United States Constitution . . .

In re Opinion of the Justices, 148 So. at 111. Alabama's position is consistent with that of at least eleven states.[52]

The Alabama experience and numerous state laws are further evidence of citizens' right to inform and instruct. In our deliberative democracy, elected officials ultimately may act as they deem best. However, the citizenry have the right to hold them accountable for their actions.

C. States Have The Power To Control The Content Of Their Election Ballots.

Article I, §4 of the Constitution invests states with the power to regulate the "manner" of elections. States have exercised that power by enacting a multitude of regulations that frequently identify criteria or standards for choosing between candidates.

The states' power to control the content of their election ballots is often exercised in favor of the two major political parties. Nearly all of the states provide for

---

[52] Eleven states' nomination petitions for delegates to ratifying conventions for constitutional amendments to the Federal Constitution require candidates to include a statement in their petition regarding whether they oppose or favor ratification of the proposed amendment. In Arizona, nomination petitions for delegates to such conventions must have a statement regarding whether the candidate favors or opposes ratification of the amendment. A delegate who is elected based on a platform or nomination of petition statement favoring or opposing ratification must vote in accordance with that platform or statement at the convention; otherwise, the delegate is guilty of a misdemeanor, and the delegate's vote will not be considered. *See* AZ. Rev. St. Ann. §§16-703(C); 16-704(A); and 16-705(C). For states with similar provisions , see Del. Code Ann., Title 15, §7706; Fla. St. Ann. §107.04(1); Idaho Code Ann. §34-2205; Ind. Code §3-10-5-7 and §3-10-5-9; Mont. Code Ann. §13-26-103; Ohio Rev. Code Ann. §3523.04; S.D. Codified Laws §2-15-4; Utah Code Ann. §20A-15-103; Vt. St. Ann., Title 17, §1814; and Rev. Code Wash. Ann. §29.74.060.

party labels and some states actually provide preferences for the major party candidates. For example, states give the major party candidates preferential ballot position by printing the names of their candidates in the first two columns of the ballot followed by the names of independent or third-party candidates.[53]

---

[53] *See, e.g.*, ALA. St. §17-8-5 ("In the case of nomination by independent bodies, the ballot shall be so arranged that at the right of the last column for party nomination the several tickets of the names of the independent candidates shall be printed in one or more columns according to the space required, . . . "); AZ. Rev. St. Ann. §16-502(E) ("The lists of the candidates of the several parties shall be arranged with the names of the parties in descending order according to the votes cast for governor for that county in the most recent general election for the office of governor, . . . In the case of political parties which did not have candidates on the ballot in the last general election, such parties shall be listed in alphabetical order to the right of the parties which did have candidates on the ballot in the last general election . . . "); COLO. Rev. St. Ann. §1-5-404(1)(a)(b)(c) ("The names of the candidates of the two major political parties shall be placed on the general election ballot in an order established by lot and shall comprise the first group; . . . "); DEL. Code Ann. Rev. §4502(a) ("The device named and chosen and the lists of candidates of the Democratic Party shall be placed in the first column on the left-hand side of the ballot, of the Republican Party in the second column, and of any other party, and the space for the voter to write in the name of any candidate of his or her choice for any office, in such order as the department of elections shall decide. The names of unaffiliated candidates shall appear in alphabetical order, under the heading 'Unaffiliated Candidates,' after the listing of the various political parties."); FLA. St. Ann. §101.151(5) ("Minor political party candidates and candidates with no party affiliation shall have their names appear on the general election ballot following the names of recognized political parties, . . . "); Code of GA. Ann. §21-2-285(c) ("In a general election, the names of candidates who are nominees of a political party shall be placed under the name of their party. The columns of political parties shall be printed on the ballot, beginning on the left side thereof,

All candidates who are members of one of the major political parties are listed with that party label. Yet, this Honorable Court has recognized that the labels "Democrat" or "Republican" often tell voters little. *See Buckley v. Valeo*, 424 U.S. 1, 70 (1976) (per curiam). By printing certain information on the ballot, states tell voters that such information is more important than other possible information. A variety and breadth of such information is provided throughout the fifty states.

---

and shall be arranged from left to right in the descending order of the totals of votes cast for candidates of the political parties for Governor at the last gubernatorial election. The columns of parties having no candidate for Governor on the ballot at the last gubernatorial election shall be arranged alphabetically according to the party name to the right of the columns of the parties so represented. The columns of political bodies shall be arranged alphabetically according to the body name to the right of the party columns. The names of all independent candidates shall be printed on the ballot in a column or columns under the heading 'Independent,' which shall be placed to the right of the political body columns."); IND. St. Ann. §3-11-2-6(a)(b)(c); MD. Code of 1957, Art. 33, §9-210(j)(2)(i)(ii); N.H. Rev. St. Ann. §656:5(II)(. . . , the names of the candidates of the party which received the largest number of votes at the last preceding state general election shall be listed first."); OKLA. St. Ann. §6-106 ("For each ballot for which there are partisan candidates, the candidates of the recognized parties shall be printed in the first position in lot order followed by candidates of unrecognized parties in lot order followed by independent candidates in lot order."); General Laws of R.I. Ann. §17-19-9.1; TENN. Code Ann. §2-5-206 (independent candidates' names are listed immediately after the names of the candidates of the political parties); Tex. St. and Codes Ann. §52.065(d) (independent candidates are listed in a column following the political party columns); W.VA. Code of 1966 §3-6-2(c)(3); WIS. St. Ann. §5.64(1)(b).

1. Political Party Label, Emblems And Other Information.

Most States have enacted regulations that allow party affiliation or lack thereof to be printed either with the candidates' names or the candidates' names are listed under the appropriate party label column on the ballot.[54] In some states the parties are also permitted to print a party emblem as an additional means of associating the party with its candidates.[55] Furthermore, some states

---

[54] *See* Code of ALA., §§17-8-4, 17-8-5; Alaska St. Ann. §15.15.030(5); AZ. Rev. St. Ann. §16.502(E); Ark. Code of 1987 Ann. §7-5-208(f)(5); West's Ann. Calif. Code, Elections, §13105(a)(c); Colo. Rev. St. Ann. 1-5-403(4); Conn. General St. Ann. §9-279; Del. Code Ann. Rev. 1974, Title 15, §§4502(a) and 5005; Fla. St. Ann. §101.151(4)(5); Official Code of Ga. Ann. §21-2-285(c); Hawaii Rev. St. §11-112(a); Idaho Code Ann. §§34-904 and 34-906; West's Smith-Hurd Ill. Comp. St. Ann. Title 10, §5/16-3; Burn's Indiana St. Ann. §§3-8-6-5; 3-11-2-5; Iowa Code Ann. §49.31(1); Kansas St. Ann. §25-613; Ky. Rev. St. Ann. §118.325(2)(4); La. St. Ann. §18:551(D); Maine Rev. St. Ann., Title 21-A, §602(2)(A)(B); Ann. Code of Maryland of 1957, Art. 33, §9-210(g); Mich. Comp. Laws Ann. §168.696(1); Minn. St. Ann. §§204B.36(2) and 202A.11; West's Ann. Miss. Code, §23-15-359(2); Vernon's Ann. Missouri St. §115.237(2); Mont. Code Ann. §§13-10-209(1)(a), 13-10-303, and 13-10-203; Nev. Rev. St. Ann. §293.267(3)(a); N.H. Rev. St. Ann. §§656:5, 656:9; N.J. St. Ann. §19:13-4; N.M. St. §1-7-6; McKinney's Consolidated Laws of N.Y. §§7-104(4)(a), 7-106; Gen. St. of N.C. §163-140; N.D. Century Code Ann. §16.1-06-05(3); Baldwin's Ohio Rev. Code Ann. §3505.03(B); Okla. St. Ann. §6-106; Ore. Rev. St. §254.135(4)(a); Purdon's Penn. St. Ann., Title 25, §2963(b); Gen. Laws of R.I. Ann., §§17-15-8 and 17-19-9.1; S.D. Codified Laws Ann. §12-16-2; Tenn. Code Ann. §§2-5-206(b) and 2-5-207(d)(1); Vernon's Texas St. and Codes Ann., Title 5, §52.065 and §52.067; Utah Code Ann. §20A-6-301; Vt. St. Ann., Title 17, §2472(b); Const. of Va., art. II, §3; Rev. Code of Wash. Ann. §29.30.020; W.Va. Code of 1966 §3-6-2; Wis. St. Ann. §5.64(b); and Wyo. St. Ann. §22-6-120(a)(vii).

[55] *See* Code of ALA. §§17-8-6 and 17-8-8; DEL. Code Ann. Rev., Title 15, §§3302; 4502(a), and 5005; Burn's IND. St. Ann. §§3-8-7-11, 3-8-6-5(b), 3-11-2-5; and 3-11-2-9; KY. Rev. St. Ann. §118.325(2)(4); N.H. Rev. St. Ann. §656:11; N.M. St. §1-7-6; McKinney's Consolidated Laws of N.Y. §§2-124, 7-104, and 7-106; OKLA. St. Ann. §6-106; and Utah Code Ann. §20A-6-301(1)(d).

allow candidates who are nominated by more than one party to have the names of all of the parties that nominated the candidate to be printed with the candidates' names. This principle is known as "fusion."[56] Among the states that allow "fusion" candidacies are California[57] and New York.[58] Other states allow short statements on the ballot. *See* N.J. St. Ann. §19:23-17.[59]

---

[56] *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354 n.1 (1997).

[57] *See* West's Ann. Calif. Codes, Elections, §13105(c).

[58] *See* McKinney's Consolidated Laws of N.Y. §§6-120, 6-146(1), and 7-104(5).

[59] There is a similar provision for candidates running in municipal elections. *See* N.J. St. Ann. §40:45-10. Similarly, the State of Wisconsin provides that independent candidates shall have printed under their names on the ballot, in five words or less, the party or principle of candidate, if any. *See* Wis. St. §5.64(1)(e). In *Ihlenfeldt v. State Election Bd.*, 425 F.Supp. 1361 (D.Wis. 1977), while upholding this statutory provision, the district court pointed out that Wisconsin had the right to "organize its ballot." *Id.* at 1364 (citing *United States v. Classic*, 313 U.S. 299 (1941)). As part of that right, the court recognized that " . . . To insure that the candidates listed under the Independent heading are able to project a political identity to the electorate, Wisconsin permits them to identify themselves in five words or less . . . it insures his access to the electorate in as meaningful a way as possible." *Id.* at 1364. For other states with similar provisions, see Ariz. Rev. St. Ann. §16-341(D) (designation in three words or less); Colo. Rev. St. Ann. §1-4-601(2), §1-5-403(4) (political party or organization name may not exceed three words and they may not promote candidate or equal a campaign promise); Minn. St. Ann. §204B.36(2) and §204B.07(1)(c) (political party or principle not expressed in more than three words with candidates' names on

2. Incumbency Designations.

In addition to political party designations and emblems, some states regulate their election ballots in such a manner that some candidates are permitted to distinguish themselves with incumbency designations. In such a situation, experience is a classification the state has singled out as being more significant than other distinctions such as what action or actions candidates took or will take on matters of great public importance. In addition, incumbency designations prohibit someone with even greater experience from providing evidence of such on the ballot. Incumbency protection is not uncommon.[60]

In Minnesota, candidates for judicial office who are incumbents running for the same office may be designated on the ballot as the "incumbent." *See* Minn. St. Ann. §204B.36(5).[61] The State Supreme Court held in *Peterson v.*

---

the general election ballot); and General Laws of R.I. Ann. 1956, §17-19-9.1 (independent candidates can choose, in no more than three words, a political principle, movement or organization to identify himself with on the ballot).

[60] *See* Official Code of Ga. Ann. §21-2-284(c); §21-2-284.1(a)(b)(3); and §21-2-285(c) (1998 ed.). Furthermore, for candidates whose nomination to the same office in a precinct, ward or district contains any portion of the territory which s/he was elected to represent in the last preceding municipal or state election is considered the incumbent. Next to their names is printed, at the candidate's request, no more than eight words explaining the public offices that the candidate is currently holding or has held. *See* Mass. General Laws Ann., Ch. 53, §34. Candidates for state or city office who are also elected incumbents shall have printed with their names on Massachusetts' election ballots the words, "Candidate for Reelection." *See* Mass. General Laws Ann., Ch. 54, §41.

[61] ***See also*** Mich. Const. art. VI, §24 (incumbent Justices and judges serving on that state's various courts and who are elected on a non-partisan basis shall have printed under their name the designation of that office if they are a candidate for the

Stafford, 490 N.W.2d 418 (Minn. 1992), *cert. denied*, 507 U.S. 1033 (1993) by relying on an earlier decision in *Gustafson v. Holm*, 44 N.W.2d 443 (Minn. 1950), that,

> In *Gustafson*, we stressed the fact that the purpose of these two separate identifications is information, not to give the incumbent an advantage. The fact that this designation in a particular election may provide the incumbent with an advantage over other candidates does not necessarily invalidate the statute . . . Use of the word 'incumbent' following the candidate's name, simply informs the voter of the person who presently holds the position . . . In order to enable the electorate to know who candidates are, it is not always possible to treat all candidates with absolute equality.

Peterson v. Stafford, 490 N.W.2d at 423-24 (quoting *Gustafson v. Holm*, 44 N.W.2d 443, 447 (Minn. 1950)).

California also provides incumbency designations. *See* West's Ann. Calif. Codes, Elections, §13106. California provides that under the name of each candidate, the candidate may choose one of the following designations: words describing the elective office the candidate holds at the time of filing nominating papers; the word "incumbent" if the candidate is running for the same office held at the time of filing nominating papers; in three words or less describing the current principal professions, vocations, or occupations the candidate practices; or "appointed incumbent" may be printed by a candidate's name if the candidate is holding an office, other than a judicial office, because of an appointment to that office and the

---

same office); and Ore. Rev. St. §254.135(4)(c) ("The word 'incumbent' shall follow the name of each candidate for the Supreme Court, Court of Appeals, Oregon Tax Court or circuit court who is designated the incumbent by the Secretary of State under O.R.S. 254.085.").

person is a candidate for election to that same office. *See* West's Ann. Calif. Codes, Elections, §13107(a)(1)(2)(3)(4) (2000 Cum. Pocket Part).

Incumbency labeling is particularly onerous on other candidates because it recognizes only one candidate as particularly worthy of state approval. Yet, such labeling has never been deemed unconstitutional.

3. Residency Or Nicknames

In addition to party labels and emblems, and incumbency designations, states print other information on the ballot. Two examples of this other information are candidates' residences or nicknames.

In Massachusetts, for example, the address of each candidate for an elective office, for a ward or town committee, or for state committee must be printed next to their names on the ballot. *See* Mass. General Laws Ann. Ch. 53, §34. See *also* Mass. General Laws Ann., Ch. 54, §41. Alaska allows a nickname or familiar form of a candidate's proper name may be used as part of the candidate's name on the ballot. *See* Alaska St. §15.15.030(4). In Arkansas, a candidate filing for any elective office may use up to three given names, one of which may be a nickname or any other word used to identify the candidate with the voters on the ballots for primary elections. See Arkansas Code of 1987 Ann. §7-7-305(c)(1)(A). However, a candidate may not use a nickname that includes a professional or honorary title. *See* Arkansas Code of 1987 Ann. §7-7-305(c)(1)(B). Candidates may add as a prefix to their name the title or an abbreviation of an elective office the candidate currently holds. *See* Arkansas Code of 1987 Ann. §7-7-305(c)(1)(A).

4. Summation.

The foregoing examples provide a short survey of the vast array of the content of election ballots. This multitude of regulations provides state-sanctioned distinctions

among candidates. The informed voter law provides the most important ballot information to voters since the provision of information used for adoption of the Seventeenth Amendment.

Opponents of the informed voter law are concerned that candidates' actions regarding a federal term limits amendment may prove unpopular. But that is exactly why the citizens of Missouri passed that law. The self-interest of candidates precludes them from acting in accordance with the will of people. Missouri's law holds candidates accountable to the people. As this Honorable Court has stated, legislators have an obligation to take a position on a matter of public importance in order that the people whom they represent "can be fully informed by them, and be better able to assess their qualifications for office." *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966).

D. The Ballot Has Been Used To Provide Voters With Information Regarding A Candidate's Position On A Constitutional Amendment.

An informed voter law cannot be distinguished from other ballot information because it provides information about a constitutional amendment. Candidates' positions on constitutional amendments have been a vital element in selecting candidates for public office. Throughout this country's history, political parties have placed support of constitutional amendments in their platforms. Party labels therefore are shorthand for amendments supported by candidates.

For example, the Socialist Party Platform of 1960 supported an amendment that would guarantee the right of ready ballot access to minority political parties in all fifty states. *See* NATIONAL PARTY PLATFORMS, 1840-1972 at 630 (Univ. of Ill. Press, 5th ed. 1973). The Democratic Party Platform of 1964 advocated an amendment that gave the District of Columbia voting representation in Congress. *Id.* at 648. Many other parties' platforms have called for constitutional amendments. Yet, party labels

are not precluded from ballots. By including a party label on the ballot, voters have been given shorthand information regarding a candidate's commitment to supporting a specific amendment. In short, party labels – insofar as they are shorthand for party platforms – provide voters with information regarding a candidate's support of various constitutional amendments.

CONCLUSION

Missouri's informed voter law should be upheld not only because it provides ballot information similar to that used by the political parties, but because it is far more important than any other information placed on the ballot. Based on the foregoing brief, Amicus Curiae Missouri Term Limits respectfully requests that this Honorable Court reverse the judgment below.

Respectfully submitted,

STEPHEN J. SAFRANEK*
Associate Professor of Law
Ave Maria School of Law
3475 Plymouth Rd.
Ann Arbor, MI 48105-2550
(734) 827-8096

* *Legal Counsel of Record for Amicus Curiae Missouri Term Limits*