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 STATE OF NEBRASKA IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The people of the State of Nebraska, like those in Alaska, Arkansas, California, Colorado, Idaho, Maine, Nevada, and South Dakota, have adopted a constitutional provision substantially the same as the Missouri law under review. The amicus curiae has an interest in upholding its democratically enacted fundamental law. The amicus curiae also has an interest in protecting the power of the States to prescribe the manner of holding elections; in preserving the authority and role of the States in our Union; and in upholding the right of the people to express their wishes to their elected representatives.

The amicus curiae agrees with the State of Missouri that this case "presents the Court with the most fundamental issue in a representative democracy: the right of the people to participate in their own governance." (Petitioner's Reply Brief to Brief in Opposition at 2). Regardless of how one views the particular issue which gave rise to the Missouri law and ones like it in other States, the right of the people to communicate their wishes to their elected representatives must be preserved.

SUMMARY OF ARGUMENT

This case concerns the right of the people to express their collective will to their elected representatives regarding a proposed amendment to the United States Constitution. The provision in question, as well as similar provisions in other States, expresses the will of the people as to the adoption of a federal term limits amendment.

Such provisions do not usurp the authority of the State legislatures or Congress to propose constitutional amendments or make application for a constitutional convention. The challenged provision is a nonbinding advisory instruction to State legislators and members of Congress expressing the collective will of the voters.

Neither Article V nor the Free Speech Clause of the First Amendment prevent voters from knowing precisely what position candidates have taken on a specific term limits amendment. Informing the electorate is a legitimate exercise of a State's power to regulate the content of its ballots. This Court has made it clear that the Constitution grants States broad power to prescribe the time, places and manner of holding elections for Senators and Representatives, U.S. Const., art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices. The challenged amendment discloses information to the electorate about legislators' voting records, and does not eliminate legislative discretion or dictate how the legislators must vote.

ARGUMENT

MISSOURI'S INFORMED VOTER LAW IS WITHIN THE POWER OF A STATE TO REGULATE ITS ELECTION PROCESS AND DOES NOT USURP THE AUTHORITY OF CONGRESS OR THE STATE LEGISLATURES TO PROPOSE AMENDMENTS TO THE U.S. CONSTITUTION.

A. Introduction.

In 1995 this Court invalidated term limit amendments adopted by the voters of twenty-three (23) States. ***U.S. Term Limits v. Thornton***, 514 U.S. 779 (1995) (5 to 4 decision). The Court concluded that an amendment to the U.S. Constitution would be required before term limits could be imposed on members of Congress. ***Id.*** at 838. Subsequently, a movement to encourage adoption of such an amendment began nationwide. On November 5, 1996, the voters of the States of Alaska, Arkansas, Colorado, Idaho, Maine, Missouri, Nebraska, Nevada, and South Dakota approved Informed Voter Laws as amendments to their State Constitutions. *See* Kris W. Kobach, ***May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution***, 33 U.C. Davis L. Rev. 1, 3 n.1 (1999). In June of 1998 the voters of California approved a similar law. ***Id.*** These laws "instruct" state legislators and members of Congress to use the powers of their offices to support an actual Congressional term limits amendment to the United States Constitution. The laws also require the placement of statements on the next election ballot informing voters whether candidates have failed to take specific action supporting the federal term limits amendment. This

ballot language provision is similar to a method utilized by a number of States early in the last century to encourage adoption of the Seventeenth Amendment which instituted direct election of U.S. Senators. *See, e.g.*, 1909 Laws of Neb., Ch. 51, at 253.

Unlike other provisions invalidated since *Hawke v. Smith*, 253 U.S. 221 (1920), the challenged Missouri provision (and similar provisions adopted by other States) does not employ financial penalties such as docking the salaries of dissenting legislators; nor does it proscribe, limit or mandate the terms of debate or deliberation on the proposed constitutional amendment. The internal "coercion" that a particular legislator may feel in response to public disclosure of information is beyond the pale of proper judicial inquiry. It is an inherently subjective and political question. It differs fundamentally from an objectively binding provision or one with penalties such as salary forfeiture. Furthermore, recent legislative history shows that the provision did not, in fact, override the discretion of its legislative opponents.

Under Missouri's law, as under similar provisions, ratification of the proposed constitutional amendment still depends on the vote of the State Legislatures. Legislators are free to vote however they deem appropriate. Their current term of office is not affected in any manner regardless of how they vote. No punitive measure of any kind is imposed during their term of office. The only consequence of failing to follow the voters' instructions is to have factual information placed on the ballot at the next election informing voters of the behavior of the candidates who are seeking a new term in office.

Extensive historical precedent involving the use of ballot language to inform voters of candidates' positions on constitutional amendments, including the Seventeenth Amendment, demonstrates that such expressions of popular will have never been thought to violate the U.S. Constitution. On the contrary, such expressions of the people's collective will are legitimate means by which to communicate with elected representatives in order to ensure government of the people, by the people, and for the people.

B. Missouri's Informed Voter Law is a Nonbinding Advisory Instruction to Legislators and Members of Congress Expressing the Collective Will of the People Regarding Term Limits.

It is not disputed that the people of a state may not bind their state legislators to apply for a constitutional convention. Conversely, it is also clear that a nonbinding advisory instruction regarding such a convention is valid. *See Kimble v. Swackhamer*, 439 U.S. 1385, 1386 (Rehnquist, Circuit Justice 1978); *Miller v. Moore*, 169 F.3d 1119, 1123-1124 (8th Cir. 1999). The key issue in this case, then, is whether Missouri's law is a mandatory provision that dictates how legislators must vote, or whether it is a nonbinding advisory instruction expressing the collective will of the people regarding how they wish their elected representatives to vote on an application for a convention for the purpose of adopting a proposed term limit amendment.

1. This case is governed by fundamental principles of federalism which dictate that a federal court must read Missouri's amendment as a nonbinding advisory expression of the will of the people to their elected representatives rather than as an unconstitutional attempt to bind legislators.

The threshold issue in this case is whether a federal court may strike down the fundamental law of a sovereign State where a construction of the challenged provision is fairly possible by which the constitutional doubts may be avoided. This Court has long adhered to a basic rule of construction, grounded in important considerations of federalism, that where two interpretations of a state statutory or constitutional provision are possible, a federal court must adopt the one which makes the provision constitutional. ***United States v. National Dairy Products Corp.***, 372 U.S. 29, 32 (1963).

Specifically, the issue here is whether Article VIII of the Missouri Constitution is a nonbinding advisory instruction to legislators and members of Congress expressing the wishes of the voters, or whether it is an unconstitutional usurpation of the legislature's authority with regard to applying for a constitutional convention.

The applicable law is clear. Advisory and nonbinding referenda on an amendment to the United States Constitution are valid. ***Kimble v. Swackhamer***, 439 U.S. at 1386. As long as the provision does not place any legal requirement on the legislature or any of its members, the communication by the people to their legislature does not improperly inject the citizenry into the amendment process. *See Kimble*, 439 U.S. at 1386, 1387; ***Miller v. Moore***,

169 F.3d at 1123-1124. Thus, if Article VIII may be interpreted as a non-binding advisory instruction, it must be upheld.

The key language in Article VIII (the word "instruct") has two possible constructions, the first being that the provision is an impermissible attempt to bind legislators to propose and adopt a constitutional amendment, and the second being that the provision is a nonbinding advisory expression of the collective will of the people – an advisory communication between voters and their elected representatives. As discussed below, it is clear that it is fairly possible to construe Article VIII so as to avoid an unconstitutional result. Since this Court is obliged to presume an intent to act within constitutional bounds, the Court must read Article VIII as a nonbinding advisory communication between the people and their elected representatives. ***De Bartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council***, 485 U.S. 568, 575 (1988).

2. Examination of the text of Article VIII shows that it is a nonbinding advisory instruction which does not mandate how legislators must vote.

Opponents of the challenged provision argue that it is no different from a provision which cuts legislative salaries or forces perpetual legislative sessions if legislators fail to adopt a specific proposal. However, when one examines the actual text of Article VIII, it becomes clear this is not true.

Article VIII does not usurp the authority of Congress and State Legislatures. On the contrary, Article VIII is a nonbinding instruction to members of Congress and congressional candidates expressing the wishes of the State's voters. Under Article VIII, ratification of the proposed term limits amendment still depends on the vote of the State Legislatures. State representatives can (and do) still vote however they deem appropriate. Their term of office is not affected in any manner. Their salary is also not affected. ***Compare AFL-CIO v. March Fong Eu,*** 686 P.2d 609 (Cal. 1984) (invalidating initiative calling for legislature to seek federal balanced budget amendment on penalty of loss of salary). No punitive measure of any kind is imposed during their term of office. No debate or deliberation is proscribed, limited or mandated. ***Compare State ex rel. Harper v. Waltermire,*** 691 P.2d 826, 829 (Mont. 1984) ("The stricken ballot measure would compel the Legislature to reach a specific result under threat of confinement and no pay.").

The only consequence of failing to follow the voters' instructions under Article VIII is to have factual information placed on the ballot at the next election informing voters of the position of the candidates who are seeking a *new* term in office. Although the Arkansas Supreme Court characterized similar descriptive ballot language as "threatened political death." ***Donovan v. Priest,*** 931 S.W.2d 119, 127-128 (Ark. 1996), the Supreme Court of Idaho held that a nearly identical provision in that State's Constitution does *not* violate Article V. ***Simpson v. Cenarrusa,*** 944 P.2d 1372 (Idaho 1997). After striking the ballot language portions of the provision on state law grounds that are not at issue in the present case, the court held

that the instructions to Idaho's state and federal legislators regarding the proposed term limits constitutional amendment did not run afoul of Article V as they were nonbinding and advisory. The court stated, *"Members of Congress and legislators are not compelled to support the proposed amendment; they are free to act as they wish."* ***Simpson v. Cenarrusa,*** 944 P.2d at 1376-1377. Consequently, it is clear that the term "instruct" in Article VIII may fairly be construed as nonbinding.

Furthermore, ***Donovan*** and similar decisions such as ***Miller v. Moore,*** 169 F.3d 1119 (8th Cir. 1999), are simply incorrect. The U.S. Constitution does not protect politicians from the exercise of the voters' discretion or the voters' right to be informed of candidates' positions on specific constitutional amendments. The political effect of Article VIII, if any, relates only to a *future* term of office – something to which no candidate (incumbent or otherwise) has an entitlement. Informed Voter Laws may be compared to resign-to-run laws; laws prohibiting primary losers from running in the general election by petition; state term limit laws; campaign finance disclosure laws; political primary rules; minimum primary vote requirements, etc. As discussed in more detail below, this Court's decisions in this area do not forbid political consequences that result from disclosure of factual information to the public concerning candidates' positions on proposed amendments.

3. Examination of *Hawke v. Smith* reveals that Informed Voter Laws do not violate Article V.

Opponents of Article VIII argue that ***Hawke v. Smith***, 253 U.S. 221 (1920), must be read broadly to proscribe the "instruction" given to legislators. They describe Article VIII as an attempt to coerce legislators rather than as a non-binding advisory expression of the will of the people to their elected representatives. Such a reading of ***Hawke v. Smith*** is inappropriate for two reasons.

First, an expansive reading of ***Hawke v. Smith*** is inappropriate under applicable rules of construction as well as important principles of federalism. As discussed above, where two differing interpretations are possible, a court must favor a saving construction that renders the provision constitutional. Article VIII can fairly and accurately be read as a non-binding advisory instruction to legislators and members of Congress expressing the wishes of the voters. It does not force legislators to vote for anything. For example, a majority of Nebraska's Congressional Representatives, in fact, chose not to support the proposed term limits amendment. (Congressional Record – House, Feb. 12, 1997 H 489-512).

The second reason that ***Hawke v. Smith*** cannot be read as expansively as proposed by the Respondent is that expressions of popular will cannot be equated with usurping the constitutional authority of the Congress or State Legislatures. In ***Hawke v. Smith***, the Court discussed the impermissibility of ratification of constitutional amendments directly by the people rather than by

the Legislatures. *In support of its holding* that a "Legislature" is a representative body and does not include a referendum by the people, *the Court specifically referred to the process for the adoption of the recently ratified Seventeenth Amendment* which provided for the direct election of U.S. Senators: "It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote." ***Id.*** at 228. Although not readily apparent to many of those reading this statement 80 years later, this statement by the Court undermines the Respondent's position by exposing his mischaracterization of Article VIII. The legal significance of the Court's statement is clear upon review of its historical context.

As the Court was unquestionably aware, the *ratification of the Seventeenth Amendment was accomplished with the aid of numerous state laws similar to Missouri's Article VIII. See, e.g.*, Oregon Primary Law, 1904; 1909 Laws of Neb., ch. 51, at 253; Idaho Session Laws, House Bill No. 16 (1909). *In fact, by 1912, 29 of the 48 states had provisions in place for selecting the popular choice for U.S. Senator. See* Ronald R. Rotunda, *The Aftermath of Thornton*, 13 Const. Comm. 201, 207 (Summer 1996).

In light of the Court's choice of the ratification of the Seventeenth Amendment as an *example* in ***Hawke***, it seems clear that *while the Court saw direct ratification of constitutional amendments by means of a popular referendum as impermissible, the Court viewed nonbinding "instructions" to legislators and ballot language provisions as being in a different category.* Thus, ***Hawke v. Smith*** not only fails to support the Respondent's position, but in fact reveals his mischaracterization of Article VIII. ***Hawke v. Smith***

shows that the provisions of Article VIII are in a different category from impermissible direct ratification provisions. Historical evidence supporting this reading of *Hawke v. Smith* is set forth in section IIC, *infra*.

4. Article VIII does not eliminate legislative discretion.

The Respondent argues that Article VIII does not constitute advisory language expressing the will of the people, but rather is a mandatory and coercive requirement which forces and requires legislators to vote for a term limits amendment. However, assertions are one thing and facts are another. The Respondent's allegations are simply not true.

State representatives are not bound by Informed Voter Laws to vote in a predetermined way, and in fact they have exercised their individual judgment. For example, despite a constitutional provision nearly identical to Missouri's (Neb. Const. Article XVIII) the majority of Nebraska's delegation in the U.S. House of Representatives voted *against* the term limit amendment requested. (Congressional Record – House, Feb. 12, 1997 H 489-512).

In rejecting Missouri's view of the amendment as a nonbinding advisory provision, the Eighth Circuit found that the word "instructs" must be interpreted as mandatory in nature. This finding is erroneous for several reasons. More directive language is quite easy to draft. Mandatory terms such as "shall" and "must" are absent from the provision. Furthermore, there are no penalties for noncompliance. Finally, the Amendment clearly contemplates that some legislators will choose not to support

the proposed term limits provision. The amendment contains provisions regarding what happens when a legislator supports the proposal, and also when a legislator does not.

Some courts have found that the Informed Voter Laws produce "fear of stigmatization." To that conclusion, we can only demur. The "fear of stigmatization" is a political question outside the proper bounds of judicial inquiry in this context. Responsiveness to the wishes of the citizenry is central to representative democracy. Candidates may lose votes as a result of their public financial disclosures. Yet, the Court has upheld such disclosure requirements. ***Buckley v. Valeo***, 424 U.S. 1 (1976). The Eighth Circuit's conclusion ignores the fact that candidates may also lose votes because of political party affiliation labels. Yet, such labels have been upheld. Candidates may lose votes because they are labeled on the ballot with a designation other than the one they prefer. Yet, such laws are constitutional. ***Socialist Workers Party v. Eu***, 591 F.2d 1252 (9th Cir. 1978), cert. den., 441 U.S. 946 (1979).

The Eighth Circuit's conclusion is at odds not only with the real life facts, but also with common sense. It can hardly be assumed that voters would not be made aware of a candidate's position on term limits during a campaign, even in the absence of Article VIII. The votes of legislators are public records. Furthermore, failure of an elected official to follow voter instructions regarding term limits would cost the candidate votes at the polls only if the voters made that choice. This is the voters' right. Impermissible coercion, such as docking legislators' pay or confining legislators, cannot be equated with potential

political pressure arising from the provision of factual information to voters. Under Article VIII, as was the case in ***Kimble v. Swackhamer***, 439 U.S. at 1388, each member of the Legislature is still free to obtain the views of constituents in the legislative district which he represents, and vote accordingly.

The Respondent apparently believes that providing factual information to voters (at the voters' request) so that voters can intelligently exercise their elective franchise is a constitutional infringement. However, nothing in Article V or any other provision in the Constitution prohibits the people from expressing their collective will, and then holding their elected representatives accountable in future elections as to whether they acted to implement the people's wishes. ***Kimble v. Swackhamer***, 439 U.S. at 1387. Article VIII is an advisory provision expressing the will of the people. It does not mandate that legislators or members of Congress vote for the proposed term limits amendment.

The nonbinding nature of the provision is not a matter of conjecture, speculation or prognostication. As a matter of historical fact, a number of legislators, including, for example, a majority of Nebraska's Representatives in Congress, voted contrary to the allegedly "binding" instructions in the challenged provision. The legislators were, quite obviously, not "bound" by the provision.

C. States Have Previously Used the Ballot to Provide Voters With Information Regarding a Candidate's Position on Constitutional Amendments.

1. Introduction.

An examination of the process leading to the adoption of the Seventeenth and Twenty-first Amendments gives important insight into this Court's decision in *Hawke v. Smith* and also to the longstanding interpretation of Article V.

Article V of the United States Constitution has not historically been interpreted as prohibiting the placement of information on the ballot when such information relates to a constitutional amendment. The matter of candidates' positions on constitutional amendments has long been a vital component in American politics and has historically been part of the candidate selection process.

2. Other states have used methods far more "coercive" than Article VIII in dealing with constitutional amendments.

Other States have used methods far more "coercive" than Article VIII in dealing with constitutional amendments. For example, some States utilized ballot information to ratify the Twenty-first Amendment, which is the only amendment to the United States Constitution ratified by state conventions. The State of Alabama, for example, in order to ensure voting in accordance with the people's wishes on the passage of the Twenty-first Amendment, provided that those eligible to attend the convention for ratification must sign a pledge to abide by

the non-binding vote of Alabama's voters. This requirement was upheld in ***In re Opinions of the Justices***, 148 So. 107, 109-10 (Ala. 1933).

In other States as well, the procedures for nomination of delegates to ratifying conventions for amendments to the United States Constitution require candidates to include a statement in their petition regarding whether they oppose or favor ratification of the proposed amendment. In Arizona, for example, the nomination petitions must have a statement by the candidate that the candidate either favors or opposes ratification of the amendment to the U.S. Constitution. Furthermore, a delegate who is elected based on a platform or nomination petition statement favoring or opposing ratification must vote in accordance with that platform or statement at the convention; otherwise, that delegate is guilty of a misdemeanor, and the delegate's vote will not be considered. Ariz. Rev. Stat. Ann. §§ 16-703(C), 16-704(A), 16-705(C) (1996).

In the State of Washington, candidates for election as a delegate to a ratifying convention must file a "declaration of candidacy." This "declaration" must include a:

> sworn statement of the candidate that he is either for or against, as the case may be, the amendment which will be submitted to a vote of the convention and that he will, if elected as a delegate, vote in accordance with his declaration. The form shall be so worded that the candidate must give a plain unequivocal statement of his views as either for or against the proposal upon which he will, if elected, be called upon to vote.

Wash. Rev. Code § 29.74.060 (1993).[1]

The approach taken by States like Alabama with respect to the Twenty-first Amendment, and by States like Arizona and Washington with respect to ratifying conventions for constitutional amendments was not, and is not, unique. A similar technique was used by the States as a means of encouraging adoption of the Seventeenth Amendment.

3. Widespread use of ballot language led to adoption of the Seventeenth Amendment.

By the late 1800's, there was growing discontent among the people regarding the selection of United States Senators by State legislatures rather than directly by the people.

The State of Oregon established the precedent that other States followed when, in 1904, Oregon adopted a "direct" primary law through the people's Initiative and Referendum process. Upon being nominated, a candidate could also sign his name to one of two statements which

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[1] For states with similar provisions *see* **Del.** Code Ann. Title 15, § 7706 (Michie 1999); **Fla.** Stat. Ann. § 107.04(1) (West 2000 Cum. Supp.); **Idaho** Code Ann. § 34-2205 (Michie 1995); **Ind.** Code §§ 3-10-5-7 and 3-10-5-9 (LEXIS 1998); **Mont.** Code Ann. § 13-26-103 (1999); **Ohio** Rev. Code Ann. § 3523.04 (Anderson 1996); **S.D.** Codified Laws § 2-15-4 (Michie 1992); **Utah** Code Ann. § 20A-15-103 (LEXIS 1998); **Vt.** Stat. Ann. Title 17, § 1814 (Equity 1982).

would appear on the ballot by the candidate's name. 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 votes for that position at the general election next preceding the election of a Senator in Congress without regard to my individual preferences.

Statement Number 2 read:

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

Oregon Primary Law, 1904.

Moreover, in 1908, supporters of the direct election of Senators submitted another proposal to the people of Oregon by way of the Initiative. This bill stated:

> Be it enacted by the people of the State of Oregon: SECTION 1. That *we, the people of the State of Oregon, hereby* **instruct** our representatives and senators in our legislative assembly, as such officers, to vote for and elect the candidates for United States Senators from this State who receive the highest number of votes at our general election.

(emphasis added).

In addition to Oregon, the State of Idaho enacted a similar primary election law in 1909. Idaho Session Laws,

House Bill No. 16 (1909). Nebraska took a similar step in its primary election law when it allowed candidates for the state legislature to sign a Statement Number One or a Statement Number Two identical to Oregon's on their nominating petitions. Candidates who signed Statement Number One would have printed after their names, "Promises to vote for the people's choice for the United States Senator." The candidates who had signed Statement Number Two would have printed after their names, "Will not promise to vote for people's choice for United States Senator." 1909 Neb. Laws, House Roll No. 1, Ch. 51 at pp. 252-254 (codified at Cobbey's Annotated Statutes § 5906).

North Dakota had a similar provision. In ***State v. Blaisdell***, 118 N.W. 141, 145 (N.D. 1908), the North Dakota Supreme Court upheld the provisions of North Dakota's primary election law which allowed the voters of each party to express their choice for Senator. The court stated, "*It merely permits an expression of choice by the voters*, and its provisions, in effect, provide a convenient method of exercising the constitutional right of petition." ***Id.*** at 147 (emphasis added). ***See also*** 1909 Ill. Laws 46, 58-59.

Furthermore, in ***State v. Frear***, 125 N.W. 961 (Wis. 1910), the Wisconsin Supreme Court ruled that the Wisconsin primary law did not require the candidates to pledge themselves to support any particular nominee and should consider such information "advisory." The Wisconsin Supreme Court concluded that:

> ***Construing the law as imposing no legal obligation on the part of any member of the Legislature to vote for his party nominee at the***

> ***primary, we must assume that the legislators will vote according to their consciences and convictions, giving due weight to the advisory vote of the people, and that therefore neither the letter nor the spirit of the Constitution has been transgressed.***

Id. at 972 (emphasis added).

These provisions adopted by the various States ultimately led to the proposal and ratification of the Seventeenth Amendment.

In sum, the people of the States have sometimes used ballot information in order to allow voters to cast informed votes on important issues. When the voters use ballot information that does not involve otherwise unconstitutional discrimination (i.e., race), it has been and should be permitted. The historical precedent established prior to the passage of the Seventeenth Amendment, as well as current State practice regarding the nomination of delegates to ratifying conventions, demonstrate that no constitutional barrier has heretofore been thought to prevent the people from requiring that information be provided to voters regarding candidates' positions on constitutional amendments.

D. Descriptive Ballot Language is Commonly Used Today by the States And Takes on Many Forms.

In analyzing the issue in this case, it is important to avoid confusing the unfamiliar with the unconstitutional. It should be noted that the very existence of a state-printed ballot is a legislative innovation of the States. As

this Court has pointed out, "until the late 1800's, all ballots cast in this country were write-in ballots. The system of state-prepared ballots, also known as the Australian ballot system, was introduced in this country in 1888 . . . Prior to this, voters prepared their own ballots or used preprinted tickets offered by political parties." ***Burdick v. Takushi***, 504 U.S. 428, 446 (1992).

As to ballots for Congressional elections, U.S. Const. art. I, § 4, cl. 1 of the U.S. Constitution provides that States may prescribe "The Times, Places and Manner of holding Elections for [U.S.] Senators and Representatives. . . . " This provision expressly authorizes the States to regulate the manner of its elections for members of Congress. ***See Burdick v. Takushi***, 504 U.S. at 433. Under this provision, how States conduct their elections is within their discretion so long as they do not violate some other provision of the U.S. Constitution. ***See, e.g., U.S. Term Limits***, 514 U.S. at 834, ***Eu v. San Francisco Democratic Cent. Comm.***, 489 U.S. 214, 222 (1989).

Article VIII of the Missouri Constitution expressly states that its purpose is to "lead to the adoption" of a constitutional amendment. Mo. Const. art. VIII, § 15. It informs voters regarding candidates' behavior on Congressional term limits. States may generally enact ballot regulations which help the electorate make informed decisions. In fact, this Court has held that " *'there can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will. . . . '* " ***Tashjian v. Republican Party of Connecticut***, 479 U.S. 208, 220 (1986) (quoting ***Anderson v. Celebrezze***, 460 U.S. at 796) (emphasis added). Significantly, *the Court made this statement in the context of its discussion of the role*

of political party labels on election ballots. Political party labels are themselves a common form of descriptive ballot language. The Court noted that "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 inform themselves for the exercise of the franchise." ***Id.*** at 552 (emphasis added). ***See also Twin Cities Area New Party v. McKenna,*** 73 F.3d 196, 200 (8th Cir. 1996), rev'd on other grounds, sub nom. ***Timmons v. Twin Cities Area New Party,*** 520 U.S. 351 (1997) ("The Supreme Court has recognized that party labels provide a shorthand designation of the views of party candidates on matters of public concern. . . . ").

Many States have a long history of placing information on the ballot in addition to the candidates' names. Besides political party labels, States have sanctioned the placement of information on the ballot such as whether the candidate was endorsed by his or her political party convention, which Presidential contender the candidate supports, whether the candidate obtained ballot access by petition, and whether or nor the candidate has promised to vote for the people's choice for U.S. Senator. Never has a court stricken such ballot information until now.

It is important to remember that political parties are not part of our constitutional framework, and have no constitutional basis beyond the right of political association. Placement of party labels on ballots is a form of descriptive language meant to inform voters. Voters have long been accustomed to descriptive language such as "Democrat" or "Republican" following candidates' names. Some past political party names were even more

descriptive, such as "Free Silver," "Socialist Workers," "People's Independent," or "Prohibition." New party names are also often descriptive, such as "Reform" and "Green." A candidate could, if otherwise qualified, run on the "Term Limit" ticket or the "Experience Counts" ticket. Party names are intentionally chosen to convey a message to voters.

It is also significant that the Court has held that political candidates can be required by law to disclose where their campaign money comes from and how it is spent. ***Buckley v. Valeo,*** 424 U.S. 1, 66 (1976). Although this information is not currently printed on the ballot, it is nonetheless required by law to be supplied to voters for the purpose of assisting them in identifying the philosophy of the candidate. In this regard, the Court in ***Buckley*** stated, "disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid voters in evaluating those who seek federal office. *It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels* and campaign speeches." ***Id.*** at 66-67 (emphasis added). Similarly, the Court stated, "In many situations the label 'Republican' or 'Democrat' tells a voter little." ***Id.*** at 70 (upholding campaign disclosure requirements in order to inform the voters of the interest that specific candidates represent).

It is quite possible that in the future voters will cast their votes using computer terminals at the polling places. Voters may well be able to access biographical information on the candidates, campaign finance disclosures, as well as the candidates' positions on major

issues. There is no constitutional prohibition against providing accurate information to the voters. This is true with regard to candidates' political party affiliation, their campaign contributions, and their status as either a party nominee or a petition candidate. It is also true regarding their position on major constitutional amendments such as the direct election of U.S. Senators and Congressional term limits.

The use of descriptive ballot language as provided by Article VIII is legally indistinguishable from party labels, and is intended to assist voters in making informed decisions.

CONCLUSION

Article VIII of the Missouri Constitution is a non-binding advisory instruction expressing the wishes of voters on a matter of public concern. It does not usurp the authority of Congress or State legislatures, and is within the authority of the States to prescribe the manner of elections. The Court should reverse the Eighth Circuit Court of Appeals and uphold the authority of the people of the States to communicate advisory instructions to their elected representatives.

Respectfully submitted,

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