

State of Minnesota In Supreme Court

Case No. A12-0920

League of Women Voters Minnesota; Common Cause, a District of Columbia nonprofit corporation; Jewish Community Action; Gabriel Herbers; Shannon Doty; Gretchen Nickence; John Harper Ritten; Kathryn Ibur,

Petitioners,

vs.

Mark Ritchie, in his capacity as Secretary of State of the State of Minnesota,
and not in his individual capacity,

Respondent,

and

87th Minnesota House of Representatives and
87th Minnesota Senate,

Intervenors-Respondents.

**BRIEF OF AMICI CURIAE STATE SENATOR SCOTT J. NEWMAN AND
STATE REPRESENTATIVE MARY KIFFMEYER**

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TABLE OF CONTENTS

Issue Presented 1

Introduction 2

Argument..... 4

 The Court cannot deprive the people the right to invoke their wisdom upon the proposed constitutional amendment through their vote because, in this case, to do so would violate a fundamental right under Article IX, § 1 and exceed the Court’s jurisdiction. 4

 A. The League does not challenge the constitutionality of the proposed Voter ID amendment itself and, therefore, has waived that opportunity to attempt to exclude the amendment from the ballot. 4

 B. Article VII, section 1 protects the right to vote, and Article IX, section 1 extends that right to proposed constitutional amendments; thus, in this case, the Constitution demands the Court submit the amendment to the popular vote. 13

Conclusion..... 14

TABLE OF AUTHORITIES

Constitutional Provisions

Minn. Const., art. IX, § 1	passim
Minn. Const., art. VII, § 1	passim

Statutes

H.F. No. 2738, ch. 167, §§ 1-2, 87 th Leg. Reg. Sess. (Minn. 2012)	5, 10, 11, 12
Minn. Stat. § 204B.44	2
Minn. Stat. § 645.20	3

Rules

Minn. R. Civ. App. P. 103.04.....	6
-----------------------------------	---

Cases

<i>Balder v. Haley</i> , 399 N.W.2d 77 (Minn. 1987).....	6
<i>City of St. Paul v. Dalsin</i> , 245 Minn. 325, 71 N.W.2d 855 (1955).....	7
<i>Frank v. Winter</i> , 528 N.W.2d 910 (Minn. App. 1995)	6
<i>Genin v. 1996 Mercury Marquis</i> , 622 N.W.2d 114 (Minn. 2001).....	11
<i>Gummow v. Gummow</i> , 356 N.W.2d 426 (Minn. App. 1984)	6
<i>In re McConaughy</i> , 106 Minn. 392, 119 N.W. 408 (1909)	10, 11
<i>Laase v. 2007 Chevrolet Tahoe</i> , 776 N.W.2d 431 (Minn. 2009).....	11
<i>Marr v. Stearns</i> , 72 Minn. 200, 75 N.W. 210 (1898).....	11
<i>McIntire v. State</i> , 458 N.W.2d 714 (Minn. App. 1990)	6
<i>Melina v. Chaplin</i> , 327 N.W.2d 19 (Minn. 1983).....	6
<i>Minnesota Voters Alliance v. City of Minneapolis</i> , 766 N.W.2d 683 (Minn. 2009)	6
<i>Soohoo v. Johnson</i> , 731 N.W.2d 815 (Minn. 2007).....	6
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	6
<i>Wash. State Grange v. Wash. State Republican Party</i> , 552 U.S. 442 (2008).....	6
<i>Winget v. Holm</i> , 244 N.W. 331 (Minn. 1932).....	5, 8

Issue Presented

Minnesota's Constitution requires a proposed constitutional amendment passed by the legislature be submitted for the popular vote during the 2012 general election. The legislature passed a proposed amendment and a separate ballot question on the amendment. The ballot question is constitutionally challenged but not the proposed amendment itself. If the court finds the ballot question unconstitutional, must the proposed constitutional amendment still be placed on the ballot for the popular vote in the general election?

Apposite Constitutional Articles:

Minn. Const., art. IX, § 1; and
Minn. Const., art. VII, § 1.

INTRODUCTION

This Court, after denying their joint motion to intervene, granted leave and invited Minnesota Senator Scott J. Newman and Minnesota House Representative Mary Kiffmeyer as *amici curiae* to file the instant joint brief in favor of the 87th Minnesota Senate and 87th Minnesota House of Representatives as Respondents¹ to the Petition of the League of Women Voters Minnesota.² The League is challenging only the ballot question regarding a proposed constitutional amendment on voter identification to Article VII, § 1 of the Minnesota Constitution.³

Newman and Kiffmeyer suggest that this Court must afford Minnesota citizens the opportunity to adopt or reject the proposed constitutional amendment on voter identification to Article VII, § 1 should the Court find the challenged ballot question unconstitutional. Article IX, § 1 mandates the Court to do so. The constitutional provision strictly limits the jurisdiction of the Court in rejecting a proposed constitutional amendment as passed by the majority of both legislative houses. There is no federal question before this Court regarding the proposed amendment itself as violative of the

¹ Or. Denying Mot. to Intervene (June 15, 2012).

² Reference to the “Petitioners, the “League,” or the “League of Women Voters” includes all Petitioners — the League of Women Voters Minnesota, Common Cause, Jewish Community Action, Gabriel Herbers, Shannon Doty, Getchen Nickence, John Harper Riten, and Kathryn Ibur.

³ Under Minn. Stat. § 204B.44; Petr.s’ Br. and Add. (May 30, 2012).

United States Constitution.⁴ There is no other issue raised before this Court regarding the infirmity of the proposed amendment itself.⁵

Despite simultaneous passage, the ballot question and the proposed amendment are two separate and distinct acts of the legislature. The provisions, by law, are severable.⁶ Should this Court find the ballot question's language violative of neutrality in presenting the proposed amendment to the popular vote, *it cannot be fatal* to the amendment itself being placed before the voters because of the constitutional mandate under Article IX, § 1 — the amendment “shall ... be submitted to the people ...” The Court would exceed its jurisdiction if it prohibited the submission of the proposed amendment to the people.

Newman and Kiffmeyer suggest to the Court that under the present circumstances, if it finds the present ballot question unconstitutional, the Court has the authority to suggest a revision to the question in word usage that reflects “political” neutrality or in the alternative, direct the submission of the proposed amendment in whole on the ballot

⁴ *See id.*

⁵ *Id.*

⁶ Minn. Stat. § 645.20 on “Construction of Severable Provisions”:

Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

with a simple question — “Should this proposed amendment be adopted to amend Article VII, § 1 of the Minnesota Constitution? Yes ... No”

Whichever route the Court may choose, it cannot deprive the people, in this case, the right to invoke their wisdom upon the proposed constitutional amendment. The invocation of the people’s wisdom is, as a practical matter, an extended protected right to vote under Article IX, § 1 that is as fundamental as that expressed under Article VII, § 1. As a matter of law, the League of Women Voters Petition must be dismissed. In the alternative, the Court may either modify the ballot question, or present the proposed constitutional amendment on the ballot as a whole with a neutral question whether to adopt or to reject.

ARGUMENT

The Court cannot deprive the people the right to invoke their wisdom upon the proposed constitutional amendment through their vote because, in this case, to do so would violate a fundamental right under Article IX, § 1 and exceed the Court’s jurisdiction.

A. The League does not challenge the constitutionality of the proposed Voter ID amendment itself and, therefore, has waived that opportunity to attempt to exclude the amendment from the ballot.

The League’s central effort is to exclude the proposed constitutional amendment from the November 2012 election as relief. But, in this case, that relief, the Court cannot offer. The Court has no jurisdiction to do so. As the Respondents 87th Minnesota Senate and 87th Minnesota House of Representatives concisely state:

The issue before the Court is not whether the proposed ‘Photo ID Amendment’ should or should not become part of the Minnesota Constitution. The Minnesota Legislature has exclusive constitutional authority to place this proposed amendment on the ballot for the voters’ consideration.⁷

The League’s Petition attacks the ballot question passed simultaneously with the proposed constitutional amendment.⁸ While the League argues the merits of the ballot question, they do not suggest the legislature’s constitutional amendment itself is not proposed, submitted, and ratified in conformance to the mandate of the Constitution⁹ under Article IX, § 1. The League does not argue the proposed amendment violates the United States Constitution.¹⁰ The League does not argue the proposed constitutional amendment is contrary to any other law, federal or state. It does argue so for the ballot question, but not the amendment itself. Therefore, if the Court finds the ballot question constitutionally infirm, the proposed constitutional amendment must still be presented for the wisdom of the people through the ballot in November’s general election for the popular vote.

⁷ 87th Minn. Sen. and 87th Minn. House Rep. Resp. Br. at 2 (June 25, 2012).

⁸ H.F. No. 2738, ch. 167, §§ 1-2, 87th Leg. Reg. Sess. (Minn. 2012).

⁹ See *Winget v. Holm*, 244 N.W. 331, 332 (Minn. 1932).

¹⁰ See e.g. Citizens for Elec. Integrity *Amicus Curiae* Br. at 9-13 (June 21, 2012) (attacking what amendment might do to Election Day Registration, but not citing any case law or challenging constitutionality of the proposed constitutional amendment) and at 14-20 (arguing proposed amendment may “threaten” mail-in and absentee voters but citing no U.S. Constitution violation or violation of any other law) (June 21, 2012); City of Saint Paul *Amicus Curiae* Br. at 7 (June 18, 2012) (suggests that proposed amendment could strip certain citizens of their right to vote, but cites no case law, no constitutional provision, or other support to challenge the amendment, only suggesting what the proposed *might* do).

Throughout the Petitioners' brief, there is conflation between the Court's jurisdiction in determining the validity of a ballot question and the proposed constitutional amendment. As the Petitioners admit and profess, "the substantive merits of the amendment [are] beyond the scope of [the] Petition."¹¹ The Petitioners try in fact to challenge the merits in the guise of the adequacy of the ballot question. The Court should discern, however, that the League has waived any meritorious legal argument, if any ever existed, against the proposed amendment itself.¹² In fact, the League cannot, because if there is any constitutional argument to make, it would have to be a facial challenge which the League has not made. Because the amendment has not yet been implemented, the League could only challenge the proposed amendment on its face, rather than as applied: "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications."¹³ Of course, the burden of proving that the

¹¹ Petr.s' Br. and Add. at 1 (May 30, 2012).

¹² Generally, a party's failure to address an argument in its brief results in waiver of that argument. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1983). If an issue has not been addressed in a party's principal brief, the issue cannot be revived by raising it in a reply brief. *McIntire v. State*, 458 N.W.2d 714, 717 n. 2 (Minn. App. 1990), *pet. for rev. denied* (Minn. Sept. 28, 1990) *cert. denied*, 498 U.S. 1090 (1991); *Gummow v. Gummow*, 356 N.W.2d 426, 428 (Minn. App. 1984). However, Newman and Kiffmeyer do understand that this Court may reach issues not ordinarily considered properly raised. *See Balder v. Haley*, 399 N.W.2d 77, 80 (Minn. 1987); Minn. R. Civ. App. P. 103.04. *See also, Frank v. Winter*, 528 N.W.2d 910, 913 (Minn. App. 1995).

¹³ *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 688 (Minn. 2009) *citing Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 448-49 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see also Soohoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007) (stating that a facial challenge to the

proposed amendment is facially unconstitutional would be on the League. The League has failed even to make a single argument supporting a facial challenge to the proposed amendment.¹⁴

The League does try to suggest to the Court that the application of the proposed amendment is challengeable by conflating its arguments with those on the ballot question. Policy arguments abound and rhetoric opposing the amendment is replete throughout the League's brief. But, there is no law cited suggesting the proposed amendment itself as unconstitutional:

- Vagueness — “The amendment would also require “[a]ll voters” to be subject to ‘substantially equivalent identity and eligibility verification before voting’...is so vague it is anyone’s guess what effect it will ultimately have on Minnesota’s voting system....”¹⁵
- Impact — “The proposed amendment would also require Minnesota to adopt a ‘provisional balloting’ system. Provisional balloting would add delay, uncertainty and expense to Minnesota’s voting system.”¹⁶
- Restrictive access — “[W]hether to strictly require ‘government-issue’ photo identification or to accept a broader array of identification is one of the significant variables in how restrictive the scheme is.”¹⁷

constitutionality of a statute requires a showing that no set of circumstances exists under which the statute would be valid).

¹⁴ *Minnesota Voters Alliance*, 766 N.W.2d at 688, citing *City of St. Paul v. Dalsin*, 245 Minn. 325, 329, 71 N.W.2d 855, 858 (1955).

¹⁵ Pets’ Br and Add. at 2; see also 8, 25-26.

¹⁶ *Id.* at 8; see also, 15, 17; 30.

¹⁷ *Id.* at 9; see also 10 – 11; 28.

- Effect — “Minnesota’s proposed amendment would not only change Minnesota’s voting system by imposing one of the strictest voter identification requirements in the nation, it would enshrine these requirements in the Minnesota Constitution,”¹⁸ and suggesting the elimination of Election Day Registration.¹⁹
- Class creation — “[T]he amendment would actually ... create two classes of voters: those voting in person, who would be expressly required by the Constitution to present photo identification, and those voting by mail, who would not.”²⁰

Newman and Kiffmeyer do not suggest that this Court could never assert its jurisdictional to review a proposed constitutional amendment:

There seems to be no good reason why the court should not interpose to save the trouble and expense of submitting a proposed constitutional amendment to a vote, if it be not proposed in the form demanded by the Constitution, so that, though approved by the electors, the courts would be compelled to declare it no part of the Constitution.²¹

Because the ballot question is separate from the proposed amendment — the amendment’s language approved by the Legislature *cannot* be changed by this Court or any court — the language within the question itself may either be changed or eliminated. The ballot question *cannot of itself be fatal* to avoid the constitutional mandate of Article

¹⁸ *Id.* at 12.

¹⁹ *Id.* at 13-17.

²⁰ *Id.* at 22.

²¹ *Winget v. Holm*, 187 Minn. 78, 81, 244 N.W. 331, 332 (1932). Another example of a procedural violation would be if the Legislature failed to have the proposed amendment published with its session laws thereby violating the Article IX, section 1 mandate. That omission would be fatal. The Court would have jurisdiction to bar the proposed amendment from the election ballot.

IX, section 1 to bring the proposed amendment to the wisdom of the people for approval or rejection.

The session law itself is divided into two parts: section 1 including the proposed constitutional amendment and section 2 including the ballot question (and title under section 2(b)). The session law states:

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. **CONSTITUTIONAL AMENDMENT PROPOSED.**

An amendment to the Minnesota Constitution is proposed to the people. If the amendment is adopted, article VII, section 1, will read:

Section 1.(a) Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct. The place of voting by one otherwise qualified who has changed his residence within 30 days preceding the election shall be prescribed by law. The following persons shall not be entitled or permitted to vote at any election in this state: A person not meeting the above requirements; a person who has been convicted of treason or felony, unless restored to civil rights; a person under guardianship, or a person who is insane or not mentally competent.

(b) All voters voting in person must present valid government-issued photographic identification before receiving a ballot. The state must issue photographic identification at no charge to an eligible voter who does not have form of identification meeting the requirements of this section. A voter unable to present government-issued photographic identification must be permitted to submit a provisional ballot. A provisional ballot must only be counted if the voter certifies the provisional ballot in the manner provided by the law.

(c) All voters, including those not voting in person, must be subject to substantially equivalent identity and eligibility verification prior to a ballot being cast or counted.

Sec. 2. SUBMISSION TO VOTERS.

(a) The proposed amendment must be submitted to the people at the 2012 general election. If approved, the amendment is effective July 1, 2013, for all voting at elections scheduled to be conducted November 5, 2013, and thereafter. The question submitted must be: “Shall the Minnesota Constitution be amended to require all voters to present valid photo identification to vote and to require the state to provide free identification to eligible voters, effective July 1, 2013?”

Yes.....

No.....

22

...

This Court has recognized that “the legislature may in its discretion determine whether it will pass a law or submit a proposed constitutional amendment to the people. The courts have *no* judicial control over such matters, not merely because they involve political questions, *but because they are matters which the people have by the Constitution delegated to the Legislature.*”²³ Therefore, the Court may not change or modify the language of the proposed amendment. In this case, there is nothing to suggest that the proposed constitutional amendment as drafted and passed by a majority of both houses amending Article VII, section 1 is fatally flawed.

As for the ballot question found in Section 2, a separate and distinct provision, it is intended to be neutral, to give effect to Article IX, section 1, and not to be fatal to submitting the proposed amendment itself to the people. As others have discussed, challenges to *ballot questions* require a showing that the *question* is “so unreasonable and

²² H.F. No. 2738, ch. 167, §§ 1-2, 87th Leg. Reg. Sess. (Minn. 2012).

²³ *In re McConaughy*, 106 Minn. 392, 414, 119 N.W. 408, 417 (1909) (emphasis added).

misleading as to be a palatable evasion of the constitutional requirement to submit the law to a popular vote.”²⁴ The general opposition to the ballot question appears to suggest the lack of neutrality in the chosen language. The Court may throw out the question as proposed, suggest a new question, or suggest modifications to the wording of the ballot question itself to ensure “political” neutrality in the language chosen.²⁵ The reason a Court would do so is that both the Court and the people are rightfully concerned about the “neutrality” of a ballot question proposed by the legislative proponents of the proposed amendment.

But since “all political power is vested in the people,”²⁶ recognized by this Court as “the fundamental principle of American constitutional law,”²⁷ the Court cannot avoid the constitutional mandate in this case under Article IX, section 1 that the proposed amendment itself must be submitted to the popular vote even if the ballot question is found violative of neutrality.

Our opponent, the City of Saint Paul, appears not to disagree with our analysis. Although Saint Paul suggests that Section 2 of H.F. 2738 was a legislative attempt to

²⁴ *State ex rel. Marr v. Stearns*, 72 Minn. 200, 218, 75 N.W. 210, 214 (1898), *rev'd on other grounds*, 179 U.S. 223 (1900).

²⁵ “We cannot rewrite a statute under the guise of statutory interpretation.” *Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 438 (Minn. 2009), *citing Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 119 (Minn. 2001) (stating that the court may not add words to a statute).

²⁶ *In re McConaughy*, 106 Minn. at 414, 119 N.W. at 416.

²⁷ *Id.*

“proceed by way of ordinary legislation on the form and manner of submitting an amendment”²⁸ and, therefore, the Governor’s veto of Section 2 was proper, the City recognized that the Governor *could not veto* the proposed constitutional amendment.²⁹ Therefore, ultimately, as we suggest and Saint Paul concurs, the full text of the constitutional amendment must go forward to the people under the mandate of Article IX, section 1:

“[I]t would be fair and equitable for the Court to order that the full text of the amendment be ‘submitted’ to the people in compliance with Article IX.”³⁰

Thus, whether the Court finds the ballot question violative of “neutrality” or “palability” or that the Governor’s veto successfully caused Section 2 of H.F. 2738 to be entirely ineffective as a law, it is a procedural failure that cannot be a fatal flaw to the presentation of the proposed Voter ID constitutional amendment to the people under Article IX. At the very least, the proposed constitutional amendment as a whole must appear on the ballot for the November 2012 general election with a question to follow that respects the principle of neutrality such as: “Should the proposed amendment be adopted and added to Article VII, § 1 of the Minnesota Constitution? Yes ___; No ___.”

²⁸ City of Saint Paul *Amicus* Br. in Supp of Petrs. at 2 (June 18, 2012).

²⁹ *Id.* at 4 *citing and quoting* Minn. Atty. Op. 213-C (Mar. 9, 1994) (available at <http://www.ag.state.mn.us/resources/opinions/030994.HTM>) (concerning a bill that contained both a constitutional amendment and ordinary legislation).

³⁰ City of Saint Paul *Amicus* Br. at 7.

B. Article VII, section 1 protects the right to vote, and Article IX, section 1 extends that right to proposed constitutional amendments; thus, in this case, the Constitution demands the Court submit the amendment to the popular vote.

There is no challenge to the constitutionality of the proposed Voter ID amendment itself as a federal question under the United States Constitution or as violative of any other federal or state law. Thus, in this case, the jurisdiction of the Court is narrowed to the ballot question only. Hence, the Court has no jurisdiction to prevent the proposed amendment from reaching the people. The plain meaning of Article IX, section 1 requires “[p]roposed amendments shall be ...submitted to the people for their approval or rejection....” Article IX is reflective of and adopts the Court’s recognized doctrines that “all political power is vested in the people”³¹ and that the Constitution “is the creature of their power and the instrument of their convenience.”³²

It is without doubt that the right to vote enshrined under Article VII, §1 of the Minnesota Constitution reflects the precious jewel of our political beliefs, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”³³ The same right to vote into office candidates extends to amendments to the Minnesota Constitution.

Article IX, section 1 specifically reserves the right of the people to vote on the proposed amendment. Here, because the proposed amendment itself is not

³¹ *In re McConaughy*, 106 Minn. at 414, 119 N.W. at 416.

³² *Id.*, 106 Minn. at 414, 119 N.W. at 417.

³³ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

constitutionally challenged, the Court cannot disenfranchise the people eligible under Article VII, section 1 to vote on the proposed amendment. The Court's rationale on the narrow issue of the ballot question is not a legal substitute for the wisdom of the people as prescribed and demanded under Article IX, section 1.

CONCLUSION

The Court cannot deprive the people, in this case, the right to invoke their wisdom upon the proposed constitutional amendment on Voter ID by either approving or rejecting the amendment. The ballot question at issue is procedural. If the Court finds it infirm, it is not and cannot be a fatal flaw to prevent the proposed amendment from reaching the people in the November 2012 general election. The people have, as a practical matter, an extended protected right to vote under Article IX, § 1 on the proposed amendment is as fundamental as that expressed under Article VII, § 1. Therefore, as a matter of law, the League of Women Voters Petition must be dismissed. In the alternative, the Court by order may either suggest to modify the ballot question or require the proposed constitutional amendment be on the ballot as a whole with a neutral question whether to adopt or to reject it.

Dated: June 27, 2012



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CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P. 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 3,724 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 97-2003, the word processing system used to prepare this Brief.



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