

A06-1871

STATE OF MINNESOTA
IN SUPREME COURT

OFFICE OF
APPELLATE COURTS

OCT - 5 2006

FILED

Tim Breza, Larry Buboltz,
Dan Dorman, Morrie Lanning,
Michael Lang, Keith Langseth,
Jerry Miller, H. Dan Ness,
Tom Rukavina, Kathy Serva,
Eric Sorensen, Mark Voxland,
Lauri Winterfeldt-Shanks,

Petitioners,

vs.

**PETITION PURSUANT
TO MINN. STAT. 204B.44
TO ENJOIN ELECTION
ON BALLOT QUESTION**

Mary Kiffmeyer, Minnesota
Secretary of State,

Respondent.

Douglas Peine
Atty. Reg. No. 84979
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St. Paul, Minnesota 55104
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ATTORNEY FOR PETITIONERS

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PETITION FOR RELIEF

Petitioners ask this Court to enjoin an election, scheduled for November 7, 2006, on the following proposed constitutional amendment question:

Shall the Minnesota Constitution be amended to dedicate revenue from a tax on the sale of new and used motor vehicles over a five-year period, so that after June 20, 2011, all of the revenue is dedicated at least 40 percent for public transit assistance and not more than 60 percent for highway purposes?

Yes _____

No _____

If this amendment is adopted, two sections will be added to Article XIV of the Constitution to read:

Section 12. Beginning with the fiscal year starting July 1, 2007, 63.75 percent of the revenue from a tax imposed by the state on the sale of a new or used motor vehicle must be apportioned for the transportation purposes described in section 13, then the revenue apportioned for transportation purposes must be increased by ten percent for each subsequent fiscal year through June 20, 2011, and then the revenue must be apportioned 100 percent for transportation purposes after June 30, 2011.

Section 13. The revenue apportioned in section 12 must be allocated for the following transportation purposes: not more than 60 percent must be deposited in the highway user tax distribution fund, and not less than 40 percent must be deposited in a fund dedicated solely to public transit assistance as defined by law.

H.F. 2461, ch. 88 secs. 9 & 10, 2005 Minn.Laws 459.

PROCEDURAL MATTERS

A. Authority to Petition under Minn.Stat.204B.44

We proceed under **Minn.Stat. sec. 204B.44:**

Any individual may file a petition in the manner provided in this section for the correction of any of the following errors, omissions or wrongful acts which have occurred or are about to occur:

(a) An error or omission in the placement or printing of the name or description of any candidate or any question on any official ballot;

(b) Any other error in preparing or printing any official ballot;

(c) Failure of the chair or secretary of the proper committee of a major political party to execute or file a certificate of nomination;

(d) Any wrongful act, omission, or error of any election judge, municipal clerk, county auditor, canvassing board or any of its members, the secretary of state, or any other individual charged with any duty concerning an election.

The petition shall describe the error, omission or wrongful act and the correction sought by the petitioner. The petition shall be filed with any judge of the Supreme Court i the case of an election for state or federal office or any judge of the district court in that county in the case of an election for county, municipal, or school district office. The petitioner shall serve a copy of the petition on the officer, board or individual charged with the error, omission or wrongful act, and on any other party as required by the court. Upon receipt of the petition the court shall immediately set a time for a hearing on the

matter and order the officer, board or individual charged with the error, omission or wrongful act to correct the error or wrongful act or perform the duty or show cause for not doing so. The court shall issue its findings and a final order for appropriate relief as soon as possible after the hearing. Failure to obey the order is contempt of court.

B. Jurisdiction Under the Statute

This statute expressly confers on this Court original jurisdiction over issues involved in "state"wide elections.¹

C. Subject Matter Jurisdiction

Subsection (a) of the statute extends this Court's jurisdiction not only over issues involving a "candidate" but also "any question on any official ballot."

This language was not a part of the predecessor statute in effect in 1932, i.e., **Minn.Stat. sec. 347 (1927)**. Under that law, only those challenges regarding "candidates" were expressly authorized by the legislature.² Even so, this Court held that its jurisdiction also included challenges to

¹Only issues in elections "for county, municipal, or school district office" proceed first to the district court.

²The phrase was added in **1990 Minn. Laws ch. 453, sec. 6**.

ballot questions:

There can be no essential difference between submitting to the voters a candidate who has no legal right to appear on the ballot and submitting a proposed amendment to the Constitution in a form therein prohibited.

Winget v. Holm, 187 Minn. 78, 244 N.W. 331, 332 (Minn. 1932); Housing and Redevelopment Authority of Minneapolis v. City of Minneapolis, 293 Minn. 227, 198 N.W.2d 531, 536 (Minn. 1972); see also, Fugina v. Donovan, 259 Minn. 35, 104 N.W.2d 911 (Minn. 1960).

And thus the "errors and omissions" to be corrected under section 204B.44 are not simply "mechanical" or "procedural" ones but also those constitutional infirmities arising from the Legislature's choice of language in a particular ballot question. Page v. Carlson, 48 N.W.2d 274 (Minn. 1992); see also, Housing and Redevelopment Authority of Minneapolis v. City of Minneapolis, 293 Minn. 227, 198 N.W.2d 531, 536 (Minn. 1972); Fugina v. Donovan, 259 Minn. 35, 104 N.W.2d 911 (Minn. 1960); Winget v. Holm, 244 N.W. 331, 332 (Minn. 1932).

D. Standing

"Any individual" may file a petition under 204B.44.

This statutory language "has been broadly construed" to grant standing to any "person qualified to vote", Moe v. Alsop, 288 Minn. 323, 325, 180 N.W.2d 255, 257 (1970), or at

least to any "registered voter", Clifford v. Hoppe, 357 N.W.2d 98, 100 n.1 (Minn. 1984).³

All of the Petitioners hereto satisfy both tests. (See attached Petitioners' affidavits).

STATEMENT OF FACTS

Brief History of the Motor Vehicle Sales Tax

Although largely irrelevant to the narrow issue raised in this Petition, for the convenience of the Court we have attached in the Appendix an Information Brief from the House of Representatives Research Department which tracks the lengthy history of the Motor Vehicle Sales Tax ("MVST"). (A.⁴3-11).

Suffice it to say that the question of how to use the revenues generated by the MVST has been debated since the tax was enacted in 1967. The flashpoint of that debate has been the legislature's initial decision to direct the tax's revenues into the general fund. Some have argued over the years that the MVST is a user tax and as such should be -

³These similar but distinctive tests were identified in Schiff v. Griffin, 639 N.W.2d 56 (Minn.App. 2001), but there, as here, the court was not obliged under the facts to choose between them.

⁴Citations preceded by "A." are to the pages of the Appendix attached to this Petition.

like the gas tax and vehicle license tax - dedicated to transportation. (A.3-4).

Proponents of that dedication were successful in the 1980's but not permanently so. The Information Brief traces in detail the ways in which the dedication to highways "was periodically changed or suspended" and then "abolished entirely beginning in fiscal year 1992" only to be partially restored again in 2000. (A.4-8).

In 2001 the legislature for the first time allocated a portion of MVST revenue to be used for transit operations, i.e., bus and light rail. The intention here was to assist local governments after they had been prohibited from using property taxes for transit. (A.8-9).

In 2003 the allocation to transit was increased "at the expense of the share for dedicated highway funds." (A.9-10).

2005 Legislative Session

In 2005 the legislature passed a transportation bill which included with it the proposed constitutional amendment challenged in this Petition. The bill itself was vetoed by the Governor⁵, however the proposed constitutional amendment survives in accordance with the Opinion of the Attorney

⁵On May 19, 2005. **Journal of the House, May 19, 2005 at 5039.**

General (also attached, at A.32) on the theory that the amendment is not subject to gubernatorial veto. (A.10-11).

2006 Legislative Session

During the 2006 legislative session three different bills were introduced in the House and Senate to clarify the amendment question. **H.F.3048/S.F.2446; H.F.2915/ S.F.2444; H.F.3173/S.F.2444.** The first two would have *constitutionally* guaranteed a firm 60 % for highways and 40 % for transit. The third favored *statutorily* dedicating the 60/40 split.

Ultimately, the constitutional guarantee prevailed in both Senate and House Omnibus Transportation bills, and so both went to conference committee with the firm 60/40 dedication in place. **S.F.3764; H.F.2461.**

But there they both languished and died, thus leaving the 2005 version of the amendment ballot question to go to the voters this November 7.

ARGUMENT

A. The Applicable Law:

The Language of a Proposed Constitutional Amendment Ballot Question Must Not Be Misleading or Deceitful

Submitting a proposed constitutional amendment to an election by the people of Minnesota is a legislative function. But it is a function that does not operate free of constitutional restraints:

Neither the form nor the manner of submitting a question of amendment to the people is prescribed by the constitution. They are left to the judgment and discretion of the legislature, **subject only to the implied limitation that they must not be so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote.**

State v. Stearns, 72 Minn. 200, 75 N.W. 210, 214 (Minn. 1898), reversed on other grounds, 21 S.Ct. 73, 179 U.S. 223, 45 L.Ed. 162 (emphasis added).

This language was reiterated in State v. Duluth & N.M.Ry.Co., 102 Minn. 26, 112 N.W. 897, 898 (Minn. 1907).

Further guidance was provided by the Court in 1960 in the context of whether proposed amendments need to be separately submitted to the voters. Without referencing either State v. Stearns or State v. Duluth & N.M.Ry.Co., the opinion in Fugina v. Donovan, 104 N.W.2d 911 (Minn. 1960), says that the purpose of requiring separate submission is:

to prevent imposition upon or deceit of the public by the presenting of a proposal which is misleading

or the effect of which is concealed or not readily understandable.

At 914; see also, Elbers v. Grove, 502 N.W.2d 810, 814 (Minn.App. 1993).

B. Application of the Law to the Facts

1. What the Ballot Question Actually Says:

The ballot question at issue in this case addresses the allocation of revenue from the tax on automobile and truck sales. It proposes that all of that revenue be "**dedicated at least 40 percent for public transit assistance and not more than 60 percent for highway purposes.**"

Laid bare, the allocation is this:

FOR HIGHWAYS: 0 - 60 %

FOR TRANSIT: 40 - 100 %

2. How the Ballot Question is Misleading and Deceptive:

What the ballot question obscures is the crucial fact that the amendment gives authority - constitutional authority, no less - for the entire fund to be applied to transit with highways receiving nothing.

This is a radical and permanent change that needs to be clearly spelled out to the voters.

This the ballot question does not do. To the contrary, by artful opposition of the phrases "not more than" and "not less than," the casual reader is left to conclude that he or she is voting to allocate 40 percent to public transit and 60 percent to highways.

Most telling is the fact that the "60 percent" number in the ballot question is entirely superfluous. Obviously if transit is to get "not less than 40 percent," then the maximum of 60 percent for transportation is a given. Its inclusion is not only unnecessary but misleading.

And perhaps deliberate, as well. It is difficult not to suspect on the part of the drafter the shrewd insight that including both "40 percent" and "60 percent" in the ballot question would trick most voters into reading a firm 40/60 split of the revenue.

In any event, whether deliberate or not, all parties have fallen victim.

3. Evidence that the Amendment Will Be Confusing for Voters

a. The Press Is Confused By the Ballot Language:

We have attached in the appendix hereto a number of press clippings from the local media. The titles of several tell the tale:

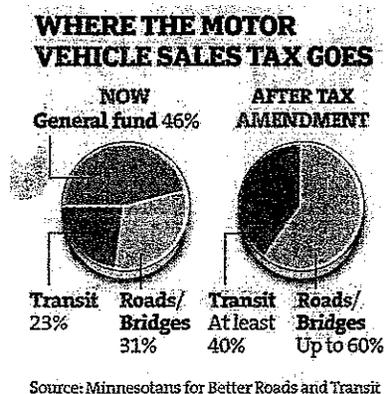
"Confusion about MVST ballot question . . ." (A.12)

"Legislators take a crack at clearer language . . ." (A.15)

"Confusing Ballot Language" (A.22)

"Transportation-funding amendment is clear as mud" (A.23)

Most telling is the strikingly misleading graphic accompanying the Star Tribune article of September 30th. It purports to show the transit/highway allocation before and after the amendment via two pie charts:



A picture is worth a thousand words. The casual reader - even the attentive reader - will come away with the crisp

and confident mental image that roads and bridges are going to get a hard 60% and transit 40%. That's what the pie chart clearly shows. Readily understandable. More reliable than words. A win/win situation for everyone.

But it's not true.

Obviously the press is the primary source of information for the voters. If the press does not understand the implications, the voters have little chance.

b. The Pollsters Are Confused by the Ballot Language:

The Star Tribune article of September 20 attached at page 19 of the Appendix, grew out of an effort by the Minnesota Poll to clarify "the confusing language that will appear on the ballot." To that end, the Poll put before a sample of voters:

1. the language of the amendment as it reads; and
2. the pollsters' "simplified version". (A.19).

Unfortunately, whoever drafted the "simplified version" obviously did not understand the full implication - or at least was unsuccessful at making it any less obscure:

THE AMENDMENT: "all of the revenue is dedicated at least 40 percent for public transit assistance, and not more than 60 percent for highway purposes"

THE "SIMPLIFIED" VERSION: "with at least two-fifths going to public transit and the rest going to highways"

What the poll should have asked is whether the voters would vote for an amendment that authorizes from 40 to 100% of the revenue be spent on transit with 0 to 60% going for highways.

c. **The Attorney General's Office Is Confused by the Ballot Language:**

Pursuant to **Minnesota Statutes section 3.21**, the attorney general is required to "furnish to the secretary of state a statement of the purpose and effect of all amendments proposed" along with "the portions of the context that the attorney general deems necessary to understand the amendment."

In **Knapp v. O'Brien**, 288 Minn. 103, 179 N.W.2d 88 (1970), it was held that just such a statement saved an otherwise confusing ballot question. The Court's theory, post-election, was "that people relied on the Attorney General's explanation of the effect of the amendment when approving the amendment."

We would suggest that, even in the best of circumstances, it is a doubtful proposition that enough of the electorate actually reads such statements to make any difference.

In any event, the issue is moot here. The Attorney General's office did in fact issue a 3.21 statement. We have attached it at page 30 of the Appendix. On the transit/highway split, it is even less clear than the Minnesota Poll's "simplified version":

The amounts so apportioned must be allocated between the local transit assistance fund and the highway tax distributing fund, with at least 40 percent going to the local transit assistance fund.

Again, what gets lost in the verbiage is the critical fact that highways might well end up with nothing. And it is simply not realistic to expect voters themselves to draw out this implication from the fog.

d. **The Secretary of State's Office Is Confused by the Ballot Language:**

The Secretary of State has affixed a title to the amendment question that will be included on the ballot:

PHASED IN DEDICATION OF THE MOTOR VEHICLE SALES TAX
TO HIGHWAYS AND PUBLIC TRANSIT

(<http://www.sos.state.mn.us/home/index.asp?page=10&recordid=86&returnurl=index%2Easp%3Fpage%3D10>)

Its purpose is to help enlighten the voters. At least with regards to the crucial 40/60 issue, it succeeds only in helping entrench the idea that both highways and public transit are guaranteed revenue under the amendment. The

more accurate version would read: "PHASED IN DEDICATION OF THE MOTOR VEHICLE SALES TAX TO PUBLIC TRANSIT AND PERHAPS TO HIGHWAYS".

e. The Legislature Itself Was Confused by the Ballot Language:

The significant issue in the debate over transportation in both the House and the Senate in 2006 was not whether the 2005 ballot question was confusing. The issue was how to fix it. See Senate Webcast at www.senate.leg.state.mn.us/media/archive/2006/floor/index.shtml#header, May 11, 2006, 04:27:01 f.; House Television Program at www.house.leg.state.mn.us/htv/archivesHFS.asp?ls_year=84, May 16, 2006, 00.15.01 f.

For example, this from Senator Scott Dibble:

To be sure, the language that was proposed originally that came over last year was convoluted, was confusing, had lots of provisions and no doubt folks who weren't yet already familiar with this particular ballot question probably would have looked at it, eyes glazed over, and passed over it.

At 04:38:11.

Noone rose to dispute the point in either the Senate or the House.

In fact, there is testimony that in 2005 both bodies believed the amendment language would effect a firm 60/40 split:

It's a firm 40 %. That's what was portrayed last year when the transportation bill passed the Senate. On the floor of the Senate we were told it was a firm 40 and 60.

Sen. Rod Skoe at 04:42:38.

I know those who voted for this transportation bill last year . . . the intent at that time was to vote for a 60/40 split.

Rep. Paul Marquart at 00:37:39.

These statements are especially troubling insofar as they, too, suggest a deliberate intent by some legislators to mislead their colleagues.

In any event, if a substantial number of the legislators themselves could read the ballot question and assume a firm 60/40 split, the voters cannot be expected to fare any better.

C. Remedy: Injunction

Where the Court finds that a particular ballot question is in fact misleading or not readily understandable, it is "proper" for the Court "to enjoin" the Secretary of State from holding an election on the question. **Housing and Redevelopment Authority of Minneapolis v. City of Minneapolis**, 198 N.W.2d 531, 536 (Minn. 1972), citing **Winget v. Holm**, 244 N.W. 331, 332 (Minn. 1932).

CONCLUSION

Bad legislation is one thing. But bad legislation that misleads the electorate in the voting booth is another.

Whether the result of a deliberate intent to deceive or simply shoddy, last-minute draftsmanship, this sort of legislative process is a disservice to the people of Minnesota, and it cannot be countenanced.

It cannot be countenanced because it cuts at the very heart of the democratic system. Only when "the people are well-informed," wrote Jefferson, "can they be trusted with their own government," just as they "cannot approve what they do not understand." **Jefferson to Richard Price, 1789; Jefferson, Opinion on Apportionment Bill, 1792.**

For these reasons we ask this Court to enjoin an election on the MVST amendment question.

Respectfully submitted,



Douglas Peine
Atty.Reg.No. 84979
2460 Beverly Road
St. Paul, Minnesota 55104
612-308-0014

ATTORNEY FOR PETITIONERS

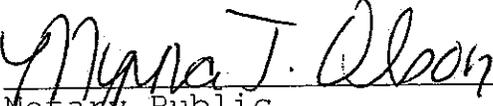
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I am a registered voter in the State of Minnesota.

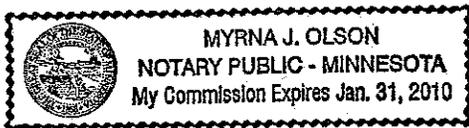
October 4, 2006
DATED:


Petitioner

Subscribed and sworn to before me,
this 4 day of October, 2006



Notary Public



I am a registered voter in the State of Minnesota.

DATED:

Oct 5, 2006

Jerry S Buboltz

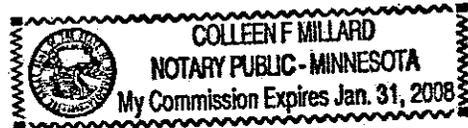
Petitioner

Subscribed and sworn to before me,

this 5th day of October, 2006

Colleen Millard

Notary Public



I am a registered voter in the State of Minnesota.

10/03/06

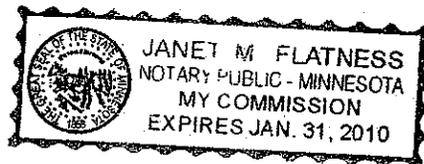
DATED:

Janet M. Flatness
Petitioner

Subscribed and sworn to before me,
this 3rd day of October, 2006

Janet M. Flatness

Notary Public



I am a registered voter in the State of Minnesota.

Morris L. Lanning

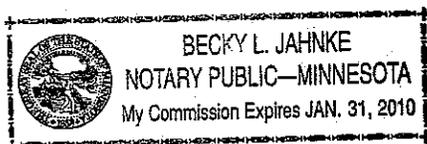
Morris L. Lanning
Petitioner

DATED:

Subscribed and sworn to before me,
this 4th day of October, 2006

Becky L. Jahnke

Notary Public



I am a registered voter in the State of Minnesota.

DATED: *October 4, 2006*

Michael Lang
Michael Lang
Petitioner

Subscribed and sworn to before me,
this 4th day of October, 2006

Kathleen M Riordan

Notary Public



I am a registered voter in the State of Minnesota.

Keith Langseth

Keith Langseth

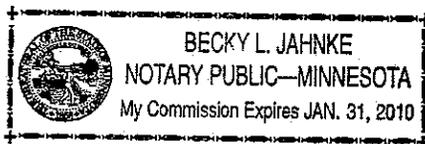
DATED: 10-4-06

Petitioner

Subscribed and sworn to before me,
this 4th day of October, 2006

Becky L. Jahnke

Notary Public



I am a registered voter in the State of Minnesota.

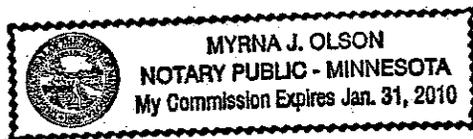
DATED: 10-4-06

Jerome S. Miller
Petitioner

Subscribed and sworn to before me,
this 4th day of October, 2006

Myrna J. Olson

Notary Public



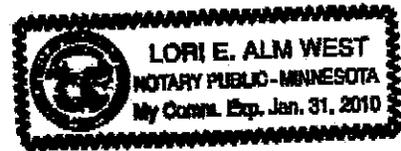
I am a registered voter in the State of Minnesota.

10/4/06
DATED:

Harold Daniel Ness
Petitioner

Subscribed and sworn to before me,
this 4th day of October, 2006

Lori E. Alm-West
Notary Public



I am a registered voter in the State of Minnesota.

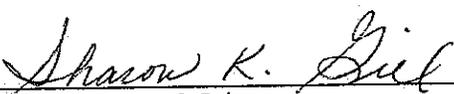
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10/4/06

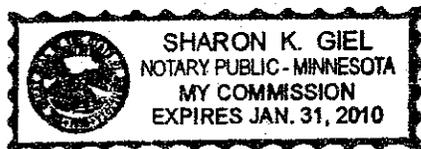


Petitioner

Subscribed and sworn to before me,
this 4th day of October, 2006



Notary Public



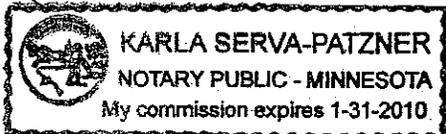
I am a registered voter in the State of Minnesota.

DATED: 10-4-2006

Kathleen K Serva
Petitioner

Subscribed and sworn to before me,
this 4 day of October, 2006

Karla R Serva Patzner
Notary Public



I am a registered voter in the State of Minnesota.

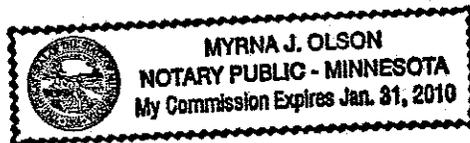
DATED: *October 4, 2006*

Eric Buhl Aarssen
Petitioner

Subscribed and sworn to before me,
this 4 day of October, 2006

Myrna J. Olson

Notary Public



I am a registered voter in the State of Minnesota.



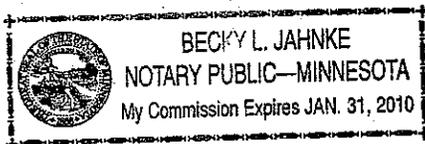
Mark Voxland

DATED: 10-4-06

Petitioner

Subscribed and sworn to before me,
this 4th day of October, 2006



Notary Public

I am a registered voter in the State of Minnesota.

Lauri Winterfeldt-Shanks
Lauri Winterfeldt-Shanks

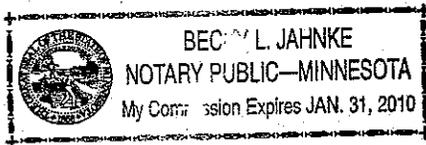
DATED: *October 4, 2006*

Petitioner

Subscribed and sworn to before me,
this 4th day of October, 2006

Betsy L. Jahnke

Notary Public



The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).