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STATE OF MINNESOTA
IN SUPREME COURT

OFFICE OF
APPELLATE COURTS

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No. A06-1871

FILED

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Jerry Miller, H. Dan Ness, Tom Rukavina, Kathy Serva, Eric Sorensen, Mark Voxland,
Lauri Winterfeldt-Shanks,

Petitioners,

vs.

Mary Kiffmeyer, Minnesota Secretary of State,

Respondent.

AMICUS CURIAE BRIEF OF
REPRESENTATIVE RON ERHARDT, MINNESOTA CHAMBER OF
COMMERCE, AND MINNESOTA CENTER FOR ENVIRONMENTAL
ADVOCACY

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STATEMENT OF THE CASE¹

Petitioners seek to enjoin an election, scheduled for November 7, 2006, on the following ballot question, describing a proposed Transportation Amendment to the Minnesota Constitution:

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 30, 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 _____

The language of the ballot question is derived from the text of the actual amendments that will be added to Article XIV of the Minnesota Constitution, if adopted:

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 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 30, 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 §§ 9 & 10, 2005 Minn. Laws 459.

¹ Pursuant to Minnesota Civil Appellate Rule 129.03, no counsel for a party authored this brief in whole or in part, and no person or entity made a monetary contribution to the preparation or submission of this brief other than the amici, their members (in the case of organizational amici), or their counsel.

The proposed Transportation Amendment reflects the Legislature's considered decision to dedicate the state sales tax on motor vehicles to funding transportation needs. The Amendment phases in the tax dedication over a period of five years and provides flexibility in the allocation of that money, while requiring that transit gets a guaranteed 40 percent of the allocation.

Petitioners allege that the ballot question on the Transportation Amendment is infirm because it is misleading, deceptive and will confuse voters. Petitioners ask the Court to enjoin the Secretary of State from holding an election on the question.

INTRODUCTION

Petitioners ask the Supreme Court to do something it has never done before: declare the language in a ballot question on a proposed constitutional amendment "so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote." State ex rel. Marr v. Stearns, 72 Minn. 200, 75 N.W. 210, 214 (1898), rev'd on other grounds, 179 U.S. 223 (1900).² Petitioners base their case for judicial intervention into the constitutional amendment process on

² This Court has only once enjoined a ballot question, and that case involved an amendment to a city charter, not a constitutional amendment passed by the Legislature. In Housing & Redevelopment Authority v. City of Minneapolis, 293 Minn. 227, 198 N.W.2d 531 (1972), the Court affirmed a lower court's finding that a proposed charter amendment to the City Charter of the City of Minneapolis violated the Minnesota Constitution's home rule provisions. The Court held that it was reasonable to enjoin an election where the measure, if adopted, would be found unconstitutional by the courts. 198 N.W.2d at 536 (citing Winget v. Holm, 187 Minn. 78, 244 N.W. 331, 332 (1932)). Housing & Redevelopment Authority was not decided on the basis of any confusion in the ballot question itself, and therefore has no relevance to this case.

purported mass “confusion” surrounding the meaning of the Transportation Amendment ballot question. Petitioners’ evidence comprises little more than anecdotes bolstered by speculative inferences about the impact of newspaper stories on voters. In reality, there is no confusion that requires or permits the Court to withdraw the ballot question from the public’s consideration.

Petitioners’ request that the Court enjoin the ballot question is a transparent attempt to have the judicial branch use its equitable powers to accomplish what Petitioners themselves failed to accomplish in the 2006 Legislative Session. It is patently obvious that Petitioners would prefer a constitutional amendment that guarantees a “firm” 60/40 split between highway and transit funding rather than the flexible 60/40 split in the proposed Transportation Amendment.³

The legislative history of the Transportation Amendment demonstrates that the Legislature considered, but ultimately rejected, replacing the flexible 60/40 split with a fixed 60/40 split. In 2006, the Legislature carefully considered the question of whether the split between highway and transit funds should be fixed or flexible. To Petitioners’

³ When the Petitioners have themselves appeared in the news media, it has been as advocates of a fixed 60/40 split between highway funds and transit funds from the legislative dedication. See “Moorhead Leaders Await Court’s Proposal Review,” Fargo Forum at Appx. 0001-02 (Oct. 6, 2006) (Petitioners Lanning, Langseth, Voxland and Winterfeld-Shanks); Minutes, Meeting of Alexandria City Council at Appx. 0003 (Feb. 27, 2006) (Petitioner Ness); “Transportation Funds on Nov. 7 Ballot: Statewide Groups of Supporters, Opponents to Face Off at Polls,” Mesabi Daily News at Appx. 0006 (Aug. 17, 2006) (Petitioner Rukavina); “Outdoor Bands Can Play Until 12 Without A Permit,” DL [Detroit Lakes] Online at Appx. 0009 (Mar. 12, 2006) (Petitioner Bubolz).

dismay, the fixed 60/40 split failed to clear the Conference Committee, leaving the flexible split on the ballot.

With their last-minute flurry of filings, Petitioners seek to spring an “October Surprise”⁴ in order to frustrate the considered will of the Legislature, and to interfere with the voters’ right to decide the fate of the proposed Transportation Amendment.

Petitioners have presented no compelling evidence that warrants the extreme step of judicial intervention into the legislative and electoral process.

ARGUMENT

I. JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENT BALLOT QUESTIONS IS VERY LIMITED

The Minnesota State Constitution mandates that courts safeguard the right of the people to amend the laws under which they live:

Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good.

Minn. Const. art I, § 1. Accordingly, the Minnesota Supreme Court has long recognized that judicial review of constitutional amendment ballot questions is very circumscribed:

The courts cannot review the judgment and discretion of the Legislature in prescribing the form and substance of the question to be submitted, simply because they may be of the opinion that the question was not phrased in the best or fairest terms.

⁴ Petitioners were aware of the ballot question well before October 4, 2006. See, e.g., Appendix 0003-09. Petitioners’ unreasonable delay in asserting a known right would properly bar Petitioners’ claim, if they had one. See Fetsch v. Holm, 236 Minn. 158, 52 N.W.2d 113, 115 (1952).

State v. Duluth & N.M. Ry. Co., 102 Minn. 26, 112 N.W. 897, 898 (1907); see also State v. Minnesota & N.W. Ry. Co., 102 Minn. 506, 112 N.W. 899, 899 (1907) (per curiam) (affirming Duluth & N.M. Ry. Co.); Winget v. Holm, 187 Minn. 78, 244 N.W. 331, 334 (1932) (“Since the Legislature is invested with the power to propose amendments, their scope and form must be left to it within reasonable limits.”); Dunnell Minn. Digest Constitutional Law § 1.02 (4th ed. 2006).⁵

The case of Fugina v. Donovan, 259 Minn. 35, 104 N.W.2d 911 (1960), cited by Petitioners in their Petition to Enjoin Election at 11-12 (10/04/06), is consistent with the Supreme Court’s deference to legislative drafting of proposed constitutional amendments. In Fugina, the Petitioner sought to prevent the Secretary of State from submitting to voters two constitutional amendments in the form of a single legislative proposal. Although the Supreme Court stated that it “would have been preferable to present [the two amendments] as separate proposals,” the Court nonetheless concluded that “this belief cannot be made the basis for a ruling that the propositions must be separately submitted.” 104 N.W.2d at 914. Instead, the Court applied a “broader and more liberal view” to the question before it, and refused to enjoin the election so long as it could identify a rational basis for the Legislature’s actions. Id.; see also Winget, 244 N.W. at 334 (stating that the Supreme Court will defer to the judgment of the Legislature on the drafting of amendments).

⁵ Petitioners reliance, in part, on Minn. Stat. § 204B.44, as a basis for the Court’s jurisdiction does not change the standard of judicial review set forth in this section.

Consistent with the deference owed to the Legislature, the Minnesota Supreme Court has identified a very narrow scope for judicial review, requiring only that amendment ballot questions “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 ex rel. Marr v. Stearns, 72 Minn. 200, 75 N.W. 210, 214 (1898). In the 108 years since the Stearns decision, the Minnesota Supreme Court has never found the language in a amendment ballot question to be so confusing or misleading as to transgress this standard.

II. THE BALLOT QUESTION IS NOT UNREASONABLE OR MISLEADING

The only evidence that Petitioners put forth to support their claim that the ballot question is “misleading or deceitful” are anecdotes and newspaper stories relating that some people are confused by its language. Petitioners’ claims come nowhere close to meeting the high standard required for judicial interference in the amendment process. In both Stearns and Duluth & N.M. Railway, the Minnesota Supreme Court confronted objectively “confusing” ballot questions and concluded that the questions were neither unreasonable nor misleading.

A. A Ballot Question That Tracks The Language Of The Amendment Cannot Be Unreasonable Or Misleading

The Stearns case involved a constitutionally mandated ballot question, which required that any proposed law repealing laws relating to the taxation of railroads had to be approved by a popular vote to become effective. The proposed law, which consisted of 502 words and five sections, imposed taxes on railroad lands while exempting lands

held, used or occupied for rights of way, gravel pits, sidetracks, depots, and all buildings and structures used in the actual management and operation of the railroads. The proposed law also repealed tax laws on railroads inconsistent with the Act. See Ch. 168, General Laws of 1895, attached hereto as an Addendum. The ballot question, however, provided none of this detail. It said only:

For taxation of railroad lands. Yes___ No___

The petitioner in Stearns challenged the validity of the ballot question – in language reminiscent of Petitioners’ accusations of deliberate deceit – as a “cunning political device to catch votes.” 75 N.W. at 214. The Court disagreed, holding that the language was not unreasonable or misleading, and further noting that “there are a large number of important amendments to the constitution which were submitted by a ballot upon which there was no suggestion as to the nature of the amendment.” Id. at 215.

By contrast, the ballot question for the proposed Transportation Amendment is simply not confusing under the standard set forth in Stearns. The Transportation Amendment ballot question tracks the language of the amendment itself, reducing any potential confusion a voter might have about the substance of the amendment. At its core, then, Petitioners’ complaint is not with the ballot question, but with the text of the Transportation Amendment itself, and the flexible 60/40 split in the dedicated fund between highway projects and transit projects. However, that text is plainly not subject to judicial review, the drafting of constitutional amendments being solely the province of the Legislature. Wass v. Anderson, 312 Minn. 394, 252 N.W.2d 131, 135 (1977)

(holding that form of proposed constitutional amendment “is a matter addressed to legislative discretion”).

B. Ambiguity In A Ballot Question Does Not Render It Constitutionally Infirm

The Duluth & N.M. Railway case involved the same railroad taxation provision as the Stearns case did. At issue in Duluth & N.M. Railway was a proposed law that would increase the gross earnings tax on all railroads to 4 percent. The ballot question put before the voters asked whether they approved an increase in the railroad tax:

*For increasing the gross earnings tax of railroad companies from
three to four per cent. Yes ___ No ___*

112 N.W. at 898. The Railway challenged the ballot question as unconstitutionally misleading because voters could be misled into thinking that the law would only increase the tax rates of those railways paying a 3 percent tax at the time the amendment passed, rather than all railways. Id. The Court agreed with the Railway that the reference to the 3 percent rate was both superfluous and confusing, and that “the simplest and fairest form of the question submitted would have been this: ‘For increasing the gross earnings tax of railroad companies to four per cent.’” Id. Nevertheless, the Court found that the purpose of the proposed law was “fairly expressed in the question submitted” and upheld its constitutionality. Id. at 898-99.

Petitioners freely admit that they are asking this Court to engage in the type of second-guessing of the legislature expressly prohibited by Duluth & N.M. Railway. The Petitioners implore the Court to “[m]ake the legislature go back and do it right” and to

“send a message to the legislature that it, too, like the rest of us, cannot get away with slapdash work.” Petitioners’ Laches Mem. at 10 (10/10/06).

Such a level of judicial interference in the legislative process is inconsistent with the holding in Duluth & N.M. Railway, and the separation of powers concerns that underlie the Court’s deference to the Legislature in the area of proposing constitutional amendments. There is no reason to believe that the Transportation Amendment does anything other than reflect the will of a majority of its members. As Petitioners readily admit, the Transportation Amendment not only was approved by the Legislature in 2005, but it was thoroughly debated in 2006, after which the Legislature decided to make no changes in the Amendment or ballot question. In other words, given a chance for a do-over, the Legislature remained satisfied with its initial judgment. Petitioners disagree with that decision – but that is a matter of a difference of opinion about transportation policy, not constitutional law.

The only question before the Court is whether the ballot question on the Transportation Amendment “fairly expresse[s]” the underlying text of the actual Amendment. It does so by reasonably and accurately describing the Amendment’s flexible allocation between transit and highway funding. Accordingly, the ballot question more than satisfies the constitutional requirements set forth by the Court.

III. THE ATTORNEY GENERAL’S STATEMENT RESOLVES ANY PERCEIVED CONSTITUTIONAL INFIRMITY

Pursuant to Minn. Stat. § 3.21, the Attorney General furnished the Secretary of State with a statement of the purpose and effect of the proposed Transportation

Amendment. See Petition to Enjoin Election at Appx. 30-31. In Knapp v. O'Brien, 288 Minn. 103, 179 N.W.2d 88 (1970), the Supreme Court held that such statements can clarify an otherwise confusing ballot question because “it must be assumed that [the voters] relied on the attorney general’s explanation of the effect of the amendment.” 179 N.W.2d at 94.

Recognizing that the holding Knapp is fatal to their claims, Petitioners desperately attempt to evade its holding. First, Petitioners directly challenge the Court’s holding by asserting that it is a “doubtful proposition” that voters read these attorney general statements. Petition to Enjoin Election at 16. Second, Petitioners declare, without foundation, that the Attorney General’s statement is confusing. Id. at 17. In fact, the Attorney General’s statement succinctly and accurately conveys the impact of the Transportation Amendment, if adopted. To the extent that the Court finds that the Attorney General’s statement clarifies the Transportation Amendment, Knapp is controlling and disposes of Petitioners’ claims.

CONCLUSION

For the foregoing reasons, and those advanced by Respondent Kiffmeyer, the Court should dismiss the Petition to Enjoin Election and decline to enjoin the vote on the Transportation Amendment ballot question.

Dated: October 13, 2006

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ADDENDUM

LAWS OF MINNESOTA, 1895

CHAPTER 168

An act relating to the taxation of certain lands owned by railroad companies in this state, and repealing laws and parts of laws relating to the taxation of the same, and to provide for the submission of this act to the people of this state for their approval or rejection.

Be it enacted by the Legislature of the state of Minnesota:

SECTION 1. All lands in this state heretofore or hereafter granted by the state of Minnesota or the United States, or the territory of Minnesota to any railroad company shall be assessed and taxed as other lands are taxed in this state, except such parts of said lands as are held, used or occupied for right of way, gravel pits, sidetracks, depots and all buildings and structures which are necessarily used in the actual management and operation of the railroads of said companies.

Provided that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings in the same manner and in the same amount as now provided by law. And that nothing in this act contained shall be construed to repeal said laws except in so far as the same relate to the tax upon said lands.

SECTION 2. Such portion or portions of any act or acts, general or special, of the state or territory of Minnesota heretofore enacted, which provides or attempts to provide for any exemption of lands hereby declared taxable, from taxation, or for any other method of taxing said last mentioned lands different from the method of taxing other lands in this state, or which are in any manner inconsistent with the provisions of this act, are hereby repealed.

SECTION 3. If this act shall be held to be void so far as it applies to the lands of any particular railroad company in this state, it shall not be ground for declaring it void or inapplicable to any other company not similarly situated.

SECTION 4. This act shall be submitted to the people of this state for their approval or rejection at the next general election for the year eighteen hundred and ninety-six (1896).

The secretary of state shall cause to be printed upon the form of ballots used in voting for state officers at the next general election, in manner conformable with the requirements of the general election law the words:

	Yes.
For taxation of railroad lands.....	-----
	No.

and each electing voter at such election shall designate his vote by a cross mark made opposite one or the other of the said words "Yes" and "No," and the said election shall in all respects conform so far as may be to the requirements of the general election law, and the returns of said election shall be made, canvassed and certified and the result thereof declared in the manner provided by law for returning, certifying and canvassing votes cast for state officers.

SECTION 5. This act shall take effect and be in force from and after its passage.

Approved March 19th, 1895.

STATE OF MINNESOTA
IN SUPREME COURT

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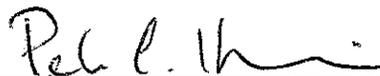
**CERTIFICATION OF
BRIEF LENGTH**

Appellate Court
Case Number: A06-1871

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,339 words. This brief was prepared using Microsoft Word 2003 software.

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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).