

# On the public funding of 'government speech'

Many times this column is helpful to advise you, the readers, about decisions of courts in Missouri that impact your tasks as journalists. But this month, the column is a “heads up” to keep an eye on a case pending in the Missouri Supreme Court that may have a significant impact on your city, your city’s leaders and its budget, and public information about ballot measures that might become advertising in your newspapers.

The case is *City of Maryland Heights v. State of Missouri* (the case number is SC 99098, if you are searching for it). The Missouri Supreme Court has begun the process of hearing it, having received the appeal directly from the Circuit Court of Cole County because it’s an appeal of a state statute. The court has received the legal file (“the record”). Briefs will be filed, and then, probably this fall sometime, oral arguments would be anticipated.

Why is this case so important? It is focused on the interpretation of Section 115.646, the statute that governs spending of public funds on election matters. “No contribution or expenditure of public funds shall be made directly by any officer, employee or agent of any political subdivision to advocate, support, or oppose any ballot measure or candidate for public office.”

But at the same time, it allows officials to make “public appearances” and issue “press releases” regarding such matters.

When the case was tried, some of the cities’ officials talked about using city funds to publish and distribute postcards and newsletters to citizens and speaking at city venues regarding various ballot measures. The statutory language was “vague,” they said, leaving them uncertain what they could or could not do. They

risked both civil fines and criminal penalties if found in violation. Plus, what about their First Amendment rights? The State’s attorneys didn’t dispute their past actions but argued this statute was not unconstitutional.

Cole County Circuit Judge Cotton Walker agreed that the statute targeted speech based on content. But Judge Walker then turned to the State’s defensive argument – that the First Amendment did not apply to “government speech.”

What’s that? Government speech is officials, in their official capacity, speaking about the government’s position and point of view. Such speech “was integral and necessary to the act of governing,” the Judge said, pointing to supporting case law. And, of course, such acts required the expenditure of some government funds to disseminate its point of view.

Judge Walker pointed out that rulings by the U.S. Supreme Court held that government had a right to express its point of view and concluded this statute did not regulate such “government speech.”

Confused? Listen to this sentence in the decision: “For example, a city council may call for an election on a tax increase and support its passage, but a mayor having a column in a monthly newsletter may nonetheless declare his or her opposition to the tax proposal.” Under that set of facts, only the council’s expressed viewpoint was “government speech,” not the mayor’s statement.

Therefore, the statute targets only “officers, employees, and agents” of political subdivisions, and the Judge said this is a violation of their constitutional rights.

“Missouri voters are intelligent enough to assess for themselves the truthfulness and underlying motives and biases of election campaign claims....” the Judge noted.

He then went on to note other concerns in the statute’s language. Where it says “any ballot measure,” does that mean public funds can be spent until the ballot is printed? When do the statute limitations begin? And what constitutes “public funds”?

Other Ethics Commission statutes talk about “contributions” and “anything of value” – which is much broader than “public funds,” it would seem. What about employee time? Use of public vehicles, copiers, communication tools like newsletters? “Has the city clerk committed a crime by using a city computer to respond to a resident’s inquiry on the effect of a pending ballot measure?” the Court queried. “Does the statute require a government publication to include both sides of every electoral question?”

In light of these issues, the Circuit Judge held the statute was unconstitutional and therefore void. The State’s attorneys have initiated the appeal directly to the Missouri Supreme Court.

And the impact on you, the reader? So many times, questions arise about public bodies spending for informational advertising for ballot issues. So many times, city officials hold press conferences in places where citizens question the forum to reporters. Sometimes, advertising departments have been hesitant to accept political advertising due to uncertainty about this statute.

Stay tuned. It may be late fall, but perhaps we’ll have some better answers soon.



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