

## Unconstitutional Proscription on Forming a Campaign Committee Shortly Before an Election

*Missourians for Fiscal Accountability v. Klahr*  
(Ortrie D. Smith, W.D. Mo. 2:14-cv-4287)

A district court's temporary restraining order blocked a proscription on forming a campaign committee fewer than 30 days before an election. After the election, the district judge determined that the case was not moot, but he later determined that it was not ripe. The court of appeals concluded that the case was ripe, and the district judge then issued a summary judgment that the proscription was unconstitutional. The court of appeals agreed, and the district judge awarded the plaintiff \$158,055.80 in attorney fees and costs.

*Subject:* Campaign activities. *Topics:* Campaign finance; attorney fees; recusal; ballot measure.

On the Thursday before the November 4, 2014, general election, an organization established on October 22 to promote a ballot proposition filed a federal complaint in the Western District of Missouri challenging a statute that forbade the formation of a campaign committee fewer than 30 days before an election.<sup>1</sup> A little after 11:00 the following morning, the organization filed a motion for preliminary and permanent injunctions and a temporary restraining order.<sup>2</sup>

On the case's second day, Judge Dean Whipple recused himself,<sup>3</sup> and the court reassigned the case to Judge Ortrie D. Smith.<sup>4</sup> Judge Smith held a telephonic hearing at 3:30 p.m. on Friday.<sup>5</sup> On Sunday, Judge Smith issued a temporary restraining order against enforcement of the statute as an unconstitutional restriction on speech.<sup>6</sup> "[T]he blackout period is not a disclosure requirement. It does not require those collecting or expending funds to say anything to anyone, much less to the electorate. To the contrary, the blackout period *forbids* communication by preventing the committee from expending solicited funds."<sup>7</sup>

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1. Complaint, *Missourians for Fiscal Accountability v. Klahr*, No. 2:14-cv-4287 (W.D. Mo. Oct. 30, 2014), D.E. 1; *Missourians for Fiscal Accountability v. Klahr*, 892 F.3d 944, 948 (8th Cir. 2018); *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 792 (8th Cir. 2016); *see* Mo. Rev. Stat. § 130.011(8).

2. Motion, *Missourians for Fiscal Accountability*, No. 2:14-cv-4287 (W.D. Mo. Oct. 31, 2014), D.E. 5; Temporary Restraining Order Opinion at 2, *id.* (Nov. 2, 2014), E.E. 9, 2014 WL 5530996.

3. Recusal Order, *id.* (Oct. 31, 2014), D.E. 4.

4. Docket Sheet, *id.* (Oct. 30, 2014) (D.E. 6).

5. Transcript, *id.* (Oct. 31, 2014, filed Nov. 17, 2014), D.E. 12; Temporary Restraining Order Opinion, *supra* note 2, at 2.

6. Temporary Restraining Order Opinion, *supra* note 2; *Missourians for Fiscal Accountability*, 892 F.3d at 948; *Missourians for Fiscal Accountability*, 830 F.3d at 792.

7. Temporary Restraining Order Opinion, *supra* note 2, at 4.

Two days after the election, Judge Smith issued an order to show cause why the case should not be dismissed as moot: “Plaintiff can no longer advocate in support of ballot issues from the election, and the Court can no longer grant any effective relief.”<sup>8</sup> On January 8, 2015, Judge Smith concluded that the case was not moot, because “Plaintiff must register at least thirty days before any future elections.”<sup>9</sup>

On April 27, however, Judge Smith determined that the organization’s claims were not yet ripe.<sup>10</sup> By a vote of two to one, the court of appeals determined on July 29, 2016, that the case was ripe because the committee formed to support a successful 2014 ballot proposition had engaged in 11 days of self-censorship.<sup>11</sup> Judge Smith awarded the organization summary judgment on January 5, 2017,<sup>12</sup> a judgment affirmed by the court of appeals on June 12, 2018.<sup>13</sup> “[T]he formation deadline prohibits those who do not form a campaign committee 30 days before the election from speaking.”<sup>14</sup> “Due to its burden on speech and its modest effect on preventing circumvention of the disclosure regime, the formation deadline is not narrowly tailored.”<sup>15</sup>

On April 10, 2017, Judge Smith awarded the organization \$158,055.80 in attorney fees and costs.<sup>16</sup>

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8. Order to Show Cause, *Missourians for Fiscal Accountability*, No. 2:14-cv-4287 (W.D. Mo. Nov. 6, 2014), D.E. 11.

9. Order at 1, *id.* (Jan. 8, 2015), D.E. 20.

10. Opinion, *id.* (Apr. 27, 2015), D.E. 25, 2015 WL 1893359; *Missourians for Fiscal Accountability*, 830 F.3d at 792; *Missourians for Fiscal Accountability*, 892 F.3d at 948.

11. *Missourians for Fiscal Accountability*, 830 F.3d at 794–97; *Missourians for Fiscal Accountability*, 892 F.3d at 948.

12. Opinion, *Missourians for Fiscal Accountability*, No. 2:14-cv-4287 (W.D. Mo. Jan. 5, 2017), D.E. 44, 2017 WL 58588; *Missourians for Fiscal Accountability*, 892 F.3d at 948.

13. *Missourians for Fiscal Accountability*, 892 F.3d at 946.

14. *Id.* at 949.

15. *Id.* at 952.

16. Opinion, *Missourians for Fiscal Accountability*, No. 2:14-cv-4287 (W.D. Mo. Apr. 10, 2017), D.E. 62.