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IN THE SUPREME COURT OF MISSOURI

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VICTOR ALLRED,

Respondent/Cross-Appellant,

vs.

ROBIN CARNAHAN, Missouri Secretary of State,  
THOMAS A. SCHWEICH, Missouri State Auditor,  
and MISSOURI JOBS WITH JUSTICE,

Respondent and Appellants/Cross-Respondents.

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Appeal from the Circuit Court of Cole County  
The Honorable Judge Jon E. Beetem

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**BRIEF OF RESPONDENT ROBIN CARNAHAN AND  
APPELLANT/CROSS-RESPONDENT THOMAS A. SCHWEICH**

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## STATEMENT OF FACTS

On October 4, 2011, proponents of a proposed initiative petition seeking to amend Missouri's Minimum Wage Law, § 290.500, RSMo, *et seq.*,<sup>1/</sup> submitted two versions to the Secretary of State. (LF 25-34). Version two was subsequently withdrawn. (LF 165-166). The proposed initiative petition at issue seeks to increase the state minimum wage to at least \$8.25 per hour, with adjustments in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers ("CPI"), and to increase the minimum wage of employees who receive tips to 60% of the state minimum wage. (LF 28-29).

By letter dated November 8, 2011, the Secretary of State certified the official ballot title for the proposed initiative petition with the following summary statement:

Shall Missouri law be amended to:

- increase the state minimum wage to \$8.25 per hour, or to the federal minimum wage if that is higher, and adjust the state wage annually based on changes in the Consumer Price Index;

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<sup>1/</sup> All references to the Revised Statutes of Missouri will be to the 2011 Cumulative Supplement, unless otherwise noted.

- increase the minimum wage for employees who receive tips to 60% of the state minimum wage; and
- modify certain other provisions of the minimum wage law including the retail or service businesses exemption and penalties for paying employees less than the minimum wage?

(LF 78).

The Auditor, in turn, followed the processes and procedures as outlined in the Joint Stipulation (“JS”) at ¶ 19-22. This process involved gathering fiscal impact information from state and local governmental entities (Tr. 80-81; JS ¶ 19), evaluating those fiscal impact submissions for completeness and reasonableness (Tr. 32-33, 82-83, 90-91; ¶ 21), researching and verifying the accuracy of information as referenced to sources contained in a submission (Tr. 46, 48, 106), weighing those responses (Tr. 78; JS ¶ 21) and analyzing the information from all sources in the fiscal note to arrive at the fiscal note summary. (Tr. 78, 91, 110; JS ¶ 23).

The submissions of fiscal impact contained in the fiscal note are listed verbatim as received from the submitting entities or individuals. (Tr. 31-32, 87; JS ¶ 22). In those submissions, there is supporting material for the Auditor’s statements in the fiscal note summary. (Tr. 91-94). John Halwes,

the Auditor's employee who prepared the fiscal note and fiscal note summary in this case, testified about his familiarity with state and local governmental entities and their finances/budgets; being a certified government financial manager; his experience in forecasting (looking at budgeting, data analysis) and auditing (involving the skills of research and data analysis). (Tr. 77-79). These are skills he uses in preparing a fiscal note and fiscal note summary. *Id.*

On November 17, 2011, Plaintiff Victor Allred filed this suit against the Secretary of State and the State Auditor, challenging the summary statement, fiscal note, and fiscal note summary. (LF 7). The Secretary's summary statement was upheld by the trial court on cross-motions for judgment on the pleadings. (LF 1). The trial court also held that the fiscal note and fiscal note summary at issue were fair and sufficient, but that the Auditor does not have authority under the Missouri constitution to prepare a fiscal note and fiscal note summary. (LF 1).

## SUMMARY OF THE ARGUMENT

More than a decade ago, this Court established the controlling standard for a ballot title – to make the “subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal.” *United Gamefowl Breeders Assoc. of Mo. v. Nixon*, 19 S.W.3d 137, 140 (Mo. banc 2000). In his zeal to keep the initiative petition at issue off the ballot, Plaintiff conjures up several arguments challenging the summary statement, fiscal note, and fiscal note summary. None succeed, as the trial court held, because the summary statement, fiscal note, and fiscal note summary give notice of the purpose of the initiative petition, and are therefore fair and sufficient.

The Secretary’s summary statement gives sufficient notice of the subject of the proposal – increasing minimum wage. Yet, Plaintiff challenges the Secretary’s reference to the Consumer Price Index in the summary statement. The reference is essential, however, to show that the new state minimum wage is subject to the CPI, which has not been the case under current Missouri law. Similarly, the summary statement’s description of the minimum wage increase for tipped employees is fair and sufficient because the proposal increases the “wage” – the employer paid portion – for tipped employees. Accordingly, the trial court correctly upheld the Secretary’s summary statement.

The trial court also correctly found that the fiscal note and fiscal note summary were sufficient and fair by properly applying relevant case law and § 116.175. First, Art. IV, § 13 of the Missouri Constitution authorizes the legislature to create authority for the Auditor to conduct investigations. While the Constitution provides the authority for investigations, it does not define what those investigations have to look like. Instead, the authority to define investigations is left to specific enacting legislation, such as § 116.175.

Second, the fiscal note and fiscal note summary in this case are sufficient and fair since they comply with the plain meaning and intent of § 116.175, and are consistent with case law as developed in the Court of Appeals. The processes and procedures followed by the Auditor in this case in developing the fiscal note and fiscal note summary provided the assessment required by the statute and case law, based on objective data provided by state and local governmental entities and a proponent. The ruling of the trial court finding the fiscal note sufficient and fair should be affirmed.

## ARGUMENT

### *Standard of Review*

As with any court-tried case, the trial court's judgment in a ballot initiative case should be affirmed "unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Missouri Mun. League v. Carnahan*, --- S.W.3d ----, 2011 WL 3925612, \*2 (Mo. App. W.D. 2011) ("*MML I*") (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). Plaintiff fails under each of these standards.

When considering the Secretary's summary statement, "the only question on appeal is whether the trial court drew the proper legal conclusions, which [courts] review[] *de novo*." *MML II*, 2011 WL 3925612, \*2 (citing *Overfelt v McCaskill*, 81 S.W.3d 732, 735 (Mo. App. W.D. 2002) and *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573, 579-80 (Mo. App. W.D. 2010) ("*MML I*"). Likewise, in reviewing the arguments related to the Auditor's fiscal note and fiscal note summary, the trial court's legal conclusions and application of the law to the facts are reviewed *de novo*. *MML I*, 303 S.W.3d at 579-580, citing *Coyle v. Dir. of Revenue*, 181 S.W.3d 62, 64 (Mo. banc 2005).

**I. The Trial Court Correctly Certified the Secretary’s Summary Statement Because it “Makes the Subject Evident With Sufficient Clearness to Give Notice of the Purpose to Those Interested or Affected by the Proposal.”**  
**– Responding to Appellant’s Point I.**

Chapter 116 sets forth the procedures for circulation and submission of an initiative petition, as well as the standards for review of the summary statement prepared by the Secretary. After approval as to form, the Secretary has 10 days to prepare a summary statement for a proposed initiative petition, which cannot exceed 100 words. § 116.334. The Secretary’s summary statement must use “language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.” § 116.334. Section 116.190 requires that anyone challenging the summary statement must show that it is “insufficient or unfair.” § 116.190.3.

In *United Gamefowl Breeders*, this Court described the test for an “insufficient or unfair” ballot title as “whether the ballot title makes the subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal.” *Id.* at 140-41 (citing *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 14 (Mo. banc 1981)). Here, the Secretary’s summary statement makes the subject of the initiative petition – increasing

the state minimum wage – evident with sufficient clearness, just as the trial court concluded.<sup>2/</sup>

**A. Legal Standards Applicable to the Secretary’s  
Summary Statement.**

In reviewing a summary statement for an initiative petition, the burden is on the party challenging the summary statement to show that the language is “insufficient or unfair.” § 116.190.3. To meet this burden, the party must show that the summary statement “inadequately and with bias, prejudice, deception, and/or favoritism state[s] the consequences of the [initiative].” *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo. App. W.D. 1994). As such, the test is “whether the language fairly and impartially summarizes the purposes of the measure so that voters will not be deceived

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<sup>2/</sup> Even if the Secretary’s summary statement was unfair or insufficient, which it is not, it should be returned to the Secretary for any changes. The Missouri Constitution bestows upon the Secretary the authority to submit all initiatives or referendum petitions to the people. *See* Art. III, § 53, Mo. Const. Section 116.334 explicitly requires the Secretary to prepare a summary statement for a ballot initiative measure – and no one else. No provision of the Missouri Constitution or Chapter 116 permits a court to modify a summary statement prepared by the Secretary.

or misled.” *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999).

The Secretary prepares summary statements that endeavor to promote an informed understanding of the probable effects of proposed amendments. *See Cures Without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. App. W.D. 2008). Importantly, courts have repeatedly recognized that “whether the summary statement prepared by the Secretary of State is the best language for describing the [initiative] is not the test.” *Bergman*, 988 S.W.2d at 92. Indeed, as the court of appeals has aptly noted, “[i]f charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions,” and “there are many appropriate and adequate ways of writing the summary ballot language.” *Asher v. Carnahan*, 268 S.W.3d 427, 431 (Mo. App. W.D. 2008).

One of the more comprehensive decisions from the court of appeals to address the standard for reviewing ballot summary language is *Missourians Against Human Cloning*, 190 S.W.3d 451. In that case, the court described the process and the applicable standards as follows:

Our role is not to act as a political arbiter between opposing viewpoints in the initiative process: When courts are called upon to intervene in the initiative process, they must act with restraint, trepidation ... Courts are understandably reluctant to become

involved in pre-election debates over initiative proposals. Courts do not sit in judgment on the wisdom or folly of proposals.

*Id.* at 456 (citing *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990)). Furthermore, the purpose of the ballot title is merely “ ‘to give interested persons *notice of the subject* of a proposed [law] to prevent deception through use of misleading titles. If the title gives adequate notice, the requirement is satisfied.’ ” *Missourians Against Human Cloning*, 190 S.W.3d at 456 (quoting *Union Elec. Co. v. Kirkpatrick*, 606 S.W.2d 658, 660 (Mo. banc 1980)) (emphasis added).

The *Missourians Against Human Cloning* decision also emphasized that § 116.190 does not require the Secretary’s summary statement to be the most specific or preferable summary for a particular initiative: “Even if [a plaintiffs’] substitute language would provide more specificity and accuracy in the summary ‘and even if that level of specificity might be preferable’ ” this is not the test. *Id.* (quoting *Bergman*, 988 S.W.2d at 92). Furthermore, the summary statement, which is limited to 100 words, “need not set out the details of the proposal.” *United Gamefowl Breeders Assoc. of Mo.*, 19 S.W.3d at 141 (citing *Buchanan*, 615 S.W.2d at 14).

**B. The Secretary's Summary Statement is Sufficient and Fair.**

The Secretary's summary statement in this case fairly and impartially gives notice of the subject of the proposed law – an increase in the state minimum wage. Plaintiff argues that the summary statement is supposedly unfair and insufficient in three ways. These arguments fail, however, and should be rejected.

**1. The summary statement properly identifies increases to the minimum wage, including the application of the CPI to the new state minimum wage.**

The Plaintiff's first claim challenging the summary statement focuses on what he argues is a misleading reference to existing Missouri law. The Secretary's responsibility is to prepare a summary statement that is fair and sufficient and provides an informed understanding of the probable effect of a proposed amendment. *Cures Without Cloning*, 259 S.W.3d at 82. The preparation of an appropriate summary statement may require providing context for a proper understanding of the proposed amendment. The summary statement in this case does just that, and any reference to existing law is essential to provide an informed understanding of the probable effect of the proposed amendment.

Context is important here because it informs voters about the new interaction of the federal minimum wage and adjustments such as the CPI. For example, § 290.502 currently provides that the employee's minimum wage is either \$6.50 per hour or minimum wages "set under the provisions of federal law as the prevailing federal minimum wage." In contrast, the proposed amendments to the statute provide that the state minimum wage is \$8.25 per hour, and that "[i]f the federal minimum wage rate is increased above the minimum wage rate then in effect under this section [*i.e.* \$8.25], the higher federal rate *shall become the minimum wage rate in effect under this section.*" (emphasis added). No longer would it be one or the other, but instead the higher minimum wage – whether the \$8.25 or the federal minimum wage – would *become* the state minimum wage.

This distinction is important when considering the adjustments of the CPI in the statute. The current statute references the CPI, but the Missouri Department of Labor has not interpreted it to include cost of living increases if the federal minimum wage is being applied as the higher rate. Indeed, although the applicable CPI has increased each year for the past three years, *see* <http://www.ssa.gov/oact/STATS/avgcpi.html>, the state minimum wage has nevertheless remained the same for the last three years. *See* <http://www.labor.mo.gov/DLS/MinimumWage/>. Under the new § 290.502, however, the CPI would apply to the "rate in effect under this section" and

the federal minimum wage would *become* the state minimum wage in effect if it is the highest rate. *Id.*

From this context, the Secretary drafted a bullet point for the summary statement in an effort to reflect this amendment in the law. She summarized it as follows:

- increase the state minimum wage to \$8.25 per hour, or to the federal minimum wage if that is higher, and adjust the state wage annually based on changes in the Consumer Price Index;

The summary statement, therefore, seeks to inform voters that the CPI will apply to the state minimum wage, whether it is the \$8.25 or the federal minimum wage. To do this, the Secretary had to reference the CPI. She did so, not in a way to repeat existing law, but to show that the state minimum wage, regardless of its source, is now subject to the CPI.

It was essential for the Secretary to incorporate a reference to the CPI and the corresponding adjustment of the minimum wage in order to communicate accurately to voters concerning the impact that approving the amendment would have on the minimum wage in Missouri. This constitutes a fair and sufficient summary of these proposed changes in the law.

The basis of the Plaintiff's claim is the decision in *MML I*. The summary statement in *MML I* restated, in part, existing law on "just

compensation.” The Court found this language to be insufficient and unfair because it suggested an amendment was being made to “just compensation” that was not, in fact, being made.

Following the decision in *MML I*, the court of appeals in *MML II*, 2011 WL 3925612 2011 WL 3925612, at \*10, clarified the rule holding that the “mere fact that a proposal references” current law “does not make it automatically unfair or prejudicial.” The court in *MML II*, in fact, found that “such a rule would be absurd in that at least in some instances context demands a reference to what is currently present to understand the effect of the proposed change.” *Id.*; see also *Coburn v. Mayer*, --- S.W.3d ---, 2012 WL 2122226, \*3 (Mo. App. W.D., June 13, 2012). Plaintiff simply disregards the decision in *MML II*, which is essential for the application of the proper standard.

Here, a summary that merely stated that the proposed amendments would raise the state minimum wage to \$8.25 per hour or the prevailing federal minimum wage, without any reference to the CPI, would be misleading, as Plaintiff readily acknowledges. Furthermore, changing the summary statement to provide that the state minimum wage would “continue” to be adjusted for the CPI, as suggested by Plaintiff, would be even more misleading than simply omitting any reference to the CPI. A statement that the state minimum wage would “continue” to be adjusted would imply

that the initiative petition would not change the CPI's influence on minimum wage. But it does, because the CPI currently has no influence since the present state minimum wage is the federal minimum wage which is not adjusted by the CPI. As acknowledged by the trial court, "any reference to existing law [in the summary statement] is essential to provide the necessary context for the provision being changed." Order, p. 4.

It was essential for the Secretary to incorporate a reference to the CPI and the corresponding adjustment of the state minimum wage in order to communicate accurately to voters the probable effects of the proposed amendment. And even if a change to the language of the summary statement might provide "more specificity and accuracy in the summary and even if that level of specificity might be preferable, whether the summary statement prepared by the Secretary of State is the best language for describing the [initiative] is not the test." *Missourians Against Human Cloning*, 190 S.W.3d at 457 (citations omitted). The test for the summary statement is whether the voters have a fair and impartial summary to evaluate. *Id.*

The phrasing of the summary statement in this case ensures that the voters have an accurate picture of the implications of the initiative petition and it gives notice of the subject of the proposed changes to those the proposal would affect. *Cures Without Cloning*, 259 S.W.3d at 81.

**2. The summary statement properly describes the impact on employees who receive tips.**

In his second claim, Plaintiff argues that the summary statement is misleading by supposedly implying that tipped employees are not paid at or above the state minimum wage. This argument relies exclusively on semantic differences between the language of the summary statement and the Plaintiff's preferred phrasing. The summary statement phrase at issue reads, "Shall Missouri law be amended to...increase the minimum wage for employees who receive tips to 60% of the state minimum wage...?" This summary statement endeavors to promote an informed understanding for voters of the probable effect of the proposed amendment. *Cures Without Cloning*, 259 S.W.3d at 82.

Missouri's minimum wage currently provides that no employer of an employee who receives tips is required to pay "in excess of fifty percent of the minimum wage specified in sections 290.500 to 290.530." § 290.512.1. Tips are not referred to as "wages" under § 290.512, and the proposed statutory changes would increase the minimum "*wage*" for employees that receive tips to 60% of the state minimum wage. The premise of the Plaintiff's argument is that by omitting the second clause of the statute requiring total compensation to be at or above the state minimum wage, the summary statement should be described as the "minimum *employer-paid portion*."

Appellant's Br. p. 31 (emphasis in original). When evaluating the language of the summary statement, however, the test is whether the language of the summary is fair and impartial and not whether the language employed in the summary is the most specific or accurate. *Missourians Against Human Cloning*, 190 S.W.3d at 457.

The summary statement in this case accurately describes the function of the proposed increase for tipped workers in Missouri – moving from 50% to 60% of the state minimum wage. The summary statement is clear that the proposed change would increase the wage being paid to employees receiving tips, which is the purpose and effect of the proposal in relation to tipped employees. By conveying this fundamental change, the summary statement fairly puts voters on notice of the purpose and effect of the change. Moreover, interactions between members of the public and tipped employees are sufficiently common that public confusion about the phrasing of the summary statement is very unlikely.

The Plaintiff contends that an accurate summary statement would use language consistent with the Department of Labor's regulations, using the term "wages" or "compensation" to refer to the wage rate being paid directly from the employer to the tipped employee. Appellant's Br. p. 32. The specific phrase "minimum wage," he contends, is used only to refer to the state minimum wage rate. The utility of this argument is questionable at best.

The Plaintiff provides no explanation of when the modifier “minimum” can be used with the terms “wages” or “compensation.” Therefore, under the Plaintiff’s own logic, “minimum wages” or “minimum compensation” would be an accurate description of the effect of the petition where “minimum wage” would not. No practical purpose would be served by modifying the summary statement to read “increase the minimum wages,” rather than “increase the minimum wage.”

The summary statement presents an accurate description of the proposed change within the statutory definition of “wage” provided in § 290.500. “Wage” is defined as “compensation due to an employee by reason of his employment.” § 290.500(7). The phrase “minimum wage” is not defined apart from this definition of “wage.” “By reason of his employment,” a tipped worker is only due a “wage” from the employer in the amount of 50% of the state minimum wage. The proposal described in the summary statement would adopt this same definition of “wage” and increase the percentage owed from 50% to 60%. Thus, “[i]ncrease the minimum wage” accurately describes that proposed change within the parameters of the statute at issue.

In essence, Plaintiff is arguing that the entirety of the complex minimum wage law and its associated application to tipped employees could be adequately detailed in the very short space of words provided for a

summary statement. This level of detail could not and need not be provided. In this case, the summary statement tracks the language of the proposed initiative petition. Both state that the proposal will increase the minimum wage for employees who receive tips “to 60% of the state minimum wage.” As the trial court stated, “[i]ndeed, it can hardly be said to be misleading for the Secretary to use the very language in the proposed amendment as part of the summary statement.” Order, p.7.

The summary statement is also correct to refer to the change as an “increase” since a voter is not going to read an “increase . . . to 60%” and think that employees who work for tips are now going to earn less or receive a separate, lower state minimum wage than all other employees. An “increase” communicates that workers will receive greater wages, which is what will happen. Thus, the phrase, “increase . . . to 60% of the state minimum wage,” fairly and accurately describes how the increase will apply to tipped employees.

**3. The Secretary’s summary statement accurately accounts for the changes in how the CPI is applied.**

In the Plaintiff’s final argument, he claims that the Secretary’s summary statement does not account for the “sea change in Missouri law” – which is the application of the CPI to the state minimum wage regardless of

whether it arises from the new \$8.25 amount or the prevailing federal minimum wage. Appellant's Br. p. 36. But this is exactly what the Secretary's summary statement does. As described above, current interpretations of Missouri law do not provide for CPI adjustments to the minimum wage when it is governed by federal minimum wage statutes. This proposed initiative petition increases the state minimum wage to meet the federal minimum wage when necessary, and then continues to escalate the wage rate based on the CPI.

The Plaintiff argues that the summary statement merely repeats the law requiring that the higher of state or federal minimum wage be paid, and does not inform voters of the multiplier effect of the CPI. This argument stands in direct conflict with the Plaintiff's first argument, advocating elimination or modification of the CPI reference. The language of the provision in the summary statement provides a description of both the "super-escalator" and the redefinition of a higher federal minimum wage as the state minimum wage. This description provides as much clarity of the proposed changes as is feasible within the summary statement's 100 word limit. The Secretary need not set out the "super-escalator" provision in a separate bullet point in order for the summary statement to be sufficient. If voters would like more information on the proposed amendment, the full text

of the proposed amendment is available for their review as it is attached to each page of the petition. § 116.050.

Furthermore, distinctions Plaintiff attempts to make between alternative versions of this initiative petition are irrelevant to the sufficiency of the summary statement. There is only one version at issue, and the question is not whether the Secretary intended to draft an accurate statement for the provisions of another initiative petition, but whether the summary statement provides a fair and impartial description of the contents of the initiative petition at issue. The summary statement meets this standard.

**II. The Trial Court Correctly Held That the Fiscal Note and Fiscal Note Summary are Fair and Sufficient Because the Auditor Properly Assessed the Information He Received in the Twenty-day Window for Preparing the Fiscal Note and Fiscal Note Summary Pursuant to § 116.175. – Responding to Appellant’s Point II.**

**A. Article IV, § 13 of the Missouri Constitution Authorizes the Auditor to Conduct Investigations Without Further Describing the Manner in Which Those Investigations Must Be Done.<sup>3/</sup>**

Plaintiff seeks to drape in constitutional garments his initial attack on the sufficiency and fairness of the fiscal note and fiscal note summary in this case. Specifically, he tries to argue that Art. IV, § 13 of the Missouri Constitution creates “true” minimal standards for any investigations authorized by law for the Auditor to conduct. (Opening Brief of Respondent/Cross-Appellant Victor Allred p. 39). The plain reading of the Constitution strips away this argument and reveals it as incorrect.

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<sup>3/</sup> The Auditor respectfully refers this Court back to his “Brief of Appellant/Cross Respondent Auditor Thomas A. Schweich” filed on June 8, 2012, discussing the constitutionality of § 116.175.

Article IV, § 13, Missouri Constitution, consists of five sentences which state as follows:

The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once annually. He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds.

Plaintiff's argument ignores the reality that the Constitution does not define investigation or specify any requirements for what an investigation "related to the supervising and auditing of the receipt and expenditure of public funds" would look like. The Constitution leaves that to the legislature

to define. It certainly does not say the Auditor may conduct “true” investigations. As argued in the Auditor’s initial brief, the Constitution only provided the authority for the Auditor to conduct investigations as authorized by law. It was left to the legislature to enact laws to provide for investigations and define those investigations. It did that with the passage of § 116.175. Section 116.175 defines the quality and nature of the investigation. As discussed below, the State Auditor follows processes and procedures that comply with § 116.175 and Art. IV, § 13. Since investigation is not defined, one relies on common understanding as revealed in every day usage. It is not left to Plaintiff’s power to define what he believes a “true” investigation is. He is understandably disappointed in what the law, particularly case law, says is an adequate and fair investigation under § 116.175.

**B. The Fiscal Note and Fiscal Note Summary are Sufficient and Fair.**

A court’s role in initiative petition cases is limited. Where opponents of a measure bring suit, a court should give great deference to the State’s efforts. *See, e.g., Missourians Against Human Cloning*, 190 S.W.3d at 456 (“Our role is not to act as a political arbiter between opposing viewpoints in the initiative process: When courts are called upon to intervene in the initiative process, they must act with restraint, trepidation, and a healthy

suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course.”). “Courts do not sit in judgment on the wisdom or folly of proposals.” *See Missourians to Protect the Initiative Process*, 799 S.W.2d at 827.

Challengers to a fiscal note and fiscal note summary, such as Plaintiff in this case, “bear(s) the burden of demonstrating in the first instance that the Auditor’s fiscal note and fiscal note summary are insufficient or unfair.” *MML I*, 303 S.W.3d 573 at 582 (citing *Cures Without Cloning*, 259 S.W.3d at 81). Again, the court in *Hancock*, 885 S.W.2d at 49, declared that “the words insufficient and unfair as used in section 116.190.3, and applied to the fiscal note mean to inadequately and with bias, prejudice, deception and/or favoritism state the fiscal consequences of the proposed proposition.” The court also held that “[a]s applied to the fiscal note summary, insufficient and unfair means to inadequately and with bias, prejudice, deception and/or favoritism synopsis in [50] words or less, the fiscal note.” *Id.*

The purpose of a fiscal note is to inform the public of the fiscal consequences of a proposed measure. § 116.175.1. So long as the fiscal note conveys the fiscal consequences to the public adequately and without bias, prejudice, deceptions, and/or favoritism, the Auditor has met his responsibilities under the statute. *Hancock*, 885 S.W.2d at 49. All the details of a fiscal note need not be set out in a fiscal note summary consisting of a

mere 50 words. *MML I*, 303 S.W.3rd at 583 (citing *Bergman*, 988 S.W.2d at 92).

Section 116.175, provides the sole means by which a fiscal note and a fiscal note summary are prepared by the Auditor. Section 116.175.1 imposes a duty upon the Auditor to “assess the fiscal impact of a proposed measure.” Subsection 1 goes on to describe the process by which the Auditor *may* gather information to assess the fiscal impact of a measure. Section 116.175.1 states:

[T]he auditor shall assess the fiscal impact of the proposed measure. The state auditor may consult with the state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal. Proponents or opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact . . . provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state.

The court of appeals has described this process in detail, explaining that the Auditor can solicit feedback from various state and local entities,

then “[t]he Auditor’s normal policy and procedure is to include verbatim the submissions of state and local government entities and proponents and opponents of the proposal.” *MML II*, \_\_S.W.3d\_\_, 2011 WL 3925612, at page 5. The process provided in § 116.175.1, which has been upheld by the court of appeals, does not at any point require the Auditor to summarize or explain his analysis. *MML II*; *MML I*.

**1. The trial court correctly found that the fiscal note was sufficient and fair pursuant to § 116.175, in both process and substance.**

Here, the evidence shows that the submissions of fiscal impact contained in the fiscal note are listed verbatim as received from the submitting entities or individuals. (Tr. 31-32, 87; Joint Stipulation, hereinafter “JS”, ¶ 22). In those submissions, there is supporting material for the Auditor’s statements in the fiscal note summaries. (Tr. 91-94). The court of appeals has repeatedly upheld this process for drafting fiscal notes. See *MML II*, \_\_S.W.3d\_\_, 2011 WL 3925612, at pages 7-8; *MML I*, 303 S.W.3d at 582.

In *MML I*, plaintiffs claimed that the Auditor had failed to “independently assess” the fiscal impact of proposed measures when he compiled comments from government entities and, after reviewing them for “reasonableness and completeness,” transcribed them verbatim into the fiscal

note. The court of appeals disagreed. 303 S.W.3d at 582. It held that the plain language of the statute does not mandate that the Auditor adopt another method, and found the current process adequate to satisfy statutory requirements. *Id.* Subsequently, in *MML II*, the same plaintiff tried a different tack, and argued that the Auditor's process must first be promulgated as rules. The court disagreed again. It noted the broad discretion granted the Auditor, for instance that he "*may* consult with state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal." (emphasis in original), citing § 116.175.1. The court held: "The fact that the Auditor goes through a standard process to prepare fiscal notes and fiscal note summaries does not transform this discretionary role into one that must be formalized through rules and rulemaking procedures." *Id.*

Plaintiff seeks to challenge the sufficiency and fairness of the fiscal note and fiscal note summary by asserting that the Auditor does not create a real, *bona fide* assessment and estimate of the fiscal impact of the petitions. (Opening Brief of Respondent/Cross-Appellant Victor Allred p. 45). The record and case law refute this contention.

In this case, as he has in other cases, the Auditor followed the processes and procedures described in the two *Missouri Municipal League* cases and as reflected in JS ¶ 19, ¶ 20, ¶ 21, ¶ 22, ¶ 23 and Tr. 31-32, 87, 91-94 in this

case. This process is logical since it seeks information from the very entities mentioned in the statute, *i.e.*, the fiscal impact in terms of the “estimated costs or savings, if any, to *state or local governmental entities.*” § 116.175.3. (emphasis added). Who knows better how a particular ballot proposal would impact them than the state and local governmental entities directly impacted themselves? This process involves *gathering* fiscal impact information from state and local governmental entities (Tr. 80-81; JS ¶ 19), *evaluating* those fiscal impact submissions for completeness and reasonableness (Tr. 32-33, 82-83, 90-91; ¶ 21), *researching* and *verifying* the accuracy of information as referenced to sources contained in a submission (Tr. 46, 48, 106), *weighing* those responses (Tr. 78; JS ¶ 21), and *analyzing* the information from all sources in the fiscal notes to arrive at the fiscal note summary. (Tr. 78, 91, 110; JS ¶ 23). Plaintiff attempts to belittle this process as being “mechanical” and “clerical,” but as the terms and process itself reflect this process is anything but mechanical or clerical. The process of preparing a fiscal note summary is in fact more like that of an expert forming his opinion after reviewing and analyzing information and evaluating it based on his training and experience.<sup>4/</sup> The process is indeed an investigation as understood in every day common language usage.

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<sup>4/</sup> John Halwes, the Auditor’s employee who prepared the fiscal note

Appellate decisions make it clear that the sufficiency and fairness of the fiscal notes is based on the submissions received by the Auditor during the twenty-day period he has under § 116.175.1 to assess the fiscal impact of the initiative petitions. This is also the clear intent of the statute. The court of appeals has approved this process of compiling and transcribing those submissions of fiscal impact essentially verbatim into the fiscal note. *MML II*, \_\_S.W.3d\_\_, 2011 WL 3925612, at pages 7-8; *MML I*, 303 S.W.3d at 582. Plaintiff had an opportunity to submit a proposed statement of fiscal impact under § 116.175 and did not do so. (Tr. 89). He cannot now complain and subvert the process by not submitting a proposed statement of fiscal impact during the assessment process and instead waiting to attack the fiscal note submission at trial.

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and fiscal note summary in this case, certainly has the characteristics of an expert witness: his familiarity with state and local governmental entities and their finances/budgets; being a certified government financial manager; his experience in forecasting (looking at budgeting, data analysis) and auditing (involving the skills of research and data analysis). *See* Tr. 77-79.

**2. The fiscal note summary adequately and without bias reflects the proper assessment of the information in the fiscal note pursuant to § 116.175.**

Case law from the two *Missouri Municipal League* cases also makes it clear that the sufficiency and fairness of the fiscal note summary is based on the fiscal note submissions. To hold otherwise undermines the process and allow opponents to lay in wait or “sandbag” until after a petition’s ballot title has been approved and circulated for signatures.

The court of appeals has upheld a fiscal note where the Auditor contacted only one state agency and did not include any information from local governments, where “it is possible that even the most exhaustive of efforts at estimating the impact . . . would have resulted in a conclusion that that impact could not be reasonably estimated.” *Overfelt*, 81 S.W.3d at 734. Likewise, courts have upheld fiscal note summaries that provide a range for the costs of measure where the amount is uncertain, *Hancock*, 885 S.W.2d at 49; that state that cost are “unknown” or may “exceed” a certain amount, *MML I*, 303 S.W.3d at 578 & 583; and that simply refer to estimated costs as “significant” and do not detail actual amounts, *MML II*, 2011 WL 3925612, at \*21.

The fiscal note summaries in this case fairly, and without bias or favoritism, synopsise the fiscal notes. The increased wage and benefit costs are taken directly from the responses from state and local entities. (Tr. 91; Joint Exhibits, hereinafter “J. Ex.”, 3 and 4). The sum of the wage and benefit costs estimated by the Office of Administration (“OA”) and the three local government respondents is approximately \$1,312,182. (J. Ex. 3 and 4). The phrase “exceeds \$1 million annually” aptly describes this figure. “Exceeds” includes amounts over \$1 million, and the total is reasonably close to \$1 million. The fiscal notes project an increase in state income and sales tax revenues in the amount of \$14.4 million annually, which could be impacted by business decisions. *Id.* The fiscal note summary says exactly the same thing. *Id.*

The Auditor could properly include the proponent’s \$14.4 million revenue figure in the fiscal note and fiscal note summary. Section 116.175.1 allows a proponent to submit a proposed statement. This provision would be meaningless if the Auditor could not consider such a statement and use it in the fiscal note and fiscal note summary.

Contrary to Plaintiff’s argument, the \$14.4 million revenue figure is consistent with the OA’s response. (J. Ex. 3 and 4). The OA found that the initiative would not have a *direct* impact on revenues, because it does not modify tax rates. *Id.* However, the OA acknowledged “several indirect

impacts which could impact revenue collection by an unknown amount.” *Id.* Those factors include the possibilities of increased wages and increased consumption, which naturally lead to increased income and sales tax revenues. *Id.* The OA then “identified several economic consequences of [the minimum wage] proposal which may lead to a direct or indirect fiscal impact on state and local government.” *Id.* These consequences included “an increase in wages” and “a potential increase in consumer spending,” which could lead to increases in income and sales taxes. *Id.*

Plaintiff also argues that the fiscal note summary is insufficient and unfair because the Auditor only contacted a small fraction of local governmental entities and did not extrapolate from the small data sample as to all governmental bodies. Plaintiff cites no case law in support of his claim that the Auditor is required to extrapolate, and § 116.175 imposes no such duty, as discussed above. The Auditor does the best he can, in a limited amount of time, with few responses. The summaries accurately describe wage and benefit costs as exceeding \$1 million annually. The Auditor could have projected higher costs, but the summaries would still be accurate in stating that costs are likely to exceed \$1 million annually. There are hundreds if not thousands of local governmental entities in Missouri. Plaintiff does not explain how the Auditor is supposed to contact all of them and track all of their responses while at the same time processing multiple

other initiative petitions. Extrapolating would be highly speculative, and lead to unsupported findings. The Auditor has no way of gauging which local government entities employ workers at the current minimum wage, or at rates between the current minimum wage and the new proposed minimum wage, or how many hours those employees work. It is not the job of the Auditor to draft a summary based on speculation. This is similar to the analysis of local government responses in *MML II*, where the court found:

“All of the details of a fiscal note need not be set out in a summary consisting of a mere fifty words.” *MML I*, 303 S.W.3d at 583 (citing *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999)). “Further, a fiscal note summary is not judged on whether it is the “best” language, only whether it is fair.” *Id.* (citing *Hancock v. Sec’y of State*, 885 S.W.2d 42, 49 (Mo. App. W.D. 1994)). In *MML I*, we considered a very similar fiscal note summary and found that it was sufficient and fair. See 303 S.W.3d at 582-83. It seems from the plaintiffs’ argument that they believe the fiscal note summary is unfair because it “fails to inform voters of the amount of the potential costs of the proposed petition.” **However, plaintiffs have**

**cited no authority that to be meaningful a fiscal note must be detailed as to actual amounts of estimated costs.** The summary stated that estimated costs to local governments could be significant, which is a fair statement in light of the fact that only a handful of cities reported potential substantial costs. This is an accurate statement that is unlikely to cause bias, prejudice, deception and/or favoritism for or against the proposal. *See Hancock*, 885 S.W.2d at 49. We refuse to say that the note summary must be more detailed, under the facts of this case, in order to be meaningful.

*MML II*, \_\_S.W.3d\_\_, 2011 WL 3925612, at page 7 (emphasis added).

It is the clear intent of the legislature in adopting § 116.175, and the court of appeals' decisions in the *Missouri Municipal League* cases, that the Auditor is only responsible for reviewing individual submissions for "completeness and reasonableness" and does not require that the Auditor check to make sure the information provided is the best possible analysis. The legislature's action in creating a 20-day deadline for a fiscal note and fiscal note summary establishes that reasonableness, rather than precision, was their intent for the Auditor's work.

Not only is Plaintiff's assertion of a duty by the Auditor to pursue independent analysis unsupported and contrary to existing case law, but it also leads to the very danger cited in the *Missourians Against Human Cloning* and *Missourians to Protect the Initiative Process*. That danger being, turning the process into a partisan wrangle in the courtroom instead of leaving it to a public campaign to persuade voters. The record in this case reveals that danger fully.

Plaintiff brought in a witness, Dr. Macpherson, several months after the time for the Auditor to receive proposed fiscal impact statements for inclusion and assessment in the fiscal note. (Tr. 1, 36). To allow this would invalidate a fiscal note based on information provided after the creation of the fiscal note, and would mean that an opponent could sit on information in an effort to "sandbag" the fiscal note, and in effect the initiative petition. Opponents or proponents hoping to invalidate a fiscal note or delay the initiative process would merely have to hire an expert to testify at trial about information that was not previously provided to and assessed by the Auditor in preparing the fiscal note. The trial court properly ruled in this case to not accept such testimony to attack the fiscal note and fiscal note summary. Appellate decisions make it clear that the sufficiency and fairness of fiscal notes is based on the submissions received by the Auditor during the 20-day period he has under § 116.175.1, to assess the fiscal impact of an initiative

petition. This is also the clear intent of the statute. The court of appeals has approved this process of compiling and transcribing submissions of fiscal impact essentially verbatim into the fiscal note, and Plaintiff fails to show that this holding should be overturned. *MML II*, \_\_S.W.3d\_\_, 2011 WL 3925612, at pages 7-8; *MML I*, 303 S.W.3d at 582.

The record shows conclusively that the Auditor followed processes and procedures to efficiently and effectively carry out his responsibilities under § 116.175. Those processes and procedures provided the assessment required by the statute, based on objective data provided by state and local governmental entities and a proponent. (J. Ex. 3 and 4).

### **CONCLUSION**

For the foregoing reasons, the decision of the circuit court concerning the sufficiency and fairness of the ballot title and fiscal note should be affirmed.

Respectfully submitted,

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## CERTIFICATION OF SERVICE AND COMPLIANCE

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