

**IN THE SUPREME COURT OF MISSOURI**

<b>JOHN PRENTZLER,</b>	)	
	)	
<b>Respondent,</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. SC92573</b>
	)	
<b>ROBIN CARNAHAN and THOMAS SCHWEICH,</b>	)	
	)	
<b>Appellants,</b>	)	
	)	
<b>MISSOURIANS FOR RESPONSIBLE LENDING</b>	)	
<b>and JAMES J. BRYAN, et al.,</b>	)	
	)	
<b>Appellants.</b>	)	

**Appeal from the Circuit Court of Cole County, Missouri  
Nineteenth Judicial Circuit  
The Honorable Daniel R. Green, Judge**

**REPLY BRIEF OF APPELLANTS JAMES J. BRYAN AND  
MISSOURIANS FOR RESPONSIBLE LENDING**

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Respondents filed exceedingly long briefs in this matter, claiming that Appellants failed to preserve issues for appeal and otherwise arguing that the circuit court's judgment should be affirmed. As further explained below, none of their arguments has merit, and the points raised in Northcott's and Francis's cross appeals should be denied.

## I.

**Intervenors challenged all grounds on which the circuit court's fiscal note and fiscal note summary judgment was based, including the extent to which the judgment was based on the Auditor's alleged failure to consider the "local impact" of the proposed measure, a ground which is not supported by substantial evidence. (Replies to Northcott Point III; Francis Point I; Prentzler Point I; Reuter Point III)**

Each of the Respondents' briefs claims that the instant appeals should be dismissed because Appellants' briefs failed to challenge the portion of the circuit court's judgment stating that the fiscal note and fiscal note summary were deficient because of the Auditor's alleged failure to consider the "local impact" of the proposed measure. Northcott Br. 42; Francis Br. 38; Prentzler Br. 22; Reuter Br. 39.

Such an assertion is meritless. Missourians for Responsible Lending and Mr. Bryan's Point Relied On I expressly referenced the local impact portions of the judgment and argued that the record was legally insufficient to support the judgment. Point I stated that the circuit court

**...erred as a matter of law in ruling that the Fiscal Note and Fiscal Note Summary were insufficient and unfair for failure to include state and local revenues that allegedly would be reduced due to closure of private installment**

**lenders stores because Plaintiffs' only evidence at trial of a quantified fiscal impact from the closure of such lenders (namely, the testimony of Dr. Durkin) was a legally insufficient basis for setting aside the fiscal note ....**

MRL/Bryan Br. 32, 26 (emphasis added).

And although Respondents seek to have the judgment upheld based on the local impact portion of the judgment, their brief does not cite any evidence that would support a finding that the fiscal note and fiscal note summary were insufficient or unfair because of an inadequate estimate of local impact. Apparently Respondents believe that they submitted sufficient evidence to carry their burden of proof as to local impact through the generic statements from Mr. Halwes, Dr. Haslag, and Dr. Durkin that there would be some local impact due to closure of 510 installment lenders, even though none of the witnesses could say what that impact might be.

But such an argument, if indeed Respondents had made that argument expressly, would fail under the applicable standard for fiscal note and fiscal note summary challenges. In *Overfelt v. McCaskill*, 81 S.W.3d 732, 737 (Mo. App. W.D. 2002), the plaintiff had challenged a fiscal note and summary that had stated that the local revenue impact of a measure was "unknown." For proof of the deficiency of the note and summary, the plaintiff relied on stipulations that the Auditor did not make inquiries or receive information concerning the measure from any entity other than the Department of Revenue. *Id.* at 736.

On appeal, the Court of Appeals noted that "where a party challenges the sufficiency or fairness of the fiscal note summary or the fiscal note on which it was

based, the challenging party bears the burden of presenting sufficient evidence to allow the trial court to determine what the fiscal note should have said...” (emphasis added). Applying this standard, the Court of Appeals held that the plaintiff failed to carry his burden.

Appellant failed to establish at trial what, if anything, the fiscal note and fiscal note summary should have said about the impact on local governmental entities. Indeed, it is possible that even the most exhaustive of efforts at estimating the impact that the ballot initiative would have on local governmental entities would have resulted in a conclusion that the impact could not be reasonably estimated and was, therefore, unknown. Appellant failed to show that a better estimate was available and to establish what that estimate should have been.

*Id.* 737.<sup>1</sup>

Respondents’ position here with respect to the local impact issue is very similar to the plaintiff’s in *Overfelt*. In this case, the Auditor’s Fiscal Note incorporated Dr.

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<sup>1</sup> The fiscal note remedies available to § 116.190 plaintiffs have been modified since *Overfelt* to allow for a remand to the Auditor for preparation of a new fiscal note. But as the Court of Appeals held in *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573, 581-582 (Mo. App. W.D. 2010), the legislative changes do not relieve fiscal note challengers of the *Overfelt* burden of demonstrating in the first instance that the fiscal note or fiscal note summary is insufficient or unfair.

Haslag's timely opinions regarding fiscal impact, including some opinions as to local impact. The Auditor then drafted a Fiscal Note Summary that stated, "Local governmental entities could have unknown total lost revenue related to business license or other business operating fees if the proposal results in business closures." (Prentzler L.F. 13, 49; Reuter L.F. 15; Northcott L.F. 10, 44; Francis L.F. 15, 50; App. A-00022.)

As Missourians for Responsible Lending and Mr. Bryan's opening brief pointed out, Respondents' only evidence at trial concerning alternative fiscal impact estimates came from Dr. Durkin. Dr. Durkin did not provide any calculations of what Plaintiffs believed to be the alleged local impact of the Initiative Petition. Ex. 14. Dr. Durkin's only specific estimates concerned state fiscal impact. *Id.*, p. 8-11, 15.

Under *Overfelt*, Plaintiffs' "proof" as to local impacts was thus insufficient to sustain a judgment in Plaintiffs' favor. To prevail, Plaintiffs needed to present evidence of what the local impact was and to show that the estimate had been available to the Auditor. *Overfelt*, 81 S.W.3d at 737. Because they failed to present such evidence, the circuit court's judgment may not be affirmed based on the Fiscal Note and Fiscal Note Summary's alleged failure to include additional local impact costs.

## II.

**Appellants adequately preserved the issue of whether Respondents' submitted sufficient evidence to support their fiscal note and fiscal note summary claims, and Respondents' statutory arguments ignore the unambiguous time limits for submission of fiscal impact statements and would lead to unjust results that**

**could not have been contemplated by the General Assembly. (Replies to Northcott Point IV; Francis Point II; Prentzler Point II; and Reuter Point IV)**

**A. The adequacy of Plaintiffs' fiscal note case is subject to appellate review.**

Respondents argue that this Court may not review Appellants' points regarding the dearth of competent evidence supporting the circuit court's fiscal note and fiscal note summary rulings because Appellants did not object to the admission of Dr. Durkin's testimony on grounds that his opinions were untimely. Northcott Br. p. 45-46; Francis Br. p. 44; Prentzler Br. p. 27; Reuter Br. p. 43-44.

They are wrong. "The sufficiency of the evidence to support a verdict in a court-tried case may be raised on appeal, whether or not the question was raised in the trial court." *Lee v. Ofield*, 847 S.W.2d 99, 101 (Mo. App. W.D. 1992); *City of Peculiar v. Effertz Bros Inc.*, 254 S.W.3d 51, 61 (Mo. App. W.D. 2008) (same).

But even if there were a requirement that a party must raise in the trial court the sufficiency of the evidence in a court-tried case, Appellants met the requirement. In closing argument, counsel for the Auditor argued to the circuit court that Plaintiffs' claims failed because their fiscal impact evidence was not timely and because the Auditor's fiscal note had to be judged as of the time the Fiscal Note was written. Mr. Moore stated:

So I think the only real issue in this case is, they are trying to argue that now after the fact here we have all this additional information. I think you have to look at the statute and the law. The law was designed to have the Auditor assess the situation at the time he is looking at the petition. ... And if you look at the fiscal

note, we don't have all this other additional information in there because it wasn't given to us. But that doesn't mean that the fiscal note is insufficient at the time it was prepared and written.

Tr. 242.

The trial judge's post-hearing comments indicated that he also believed the pivotal issue was whether the law allowed Plaintiffs' fiscal note evidence to have been generated after the fiscal note had been prepared. Tr. 249-50. Judge Green stated that he would be interested in post-trial briefing "about whether the fiscal note summary has to be accurate as of the time it was prepared. And with the information given, it would seem that it would be inviting sandbagging to not tell somebody what to do or something and then attack it later." *Id.*

The issue was further brought to the circuit court's attention through amici Shull and Stockman's post-trial brief. Their brief specifically argued that the General Assembly, having placed a time limit for fiscal impact submission in § 116.175.1, "did not anticipate that a fiscal note could be set aside as insufficient or unfair by an opponent who withheld information it considered pertinent until after the statutory time period elapsed."

Intervenors Missourians for Responsible Lending and Mr. Bryan again brought the timeliness issue before the circuit court when they objected to the circuit court's judgment and asked that it be vacated. One of the grounds for vacation was because Plaintiffs' claimed failings in the fiscal note "were proved by evidence not shown to have been available to the Auditor and which was generated by opponents of the initiative

petition long after the statutory time period for preparing the fiscal note had expired.” (Northcott L.F. 216-217; Francis L.F. 145-146; Prentzler 152-153; Reuter L.F. 106-107)

In short, the adequacy and timeliness of Plaintiffs’ fiscal note evidence was brought to the circuit court’s attention on multiple occasions, and the issue is adequately preserved for appellate review.

**B. Respondents’ statutory arguments lack merit.**

Respondents make a number of statutory arguments to the effect that there should be no limit on the nature of evidence a court may receive when assessing a § 116.190 fiscal note challenge. In doing so, they fail to confront the plain language of § 116.175’s time limit for opponent impact submissions and seek to distract from the issue presented in this case by a number of red herring contentions.

First, Respondents argue that Dr. Durkin’s late-submitted opinions should be considered because § 116.190 does not itself contain a subsection that expressly limits the type of evidence a court may receive in assessing fiscal note challenges. But as with any question of statutory interpretation, a court’s goal is to determine and give effect to the intent of the legislature, and in so doing, a court should “consider[] a particular statute together with related statutes which may shed light on its meaning.” *State v. White*, 622 S.W.2d 939, 944 (Mo. banc 1981). Thus, it is appropriate in interpreting the § 116.190 “insufficient or unfair” standard for the Court to take into account § 116.175’s 10-day time limit for opponents to submit fiscal impact submissions and its overall 20-day time limit for the Auditor to prepare the fiscal note. As Missourians for Responsible Lending and Mr. Bryan showed in their opening brief, § 116.175 states in clear and unambiguous

language that opponents “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.” § 116.175 (emphasis added). Inasmuch as Dr. Durkin’s estimates were not submitted within the 10-day time period or otherwise shown to have been available to the Auditor during the 20-day period in which he had to prepare the fiscal note. The emphasized proviso in § 116.175 precludes his estimates from serving as a basis to support the circuit court’s judgment.

Second, if Respondents’ interpretation were accepted and opponents were allowed to prove § 116.190 claims with late-submitted opponent fiscal impact information, the § 116.175 time limit would be rendered meaningless, a result that would be contrary to one of the most basic maxims of statutory construction – that statutory words and phrases should not be read out of existence. *Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193, 196 (Mo. banc 2009) (“When ascertaining the legislature’s intent in statutory language, it is commonly understood that each word, clause, sentence, and section of a statute should be given meaning.”). In light of this rule of construction, the 10-day time limit must be given effect, not rendered meaningless surplusage, as would be the case if Respondents’ arguments were accepted.

Third, Respondents’ argument based on Oregon’s statutory scheme makes no sense, because Oregon’s fiscal estimate requirements look nothing like Missouri’s. Unlike Missouri fiscal notes, in Oregon, a financial estimate committee is charged with preparing a financial estimate for state measures that involve the expenditure of public

money, reduction of expenditure of public moneys, or fund reductions or increases through taxation or indebtedness. Ore. Rev. Stat. § 250.125. Judicial review may be sought by any citizen, but only on the basis that the financial estimate committee did not follow required procedures. Challenges to the content of fiscal note estimates are not cognizable. Ore. Rev. Stat. § 250.131.

With Oregon ballot titles, persons are allowed to provide written comments on the draft ballot title, and challenges are limited to those who timely submitted written comments. Ore. Rev. Stat. § 250.085. In a similar vein, the Missouri General Assembly placed a strict 10-day limit on opponents who seek to provide fiscal impact information to the Auditor as the Auditor works to prepare the fiscal note and fiscal note summary under overall the 20-day time period in which the Auditor has to draft the fiscal note and fiscal note summary. Thus, to the extent Oregon's scheme resembles Missouri's scheme, both reveal a legislative intent to limit political opponents from sandbagging a state official's work by withholding critical views or information until it is too late to incorporate them into the ballot title or fiscal note.

Fourth, Respondents make the novel and legally unsupported argument that the Court cannot apply the plain language of § 116.175's 10-day time limit for opponent fiscal impact submissions because the Auditor's office does not observe the limit. Northcott Br. 51; Francis Br. 51; Prentzler Br. 34-35; Reuter Br. 49. It is the Court's province to construe statutes and declare the law, not the Auditor's, and the Court gives no deference to the Auditor's interpretation of the law where, as here, § 116.175's language is plain and unambiguous. *See Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo.

banc 1993) (“The quintessential power of the judiciary is the power to make final determinations of questions of law.”) (citing *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803)).

In any event, Respondents are twisting the Auditor’s position. The Auditor’s office has a policy of accepting fiscal impact materials that are submitted up through the 20-day time period that the Auditor has for completing the fiscal note. Respondents, in stark contrast, are urging this Court to interpret § 116.190 to allow for fiscal note challenges to be based on fiscal impact information that was first debuted some 243 days after the 20-day statutory time period for completing the fiscal note had expired. It simply makes no sense to believe that the General Assembly intended for fiscal notes that are subject to a strict 20-day time period for completion to be set aside as being “insufficient” or “unfair” based on information proffered by a political opponent some eight months after the fiscal note had to be completed in the first place, as occurred in this case.

Fifth, Respondents try to suggest that if § 116.175’s time limit is enforced against them, the Auditor could shirk its fiscal note duties and “citizen” challengers would be unable to develop an adequate record to challenge a deficient fiscal note. Such arguments have no reasonable basis and bear no connection to the facts of this case. This is emphatically not a case in which the Auditor failed to conduct a bona fide fiscal impact assessment or in which a citizen has been denied the opportunity to show that the Auditor failed to conduct a bona fide assessment.

In this case, the record is undisputed that when the Auditor prepared the Fiscal Note, the Auditor polled all relevant state entities and several local government entities

for their views about the fiscal impact of the Initiative Petition and faithfully incorporated their responses essentially verbatim into the Fiscal Note. It is also undisputed that opponents paid Dr. Haslag to prepare and submit a fiscal impact statement within the 10-day time period, and the Auditor largely incorporated Dr. Haslag's analysis wholesale into the Fiscal Note. Dr. Haslag admitted that he was not requested to address in his fiscal impact statement any impact on 510 lenders and that he did not know, even at the time of trial, what that impact might be or whether its omission rendered the fiscal note or fiscal note summary insufficient or unfair. Tr. 151, 153, 170.

Respondents' only evidence arguably supporting the circuit court's fiscal note and fiscal note summary rulings was the testimony of Dr. Durkin. And Dr. Durkin admitted that: (1) his estimates were prepared some six weeks before trial; (2) in preparing his estimates, he used information from the Federal Reserve Board and other information provided to him by private 510 lenders, with no testimony that such information was available to the Auditor; and (3) there was no reason his estimates could not have been earlier provided to the Auditor within the 10-day time period. *See supra* Missourians for Responsible Lending/Bryan Opening Br. Part F.3.c.

"Citizen" plaintiffs in § 116.190 litigation will not be denied the opportunity of creating a complete trial record if such plaintiffs must prove that the information they claim should have been included in the fiscal note was reasonably available to the Auditor within the statutory time frame the Auditor had for preparing the note. Just as in a medical malpractice case where it is incumbent on a plaintiff to show that the defendant's work fell below the standard of care that was in place at the time the disputed

medical care was being provided, the plaintiff in a § 116.190 action is under an obligation to show that the Auditor's work was deficient at the time the estimate was statutorily required to be produced. For reasons explained in *Missourians for Responsible Lending* and Bryan's opening brief, Chapter 116 would be rendered absurd and would create an unconstitutional burden on the initiative petition process if a plaintiff could defeat the Auditor's work with newly developed post-hoc information that was beyond the Auditor's reach at the time the Auditor was statutorily required to have produced the estimate in question.

Finally, it bears emphasis that in this appeal, the Court is not faced with any allegation that direct costs to state or local governmental entities, such as the costs of equipment, supplies or hiring of state employees, were omitted from the Fiscal Note. The Durkin estimates with which the trial court was concerned were indirect economic ripple effects that allegedly would be caused by certain business closures stemming from reductions in their profit margins.

As *Missourians for Responsible Lending* and Mr. Bryan argued in their opening brief, if § 116.190 were interpreted to allow proof of insufficiency or unfairness by an opponent's fiscal impact information such as Dr. Durkin's that had never been made available to the Auditor during the § 116.175 time frames and which consisted of indirect and nebulous economic ripple effects that may be associated with regulatory changes wrought by a proposed initiative petition, the result would be a tremendous and unconstitutional burden on the People's right of initiative and endless litigation for the Auditor that could not have been contemplated by the General Assembly. Such a

nonsensical reading of § 116.190 cannot stand. The circuit court's fiscal note rulings should be reversed.

### III.

**The judgment may not be affirmed on the alternative grounds urged by the Respondents because the circuit court rejected those theories, and Respondents did not cross appeal the adverse rulings. (Responds to Northcott Point VII; Francis Point V; Prentzler Point V; Reuter Point VII)**

Respondents also argue that circuit court's judgment could be affirmed on alternative theories they pressed at trial, citing the principle that a judgment may be affirmed on alternative grounds not specifically articulated by the trial court. Northcott Br. 67; Francis Br. 80; Prentzler Br. 63; Reuter Br. 65.

But the rule that a judgment may be affirmed on an alternative ground not articulated by the trial court does not assist Respondents here. In this case, the circuit court rejected and found against the Respondents on all claims and theories not otherwise addressed in the judgment. Specifically, the Second Amended Judgment stated that "IT IS FINALLY ORDERED, ADJUDGED AND DECREED that all other claims of the Plaintiffs not specifically addressed herein are found in favor of the Defendants." App. A-00008.

"The general rule of appellate procedure is that, in the absence of a cross appeal, the reviewing court is concerned only with the complaint of the party appealing and that the opposing party who filed no appeal will not be heard to complain of any portion of the trial court's judgment adverse to him." *Goldberg v. State Tax Comm'n*, 618 S.W.2d

635, 642 (Mo. banc 1981). Applying this rule, the Court of Appeals in *Committee on Legislative Research v. Mitchell*, 886 S.W.2d 662, 664-65 (Mo. App. W.D. 1994), held that a plaintiff who had succeeded in convincing the circuit court that a fiscal note was “insufficient” could not argue an alternative theory on appeal (i.e., that the fiscal note was “unfair”) because the circuit court had necessarily rejected that claim and the plaintiff had not filed a cross appeal.

Respondents here are in precisely the same position as the plaintiff in *Mitchell*. The trial court specifically rejected their alternative contentions, and they did not file a cross appeal to seek review of the adverse rulings. Respondents are thus precluded from urging this Court to affirm based on contentions that the trial court rejected and which are not the subject of a cross appeal. *Mitchell*, 886 S.W.2d at 664-65; *Goldberg*, 618 S.W.2d at 642.

#### IV.

**Respondents’ Summary Statement arguments lack merit and misstate the applicable standard for summary statement claims. (Replies to Northcott Point I; Francis Point VI; Prentzler Point VI; Reuter Point I)**

Appellants demonstrated in their opening brief that the circuit court applied the wrong standard in analyzing the Secretary of State’s Summary Statement and that the Summary Statement passes muster under the applicable standard.

Respondents’ counter arguments are lengthy, meandering, and fail to address key points on appeal. For example, Missourians for Responsible Lending and Mr. Bryan’s opening brief pointed out that this Court in *United Gamefowl Breeders Ass’n of Mo. v.*

*Nixon*, 19 S.W.3d 137, 139 (Mo. banc 2000), equated the § 116.190 test for sufficiency and fairness of a summary statement with the test for whether an initiative petition has a constitutionally “clear title,” as required by Article III, sec. 50 of the Missouri Constitution. 19 S.W.3d at 140-141.

Respondents ignore the *United Gamefowl* case. Not one of them cites or discusses it in their brief. Instead, Respondents assert that § 116.190 requires the summary to “restate the main points” of the initiative, or else be deemed deficient, a novel test that has never been adopted by any Missouri appellate court and which is at odds with this Court’s *United Gamefowl* decision and other § 116.190 cases.

Respondents also try to suggest that the sufficiency of a summary statement is in the nature of a fact issue, arguing that there was “ample support” in the record for a finding of insufficiency based on the testimony of various witnesses. *See, e.g.*, Francis Br. 95-97. Again, there is no authority for treating the adequacy of the summary statement as fact question. The adequacy of the summary statement is analyzed by comparing the language of the summary statement with the proposed measure. As the Court of Appeals held in *State ex rel. Humane Society of Missouri v. Beetem*, 317 S.W.3d 669 (Mo. App. W.D. 2010), the question of whether a summary fails the “insufficient or unfair” standard “is essentially a question of law,” reviewed *de novo* on appeal. 317 S.W.3d at 674; *see also id.* at 672 (“the trial judge, who is educated and skilled in the English language, is able to determine as a matter of law whether the Secretary’s summary is prejudicial”).

Respondents also rely on *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. App. W.D. 2008) to argue that the summary must “promote an informed understanding of the probable effect of the proposed amendment,” which, they say, required the Secretary of State to include more detail in the summary about the specific interest rate level that the Initiative Petition would impose if adopted.

But when the court of appeals in *Cures* commented that the Secretary of State must promote an informed understanding of the proposed amendment, the court was reviewing a summary statement that had stated that a proposed initiative petition would “repeal” a particular state constitutional provision, when the court of appeals had concluded that the intent of the proposed amendment was not to repeal that provision, but to broaden its reach by expanding a key definition. *Id.* at 82. *Cures* thus dealt with a situation in which the summary statement misinformed the public of the probable effect of the initiative petition because the summary wrongly indicated that the initiative petition would repeal a prohibition, when in fact it would expand the prohibition.

The Secretary of State’s Summary Statement at issue in this case does not misinform the public of the probable effect of the Initiative Petition. The Summary Statement accurately informs the public that the Initiative Petition would limit the annual rate of interest, fees, and finance charges for certain consumer loans. This indeed is the probable effect of the proposal, because, as explained in *Missourians for Responsible Lending* and Mr. Bryan’s opening brief, Missouri law does not currently have a limit on consumer credit loans and the Initiative Petition would impose such a limit. *See* MRL/Bryan Br. p. 5, 51-53.

Respondents half-heartedly argue that a limit currently exists in Missouri law, citing § 408.140 and suggesting that it “places significant restrictions on the fees and charges consumer loan companies can charge.” Prentzler Br. 80. Section 408.140 does place certain limits on fees that can be charged in connection with certain consumer loans, but the fact that the fees may be limited in certain respects is essentially irrelevant to the issues on appeal because under § 408.100, the loans may carry interest rates at any rate “agreed to by the parties,” and the circuit court based its judgment only on the ground that it believed that the Secretary should have included the specific 36 % A.P.R. rate of interest in the summary statement. For the reasons further elaborated under Point II in *Missourians for Responsible Lending* and Mr. Bryan’s opening brief, the Secretary of State was not required to include this detail in the summary statement in order for the summary statement to pass § 116.190’s deferential “insufficient or unfair” test.

## V.

**The circuit court correctly declined to hold § 116.175 unconstitutional. But even if § 116.175 were unconstitutional (which it is not), the remedy would be to omit the fiscal note and fiscal note summary on a prospective basis, without any adverse effect on the proponents’ ability to qualify the Initiative Petition for the ballot. (Responds to Northcott Cross Appeal Point I)**

Cross-Appellant Northcott argues that § 116.175 imposes duties on the Auditor that violate Article IV, sec. 14 of the Missouri Constitution. *Missourians for Responsible Lending* and Mr. Bryan concur in the analysis of this issue set forth in the State Defendants’ brief and in the related briefs submitted by the Intervenors in the *Brown* and

*Allred* cases, which are set for argument on the same docket as these appeals. For the reasons stated in those briefs, § 116.175 does not clearly and undoubtedly violate Article IV, sec. 14.

However, if the Court were to conclude that § 116.175 was unconstitutional, it should be emphasized that any remedy the Court might order should not affect the validity of any initiative petition that has been circulated with a fiscal note or summary prepared by the Auditor up to this point.

The People's right of initiative is fundamental and expressly secured by Article III, sec. 49 of the Missouri Constitution. Notably, Article III does not require an initiative petition to have a fiscal note or fiscal note summary in order to qualify for the ballot. The inclusion of fiscal note and fiscal note summary requirements in § 116.175 are non-essential elements added by the General Assembly. Because § 116.175 fiscal note requirements are non-essential, any court declaration that § 116.175 is unconstitutional should be tailored so as to not adversely affect a proponent's right to qualify a measure for the ballot. The initiative petitions should simply proceed as if § 116.175 and the fiscal note requirements had never been enacted. *See Carmack v. Missouri Dept. of Agriculture*, 31 S.W.3d 40, 48 (Mo. App. W.D. 2000) ("Generally, an unconstitutional statute is void *ab initio*, except in situations in which injustice occurs as a result of a party's good faith compliance with the unconstitutional statute") (citing *State ex rel. Public Defender Comm'n v. County Court of Greene County*, 667 S.W.2d 409, 413 (Mo. banc 1984)).

This Court ordered a similar prospective-only remedy in *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392, (Mo 1996). There, proponents of a ballot initiative concerning congressional term limits sought a declaration that the statute giving the joint legislative committee on legislative research the duty to provide fiscal note summaries exceeded the committee's constitutional authority. This Court agreed that the joint committee lacked constitutional authority to create fiscal notes for initiative petitions since the duty did not relate to "advising the general assembly." The remedy ordered was to remove the fiscal note from the ballot, but otherwise allow the underlying measure to proceed to a vote. This Court stated:

The secretary of state is ordered to direct the county election authorities to remove the fiscal note summary from the previously printed ballot question for Constitutional Amendment No. 9. If the fiscal note summary cannot be removed entirely from the previously printed ballot, the secretary of state is ordered to direct the county election authorities: (a) to prepare an opaque, adhesive sticker bearing the ballot title without the fiscal note summary and no other verbiage, which sticker shall be of sufficient size to obscure the previously printed ballot title and fiscal note summary completely; and (b) to place the opaque sticker over the previously printed ballot language for Constitutional Amendment No. 9 in such a way as to obscure all of the previously printed ballot language for that proposition. *Thompson*, 932 S.W.2d 393-394

Although Missourians for Responsible Lending and Mr. Bryan disagree with Cross-Appellant Northcott that § 116.175 is unconstitutional, if the Court were to hold otherwise, it should fashion a prospective-only remedy similar to that ordered in *Thompson*.

## VI.

**The circuit court correctly dismissed Cross-Appellant Francis and Hoover’s constitutional challenges to the underlying Initiative Petition as unripe; they are also meritless. (Responds to Francis Cross Appeal Points X and XI)**

Cross-Appellants Francis and Hoover asserted below that the Initiative Petition should be disqualified from the ballot because, in their view, it violates the uniform lender interest rate requirements of Article III, sec. 44 of the Missouri Constitution, and is void for vagueness and violative of the due process clauses of the Federal and state constitutions. The circuit court dismissed each of these claims as unripe.

In their cross appeal, Francis and Hoover argue that the claims were ripe because the Initiative Petition is facially so unconstitutional that the deficiency amounts to a matter of form.

These arguments are frivolous. In *State ex rel. Trotter v. Cirtin*, 941 S.W.2d 498, 500 (Mo. banc 1997), this Court recognized the long-standing principle that pre-election challenges directed at the substantive interpretation of a proposed measure that has not been adopted by the voters are generally considered unripe and premature. An exception to the ripeness issue exists where the challenge concerns “only procedural or ballot issues that have a bearing on the integrity of the election itself.” *Id.* See also *Union Electric*

*Co. v. Kirkpatrick*, 678 S.W.2d 402, 405 (Mo. banc 1984) (noting the existence of “a long line of decisions” holding that courts may look beyond the face of a petition only “to the extent necessary to determine whether constitutional and statutory requirements pertaining to the form of the petition have been satisfied.”).

Francis and Hoover’s claims do not fall into these limited categories. Francis and Hoover do not challenge the form of the Initiative Petition, such as whether it contains a proper enacting clause or whether the Initiative Petition is facially unconstitutional. They are requests for this Court to issue an advisory opinion about whether the Initiative Petition would violate a particular constitutional provision if it is enacted into law.

Even if the constitutional arguments were ripe, they are meritless. Article III, sec. 44’s requires that interest rates “fixed by law” be “applicable generally and to all lenders without regard to the type or classification of their business.” Mo. Const. art. III, sec. 44. This provision prohibits the General Assembly (or the People through the Initiative Process) from creating favored interest rate classifications for different lender types. “The leading and controlling case on the subject is *Household Finance Corporation v. Shaffner*, 203 S.W.2d 734 (Mo. banc 1947).” *St. Louis Teachers' Credit Union v. Marsh*, 585 S.W.2d 474, 475 (Mo. banc 1979). The basic holding of *Shaffner* is that Article III, sec. 44 permits the regulation of loans, but Article 3, Section 44 prohibits any legislation that regulates the class or type of lender. *Shaffner*, 203 S.W.2d at 738 (“Section 44 prohibits *any* favored classification of lenders” (emphasis in original)).

Thus in *Shaffner*, this Court found that the Missouri Small Loan Act, which allowed those lenders who had first obtained a license from the Commissioner of Finance

to charge interest on certain loans at a rate higher than the general legal rate of 8% at the time, violated Article 3, Section 44 because certain lenders (e.g., banks, trust companies, building and loan associations, and others) were prohibited from obtaining the required license and therefore could not charge the higher interest rates on small loans.

The Initiative Petition at issue here is easily distinguished because the Initiative Petition is directed at loan products. It provides that all persons, regardless of business type, who make the kind of loan products that are subject to the rate limit are equally limited in the interest rates they may charge as anyone else who make such loans, regardless of the type of entity. If the loan product fits the applicable definition, the same rate limit applies, regardless of who does the lending.

Francis and Hoover's void for vagueness and due process arguments are similarly insubstantial. The theory of the due process claim is not even articulated in the brief, and thus the argument on due process is not properly presented for decision. As to the assertion that the Initiative Petition is void for vagueness, Francis and Hoover have not demonstrated they have standing to assert such an argument. In *Conseco Finance Servicing Corp. v. Missouri Department of Revenue*, 195 S.W.3d 410, 415 (Mo. banc 2006), this Court specifically held that a party asserting a vagueness challenge lacked standing to challenge portions of the allegedly vague statute in the absence of a showing that those provisions directly affected them. *Id.* at 415. Francis and Hoover made no such showing in this case, and so under *Conseco*, they lack standing.

Even if Francis and Hoover had met standing prerequisites, their vagueness and due process claims would be meritless. "The test in enforcing the [vagueness] doctrine is

whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999). It is “well established that ‘if the law is susceptible of any reasonable and practical construction which will support it, it will be held valid, and ... the court must endeavor, by every rule of construction to give it effect.’” *Id.*, quoting *State v. Duggar*, 806 S.W.2d 407, 408 (Mo. banc 1991).

If words used in a law or regulation are defined or are found in dictionaries and used in accordance with their usual definitions, the laws or regulations are routinely held valid. *See, e.g. Feldhaus v. State*, 311 S.W.3d 802, 806 (Mo. banc 2010) (statute not vague because term “chronic offender” was defined in statute and words “or more” were “of common understanding that speak for themselves”); *State ex rel. Nixon v. Peterson*, 253 S.W.3d 77, 81 (Mo. banc 2008) (terms “wages” and “bonuses” were not void for vagueness, citing statutory and dictionary definitions); *State v. Dunn*, 147 S.W.3d 75, 78 (Mo. banc 2004) (statute not vague where term “highways” was “consistently given in its popular rather than technical meaning”); *Cocktail Fortune, Inc.*, 994 S.W.2d at 958 (term “oral copulation” held not vague after consulting dictionary definitions, among other things); *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36 (Mo. banc 1985) (upholding statute against vagueness challenge after noting statutory and dictionary definitions of allegedly vague terms). Francis and Hoover’s own brief cites a dictionary definition for one term they claim is vague (“device”), and the other term they claim is vague (“person”) is routinely used in all manner of statutes and commonly found in dictionaries.

Thus, neither are unconstitutionally vague. For all these reasons, Francis and Hoover's cross appeal points should be denied.

### **CONCLUSION**

For the foregoing reasons and those stated in Missourians for Responsible Lending and Mr. Bryan's opening brief, this Court should reverse the circuit court's April 17, 2012 judgment as to the Summary Statement, Fiscal Note, and Fiscal Note Summary; certify the Secretary of State's Summary Statement and the Auditor's Fiscal Note and Fiscal Note Summary as sufficient and fair; affirm the judgment insofar as it found § 116.175 constitutional and dismissed Francis and Hoover's constitutional claims as unripe; and issue such other and further relief as justice may require.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06**

The undersigned certifies further certifies that the foregoing brief that:

- (1) this brief contains the information required by Rule 55.03;
- (2) this brief complies with the limitations contained in Rule 84.06(b); and
- (3) there are 7,200 words in this brief;

/s/ Heidi Doerhoff Vollet  
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Clerk of the Court on this 20th day of June, 2012, to be served by operation of the Court's electronic filing system on all counsel of record, as follows:

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