

**IN THE SUPREME COURT OF MISSOURI**

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**No. SC92582**

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**RALPH BROWN,  
Plaintiff/Appellant,**

**v.**

**MISSOURI SECRETARY OF STATE ROBIN CARNAHAN and  
MISSOURI STATE AUDITOR THOMAS A. SCHWEICH,  
Defendants/Respondents,**

**and**

**MISSOURIANS FOR HEALTH AND EDUCATION, *et al.*,  
Defendants-Intervenors/Respondents.**

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

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**BRIEF OF DEFENDANTS-INTERVENORS/RESPONDENTS**

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**JURISDICTIONAL STATEMENT**

The Defendant-Intervenors agree with the Jurisdictional Statement of the Plaintiff.

## **STATEMENT OF FACTS**

### **A. Parties**

Plaintiff/Appellant Ralph Brown (“Brown” or “Plaintiff”) is a citizen, resident, registered voter and taxpayer of the State of Missouri. *L.F. 318*. Defendant/Respondent Robin Carnahan is the Secretary of State of the State of Missouri (the “Secretary of State”). *L.F. 319*. Defendant/Respondent Thomas A. Schweich is the State Auditor of Missouri (the “State Auditor”). *Id.*

Defendant-Intervenor/Respondent Missourians for Health and Education (“MHE”) is a Missouri non-profit corporation in good standing. *Id.* It has registered with the Missouri Ethics Commission as a campaign committee supporting the initiative petition at issue in this case. *Id.* As of March 30, 2012, MHE had raised and spent over \$600,000 collecting signatures on the initiative petition at issue in this case. *Id.*

Defendant-Intervenor/Respondent Peggy Taylor is a citizen, resident, registered voter and taxpayer of the State of Missouri. *Id.* She is vice-president and a director of MHE. *Id.*

Defendant-Intervenor/Respondent Dudley McCarter is a citizen, resident, registered voter and taxpayer of the State of Missouri. *Id.* He is a director of MHE. *Id.*

### **B. The Proposed Initiative Petitions**

On January 9, 2012, the Secretary of State received six sample sheets for initiative petitions proposing statutory amendments to Chapters 149 and 196, RSMo. *Id.* The initiative petitions propose additional taxes on cigarettes, roll-your-own tobacco, and

other tobacco products. *J. Ex. 1, 6, 11, 16, 21 and 26.*<sup>1</sup> Those proceeds would be deposited in a Health and Education Trust Fund, and used for tobacco use prevention and quit assistance and elementary, secondary, and higher education. *Id.* The Proposal would also modify the provisions of Chapter 196, RSMo, relating to the administration of the tobacco manufacturer escrow fund. *Id.*<sup>2</sup>

The six petitions were referred to as versions D, E, F, G, H, and I, respectively. *L.F. 319.* All six versions are substantially similar except for changes to the layout of the petition grid and small changes in the wording of the enacting clause. *Id.*

### **C. The Summary Statements**

The Secretary of State timely prepared (and the Attorney General timely approved) summary statements for all six versions. *L.F. 320.*

The Summary Statement for all six versions of the Petition is 99 words and states as follows:

Shall Missouri law be amended to:

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<sup>1</sup> J. Ex. stands for the parties' joint trial exhibits.

<sup>2</sup> Under a loophole in Missouri's current statute, nonparticipating manufacturers in Missouri are able to obtain an almost immediate refund of amounts that they pay in escrow, giving them a nearly \$6 per pack pricing advantage over other tobacco manufacturers. The proposed initiative petitions, if enacted, would close that loophole. *J. Ex. 1, 6, 11, 16, 21 and 26.*

- create the Health and Education Trust Fund with proceeds of a tax of \$0.0365 per cigarette and 25% of the manufacturer's invoice price for roll-your-own tobacco and 15% for other tobacco products;
- use Fund proceeds to reduce and prevent tobacco use and for elementary, secondary, college, and university public school funding; and
- increase the amount that certain tobacco product manufacturers must maintain in their escrow accounts, to pay judgments or settlements, before any funds in escrow can be refunded to the tobacco product manufacturer and create bonding requirements for these manufacturers?

*L.F. 320-321.*

**D. The Fiscal Notes and Fiscal Note Summaries**

The State Auditor timely prepared fiscal notes, as well as fiscal note summaries of no more than 50 words, excluding articles, for all six versions. *L.F. 320.* The fiscal notes and fiscal note summaries for all six versions are identical and were timely approved by the Attorney General. *Id.*

The fiscal note summary for all six versions of the Petition states: “Estimated additional revenue to state government is \$283 million to \$423 million annually with limited estimated implementation costs or savings. The revenue will fund only programs and services allowed by the proposal. The fiscal impact to local governmental entities is unknown. Escrow fund changes may result in an unknown increase in future state revenue.” *L.F. 321.*

**E. Preparation of the Fiscal Notes**

Jon Halwes of the Auditor's office was primarily responsible for compiling the fiscal notes. *Pl. Ex. 33, 35; Def. Int. Ex. B; Tr. 46-47.*<sup>3</sup> Mr. Halwes is a long-time Auditor's office employee. *Id.* He has been employed by the Auditor's office for 28 years. *Id.* He started as a staff auditor, and is currently the assistant director in the Quality Control Unit. *Id.*

To prepare the fiscal note, the Auditor's office followed its normal procedure. *Id.* The Auditor's office solicited comments from 24 state agencies and offices and 17 local government and public agencies. *Id.; L.F. 103.* Twenty-six agencies responded. *L.F. 103.* Mr. Halwes reviewed the comments for completeness and reasonableness, following up with agencies to obtain clarification where appropriate. *Pl. Ex. 33, 35; Def. Int. Ex. B; Tr. 46-47.*

**F. Certification of the Official Ballot Title**

On February 10, 2012, the Secretary of State certified the official ballot titles for all six versions. *L.F. 320.*

**G. Brown's Lawsuit**

On February 17, 2012, Brown filed an action in the Circuit Court of Cole County challenging the summary statements, fiscal notes and fiscal note summaries for all six versions of the Petition. *L.F. 6-34.* Brown's Petition did not set forth a proposed

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<sup>3</sup> Pl. Ex. stands for Plaintiff's trial exhibit. Def. Int. Ex. stands for Defendant-Intervenors' trial exhibit. Tr. stands for transcript.

summary statement or a proposed fiscal note summary. *Id.* Brown filed a motion for judgment on the pleadings on May 2, 2012. *L.F. 4, 254-290.* A hearing on the merits was held on May 7, 2012. *Tr. 1.*

On May 10, 2012, Brown submitted a pleading entitled *Plaintiff Brown's Supplemental Suggestions Concerning Res Judicata and Count IV – the Unconstitutionality of Section 116.175*, asserting that he was entitled to judgment on Count IV of the petition under the doctrine of *res judicata*. *L.F. 4.* Brown did not assert *res judicata* or *offensive collateral estoppel* in his Petition, his trial brief, his Motion for Judgment on the Pleadings or during the May 7, 2012 hearing. *L.F. 6-134, 254-290; Tr. 1-97.*

#### **H. The Judgment of the Circuit Court and Notice of Appeal**

On May 21, 2012, the Circuit Court of Cole County denied each of Brown's claims and entered judgment in favor of the Defendants and Defendant-Intervenors. *L.F. 341-353.* Brown filed a notice of Appeal on May 29, 2012. *L.F. 354-377.*

**POINTS RELIED ON**

- I. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE SUMMARY STATEMENT OF THE SECRETARY OF STATE BECAUSE THE SUMMARY STATEMENT IS FAIR AND SUFFICIENT IN THAT IT ACCURATELY SUMMARIZES THE PETITION (RESPONDING TO APPELLANT’S BRIEF POINT I)**

*Cures Without Cloning v. Pund*, 259 S.W.3d 76 (Mo. App. 2008)

*Missouri Municipal League v. Carnahan*, \_\_\_ S.W. \_\_\_, 2011 WL 3925612,

(Mo. App. 2011)

Section 116.334, RSMo

**II. THE TRIAL COURT DID NOT ERR BY CONCLUDING THAT THE FISCAL NOTE SUMMARY WAS SUFFICIENT, FAIR, AND IN COMPLIANCE WITH LAW BECAUSE THE FISCAL NOTE SUMMARY “ASSESSED THE FISCAL IMPACT OF THE PROPOSED MEASURE” AS DIRECTED BY SECTION 116.175, RSMo (RESPONDING TO APPELLANT’S BRIEF POINT II)**

*Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824 (Mo. banc 1990)

Mo. Const., art. III, § 49

Section 116.175, RSMo

**III. THE TRIAL COURT DID NOT ERR IN DENYING BROWN’S REQUEST FOR A DECLARATORY JUDGMENT THAT SECTION 116.175, RSMo IS UNCONSTITUTIONAL BECAUSE THE STATUTORY DUTIES ARE AN “INVESTIGATION REQUIRED BY LAW” AND “RELATED TO THE SUPERVISING AND AUDITING OF THE RECEIPT AND EXPENDITURE OF PUBLIC FUNDS” AS THOSE TERMS ARE USED IN ARTICLE IV, § 13 OF THE MISSOURI CONSTITUTION (RESPONDING TO APPELLANT’S BRIEF POINT III)**

*Farmer v. Kinder*, 89 S.W.3d 447 (Mo. banc 2002)

*Thompson v. Committee on Legislative Research*, 932 S.W.2d 392 (Mo. banc 1996)

Mo. Const., art. IV, § 13

**IV. THE CIRCUIT COURT DID NOT ERR IN REJECTING BROWN'S CLAIM OF RES JUDICATA (OR OFFENSIVE COLLATERAL ESTOPPEL) BECAUSE RES JUDICATA IS NOT APPLICABLE IN THAT BROWN DID NOT RAISE IT IN HIS PETITION OR IN A TIMELY FILED PLEADING AND THE PARTIES AND SUBJECT MATTER OF THIS CASE ARE NOT IDENTICAL TO ANY PREVIOUS CASE DECIDED BY THE CIRCUIT COURT (RESPONDING TO APPELLANT'S BRIEF POINT IV)**

*Consumer Finance Corp. v. Reams*, 158 S.W.3d 792 (Mo. App. 2005)

*Heins Implement Co. v. Mo. Hwy. & Transp. Com'n*, 859 S.W.2d 681 (Mo. banc 1993)

Rule 55.08

**V. IN THE ALTERNATIVE, IF THIS COURT DOES ORDER ANY CHANGE TO THE FISCAL NOTE SUMMARY OR FISCAL NOTE, THE RELIEF SHOULD BE LIMITED TO REVISING THOSE STATEMENTS ON A PROSPECTIVE BASIS**

*Cole v. Carnahan*, 272 S.W.3d 392 (Mo. App. 2008)

*State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515 (Mo. banc 1991)

*Thompson v. Committee on Legislative Research*, 932 S.W.2d 392 (Mo. banc 1996)

## STANDARD OF REVIEW

As judgment in this case was issued after a bench trial, the standard of review with regard to all contested factual issues is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Thus, the judgment will be affirmed unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *Id.* In making these determinations, this Court must view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the judgment and disregard all evidence and inferences to the contrary." *Id.*; *See also Blair v. Blair*, 147 S.W.3d 882, 885 (Mo. App. 2004).

The circuit court's judgment with regard to legal questions concerning the fairness and sufficiency of the ballot summary and fiscal note is reviewed by this Court *de novo*. *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573, 580 (Mo. App. 2010).

However, as discussed in the "Introduction and Standard of Review" sections for each Point below, the actions of the Secretary of State and State Auditor in preparing the summary statement, fiscal note summary and fiscal note are entitled to a high degree of deference. *See, e.g., United Gamefowl Breeders Ass'n v. Nixon*, 19 S.W.3d 137, 139 (Mo. banc 2000); *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990); *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 81 (Mo. App. 2008), and cases cited in those sections.

## ARGUMENT

### I. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE SUMMARY STATEMENT OF THE SECRETARY OF STATE BECAUSE THE SUMMARY STATEMENT IS FAIR AND SUFFICIENT IN THAT IT ACCURATELY SUMMARIZES THE PETITION (RESPONDING TO APPELLANT’S BRIEF POINT I)

#### A. Introduction and Standard of Review

Section 116.334, RSMo tasks the Secretary of State with preparing a “summary statement” for proposed initiative petitions. By statute, the summary statement is to be a “concise statement” that is “in the form of a question using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.” § 116.334.1, RSMo. The summary statement must not exceed 100 words. *Id.* Section 116.190 permits the circuit court to set aside the Secretary of State’s summary only if the summary is “insufficient” or “unfair.”

Section 116.134 is largely unchanged from the law as it existed in 1909. Section 6751, RSMo 1909 (set forth at *App. 10-11*).<sup>4</sup> Under Section 6751, the ballot title for initiative and referendum petitions was prepared by the Attorney General. This continued until 1985, when Section 116.134 was added and shifted the ballot title duty to the Secretary of State. *H.B. 543 (5 Vernon’s Mo. Legis. Svc. p. 38, et seq.)*. Importantly,

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<sup>4</sup> App. means the Appendix to this Brief.

Section 6751 established that the standard for a summary is that it not be “insufficient or unfair.” *App. 10-11*. The standard is now present in Section 116.190.

Persons challenging a summary statement bear a heavy burden. A summary statement is insufficient or unfair within the meaning of Section 116.190 if it “inadequately” (meaning especially lacking adequate power, capacity, or competence) “and with bias, prejudice, deception and/or favoritism state the consequences of the initiative.” *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 81 (Mo. App. 2008) (quoting *Hancock v. Secretary of State*, 885, S.W.2d 42, 49 (Mo. App. 1994) (brackets omitted)). The question of whether a summary fails the “insufficient or unfair” standard “is essentially a question of law,” reviewed *de novo* on appeal. *State ex rel. Humane Society of Missouri v. Beetem*, 317 S.W.3d 669, 674 (Mo. App. 2010); *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”).

The standard placed on summary statement challengers is high because of the importance of the citizens’ constitutional right to engage in the initiative process set forth in Article III, Section 49. Recognizing this right, this Court has held that “[b]efore the people vote on an initiative, courts may consider only those threshold issues that affect the integrity of the election itself, and that are so clear as to constitute a matter of form.” *United Gamefowl Breeders Ass’n of Mo. v. Nixon*, 19 S.W.3d 137, 139 (Mo. banc 2000).

*United Gamefowl Breeders* is instructive not only as to the limited role courts play in the initiative process, but also as to the proper substantive test that should be applied

when assessing whether a summary statement is “insufficient or unfair.” In *United Gamefowl Breeders*, this Court equated the Section 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, Section 50 of the Missouri Constitution. 19 S.W.3d at 140-141.

In constitutional clear title cases, this Court has repeatedly affirmed that a bill’s “title need only ‘indicate in a general way the kind of legislation that was being enacted’” in order to adequately and fairly apprise the public of a pending law’s subject matter. *Jackson County Sports Complex Authority v. State*, 226 S.W.3d 156, 161 (Mo. banc 2007) (quoting *Fust v. Attorney General*, 947 S.W.2d 424, 429 (Mo. banc 1997)). From the notice provided by the title, individuals can then look to the proposed law itself for greater detail about the proposed law’s precise provisions.

Consistent with clear title analysis, Missouri courts have held that a summary statement “is sufficient and fair if it ‘*makes the subject evident* with sufficient clearness to give notice of the purpose to those interested or affected by the proposal.’” *Missouri Municipal League*, 303 S.W.3d at 583 (quoting *United Gamefowl Breeders*, 19 S.W.3d at 140) (emphasis added). In other words, in a summary statement, “[a]ll that is required is that the language fairly summarizes the proposal in a way that is impartial and does not deceive or mislead voters.” *Missouri Municipal League v. Carnahan*, \_\_\_ S.W.3d \_\_\_, 2011 WL 3925612, \*4 (Mo. App. 2011). *Accord Union Elec. Co. v. Kirkpatrick*, 606 S.W.2d 658, 660 (Mo. banc 1980) (the purpose of the ballot title “is to

give interested persons *notice of the subject of a proposed [law]* to prevent deception through use of misleading titles.”) (emphasis added).

In this regard, 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 v. Carnahan*, 190 S.W.3d 451, 457 (Mo. App. 2006) (quoting *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. 1999)). Courts have recognized that “there are many appropriate and adequate ways of writing the summary ballot language” that are sufficient and fair. *See Asher v. Carnahan*, 268 S.W.3d 427, 432 (Mo. App. 2008) (“if charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions” all of which may be sufficient and fair). *Id.* at 431.

Similarly, a summary statement is not insufficient or unfair simply because “the language proposed by [the opponents] is more specific . . . even if that level of specificity might be preferable. . . .” *Bergman*, 988 S.W.2d at 92.

It is also firmly established that “not every detail of a proposal needs to be set out within the confines of the 100 word limit for summary statements.” *Missouri Municipal League*, 303 S.W.3d at 584 (citing *United Gamefowl Breeders*, 19 S.W.3d at 141). That “aspects of the ballot initiative or consequences resulting therefrom” are not included “does not render the summary statement either insufficient or unfair.” *Overfelt v. McCaskill*, 81 S.W. 3d 732, 739 (Mo. App. 2002).

**B. The Summary Statement is Fair And Sufficient**

As noted above, the summary statement at issue here provides as follows:

Shall Missouri law be amended to:

- create the Health and Education Trust Fund with proceeds of a tax of \$0.0365 per cigarette and 25% of the manufacturer’s invoice price for roll-your-own tobacco and 15% for other tobacco products;
- use Fund proceeds to reduce and prevent tobacco use and for elementary, secondary, college, and university public school funding; and
- increase the amount that certain tobacco product manufacturers must maintain in their escrow accounts, to pay judgments or settlements, before any funds in escrow can be refunded to the tobacco product manufacturer and create bonding requirements for these manufacturers?

*L.F. 320-321.* The summary statement is 99 words. *Id.*

Brown identifies three reasons that the summary statement is allegedly “insufficient and therefore unfair...” *Brief at 38-42.*<sup>5</sup> First, Brown argues that the second bullet point of the summary statement fails to describe an additional four potential uses of the fund. *Brief at 39.* Second, Brown alleges that the third bullet point does not fairly summarize the proposal with regard to funds *maintained* in escrow. *Brief at 41.* Third, Brown asserts that the third bullet point misstates the specific manufacturers that

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<sup>5</sup> Plaintiff’s Petition initially set forth 13 reasons that the summary statement is allegedly unfair and insufficient. *L.F. 8-12.* Eleven of those have been abandoned on appeal, and as discussed below, Brown adds an additional reason in this appeal.

are subject to certain bonding requirements. *Id.* Each of these arguments should be rejected.

First, Brown argues that the second bullet point should have included additional details with regard to the fund. *Brief at 39.* Brown describes these additional details as a “rather complex series of funds...” *Id.*

The second bullet point states that Missouri law would be amended to: “use Fund proceeds to reduce and prevent tobacco use and for elementary, secondary, college and university public school funding.” This statement is completely accurate. Fund proceeds will be used to reduce and prevent tobacco use and for elementary, secondary, college and university public school funding. *J. Ex. 1, 6, 11, 16, 21, 26.* The second bullet point does not state that fund proceeds will be used for those programs “only” or “without exception.” *L.F. 321.* Thus, it is not unfair or insufficient. *See Missouri Municipal League v. Carnahan*, 303 S.W.3d at 583 (quoting *United Gamefowl Breeders*, 19 S.W.3d at 140) (summary statement sufficient if it “makes the subject evident with sufficient clearness to give notice of the purpose” of the measure.)

Second, Brown complains about the portion of the third bullet point which notes that the measure would increase the amount that must be “maintain[ed]” in an escrow account. *Brief at 41.*<sup>6</sup> Under a loophole in Missouri’s current statute (that has been

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<sup>6</sup> Brown did not assert this argument as a reason the summary statement was unfair or insufficient in his Petition. *L.F. 8-12.* Under Section 116.190.3, the petition “shall state the reason or reasons why the summary statement” is unfair or insufficient. Accordingly,

closed by every other state participating in the Master Settlement Agreement), non-participating manufacturers in Missouri are able to obtain an almost immediate refund of amounts that they place into escrow, giving them a nearly \$6 per pack pricing advantage over other tobacco manufacturers. *J. Ex. 1, 6, 11, 16, 21 and 26.*

The proposal here would close that loophole, and thereby require non-participating manufacturers to “maintain” an increased amount of funds in their escrow accounts before obtaining refunds. *Id.* Merriam Webster’s Collegiate Dictionary defines “maintain” as follows: “to keep in an existing state;” “preserve from failure or decline[.]” *Merriam Webster’s Collegiate Dictionary, (10<sup>th</sup> ed. 1993), p. 702.* Similarly, Black’s Law Dictionary defines “maintain” as “to continue in possession of property, etc.)” *Black’s Law Dictionary, (7<sup>th</sup> ed. 1999), p. 965.* The word “maintain” thus accurately informs the voters that the funds will be “preserved” or can “continue” in the escrow account for a longer period of time since the loophole is closed. The summary statement therefore accurately summarizes this provision.

Third, Brown argues that the third bullet point’s reference to “these manufacturers” fails to convey that “all manufacturers who have escrow obligations” are subject to the bonding requirement. *Brief at 42.* That is a strained and incorrect reading of the third bullet point.

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Brown’s failure to state this reason in his Petition provides an additional reason it must be rejected.

The reference to “these manufacturers” in fact refers the reader back to the beginning of the bullet point, which opens the provision by noting that the requirements will be imposed on “certain tobacco manufacturers.” The use of the word “certain” puts readers on notice that not all tobacco manufacturers will be subject to this class of requirements and that the ballot language should be consulted for more details.

In this regard, the ballot language states that the bonding requirement applies to a “non-participating manufacturer” who (1) has not sold cigarettes in the state during the four previous quarters, (2) failed to make a full and timely escrow deposit, or (3) had been removed from the state directory of any state within the preceding five years. *J. Ex. 1, 6, 11, 16, 21, 26*. Thus, the bonding requirement may apply to non-participating manufacturers who have previously placed funds in escrow. The third bullet point therefore appropriately summarizes the provision as applying to “certain tobacco manufacturers.”

Brown’s three arguments with regard to the sufficiency of the summary statement are, in essence, complaints about the level of detail contained in the summary. However, as noted above, the statute provides the Secretary of State with only 100 words in which to describe the measure. § 116.334, *RSMo*. “Within these confines, the title need not set out the details of the proposal.” *United Gamefowl Breeders*, 19 S.W.3d at 141. The existing summary statement is 99 words, and it would not have been possible for the

Secretary of State to include all of the additional details that Brown believes were required within the 100 word limit.<sup>7</sup>

Even if it were possible to revise the summary statement to include these additional details within the 100 word limit, none of Brown's preferred characterizations are required in order to make the summary statement fair and sufficient. *Overfelt*, 81 S.W.3d at 738-39.

In the only two appellate cases that have found summary statements to be unfair or insufficient, the summary inaccurately described a fundamental portion of the measure in a way that was likely to deceive or mislead votes. In *Cures Without Cloning*, the summary noted that the proposed measure could *repeal* the ban on human cloning when the purpose of the measure was to in fact *expand* that ban. 259 S.W.3d 76, 82 (Mo. App. 2008).<sup>8</sup> Thus, the summary statement was simply wrong with regard to the impact of the measure.

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<sup>7</sup> Members of the public who are interested in the details of the proposal may consult the text of the measure, which is attached to each petition page and posted on the Secretary of State's website.

<sup>8</sup> Not only is *Cures Without Cloning* not on point because the summary statement was 180° wrong, its holding was subsequently ruled by the Circuit Court to be "of no legal consequence." *See Cures Without Cloning*, Cole County Circuit Court Case No. 07AC-CC00966, Order of October 6, 2008 (attached hereto at *App. 15-16*).

Similarly, in *Missouri Municipal League*, the summary statement provided that the constitution would be amended to require “just compensation” when in fact that requirement was already a part of the constitution and was not being changed. 303 S.W.3d at 588.

In contrast to those cases, Brown has not identified any inaccuracy or deception in the Secretary’s summary that would tend to mislead or deceive voters. Again, a summary statement is insufficient or unfair within the meaning of Section 116.190 if it “inadequately” (meaning especially lacking adequate power, capacity, or competence) “and with bias, prejudice, deception and/or favoritism states the consequences of the initiative.” *Cures Without Cloning*, 259 S.W.3d at 81 (quoting *Hancock*, 885, S.W.2d at 49 (brackets omitted)).

Here, Brown seeks to apply a level of precision and detail that has never before been recognized by Missouri Courts. In a summary statement, “[a]ll that is required is that the language fairly summarizes the proposal in a way that is impartial and does not deceive or mislead voters.” *See e.g., Missouri Municipal League v. Carnahan*, \_\_\_ S.W.3d \_\_\_, 2011 WL 3925612, \*4 (Mo. App. 2011). *Accord Union Elec. Co.*, 606 S.W.2d at 660 (Mo. banc 1980) (the purpose of the ballot title “is to give interested persons *notice of the subject of a proposed [law]* to prevent deception through use of misleading titles.”) (emphasis added).

### **C. Conclusion**

The summary statement at issue here more than satisfies this standard. Accordingly, Point I should be denied.



**II. THE TRIAL COURT DID NOT ERR BY CONCLUDING THAT THE FISCAL NOTE SUMMARY WAS SUFFICIENT, FAIR, AND IN COMPLIANCE WITH LAW BECAUSE THE FISCAL NOTE SUMMARY “ASSESSED THE FISCAL IMPACT OF THE PROPOSED MEASURE” AS DIRECTED BY SECTION 116.175, RSMo (RESPONDING TO APPELLANT’S BRIEF POINT II)**

**A. Standard of Review and Introduction**

The right to propose and reject laws is grounded in the Missouri Constitution:

“The people reserve power to propose and enact or reject laws and amendments to the constitution by the initiative, independent of the general assembly.” *Mo. Const., art. III, § 49*. Where, as here, the political opponents of a ballot measure seek to invalidate it, the Court should give deference to the actions of the State. This Court has stated: “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.” *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990).

The reason for that restraint is the unique and critical constitutional role that the initiative process plays. The Missouri constitution is derived only from the power of the people: “[A]ll political power is vested in and derived from the people; . . . all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.” *Mo. Const., art. I, § 1*. The people have reserved to themselves the “power to propose and enact or reject laws and amendments to

the constitution.” *Mo. Const., art. III, § 49*. The reserved power is “participatory democracy in its pure form” where “those who have no access to or influence with elected representatives may take their cause directly to the people.” *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827. Accordingly, “constitutional and statutory provisions relative to initiative are liberally construed to make effective the people’s reservation of that power.” *Id.*

The constitutional reservation to the people of the initiative petition process is similar to the right to vote. In both cases, there is a clear constitutional right. *Compare Mo. Const., art. III, § 49 with art. I, § 25 and art. VIII, § 2*. With regard to the right to vote, this court has held that “These constitutional provisions<sup>9</sup> establish with unmistakable clarity that the right to vote is fundamental to Missouri citizens.” *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. banc 2006). Equally, the right to “propose and enact or reject laws” is fundamental.

Challengers to a fiscal note and fiscal note summary, such as Brown, “bear the burden of demonstrating in the first instance that the Auditor’s fiscal note and fiscal note summary are insufficient or unfair.” *Missouri Municipal League*, 303 S.W.3d at 583 (citing *Cures Without Cloning*, 259 S.W.3d at 81. “[T]he words insufficient and unfair as used in Section 116.190.3 RSMo . . . 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.” *Hancock*, 885 S.W.2d at 49. “As applied to the fiscal note

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<sup>9</sup> *Mo. Const., art. I, § 25 and art. VIII, § 2*.

summary, insufficient and unfair means to inadequately and with bias, prejudice, or favoritism synopsized 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, *RSMo.* So long as the fiscal note conveys the fiscal consequences to the public adequately and without bias, prejudice, 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. *Missouri Municipal League*, 303 S.W.3d at 583 (citing *Bergman*, 988 S.W.2d at 92). A fiscal note summary is not judged on whether it is the best language, only whether it is fair. *Missouri Municipal League*, 303 S.W.3d at 583.

**B. The Structure of Subsection 116.175 and the Rules of Statutory Construction**

The only statute at issue in Point II is Section 116.175, which gives the State Auditor the responsibility to prepare a “fiscal note” and a “fiscal note summary.” Point II does not challenge the fiscal note. The sole challenge to the fiscal note summary is the argument that it should not have contained this sentence: “The revenue will fund only programs and services allowed by the proposal.”<sup>10</sup>

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<sup>10</sup> The fiscal note summary reads in its entirety:

Estimated additional revenue to state government is \$283 to \$423 million annually with limited estimated implementation costs or savings. The revenue will fund only programs and services allowed by the proposal. The

The starting point, of course, is the text of the statute. In Point II, Brown ignores the critical provision within Section 116.175, so it is discussed at some length here.

Subsection 1 of Section 116.175 sets forth the Auditor's general responsibility: "[T]he auditor shall assess the fiscal impact of the proposed measure." Point II of Brown's brief never cites subsection 1, nor does it ever mention the auditor's duty to "assess the fiscal impact."

Subsection 1 of Section 116.175 then goes on to describe some of the information that the Auditor can use, but is not required to use:

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 estimating the cost of the proposal in a manner consistent with the standards of the governmental accounting standards board and section 23.140, 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.<sup>11</sup>

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fiscal impact to local government entities is unknown. Escrow fund changes may result in future state revenue.

*L.F. 321.*

<sup>11</sup> Brown did not submit such a statement to the Auditor.

Subsection 2 then provides that the Auditor shall prepare a fiscal note and fiscal note summary:

2. Within twenty days of receipt of a petition sample sheet, joint resolution or bill from the secretary of state, the state auditor shall prepare a fiscal note and a fiscal note summary for the proposed measure and forward both to the attorney general.

Subsection 3 describes certain features of the fiscal note and fiscal note summary:

3. The fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities. The fiscal note summary shall contain no more than fifty words, excluding articles, which shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure.

Subsection 4 describes the Attorney General's responsibilities:

4. The attorney general shall, within ten days of receipt of the fiscal note and the fiscal note summary, approve the legal content and form of the fiscal note summary prepared by the state auditor and shall forward notice of such approval to the state auditor.

Subsection 5 describes the remedy if the Attorney General or Circuit Court finds that the fiscal note or fiscal note summary is inadequate:

5. If the attorney general or the circuit court of Cole County determines that the fiscal note or the fiscal note summary does not satisfy

the requirements of this section, the fiscal note and the fiscal note summary shall be returned to the auditor for revision. A fiscal note or fiscal note summary that does not satisfy the requirements of this section also shall not satisfy the requirements of section 1.

Brown's entire argument in Point II is based on one sentence in the statute that he takes out of context. The argument quotes only the sentence in subsection 3 reading as follows: "The fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local government entities." *Brief at 44*. From that language, Brown argues that the Auditor may *only* "state the measure's estimated cost or savings," and do nothing more. (*Brief at 44-45*: "The plain language of the statute limits the Auditor's authority to stating the cost or savings to state or local government . . .").

The notion that the Auditor may *only* estimate cost or savings ignores subsection 1 of Section 116.175, which states that the Auditor "shall assess the fiscal impact of the proposed measure." The subsection 1 assessment of fiscal impact is not limited to "cost or savings." "Fiscal impact" is obviously a broader term than is "cost or savings," and this Court should presume that the legislature intended a broader reading. *See, e.g., City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 196 (Mo. banc 2006) ("Where the legislature uses two different terms in the same statute, it must be presumed that it intended the terms to be given different meanings.")

While Brown ignores subsection 1 of Section 116.175, fortunately the trial court did not. Neither should this Court. The trial court found:

Plaintiff argues that, since § 116.175.3 states that the fiscal note “shall state the measure’s estimated cost or savings, if any,” the Auditor is prohibited from including information about revenue impacts in the fiscal note. Under § 116.175.1, the Auditor is broadly charged with assessing the “fiscal impact of the proposed measure.” A measure’s effect on state or local governmental revenue directly relates to the “fiscal impact” of the proposed measure. The Auditor prepares the fiscal note to summarize the results of his assessment of the fiscal impact. § 116.175. It is unreasonable to suggest the Auditor cannot include statements relating to revenue impacts within the fiscal note and fiscal note summary. By stating that the fiscal note and fiscal note summary must include an analysis of the “estimated cost or savings” of a measure, § 116.175.3 identifies basic information to be included within them, but does not prohibit the Auditor from including other fiscal impact information.

*L.F. 346-347.*

Subsection 1 is mandatory in that the Auditor “shall assess the fiscal impact.” The Auditor thus has no discretion to avoid making an assessment. True, subsection 1 does not expressly command that the assessment of fiscal impact be included in the fiscal note or fiscal note summary. But it makes no sense to conclude – as Brown does – that the General Assembly *ordered* the Auditor to “assess the fiscal impact of the proposed measure” and then (in the very same statute) *barred* the Auditor from using all the fruits of that assessment in the fiscal note and fiscal note summary.

Under Brown's theory, what is the Auditor to do with the mandatory assessment of fiscal impact? There is nothing else in Section 116.175 for the Auditor to do other than prepare the fiscal note and fiscal note summary. Under Brown's theory, the Auditor would have to prepare the mandatory fiscal assessment and then could do nothing more than place it on a bookshelf.

There are any number of reasons why this Court should reject this illogical reading of Section 116.175.

First, Brown's reading requires this Court to ignore the plain and unambiguous subsection 1 directive that the Auditor "assess the fiscal impact of the proposed measure." This Court has frequently recognized "the norm of statutory construction that 'every word, clause, sentence and provision of a statute' must have effect." *See, e.g., Civil Service Com'n. of City of St. Louis v. Members of Bd. of Aldermen of City of St. Louis*, 92 S.W.3d 785, 788 (Mo. banc 2003), quoting *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993) Put another way, "it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute." *Id.* Brown's argument requires the Court to ignore the subsection 1 directive to "assess the fiscal impact of the proposed measure."

Second, Brown's reading requires that the Court read into the statute words that are not there. For Brown to prevail, Section 116.175, subsection 3's first sentence would have to read as follows:

The fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local government entities, **and may include no other information.**

The bolded language, of course, does not appear in the statute. "This Court may not engraft upon the statute provisions which do not appear in explicit words or by implication from other words in the statute." *State v. Collins*, 328 S.W.3d 705, 709 n.6 (Mo. banc 2011).

Third, the "provisions of a legislative act are not read in isolation but construed together, and if reasonably possible, the provisions will be harmonized with each other." *Board of Educ. of the City of St. Louis v. Missouri State Board of Educ.*, 271 S.W.3d 1, 17 (Mo. banc 2008), quoting *State ex rel. Evans v. Brown Builders Elec. Co., Inc.*, 254 S.W.3d 31, 35 (Mo. banc 2008). The harmonious reading of subsection 1 and subsection 3 of Section 116.175 is that subsection 1 establishes the general duty to "assess the fiscal impact" of the measure and that subsection 3 mentions some, but not all, of the items that go into the fiscal note and fiscal note summary.

Fourth, though *Brown* does not express it this way, in reality the argument in Point II is based on the maxim of *expression unius est exclusio*, which means omissions shall be understood as exclusions. The argument is that by using terms "cost or savings" in subsection 3, the legislature meant to exclude all other items that might go into the fiscal note summary. "The maxim should be invoked only when it would be natural to assume by a strong contrast that that which is omitted must have been intended for the opposite treatment." *Six Flags Theme Parks, Inc. v. Director of Revenue*, 179 S.W.3d 266, 271

(Mo. banc 2005). Here, there is no reason to conclude that the reference to “cost or savings” in subsection 3 was meant to exclude every other factor.

Indeed, the facts of this case show why the *expression unius est exclusion* argument fails. The fiscal note summary here describes “Estimated additional revenue to state government is \$283 to \$423 million.”

Brown doesn’t challenge that sentence, but if his theory that only “cost or savings” can appear in the summary were true, the revenue estimate of \$283 to \$423 would be invalid, since “revenue” is not a “cost” or a “savings.”

If Brown were correct that only cost or savings can appear in a fiscal note or fiscal note summary, petition signers and voters could *never* receive information from the Auditor about increased revenues in any initiative. Thus, the fiscal note and fiscal note summary of *every* taxing measure on the ballot would have to avoid mentioning increased revenue.

This result is not only absurd, but terrible public policy. The fiscal note and fiscal note summary exist to inform the public of the fiscal consequences of the measure adequately and without “bias, prejudice, deception and/or favoritism.” *See Hancock*, 885 S.W.2d at 49. Brown’s theory would introduce bias and deception by permitting the Auditor to state only one part of the fiscal equation (cost or savings) but not the other (revenue).

Finally, this Court should evaluate Brown’s theory in light of its own observations in *Missourians to Protect the Initiative Process*. The initiative process is a reservation of the rights of the people. The Defendants-Intervenors have chosen to invoke that

fundamental right to use the initiative process. The strained reading of Section 116.175 that Brown advances is inconsistent with this Court’s holding that “statutory provisions relative to initiative petitions are liberally construed to make effective the people’s reservation of that power.” *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827. Brown’s theory asks this Court to do just the opposite.

**C. The History of Section 116.175**

This Court may review earlier versions of the law or consider the problem that the statute was enacted to remedy to discern legislative intent. *Hayes v. Price*, 313 S.W.3d 645, 654 (Mo. banc 2010). Beyond its structure, the history of Section 116.175 also shows that the Plaintiff’s reading of the statute is wrong. Section 116.175 was enacted in 1997. *H.C.S.S.B. 132, 1997 Mo. Laws*, 389, 428. It was the General Assembly’s reaction to *Thompson v. Committee on Legis. Research*, 932 S.W.2d 392 (Mo. banc 1996). There, this Court held unconstitutional Section 116.170, which assigned the task of preparing a fiscal note and fiscal note summary to the legislature’s Oversight Division of the Committee on Legislative Research. The next year, the legislature enacted Section 116.175 to assign the fiscal note and fiscal note summary tasks to the Auditor.

Comparing the statute that was declared unconstitutional (116.170) with its replacement (116.175) is instructive. Both contain the language that Brown focuses on: “The fiscal note and fiscal note summary shall state the measure’s cost or savings, if any, to state or local government entities.” *See 1997 Mo. Laws*, 427, 428. But the prior statute did not contain the language on which this Brief focuses: “The auditor shall

assess the fiscal impact of the proposed measure.” There was no reference to an assessment of the fiscal impact of the measure in the prior statute. *Id.*

Thus, the legislature intentionally and knowingly added a new and broader responsibility when it enacted Section 116.175: the Auditor is to “assess” the *entire* fiscal impact of the measure. This Court should not ignore the clear intention of the 1997 General Assembly that the fiscal analysis by the Auditor be broader and more complete than it had been before.

**D. The Fiscal Note Summary Does Not Go Beyond The Auditor’s Province**

Building on the flawed foundation that the *only* information that can go into the fiscal note summary is “cost or savings,” Brown then argues that the fiscal note summary’s statement that “revenue will fund only programs and services allowed by the proposal” is an impermissible “comment on the substantive limitations of the measure” (*Brief at 45*) that “strays into the province of the Secretary of State.” *Brief at 46.*

The very testimony cited by Brown (*Brief at 46*) disproves this point. The Auditor’s representative testified: “[I]f a reader is looking at this and saying, oh, the State is going to get an extra \$300 million, I think it’s important for them to understand that there may be restrictions on how that money can be spent.” *Brief at 46.*

The testimony regarding “how that money can be spent” goes directly to the “fiscal impact” of the measure. “Fiscal” means “Of or relating to public finances or taxation.” *Black’s Law Dictionary (8<sup>th</sup> ed. 2004) 668.* That definition includes not just how funds are received, but how they are spent.

Brown's argument that the Auditor must remain silent on "how the money can be spent" is inconsistent with Section 116.175.1's directive that the Auditor assess the fiscal impact of the measure. It also requires an unnatural bifurcation between the Secretary of State and the Auditor of assessing the fiscal impact that the statutes do not create. Finally, the testimony from the Auditor that "how that money can be spent" is "important" is true. The Auditor and the Secretary of State perform their statutory duties at the same time. *Compare § 116.175.2, RSMo with § 116.334, RSMo.* Each transmits his or her work product to the Attorney General. *Id.* Neither statute provides for the exchange of statements between the Auditor and the Secretary of State. *Id.*

**E. Conclusion**

In Point II Brown proposes a strained and illogical statutory construction that is inconsistent with the statutory text, with the canons of statutory construction, with the history of Section 116.175, and with public policy. Point II should be denied.

**III. THE TRIAL COURT DID NOT ERR IN DENYING BROWN’S REQUEST FOR A DECLARATORY JUDGMENT THAT SECTION 116.175, RSMo IS UNCONSTITUTIONAL BECAUSE THE STATUTORY DUTIES ARE AN “INVESTIGATION REQUIRED BY LAW” AND “RELATED TO THE SUPERVISING AND AUDITING OF THE RECEIPT AND EXPENDITURE OF PUBLIC FUNDS” AS THOSE TERMS ARE USED IN ARTICLE IV, § 13 OF THE MISSOURI CONSTITUTION (RESPONDING TO APPELLANT’S BRIEF POINT III)**

**A. Standard of Review and Introduction**

“When the constitutionality of a statute is attacked, constitutionality is presumed, and the burden is upon the attacker to prove the statute unconstitutional.” *Consolidated School Dist. No. 1 of Jackson County v. Jackson County*, 936 S.W.2d 102, 103 (Mo. banc 1996). The statute will be upheld “unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution.” *Smith v. Coffey*, 37 S.W.3d 797, 800 (Mo. banc 2001). Further, in arriving at the intent and purpose of a constitutional provision, the construction should be broad and liberal rather than technical, and the constitutional provision should receive a broader and more liberal construction than statutes. If a statute may be so construed as to avoid conflict with the Constitution, this will be done. *State Highway Com’n v. Spainhower*, 504 S.W.2d 121, 125 (Mo. 1973).

**B. The Text of Article IV, Section 13**

Article IV, Section 13 of the Missouri Constitution reads (emphasis added):

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.

Equally important is a second constitutional provision regarding initiative petitions stating that “the secretary of state and all other officers shall be governed by general laws.” *Mo. Const., art. III, § 53*. The Auditor is an “officer” for purposes of Section 53. Section 53 is thus an explicit constitutional statement that in the initiative context, the General Assembly has greater latitude to assign tasks to the Secretary of State and “other officers” like the Auditor than it has in other contexts. Moreover, in applying these constitutional provisions, this Court should be guided by its own precedent in *Missourians to Protect the Initiative Process*, that “constitutional and statutory provisions relative to initiative are liberally construed to make effective the people’s reservation of that power.” *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827.

In analyzing the text of Article IV, Section 13, this Court ought to start with the Auditor’s constitutional duty to “make all . . . investigations required by law.”

Section 116.175, as discussed above, requires the Auditor to “assess the fiscal impact of the proposed measure” and to state that assessment in a fiscal note and fiscal note summary.

The Section 116.175 duties are within the constitutional power to make all investigations required by law. To “investigate” is “to search into; to inquire into systematically, to examine in detail with care and accuracy.” *Webster’s New Twentieth Dictionary Unabridged*, (2d ed. 1979) 967. The Section 116.175 assessment of fiscal impact is a “search,” “inquiry,” or “examination” consistent with the dictionary definition of “investigation.” To “assess” means to “determine the importance, size, or value of” something. *Merriam-Webster Online Dictionary*, available at <http://www.merriam-webster.com/dictionary> (accessed on June 7, 2012). The word “assess” as used in §116.175, RSMo, is synonymous with “investigate” in Article IV, Section 13. The Auditor “assesses” a ballot measure by examining it and making inquiries about it – which is the dictionary definition of “investigating.” “Fiscal” means “of or relating to taxation, public revenues, or public debt”; “of or relating to financial matters.” *Id.* In short, the statute requires the Auditor to determine the potential impact of an initiative on the revenues and expenditures of state and local governments. This is entirely consistent with his constitutional power to “investigate.”

Brown tries to avoid this analysis by drawing a sharp distinction between acts by the Auditor that look forward instead of backward (*Brief at 53-54*). Nothing in the Constitution creates this distinction.

The last sentence of Section 13 requires that all duties imposed on the Auditor be “related to the supervising and auditing of the receipt and expenditure of public funds.” *Mo. Const., art. IV, § 13*. Some of the enumerated powers of the Auditor set forth in Section 13 (post-audits of state agency accounts, audits of the state treasury) contemplate a retrospective review of monies already received or expended. *Id.* Others, such as the power to “make all . . . other investigations required by law,” are silent with respect to time frame. *Id.* Still others, such as the power to “supervise [the] budgeting systems” of political subdivisions, contemplate a prospective analysis of anticipated revenues and expenditures. *Id.* Budgeting requires making estimates. Supervising budgeting systems entails overseeing how political subdivisions make estimates about future revenue and expenditures.

If Brown’s interpretation were correct, the Auditor could not supervise the “budgeting systems” used by political subdivisions, because such systems are inherently forward-looking. Courts are to harmonize Constitutional provisions that appear to conflict, rather than construe one provision in a way that renders the other meaningless. *State at Information of Martin v. City of Independence*, 518 S.W.2d 63, 66 (Mo. 1974). Brown’s overly restrictive reading of the last sentence of Article IV, Section 13 renders other provisions meaningless, contrary to accepted rules of constitutional interpretation.

For the same reason, the Court should not limit the term “investigation” in Article IV, Section 13 to a review of past receipts and expenditures. Section 13 empowers the Auditor to conduct “audits,” “post-audits,” and “investigations.” The Constitution would not use different and separate terms if they all referred to a review

and analysis of past receipts and expenditures. Each word has its own meaning, just as the phrase “supervise [the] budgeting systems” has its own meaning.

As used in Article IV, Section 13, “audits,” “post-audits,” “supervise [the] budgeting systems,” and “investigations” all entail the review – past, present, and future – of the receipt and expenditure of public funds. This is the “primary object” of Article IV, Section 13. *State at Information of Martin*, 518 S.W.2d at 66 (“in determining meaning of a constitutional provision due regard will be given to its primary objects”). The Auditor’s core functions are to track public revenues and expenditures. Other officers of the Executive Branch are not authorized to perform these functions. *See Mo. Const. Article IV, § 2 (Governor to distribute and execute the laws and conserve the peace); Article IV, § 14 (Secretary of State to authenticate and serve as custodian of records for the governor, and to perform duties as provided by law related to corporations and elections); Article IV, § 15 (Treasurer to be custodian of all state funds); and Article IV, § 22 (Director of Revenue to collect all taxes and fees payable to the State).*

Although the Joint Committee on Legislative Research is authorized to prepare fiscal notes for the General Assembly, this Court has held that that it is constitutionally prohibited from doing so for initiatives, because the Committee is strictly “advisory to the General Assembly.” *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392, 395 (Mo. banc 1996). The staff of the Auditor’s Office is knowledgeable about budgeting, accounting, and forecasting regarding public funds. They use the same skills in drafting fiscal notes that they do in performing audits. They are uniquely qualified to assess how an initiative will affect receipts (in the form of any impact on tax revenues) or

the expenditure of funds (in the form of costs to government). The General Assembly's decision to give the Auditor the power to draft fiscal notes fits naturally with his other constitutionally duties.

**C. Farmer v. Kinder**

Brown puts great weight on *Farmer v. Kinder*, 89 S.W.3d 447 (Mo. banc 2002). *Brief at 54-58*. There, the state treasurer brought suit against two circuit judges and fund administrators on the theory that the funds were unclaimed property and should be distributed under the Uniform Disposition of Unclaimed Property Act. §§ 447.500-.595, *RSMo*. The treasurer relied on Section 447.445 which read: "If any person refuses to deliver property to the state as required under Sections 447.500 to 447.595, the treasurer shall bring an action in a court of appropriate jurisdiction to enforce such delivery." The issue in *Farmer* was whether this statute violated Article IV, Section 15 of the Constitution which stated: "[n]o duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds and funds received from the United States government." The Court ruled that the statutory power to bring suit to reclaim property was not related to the constitutional terms of "receipt, investment, custody and disbursement of state funds." *Id.* at 454.

*Farmer* does not dictate the same result in this case, for a number of reasons.

First, Article IV, Section 15 at issue in *Farmer* contains no language equivalent to that in Section 13 giving the Auditor the express duty to "make all other . . . investigations required by law."

Second, the *Farmer* court gave significant weight to language in Section 15 explicitly preventing the Treasurer from collecting funds.<sup>12</sup> Thus, there was an explicit bar in Section 15 against the Treasurer performing the power that she sought to use in that case. By contrast, Section 13 *grants* the Auditor the power to investigate. Thus, the two cases are not comparable. The Treasurer in *Farmer* sought to *create* a power not expressly given. The Auditor here seeks only to *perform* the explicit powers in the Constitution.

Third, *Farmer* did not arise in the context of an initiative petition. As noted above, the initiative petition provision in the Constitution is a reservation to the people of the fundamental right to propose and enact laws. As such, “constitutional and statutory provisions relative to [the initiative process] are liberally construed to make effective the people’s reservation of that power.” *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827. Critically for this issue, the Blunt court did not limit its language regarding liberal construction to statutes. It expressly directed that constitutional analysis and construction be done “liberally” to “make effective” the people’s power to propose and enact laws. Permitting the Auditor to prepare fiscal notes and fiscal note summaries “makes effective” the initiative power by giving the voters information of a qualified and independent official. No such factor was at issue in *Farmer*.

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<sup>12</sup> See *Mo. Const., art. IV, § 15* (treasurer is “custodian of funds”) and *art. IV, § 22* (“[t]he department of [revenue] shall collect all taxes and fees payable to the state as provided by law.”)

For these reasons, Point III should be denied.

**IV. THE CIRCUIT COURT DID NOT ERR IN REJECTING BROWN'S CLAIM OF RES JUDICATA (OR OFFENSIVE COLLATERAL ESTOPPEL) BECAUSE RES JUDICATA IS NOT APPLICABLE IN THAT BROWN DID NOT RAISE IT IN HIS PETITION OR IN A TIMELY FILED PLEADING AND THE PARTIES AND SUBJECT MATTER OF THIS CASE ARE NOT IDENTICAL TO ANY PREVIOUS CASE DECIDED BY THE CIRCUIT COURT (RESPONDING TO APPELLANT'S BRIEF POINT IV)**

Brown argues that *res judicata* should apply to his challenge to the constitutionality of Section 116.175 and bar this Court's review of the circuit court's order on this point because a different judge of the circuit court considering different initiative petitions in different cases involving different parties and different facts held that provision to be unconstitutional. *Brief at 63-69*. This argument is without merit. *Res judicata* and claim preclusion are *affirmative defenses*. See Rule 55.08; *Consumer Finance Corp. v. Reams*, 158 S.W.3d 792, 797 (Mo. App. 2005). A plaintiff cannot assert an *affirmative defense* in support of his own claims. Brown may have meant to invoke the doctrine of "offensive collateral estoppel" even though he does not mention it in any of his pleadings in the circuit court. But if so, offensive collateral estoppel still "must be pled in the plaintiff's petition." *Consumer Finance Corp.*, 158 S.W.3d at 797.

Here, Brown did not plead offensive collateral estoppel in his petition, nor did he ever seek to amend his petition in order to raise it, nor did he ever refer to it in any pleading. *L.F. 1-5, 6-24*. Brown filed a dispositive motion (Motion for Judgment on the

Pleadings) on May 2, 2012, wherein he also made no mention of the issue of *res judicata*. Brown also did not raise the issue at the May 7, 2012 hearing. *Tr. 1-97*. And at no point did Brown seek in order to assert *res judicata* or offensive collateral estoppel. *L.F. 1-5*.

Instead, Brown waited until after the May 7 hearing and submitted a document entitled *Plaintiff Brown's Supplemental Suggestions Concerning Res Judicata and Count IV – the Unconstitutionality of Section 116.175* on May 10, 2012. *L.F. 4*.<sup>13</sup> Notably, at the time that this pleading was filed, there was no claim of *res judicata* set forth in any pleading, motion or other request pending before the circuit court. *L.F. 1-5*. Thus, it is not clear what pleading Brown intended to “supplement.”

However, irrespective of Brown's intent, “[A] defendant should not be able to hold preclusion in reserve as a ‘stealth defense’ long after the time for raising substantive defenses has passed.” *Heins Implement Co. v. Mo. Hwy. & Transp. Com'n*, 859 S.W.2d 681, 685 (Mo. banc 1993) (abrogated on other grounds by *Southers v. City of Farmington*, 263 S.W.3d 603, 623 (Mo. banc 2008)). Brown failed to ever raise the issue of *res judicata* or offensive collateral estoppel in a properly submitted pleading or motion before the trial court. Thus, review of Brown's *res judicata* argument is not proper here.

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<sup>13</sup> Brown asserts at page 68 of his Brief that he could not have asserted *res judicata* until May 8, 2012 because there did not exist a final non-appealable order until that date. However, Brown cites no legal authority in support of this argument. And, even if this argument had merit, Brown offers no explanation for his failure to seek to amend his Petition to assert this claim or to file a motion, rather than just suggestions.

However, even if review of the merits of Brown's argument was appropriate, it would still fail. Neither *res judicata* nor any other estoppel based claim applies in this case because the parties to the litigation are not identical. Brown claims that the parties are the same in all four cases. *Brief at 67*. This assertion is simply untrue.

Missourians for Health and Education, Dudley McCarter, and Peggy Taylor are defendants in the present cause of action. *L.F. 238, 314*. Brown even stipulated that they were entitled to intervene in the case as a matter of right. *L.F. 314*. Thus, three parties to the current case and the other cases to which Brown refers are *not* identical. The circuit court therefore could not enter a judgment affecting the rights of the Defendant-Intervenors in this case based on prior litigation to which they were not parties. *Noble v. Shawnee Gun Shop Inc.*, 316 S.W.3d 364, 369 (Mo. App. 2010) (holding that "*res judicata*, or claim preclusion, would not apply as to [parties], who have never had a judgment on the merits issued against them").

There is also not an identity of the cause of action because the initiative petitions themselves are different. Indeed, the cases cited in support of *res judicata* by Brown involve different initiative petitions and different fiscal notes and fiscal note summaries prepared and certified by the Secretary of State at different times. The required identities are thus not present, and neither *res judicata*, claim preclusion, nor any other kind of estoppel could apply in this case.

Finally, the issue of the constitutionality of Section 116.175, RSMo is a very live issue that should be decided by this Court.<sup>14</sup> Brown's attempt to prevent this Court's review of this issue is a late and self-serving attempt to avoid a decision on the merits, in apparent recognition that Brown's other arguments lack a sufficient basis upon which to overturn the decision of the circuit court.

Point IV is thus without merit and should be denied.

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<sup>14</sup> Brown is well aware that the circuit court also recently held that the statute is constitutional. *Northcott v. Carnahan*, Cole County Circuit Court Case No. 11AC-CC00557, Second Amended Final Judgment (Apr. 17, 2012).

**V. IN THE ALTERNATIVE, IF THIS COURT DOES ORDER ANY CHANGE TO THE FISCAL NOTE SUMMARY OR FISCAL NOTE, THE RELIEF SHOULD BE LIMITED TO REVISING THOSE STATEMENTS ON A PROSPECTIVE BASIS**

On January 9, 2012, Defendant-Intervenors submitted the initiative petitions with the Secretary of State. *J. Ex. 1, 6, 11, 16, 21, 26*. Since that time, those petitions were circulated with the ballot language certified for them by the Secretary of State on February 10, 2012.

Brown's requested relief includes "setting aside" and "voiding" the fiscal note summary and fiscal note for the measure.<sup>15</sup> For the reasons argued above, Brown's claims should be rejected. However, if the Court were to rule in Brown's favor, the mandate should be limited to correcting any deficiencies in the summaries on a prospective basis. The Court cannot set aside, void, or retrospectively invalidate the summaries previously certified by the Secretary of State or Auditor for the measure.

Initiative petition proponents may start circulating their petitions for signature as soon as the Secretary of State certifies the official ballot title to them. § 116.334.2, *RSMo*. Petition proponents must attach the official ballot title and include it on their initiative petition pages. § 116.180, *RSMo*. Accordingly, once the initiative petition

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<sup>15</sup> Notably, Brown's request for a declaratory judgment with regard to the authority of the Auditor (Point Relied On III) could have been asserted at any time prior to the certification of the initiative petitions in this case.

proponents receive a certified official ballot title, they may circulate their petitions for signature with that ballot language.

Under Section 116.190, a court may correct an official ballot title. But, it has no authority to order any other relief. *Cole v. Carnahan*, 272 S.W.3d 392, 394-95 (Mo. App. 2008); *Cures Without Cloning*, 259 S.W.3d at 83 (Mo. App. 2008). Upon revision, the Secretary of State will be ordered to certify the corrected language. If a court subsequently revises the ballot language prior to the filing of the petitions with the Secretary of State, petition proponents can circulate their petitions with the revised ballot language on a going forward basis. *Missourians Against Human Cloning*, 190 S.W.3d at 463 (Mo. App. 2006) (Smart, J., concurring) (opining that changes in an official ballot title should apply at the voting stage but not the petition circulation stage).

However, the Court does not have authority to void, set aside, or otherwise disturb the previous certification on a retrospective basis. Accordingly, any relief ordered by this Court should be limited to ordering the Secretary of State to certify revised language as of the date of the Court's decision and should not order any relief that would affect the validity of the Secretary of State's certification prior to the date of its decision.

If the Court interprets the statutes to allow or require a revision to the official ballot title to operate retrospectively, then the statutes requiring the official ballot title to be attached to the petition pages, prohibiting circulation of the pages before the official ballot title is certified, and allowing a Court to revise an official ballot title are unconstitutional and violate the right to enact laws by initiative petition as guaranteed by

Article III, Sections 49 & 50 of the Missouri Constitution. *See* §§ 116.175, 116.180, 116.190, 116.334, RSMo.

Statutes restricting the time in which initiative petitions may be circulated are unconstitutional. *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515 (Mo. banc 1991). By requiring an initiative petition proponent to wait for the outcome of litigation in order to receive the ballot summary that must be affixed to their petition, the statutes would in that case violate the constitutional right of initiative petition by shortening the time available to proponents to circulate their measures for signatures. *Id.*

Likewise, by disqualifying signatures obtained on valid initiative petitions based on new ballot language certified after the collection of those signatures, the statutes would violate the constitutional guarantee of the right to circulate initiative petitions and pass laws by initiative. *Rekart v. Kirkpatrick*, 639 S.W.2d 606 (Mo. banc 1982). Similarly, once proponents have submitted their petition and the constitutional deadline for filing signatures has passed, it is too late to order any changes in the language that must appear on the petitions. *Cole*, 272 S.W.3d at 395; *Missourians Against Human Cloning*, 190 S.W.3d at 463 (Smart, J., concurring).

The proper interpretation of Chapter 116, RSMo is that a court-ordered revision of an official ballot title operates prospectively only. However, if the Court believes the statutes allow or require a retrospective change in the official ballot title language, the statutes are then unconstitutional and cannot be applied to the initiative petition. It is unconstitutional to restrict the time in which petition proponents may circulate petitions for signature or to retrospectively change an official ballot title that must be printed on

petition pages in order for them to be counted as valid. Finally, once initiative petition proponents have submitted their petition and the constitutional deadline for filing signatures has passed, it is too late to order a change in the official ballot title and during the signature collection phase of the initiative petition process.

A similar issue was addressed by the Missouri Supreme Court in *Thompson*, 932 S.W.2d 392. There, proponents of a ballot initiative concerning congressional term limits sought declaration that the statute giving the joint legislative committee the duty to provide fiscal note summaries exceeded the committee's constitutional authority. The Secretary of State initially certified that the petitions failed to contain sufficient signatures to qualify for the ballot, but the proponents sought judicial review. *Thompson*, 932 S.W.2d at 394. "Upon stipulation of the parties, the circuit court ordered the secretary of state to certify the question to county election authorities for inclusion on the ballot for the November 5, 1996 election." *Id.*

While the *Thompson* court found Section 116.170 unconstitutional, the remedy the court ordered was to remove the fiscal note from the ballot:

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 at 393-394.<sup>16</sup> If the Court finds any issue with the Summary Statement or Fiscal Note Summary in this case, it should apply that ruling only to the ballot, and take no action as to signatures submitted.

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<sup>16</sup> After *Thompson* was decided, the Circuit Court of Cole County in *Drummond v. Committee on Legislative Research, et al.*, Case No. CV197-750CC enjoined the Secretary of State from including the fiscal note summary of a proposed initiative on the ballot. The Circuit Court held that the fiscal note summary was unfair and insufficient, but did not remove the proposed initiative from the ballot. *See App. at 17-20*. The appeal of the decision was dismissed prior to the issuance of an opinion.

## **CONCLUSION**

For the reasons set out in this Brief, this Court should affirm the Judgment of the circuit court.

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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 13,205 words, exclusive of the sections exempted by Rule 84.06(b), based on the word count that is part of Microsoft Office Word 2010.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on June 19, 2012, I electronically filed a true and accurate copy of the foregoing brief with the Clerk of the Court by using the Missouri eFiling System and for service on all counsel registered with the eFiling System:

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at least one-half of the states enact term limits for their members of the United States Congress.

(2) The people of Missouri declare that the provisions of this section shall be deemed severable and that their intention is that federal officials elected from Missouri will continue voluntarily to observe the wishes of the people as stated in this section in the event any provision thereof is held invalid.

(Adopted November 3, 1992)

**Section 46. Militia.**—The general assembly shall provide for the organization, equipment, regulations and functions of an adequate militia, and shall conform the same as nearly as practicable to the regulations for the government of the armed forces of the United States.

Source: Const. of 1875, Art. XIII, 2.

**Section 46(a). Emergency duties and powers of assembly on enemy attack.**—The General Assembly, in order to insure continuity of state and local governmental operations in periods of emergency only resulting from disasters occurring in this state caused by enemy attack on the United States, shall have the power to such extent as the General Assembly deems advisable. In the event there occurs in this state a disaster caused by enemy attack on the United States, the General Assembly shall immediately convene in the City of Jefferson or in such place as designated by joint proclamation of the highest presiding officers of each house, and shall have power

(1) To provide by legislative enactment for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and

(2) To adopt by legislative enactment such other legislation as may be necessary and proper for insuring the continuity of governmental operations. Notwithstanding the power conferred by this section of the constitution, elections shall always be called as soon as possible to fill any elective vacancies in any office temporarily occupied by operation of any legislation enacted pursuant to the provisions of this section.

(Adopted November 8, 1960)

**Section 47. State parks — appropriations for, required.**—For twelve years beginning with the year 1961, the general assembly shall appropriate for each year out of the general revenue fund, an amount not less than that produced annually at a tax rate of one cent on each one hundred dollars assessed valuation of the real and tangible personal property taxable by the state, for the exclusive purpose of providing a state park fund to be expended and used by the agency authorized by law to control and supervise state parks, and historic sites of the state, for the purposes of the acquisition, supervision, operation, maintenance, development, control, regulation and restoration of state parks and state park property, as may be determined by such agency; and thereafter the general assembly shall appropriate such amounts as may be reasonably necessary for such purposes.

The amount required to be appropriated by this section may be reduced to meet budgetary demands provided said appropriation is not less than that appropriated for the prior similar appropriation period.

(Amended November 8, 1960)

**Section 48. Historical memorials and monuments — acquisition of property.**—The general assembly may enact laws and make appropriations to preserve and perpetuate memorials of the history of the state by parks, buildings, monuments, statues, paintings, documents of historical value or by other means, and to preserve places of historic or archaeological interest or scenic beauty, and for such purposes private property or the use thereof may be acquired by gift, purchase, or eminent domain or be subjected to reasonable regulation or control.

## INITIATIVE AND REFERENDUM

**Section 49. Reservation of power to enact and reject laws.**— The people reserve power to propose and enact or reject laws and amendments to the constitution by the initiative, independent of the general assembly, and also reserve power to approve or reject by referendum any act of the general assembly, except as hereinafter provided.

Source: Const of 1875, Art. IV, 57

(Amended November 3, 1908).

(1963) Initiative process could not be used as method of amending St. Louis County zoning ordinance. *State v. Donohue* (Mo.), 368 S.W.2d 432.

**Section 50. Initiative petitions — signatures required — form and procedure.**—Initiative petitions proposing amendments to the constitution shall be signed by eight percent of the legal voters in each of two-thirds of the congressional districts in the state, and petitions proposing laws shall be signed by five percent of such voters. Every such petition shall be filed with the secretary of state not less than six months before the election and shall contain an enacting clause and the full text of the measure. Petitions for constitutional amendments shall not contain more than one amended and revised article of this constitution, or one new article which shall not contain more than one subject and matters properly connected therewith, and the enacting clause thereof shall be “Be it resolved by the people of the state of Missouri that the Constitution be amended:”. Petitions for laws shall contain not more than one subject which shall be expressed clearly in the title, and the enacting clause thereof shall be “Be it enacted by the people of the state of Missouri:”.

Source: Const. of 1875, Art. IV, 57.

(Amended November 3, 1998)

(1972) The requirement of this section that initiative petitions contain an enacting clause is mandatory and not directory. State ex rel. Scott v. Kirkpatrick (Mo.), 484 S.W.2d 161.

(1974) “Legal voter” held to mean “registered voter”. Scott v. Kirkpatrick (Mo.), 513 S.W.2d 442.

(1990) Organization of Missouri constitution into separate articles creates a presumption that matters pertaining to separate subjects should be set forth in separate articles and not commingled. The organizational headings of the constitution are strong evidence of what the drafters of the constitution meant by “one subject”. *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824 (Mo. 1990) (en banc).

**Section 51. Appropriations by initiative — effective date of initiated laws — conflicting laws concurrently adopted.**—The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution. Except as provided in this constitution, any measure proposed shall take effect when approved by a majority of the votes cast thereon. When conflicting measures are approved at the same election the one receiving the largest affirmative vote shall prevail.

(1974) A city charter amendment which would require salaries of city firemen to equal those of another city's firemen violates this section in that it in effect constitutes an appropriation measure which failed to provide new revenues. State ex rel. Card v. Kaufman (Mo.), 517 S.W.2d 78.

**Section 52(a). Referendum — exceptions — procedure.**—A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either by petitions signed by five percent of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded.

Source: Const. of 1875, Art. IV, 57.

(1952) Referendum petitions as to laws which become effective ninety days after recess under Art. III, Sec. 29, must be filed within ninety days after beginning of recess in order to be effective. State ex rel. Moore v. Toberman, 363 Mo. 245, 250 S.W.2d 701.

**Section 52(b). Veto power — elections — effective date.**—The veto power of the governor shall not extend to measures referred to the people. All elections on measures referred to the people shall be had at the general state elections, except when the general assembly shall order a special election. Any measure referred to the people shall take effect when approved by a majority of the votes cast thereon, and not otherwise. This section shall not be construed to deprive any member of the general assembly of the right to introduce any measure.

Source: Const. of 1875, Art. IV, 57.

(1956) As general rule after a measure is passed by the legislature, approved by voters on referendum and proclaimed to be in effect, it will not be held invalid because of procedural errors occurring during the course of its adoption. *Brown v. Morris*, 365 Mo. 946, 290 S.W.2d 160.

(1956) Where bill was referred by a provision of the bill, the signature of the speaker of the house was not necessary to constitute the bill a valid enactment after its approval by people. *Brown v. Morris*, 365 Mo. 946, 290 S.W.2d 160.

**Section 53. Basis for computation of signatures required.**—The total vote for governor at the general election last preceding the filing of any initiative or referendum petition shall be used to determine the number of legal voters necessary to sign the petition. In submitting the same to the people the secretary of state and all other officers shall be governed by general laws.

Source: Const. of 1875, Art. IV, 57.

**Section 12. Executive department, composition of — elective officials — departments and offices enumerated.**—The executive department shall consist of all state elective and appointive officials and employees except officials and employees of the legislative and judicial departments. In addition to the governor and lieutenant governor there shall be a state auditor, secretary of state, attorney general, a state treasurer, an office of administration, a department of agriculture, a department of conservation, a department of natural resources, a department of elementary and secondary education, a department of higher education, a department of highways and transportation, a department of insurance, a department of labor and industrial relations, a department of economic development, a department of public safety, a department of revenue, a department of social services, and a department of mental health. In addition to the elected officers, there shall not be more than fifteen departments and the office of administration. The general assembly may create by law two departments, in addition to those named, provided that the departments shall be headed by a director or commission appointed by the governor on the advice and consent of the senate. The director or commission shall have administrative responsibility and authority for the department created by law. Unless discontinued all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by law or by the governor as provided by law to the office of administration or to one of the fifteen administrative departments to which their respective powers and duties are germane.

(Amended August 8, 1972)

(Amended November 6, 1979)

(Amended August 7, 1984)

(Amended August 7, 1990)

**Section 13. State auditor — qualifications and duties — limitations on duties.**—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.

(1974) Held that state auditor's duty to postaudit the accounts of the department of revenue does not require or authorize identification of individual tax returns and there is no conflict between the confidentiality statutes and the auditor's constitutional duty. *Director of Revenue v. State Auditor* (Mo.), 511 S.W.2d 779.

(1997) For purposes of Hancock Amendment, State Auditor's duties include establishing accounting for calculating total state revenues and revenue limit and enforcing such accounting system. *Kelly v. Hanson*, 959 S.W.2d 107 (Mo.banc).

**Section 14. Secretary of state — duties — state seal — official register — limitation on duties.**—The secretary of state shall be custodian of the seal of the state, and authenticate therewith all official acts of the governor except the approval of laws. The seal shall be called the "Great Seal of the State of Missouri," and its present emblems and devices shall not be subject to change. He shall keep a register of the official acts of the governor, attest them when necessary, and when required shall lay copies thereof, and of all papers relative thereto, before either house of the general assembly. He shall be custodian of such records, and documents and perform such duties in relation thereto, and in relation to elections and corporations, as provided by law, but no duty shall be imposed on him by law which is not related to his duties as prescribed in this constitution.

Source: Const. of 1875, Art. V, 20, 21.

**Section 15. State treasurer — duties — custody, investment and deposit of state funds — duties limited — nonstate funds to be in custody and invested by department of revenue — nonstate funds defined.**—The state treasurer shall be custodian of all state funds and funds received from the United States government. The department of revenue shall take custody of and invest nonstate funds as defined herein, and other moneys authorized to be held by the department of revenue. All revenue collected and moneys received by the state which are state funds or funds received from the United States government shall go promptly into the state treasury. All revenue collected and moneys received by the department of revenue which are nonstate funds as defined herein shall be promptly credited to the fund provided by law for that type of money. Immediately upon receipt of state or United States funds the state

resolution proposing a constitutional amendment or a bill without an official summary statement, which is to be referred to a vote of the people, within twenty days after receipt of the resolution or bill, the secretary of state shall prepare and transmit to the attorney general a summary statement of the measure as the proposed summary statement. The secretary of state may seek the advice of the legislator who introduced the constitutional amendment or bill and the speaker of the house or the president pro tem of the legislative chamber that originated the measure. The summary statement may be distinct from the legislative title of the proposed constitutional amendment or bill. The attorney general shall within ten days approve the legal content and form of the proposed statement.

2. The official summary statement shall contain no more than fifty words, excluding articles. The title shall be a true and impartial statement of the purposes of the proposed measure in language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.

(L. 1980 S.B. 658, A.L. 1983 S.B. 234, A.L. 1985 H.B. 543, A.L. 1997 S.B. 132, A.L. 1999 H.B. 676)

Effective 6-16-99

(1984) A court may not authorize the alteration or redesignation of initiative or referendum petitions in order to correct scrivener's errors. *Payne v. Kirkpatrick* (Mo. App.), 685 S.W.2d 891.

**116.170. Fiscal note and fiscal note summary to be provided by state auditor if not provided by general assembly.** — If the general assembly adopts a joint resolution proposing a constitutional amendment or a bill without a fiscal note summary, which is to be referred to a vote of the people, the state auditor shall, within thirty days of delivery to the auditor, prepare and file with the secretary of state a fiscal note and a fiscal note summary for the proposed measure in accordance with the provisions of section 116.175.

(L. 1980 S.B. 658, A.L. 1983 S.B. 234, A.L. 1993 S.B. 350, A.L. 1997 S.B. 132, A.L. 1999 H.B. 676)

Effective 6-16-99

(1994) Words "insufficient and unfair" as used in section and applied to fiscal notes mean to inadequately and with bias, prejudice, deception and/or favoritism state the fiscal consequences of the proposed proposition. Test of fiscal note summary is not whether summary is the best language for describing effect. Burden is on opponents of language for describing effect. Burden is on opponents of language to show that language was insufficient and unfair. *Hancock v. Secretary of State*, 885 S.W.2d 42 (Mo. App. W.D.).

(1994) Where statute requires that cost be addressed in a fiscal note summary only in cases when a proposition has cost, fiscal note summary attached to initiative proposition was not insufficient

when it did not address cost, since proposition would not generate cost or savings. *Committee on Legislative Research v. Mitchell*, 886 S.W.2d 662 (Mo. App. W.D.).

**116.175. Fiscal impact of proposed measure — fiscal note, fiscal note summary, requirements.** — 1. Except as provided in section 116.155, upon receipt from the secretary of state's office of any petition sample sheet, joint resolution or bill, the 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 estimating the cost of the proposal in a manner consistent with the standards of the governmental accounting standards board and section 23.140, RSMo, 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.

2. Within twenty days of receipt of a petition sample sheet, joint resolution or bill from the secretary of state, the state auditor shall prepare a fiscal note and a fiscal note summary for the proposed measure and forward both to the attorney general.

3. The fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities. The fiscal note summary shall contain no more than fifty words, excluding articles, which shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure.

4. The attorney general shall, within ten days of receipt of the fiscal note and the fiscal note summary, approve the legal content and form of the fiscal note summary prepared by the state auditor and shall forward notice of such approval to the state auditor.

(L. 1997 S.B. 132, A.L. 1999 H.B. 676)

Effective 6-16-99

**116.180. Copies of ballot title, fiscal note and fiscal note summary to designated persons, when — ballot title to be affixed to petition, when.** — Within three days after receiving the official summary statement the approved fiscal note summary and the fiscal note relating to any statewide ballot measure, the secretary of state shall

certify the official ballot title in separate paragraphs with the fiscal note summary immediately following the summary statement of the measure and shall deliver a copy of the official ballot title and the fiscal note to the speaker of the house or the president pro tem of the legislative chamber that originated the measure or, in the case of initiative or referendum petitions, to the person whose name and address are designated under section 116.332. Persons circulating the petition shall affix the official ballot title to each page of the petition prior to circulation and signatures shall not be counted if the official ballot title is not affixed to the page containing such signatures.

(L. 1980 S.B. 658, A.L. 1997 S.B. 132, A.L. 1999 H.B. 676)

Effective 6-16-99

**116.185. Identical ballot titles may be changed, how.** — Before the ballot is printed, if the title of a ballot issue is identical or substantially identical to the title of another ballot issue that will appear on the same ballot, the election authority shall promptly notify the officer or entity that certifies the election of the identical or substantially identical title, and if such officer or entity submits a new title to the election authority, the election authority may change the title of the ballot issue prior to printing the official ballot.

(L. 1999 H.B. 676 § 1)

**116.190. Ballot title may be challenged, procedure — who are parties defendant — changes may be made by court — appeal to supreme court, when.** — 1. Any citizen who wishes to challenge the official ballot title or the fiscal note prepared for a proposed constitutional amendment submitted by the general assembly, by initiative petition, or by constitutional convention, or for a statutory initiative or referendum measure, may bring an action in the circuit court of Cole County. The action must be brought within ten days after the official ballot title is certified by the secretary of state in accordance with the provisions of this chapter.

2. The secretary of state shall be named as a party defendant in any action challenging the official ballot title prepared by the secretary of state. When the action challenges the fiscal note or the fiscal note summary prepared by the auditor, the state auditor shall also be named as a party defendant. The president pro tem of the senate, the speaker of the house and the sponsor

of the measure and the secretary of state shall be the named party defendants in any action challenging the official summary statement, fiscal note or fiscal note summary prepared pursuant to section 116.155.

3. The petition shall state the reason or reasons why the official ballot title is insufficient or unfair and shall request a different official ballot title.

4. The action shall be placed at the top of the civil docket. The court shall consider the petition, hear arguments, and in its decision certify the official ballot title to the secretary of state. Any party to the suit may appeal to the supreme court within ten days after a circuit court decision. In making the legal notice to election authorities under section 116.240, the secretary of state shall certify the language which the court certifies to him.

(L. 1980 S.B. 658, A.L. 1985 H.B. 543, A.L. 1993 S.B. 350, A.L. 1997 S.B. 132, A.L. 1999 H.B. 676)

Effective 6-16-99

**116.195. Costs of court-ordered ballot title change to be paid by the state.** — Whenever the reprinting of a statewide ballot measure is necessary as a result of a court-ordered change to the ballot language for such measure, the costs of such reprinting shall be paid by the state.

(L. 1999 H.B. 676 § 2)

**116.200. Secretary of state's decision as to sufficiency of petition may be reversed, procedure — appeal.** — 1. After the secretary of state certifies a petition as sufficient or insufficient, any citizen may apply to the circuit court of Cole County to compel him to reverse his decision. The action must be brought within ten days after the certification is made. All such suits shall be advanced on the court docket and heard and decided by the court as quickly as possible.

2. If the court decides the petition is sufficient, the secretary of state shall certify it as sufficient and attach a copy of the judgment. If the court decides the petition is insufficient, the court shall enjoin the secretary of state from certifying the measure and all other officers from printing the measure on the ballot.

3. Within ten days after a decision is rendered, any party may appeal it to the supreme court.

(L. 1980 S.B. 658)

Effective 1-1-81

election authority shall count as valid only the signatures of persons registered as voters in the county named in the circulator's affidavit. Signatures shall not be counted as valid if they have been struck through or crossed out.

2. If the election authority is requested to verify the petition by random sampling, such verification shall be completed and certified not later than thirty days from the date that the election authority receives the petition from the secretary of state. If the election authority is to verify each signature, such verification must be completed, certified and delivered to the secretary of state by 5:00 p.m. on the last Tuesday in July prior to the election, or in the event of complete verification of signatures after a failed random sample, full verification shall be completed, certified and delivered to the secretary of state by 5:00 p.m. on the last Tuesday in July or by 5:00 p.m. on the Friday of the fifth week after receipt of the signatures by the local election authority, whichever is later.

3. If the election authority or the secretary of state determines that the congressional district number written after the signature of any voter is not the congressional district of which the voter is a resident, the election authority or the secretary of state shall correct the congressional district number on the petition page. Failure of a voter to give the voter's correct congressional district number shall not by itself be grounds for not counting the voter's signature.

4. The election authority shall return the copies of the petition pages to the secretary of state with annotations regarding any invalid or questionable signatures which the election authority has been asked to check by the secretary of state. The election authority shall verify the number of pages received for that county, and also certify the total number of valid signatures of voters from each congressional district which the election authority has been asked to check by the secretary of state.

5. The secretary of state is authorized to

adopt rules to ensure uniform, complete, and accurate checking of petition signatures either by actual count or random sampling. No rule or portion of a rule promulgated pursuant to this section shall become effective unless it has been promulgated pursuant to the provisions of chapter 536.

6. After a period of three years from the time of submission of the petitions to the secretary of state, the secretary of state, if the secretary determines that retention of such petitions is no longer necessary, may destroy such petitions.

(L. 1980 S.B. 658, A.L. 1988 S.B. 647, A.L. 1995 S.B. 3, A.L. 1997 S.B. 132, A.L. 1999 H.B. 676, A.L. 2003 S.B. 50)

#### 116.160.

(2004) Secretary of state's duty to place matters on a ballot are not finally triggered until receipt of the original document. *Nixon v. Blunt*, 135 S.W.3d 416 (Mo.banc).

**116.175. Fiscal impact of proposed measure — fiscal note, fiscal note summary, requirements — return of fiscal note for revision, when.** — 1. Except as provided in section 116.155, upon receipt from the secretary of state's office of any petition sample sheet, joint resolution or bill, the 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 estimating the cost of the proposal in a manner consistent with the standards of the governmental accounting standards board and section 23.140, 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.

2. Within twenty days of receipt of a petition sample sheet, joint resolution or bill from the secretary of state, the state auditor shall prepare a fiscal note and a fiscal note summary for the proposed measure and forward both to the attorney general.

3. The fiscal note and fiscal note sum-

mary shall state the measure's estimated cost or savings, if any, to state or local governmental entities. The fiscal note summary shall contain no more than fifty words, excluding articles, which shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure.

4. The attorney general shall, within ten days of receipt of the fiscal note and the fiscal note summary, approve the legal content and form of the fiscal note summary prepared by the state auditor and shall forward notice of such approval to the state auditor.

5. If the attorney general or the circuit court of Cole County determines that the fiscal note or the fiscal note summary does\* not satisfy the requirements of this section, the fiscal note and the fiscal note summary shall be returned to the auditor for revision. A fiscal note or fiscal note summary that does not satisfy the requirements of this section also shall not satisfy the requirements of section 116.180.

(L. 1997 S.B. 132, A.L. 1999 H.B. 676, A.L. 2003 H.B. 511 merged with S.B. 623)

\*Word "do" appears in original rolls.

**116.190. Ballot title may be challenged, procedure — who are parties defendant — changes may be made by court — appeal to supreme court, when.**

— 1. Any citizen who wishes to challenge the official ballot title or the fiscal note prepared for a proposed constitutional amendment submitted by the general assembly, by initiative petition, or by constitutional convention, or for a statutory initiative or referendum measure, may bring an action in the circuit court of Cole County. The action must be brought within ten days after the official ballot title is certified by the secretary of state in accordance with the provisions of this chapter.

2. The secretary of state shall be named as a party defendant in any action challenging the official ballot title prepared by the secretary of state. When the action challenges the fiscal note or the fiscal note sum-

mary prepared by the auditor, the state auditor shall also be named as a party defendant. The president pro tem of the senate, the speaker of the house and the sponsor of the measure and the secretary of state shall be the named party defendants in any action challenging the official summary statement, fiscal note or fiscal note summary prepared pursuant to section 116.155.

3. The petition shall state the reason or reasons why the summary statement portion of the official ballot title is insufficient or unfair and shall request a different summary statement portion of the official ballot title. Alternatively, the petition shall state the reasons why the fiscal note or the fiscal note summary portion of the official ballot title is insufficient or unfair and shall request a different fiscal note or fiscal note summary portion of the official ballot title.

4. The action shall be placed at the top of the civil docket. Insofar as the action challenges the summary statement portion of the official ballot title, the court shall consider the petition, hear arguments, and in its decision certify the summary statement portion of the official ballot title to the secretary of state. Insofar as the action challenges the fiscal note or the fiscal note summary portion of the official ballot title, the court shall consider the petition, hear arguments, and in its decision, either certify the fiscal note or the fiscal note summary portion of the official ballot title to the secretary of state or remand the fiscal note or the fiscal note summary to the auditor for preparation of a new fiscal note or fiscal note summary pursuant to the procedures set forth in section 116.175. Any party to the suit may appeal to the supreme court within ten days after a circuit court decision. In making the legal notice to election authorities under section 116.240, and for the purposes of section 116.180, the secretary of state shall certify the language which the court certifies to him.

(L. 1980 S.B. 658, A.L. 1985 H.B. 543, A.L. 1993 S.B. 350, A.L. 1997 S.B. 132, A.L. 1999 H.B. 676, A.L. 2003 H.B. 511 merged with S.B. 623)

4. Failure to designate challengers and watchers by the prescribed times shall cause the county campaign committee to forfeit its right to name such persons for those omitted locations for that election.

(L. 1980 S.B. 658)

Effective 1-1-81

**116.320. Adoption of measure, vote required — effect of approval of conflicting measures.** — 1. Each statewide ballot measure receiving a majority of affirmative votes is adopted.

2. If voters approve two or more conflicting statutes at the same election, the statute receiving the largest affirmative vote shall prevail, even if that statute did not receive the greatest majority of affirmative votes.

3. If voters approve two or more conflicting constitutional amendments at the same election, the amendment receiving the largest affirmative vote shall prevail, even if that amendment did not receive the greatest majority of affirmative votes.

(L. 1980 S.B. 658)

Effective 1-1-81

**116.330. Board of canvassers or governor to issue statement.** — 1. After an election at which any statewide ballot measure, other than a proposed constitution or constitutional amendment submitted by a constitutional convention, is voted upon, the secretary of state shall convene the board of state canvassers to total the abstracts. Not later than two weeks after receiving all required abstracts, the board shall issue a statement giving the number of votes cast “yes” and “no” on each question. If voters approve two or more measures at one election which are known to conflict with one another, or to contain conflicting provisions, the board shall also state which received the largest affirmative vote.

2. After an election at which a proposed constitution or constitutional amendment adopted by a constitutional convention is submitted, the governor shall proclaim the results in accordance with section 3(c), article XII of the constitution.

(L. 1980 S.B. 658)

Effective 1-1-81

**116.332. Petitions for constitutional amendments, statutory initiative or referendum, requirements, procedure.** — 1. Before a con-

stitutional amendment petition, a statutory initiative petition, or a referendum petition may be circulated for signatures, a sample sheet must be submitted to the secretary of state in the form in which it will be circulated. When a person submits a sample sheet of a petition he or she shall designate to the secretary of state the name and address of the person to whom any notices shall be sent pursuant to sections 116.140 and 116.180. The secretary of state shall refer a copy of the petition sheet to the attorney general for his approval and to the state auditor for purposes of preparing a fiscal note and fiscal note summary. The secretary of state and attorney general must each review the petition for sufficiency as to form and approve or reject the form of the petition, stating the reasons for rejection, if any.

2. Upon receipt of a petition from the office of the secretary of state, the attorney general shall examine the petition as to form. If the petition is rejected as to form, the attorney general shall forward his or her comments to the secretary of state within ten days after receipt of the petition by the attorney general. If the petition is approved as to form, the attorney general shall forward his or her approval as to form to the secretary of state within ten days after receipt of the petition by the attorney general.

3. The secretary of state shall review the comments and statements of the attorney general as to form and make a final decision as to the approval or rejection of the form of the petition. The secretary of state shall send written notice to the person who submitted the petition sheet of the approval within thirty days after submission of the petition sheet. The secretary of state shall send written notice if the petition has been rejected, together with reasons for rejection, within thirty days after submission of the petition sheet.

(L. 1985 H.B. 543 § 1, A.L. 1997 S.B. 132)

(1991) That part of this section which limits submission to secretary of state of sample petitions to one year prior to the final date for filing signed petitions shortens time authorized by constitution, art. XII, sec. 2(b), during which constitutional amendment petitions may be circulated for signatures and is invalid. State of Mo., ex rel. Upchurch v. Blunt, 810 S.W.2d 515 (Mo. banc).

**116.334. Petition approval required, procedure to obtain petition title or summary statement — rejection or approval of petition, procedure — circulation of petition prior to approval, effect.** — 1. If the petition form is approved, the secretary of state shall within ten days prepare and transmit to the attorney general a summary statement of the measure which shall be

a concise statement not exceeding one hundred words. This statement shall be in the form of a question using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure. The attorney general shall within ten days approve the legal content and form of the proposed statement.

2. Signatures obtained prior to the date the official ballot title is certified by the secretary of state shall not be counted.

(L. 1985 H.B. 543 § 2, A.L. 1997 S.B. 132)

**116.340. Publication of approved measures.** — When a statewide ballot measure is approved by the voters, the secretary of state shall publish it with the laws enacted by the following session of the general assembly, and the revisor of statutes shall include it in the next edition or supplement of the revised statutes of Missouri. Each of the measures printed above shall include the date of the proclamation or statement of approval under section 116.330.

(L. 1980 S.B. 658)

Effective 1-1-81

THE  
REVISED STATUTES

OF THE  
STATE OF MISSOURI  
1909

TO WHICH ARE PREFIXED THE DECLARATION OF INDEPENDENCE, CONSTITUTION OF THE UNITED STATES, ANNOTATED AND INDEXED, ACT OF CONGRESS FOR THE FORMATION OF A STATE GOVERNMENT BY THE PEOPLE OF THE TERRITORY OF MISSOURI, ORDINANCE OF THE CONVENTION ASSENTING THERETO, WITH THE CONSTITUTION OF THE STATE OF MISSOURI, ANNOTATED AND INDEXED, AND TO WHICH ARE APPENDED LAWS OF THE UNITED STATES RELATING TO AUTHENTICATION OF LAWS AND RECORDS, ELECTION OF UNITED STATES SENATOR, FUGITIVES FROM JUSTICE AND NATURALIZATION OF ALIENS, TOGETHER WITH FORMS APPLICABLE TO THE LAWS OF MISSOURI.

*Revised and Promulgated by the Forty-fifth General Assembly*

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VOLUME 2

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COMPILED, ARRANGED, CLASSIFIED, ANNOTATED AND INDEXED BY THE REVISION COMMISSION, CONSISTING OF JOHN C. BROWN, HOMER HALL AND DAVID H. HARRIS, UNDER AUTHORITY OF AN ACT APPROVED APRIL 2, 1909, AND OF ARTICLE V OF CHAPTER 70, REVISED STATUTES, 1909.

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a certified copy of the judgment attached thereto, as of the date on which it was originally offered for filing in his office. On showing that any petition filed is not legally sufficient, the court may enjoin the secretary of state and all other officers from certifying or printing on the official ballot for the ensuing election the ballot title and numbers of such measure. All such suits shall be advanced on the court docket and heard and decided by the court as quickly as possible. Either party may appeal to the supreme court within ten days after a decision is rendered. The circuit court of Cole county shall have jurisdiction in all such cases. (Laws 1909, p. 554.)

**Sec. 6751. Duties of secretary of state and attorney-general relating to petitions.**—When any measure shall be filed with the secretary of state, to be referred to the people thereof by the referendum petition, and when any measure shall be proposed by the initiative petition, the secretary of state shall forthwith transmit to the attorney-general of the state a copy thereof, and within ten days thereafter the attorney-general shall provide and return to the secretary of state a ballot title for said measure. The ballot title may be distinct from the legislative title of the measure, and shall express, in not exceeding one hundred words, the purpose of the measure. The ballot title shall be printed with the number of the measure on the official ballot. In making such ballot title the attorney-general shall, to the best of his ability, give a true and impartial statement of the purpose of the measure, and in such language that the ballot title shall not be intentionally an argument likely to create prejudice either for or against the measure. Any person who is dissatisfied with the ballot title provided by the attorney-general for any measure may appeal from his decision to the circuit court, as provided by section 6750, by petition, praying for a different title, and setting forth the reasons why the title prepared by the attorney-general is insufficient or unfair. No appeal shall be allowed from the decision of the attorney-general on a ballot title unless the same is taken within ten days after said decision is filed. A copy of every such decision shall be served by the secretary of state or the clerk of the court, upon the person offering or filing such initiative or referendum petition or appeal. Service of such decision may be by mail or telegram, and shall be made forthwith. Said circuit court shall thereupon examine said measure, hear arguments, and in its decision thereon certify to the secretary of state a ballot title for the measure in accord with the intent of this section. The decision of the circuit court shall be final. The secretary of state shall print on the official ballot the title thus certified to him. (Laws 1909, p. 554.)

**Sec. 6752. Secretary to certify to county clerks, how.**—The secretary of state, at the time he furnishes to the county clerks of the several counties certified copies of the names of the candidates of state and county offices, shall furnish to each of said county clerks his certified copy of the ballot title and numbers of the several measures to be voted upon at the coming general election, and he shall use for each measure the ballot title designated in the manner herein provided. Such ballot title shall in no case exceed one hundred words, and shall not resemble, so far as probably to create confusion, any such title previously filed for any measure to be submitted at that election; he shall number such measures, and such ballot titles shall be printed on the official ballot in the order in which the acts referred by the general assembly and petitions by the people shall be filed in his

(2149)

(b) **Joinder of Remedies; Fraudulent Conveyances.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. For example, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money. (Adopted Jan. 19, 1973, eff. Sept. 1, 1973. Amended Sept. 28, 1993, eff. Jan. 1, 1994.)

#### Committee Note—1974

This Rule supersedes prior Rules 55.07 and 55.08. Paragraph (a) is the same as Rule 18(a) of the Federal Rules of Civil Procedure with "maritime" deleted. Paragraph (b) is the same as Rule 18(b) of the Federal Rules of Civil Procedure.

The change is the deletion of references to joinder of parties rules in prior Rule 55.07.

#### 55.07. Defenses—Form of Denials

If a responding party has knowledge or information sufficient to form a belief as to the truth of an averment, the party shall admit or deny the specific averment. If the responding party is without knowledge or information sufficient to form a belief as to the truth of a specific averment, the party shall so state, and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a party intends in good faith to deny only a part or a qualification of an averment, the party shall specify so much of it as is true and shall deny only the remainder. A party shall respond to all specific averments as provided in this Rule 55.07 and shall not generally deny all the specific averments.

(Adopted Jan. 19, 1973, eff. Sept. 1, 1973. Amended June 1, 1993, eff. Jan. 1, 1994.)

#### 55.08. Affirmative Defenses

In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, comparative fault, state of the art as provided by statute, seller in the stream of commerce as provided by statute, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in defamation, waiver, and any other matter constituting an avoidance or affirmative defense. A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the

court may treat the pleadings as if there had been proper designation.

(Adopted Jan. 19, 1973, eff. Sept. 1, 1973. Amended June 1993, eff. Jan. 1, 1994.)

#### 55.09. Failure to Deny, Effect

Specific averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleadings. Specific averments in a pleading to which no responsive pleading is required shall be taken as denied.

(Adopted Jan. 19, 1973, eff. Sept. 1, 1973. Amended June 1993, eff. Jan. 1, 1994.)

#### Committee Note—1974

This is substantially the same as prior Rule 55.11.

The phrase "or avoided" in the prior rule was deleted because of the change in Rule 55.01 requiring a reply when matters are to be avoided.

**Compare:** Rule 8(d) of the Federal Rules of Civil Procedure.

#### 55.10. Pleading in Alternative—Consistency

A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds.

(Adopted Jan. 19, 1973, eff. Sept. 1, 1973. Amended Sept. 28, 1993, eff. Jan. 1, 1994.)

#### Committee Note—1974

The source is prior Rule 55.12. The phrase "regardless of consistency" has been added.

**Compare:** Rule 8(e)(2) of the Federal Rules of Civil Procedure.

#### 55.11. Averments, How Made

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(Adopted Jan. 19, 1973, eff. Sept. 1, 1973.)

days after the first publication of notice if neither personal service nor service by mail is had.

(b) **Answer to Cross-Claim and Reply to Counterclaim and Other Replies—When Filed.** If a cross-claim is filed against a party, the party shall file answer thereto within thirty days after the same is filed. A reply shall be filed within thirty days after the filing of the pleading to which it is directed. If a reply is ordered by the court, it shall be filed within twenty days after the entry of the order unless the order otherwise directs.

(c) **Effect of Filing Motions on Time to Plead.** The filing of any motion provided for in Rule 55.27 alters the time fixed for filing any required responsive pleadings as follows, unless a different time is fixed by order of the court: If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be filed within ten days after notice of the court's action; if the court grants a motion for a more definite statement the responsive pleading shall be filed within ten days after the filing of the more definite statement. In either case the time for filing of the responsive pleading shall be no less than remains of the time which would have been allowed under this Rule if the motion had not been made.

(d) **Amendments Affecting Parties in Default.** When Rule 43.01(a) requires the service of new or amended pleadings upon a party in default, the party in default shall appear and defend within the same time as is required after the original service of process of like character.

(Adopted Jan. 19, 1973, eff. Sept. 1, 1973. Amended May 6, 1976, eff. Jan. 1, 1977; June 14, 1988, eff. Jan. 1, 1989; June 1, 1993, eff. Jan. 1, 1994; Sept. 28, 1993, eff. Jan. 1, 1994.)

### 55.26. Motions, Form of

(a) **Written Motion—When Required.** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(b) **Other Provisions Applicable.** The provisions applicable to captions, signing and other matters of form of pleading apply to all motions and other papers provided for by these Rules.

(Adopted Jan. 19, 1973, eff. Sept. 1, 1973.)

#### Committee Note—1974

This is the same as prior Rule 55.30.

Compare: Rule 7(b) of the Federal Rules of Civil Procedure.

### 55.27. Defenses and Objections—How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

(a) **How Presented.** Every defense, in law or fact, to a claim in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

- (1) Lack of jurisdiction over the subject matter,
- (2) Lack of jurisdiction over the person,
- (3) That plaintiff does not have legal capacity to sue,
- (4) Insufficiency of process,
- (5) Insufficiency of service of process,
- (6) Failure to state a claim upon which relief can be granted,
- (7) Failure to join a party under Rule 52.04,
- (8) That plaintiff should furnish security for costs,
- (9) That there is another action pending between the same parties for the same cause in this state,
- (10) That several claims have been improperly united,
- (11) That the counterclaim or cross-claim is one which cannot be properly interposed in this action.

A motion making any of these defenses shall be made:

(A) Within the time allowed for responding to the opposing party's pleading, or

(B) If no responsive pleading is permitted, within thirty days after the service of the last pleading.

Motions and pleadings may be filed simultaneously without waiver of the matters contained in either.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to the claim for relief.

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04. All parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 74.04.

(b) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the mo-

tion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 74.04.

(c) **Preliminary Hearings.** The defenses specifically enumerated (1)–(11) in subdivision (a) of this Rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (b) of this Rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(d) **Motion for More Definite Statement.** A party may move for a more definite statement of any matter contained in a pleading that is not averred with sufficient definiteness or particularity to enable the party properly to prepare responsive pleadings or to prepare generally for trial when a responsive pleading is not required. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(e) **Motion to Strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty days after the service of the pleading upon any party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(f) **Consolidation of Defenses in Motion.** A party who makes a motion under this Rule 55.27 may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this Rule 55.27 but omits therefrom any defense or objection then available that this Rule 55.27 permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in Rule 55.27(g)(2) on any of the grounds there stated.

(g) **Waiver or Preservation of Certain Defenses.**

(1) A defense of:

- (A) Lack of jurisdiction over the person,
- (B) Insufficiency of process,
- (C) Insufficiency of service of process,
- (D) That plaintiff should furnish security for costs,
- (E) That plaintiff does not have legal capacity to sue,
- (F) That there is another action pending between the same parties for the same cause in this state,

(G) That several claims have been improperly united, or

(H) That the counterclaim or cross-claim is one which cannot be properly interposed in this action, is waived if it is:

(A) Omitted from a motion in the circumstances described in Rule 55.27(f), or

(B) Neither made by motion under this Rule 55.27 nor included in a responsive pleading.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 52.04, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 55.01, or by motion for judgment on the pleadings.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. (Adopted Jan. 19, 1973, eff. Sept. 1, 1973. Amended June 1, 1993, eff. Jan. 1, 1994; Sept. 28, 1993, eff. Jan. 1, 1994; May 26, 2000, eff. Jan. 1, 2001; June 21, 2002, eff. Jan. 1, 2003. Amended June 23, 2008, eff. July 1, 2008; June 28, 2011 eff. Jan. 1, 2012.)

#### 55.28. Evidence on Motions

When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(Adopted Jan. 19, 1973, eff. Sept. 1, 1973.)

#### Committee Note—1974

This is the same as Rule 43(e) of the Federal Rules of Civil Procedure. It is broader than prior Rule 55.31(b) as it allows the use of oral testimony and depositions as well as affidavits.

#### 55.29. Place of Hearing and Acts in Chambers

All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials, and at any place either within or without the county where the action is pending, but no trial or evidentiary hearing, other than an authorized ex parte hearing, shall be conducted outside the county where the case is pending without the consent of all parties affected thereby. (Adopted Jan. 19, 1973, eff. Sept. 1, 1973. Amended June 1, 1993, eff. Jan. 1, 1994.)

#### 55.30. Times and Places for Hearing Motions to be Established—Submission on Written Statements Without Oral Hearing

(a) **Times and Places.** Unless local conditions make it impracticable, each trial court shall establish



Cures Without Cloning 07AC-CC0096

This case is on remand from the court of appeals, which reversed this Court's judgment certifying a new summary statement portion of the official ballot title to the Secretary of State and remanded for this Court to certify to the Secretary of State the summary statement set forth in the court of appeals' opinion. After the court of appeals initially issued its opinion, however, the proponents of the initiative petition did not file signature pages for the initiative petition with the Secretary of State before the constitutional deadline set forth in Article III, Section 50, of the Missouri Constitution. As such, the proposal is ineligible for inclusion on the November 4, 2008 general election ballot.

Also subsequent to the decision of the court of appeals, the Secretary of State and the Plaintiffs moved the court of appeals and Supreme Court for transfer. Several weeks after these applications were filed, the Intervenors and Secretary of State urged the Supreme Court to declare the case moot, and vacate the lower courts' judgments with respect to the summary statement portion of the official ballot title. The Supreme Court denied transfer, made no finding of mootness, and did not vacate the opinion of the court of appeals or the judgment of this Court.

Now on remand the parties agree, and the Court finds and determines, that any certification by this Court of the language set forth in the court of appeals' opinion will be of no legal consequence because the underlying measure cannot appear on the November ballot. The summary statement issue is therefore moot. *See Asher v. Carnahan*, -- S.W.3d --, 2008 WL 2962643 (Mo. App. W.D., Aug. 5, 2008). The Court's prior judgment with respect to all other issues is unchanged.

10-6-08



IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

**FILED**  
DEC 19 1997

ROBERT DRUMMOND, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 COMMITTEE ON LEGISLATIVE )  
 RESEARCH, et al., )  
 )  
 Defendants. )

*Linda A. Hoare*  
CLERK, CIRCUIT COURT  
COLE COUNTY, MISSOURI  
Case No. CV197-750CC

JUDGMENT

On the 19 day of December, 1997, the parties appeared by their respective counsel and the Court took up and considered the Plaintiff's "Motion for Summary Judgment Upon Count I of the Petition" and "Defendants' Cross-Motion For Summary Judgment and Response to the Plaintiff's Motion for Summary Judgment" which is also directed to Count I of the Petition. The Court heard arguments of counsel and the Court has considered the pleadings and the submissions of the parties. The facts are not in dispute with respect to Count I of the Petition.

This case involves challenges to the fiscal note summaries and fiscal notes prepared with respect to questions to be submitted to the voters of Missouri which were proposed by House Joint Resolution No. 2 ("HJR 2" and House Joint Resolution No. 9 ("HJR 9") under the provisions of Section 116.190, RSMo 1994. which were in effect during the 1997 Regular Session and at the time of the filing of this case, any challenge to either the fiscal note summaries, the fiscal notes or the ballot titles had to be made within ten days after the fiscal note summaries, the fiscal notes or the ballot titles had been submitted to the Secretary of State. The Petition in this case challenging the fiscal note summaries and

the fiscal note was timely filed. No challenges to the ballot titles with respect to HJR 2 or HJR 9 were made by the Plaintiff in his Petition, and the Court judicially notes that the records of the Cole County Circuit Court reflect that no timely challenges were made by any other person with respect to the ballot titles for HJR 2 or HJR 9.

Since the time of the filing of this action, the provisions of House Committee Substitute for Senate Bill No. 132 ("S.B. 132") enacted in 1997 during the Regular Session of the General Assembly have become effective. S.B. 132 repealed Sections 116.170 and 116.190, RSMo 1994, and enacted Sections 116.170, 116.175, 116.180 and 116.190, RSMo 1997 Cum. Supp., which change, inter alia, the procedures, responsibilities and timing for lodging court challenges with respect to fiscal note summaries, fiscal notes, and ballot titles for statewide issues to be submitted to Missouri voters. The Court concludes that the provisions of S.B. 132 relating to fiscal note summaries, fiscal notes and ballot titles have no application to HJR 2 and HJR 9. Instead, the procedures, responsibilities and timing for lodging court challenges with respect to fiscal note summaries, fiscal notes and ballot titles with respect to HJR 2 and HJR 9 are governed by the laws which were in effect prior to the effective date of S.B. 132.

The fiscal note summaries and the fiscal notes herein in issue were prepared by the Committee on Legislative Research and its Oversight Division. The decision in this case is governed by Thompson v. Committee on Legislative Research, 932 S.W.2d 392 (Mo. banc 1996). The Court therefore finds the issues for the Plaintiff upon Count I of his Petition. Because a resolution of the case in

favor of the Plaintiff upon Count I, it is not necessary for the Court to reach the alternate grounds for relief which Plaintiff alleges under Counts II, III and IV of his Petition.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, AS FOLLOWS:

1. The Court determines that that portion of Section 116.170.1, RSMo 1994, purporting to authorize the Committee on Legislative Research and its Oversight Division to submit fiscal note summaries and fiscal notes to the Secretary of State are unconstitutional inasmuch as such functions are in excess of the authority of the Committee on Legislative Research under the provisions of Article III, Section 35, of the Missouri Constitution.

2. The Court determines that the Committee on Legislative Research and its Oversight division were and are without authority to prepare and submit to the Secretary of State the purported fiscal note summaries and fiscal notes for HJR 2 and HJR 9 which are set forth in Exhibits C, D and E attached to the Petition herein.

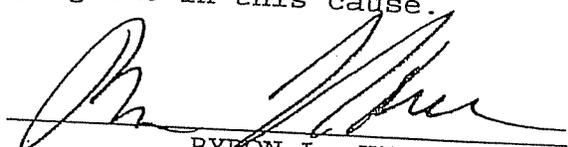
3. The Court determines that the Secretary of State is therefore without authority to include the purported fiscal note summaries or fiscal notes set forth in Exhibits C, D or E or any other fiscal note summaries or fiscal notes upon or within the sample official ballots relating to the proposal contained in HJR 2 and HJR 9 which she is required to certify to local election authorities.

4. The Court determines that the Plaintiff has not challenged the ballot titles for HJR 2 or HJR 9, nor has any other person made a timely challenge to those ballot titles.

5. The Court determines that the procedures and responsibilities for preparing the fiscal note summaries, fiscal notes and ballot titles of HJR 2 and HJR 9 and the timing for any court challenge to the fiscal note summaries, fiscal notes and ballot titles of HJR.2 and HJR 9 are governed by the provisions of law which was in effect prior to the effective date of S.B. 132.

6. The Secretary of State be and is hereby enjoined from including the fiscal note summaries or the fiscal notes set forth in Exhibits C, D and E to the Petition or any other fiscal note summaries or fiscal notes upon or within the sample official ballots relating to the proposals contained in HJR 2 and HJR 9 which she is required to certify to local election authorities.

7. Inasmuch as Plaintiff by this Judgment with respect to Count I of the Petition has been granted all of the relief which he seeks under his Petition, it is not necessary for the Court to reach the issues raised under Counts II, III or IV of the Petition. This Judgment is therefore a final judgment in this cause.

  
BYRON L. KINDER  
Circuit Judge

Dated: December 19, 1997

STATE OF MISSOURI }  
COUNTY OF COLE } SS

I, LINDA L. ROARK, Clerk of the Circuit Court of Cole County, Missouri,  
do hereby certify that the above and foregoing is a full true and correct copy of

*Judgment*  
fully as the same remains of record in my said office.  
IN WITNESS WHEREOF, I have hereunto set my hand and affixed the  
seal of my said office this 5<sup>th</sup> day of Jan 1998.  
LINDA L. ROARK, Clerk

By Mary Haulchoir  
Deputy Clerk