

IN THE SUPREME COURT OF MISSOURI

COMMITTEE FOR A HEALTHY FUTURE, )  
INC., et al., )  
 )  
 Respondents/Cross-Appellants, )  
 )  
 v. ) Case No. SC88018  
 )  
 ROBIN CARNAHAN, et al., )  
 )  
 Respondent/Cross-Respondents. )  
 )  
 LOUIS SMITHER, et al., )  
 )  
 Appellants/Cross-Respondents, )  
 )  
 and )  
 )  
 CHRIS KEMPF, et al., )  
 )  
 Cross-Respondents. )

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APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY

The Honorable Thomas J. Brown III

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Final Brief of Respondents/Cross-Appellants (Plaintiffs Below)

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## ARGUMENT

As far as the cross-appeal points are concerned, there can be no dispute that 1,880 individuals in Missouri's Fifth Congressional were denied their fundamental right to petition their government because – through no fault of their own – they were unlucky enough to sign petitions pages of circulators who did not provide enough information to the Secretary of State. L.F. 78-79. There is no dispute that these 1,880 people were found on the voter registration rolls of the local election authorities and that the signatures on the Initiative Petition matched the signatures on file with the local election authorities. L.F. 78. There is no dispute that those 1,880 people wanted their voices heard, but have been denied that right.<sup>1</sup>

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<sup>1</sup> There is also no dispute that many of the circulators did fill out the Secretary of State's "registration" forms for another petition and provided them to her by the deadline, and that a much smaller group did not fill out the registration forms. Tax Abuse Intervenors dispute the number of signatures for which the circulators who registered for another petition are responsible. *See* TAI Second Br. 32. A simple review of the joint exhibits below reveals that the exact number of signatures for each circulator was in evidence. L.F. 79; First Stip. Exs. 3, 5 and 6. Out of the 1,880 signatures that were disqualified because the circulator did not properly register, 1,488 of those signatures were gathered by individuals who filled out the Secretary of State's form for another petition. *Id.*

Instead, Tax Abuse Intervenors and the Secretary of State dispute whether those who gathered the signatures were properly registered. In so doing, the response briefs misstate the scrutiny to which laws disenfranchising voters must be held. Once this court settles on the proper prism through which to view the statutes in question, the answer to the question of circulator registration requirements becomes quite obvious.

In a democracy, the power to change laws flows from the people. Indeed, the very first amendment to the United States Constitution specifically protects the right of the people to “petition the government.” U.S. Const. amend. I. In Missouri, the people reserved unto themselves, “independent of the general assembly,” the power to change the constitution by the initiative process. Mo. Const. art. III, §49. In this case, the people are engaged in the process of exercising that power they have reserved. This Court should recognize those rights and allow 1,880 people to petition their government.

**VI. The Trial Court Did Not Err When It Found That The Initiative Petition Complied With Article III, § 51 Of The Missouri Constitution Because the Petition Generates New Revenue and Properly Appropriates that New Revenue. (Responds to Appellants’ Point Relied On VI As Supported By the Brief of Amici Curiae.)**

Representatives Carl Bearden and Alan Icet and Senator Charles Gross (collectively Legislators) requested and were granted leave to file an amici curiae brief in support of Tax Abuse Intervenors after the deadline for filing such briefs and after the Committee had already filed its Respondents' Brief. *See* Rule 84.05(f)(2). Accordingly, the Committee requested and was granted leave by this Court to respond to their arguments in this Brief. Order (Oct. 2, 2006).

The Legislators argue that the Proposed Amendment appropriates funds other than tobacco tax revenues by (a) requiring full health care services for everyone making under 200% of the federal poverty level and (b) necessitating administrative costs that cannot be funded with the tobacco tax proceeds. Both arguments fail.

**A. Subsection 8(1) Does Not Require Full Medicaid Health Care Services For Everyone Making Under 200% Of The Federal Poverty Level.**

The Legislators begin by mischaracterizing subsection 8(1). They state that it “requires the provision of ‘. . . medically necessary health care services for individuals with incomes that are 200% or less of the federal poverty guidelines, including services provided through the Medicaid or State Children’s Health Insurance Programs.” Amici Br. 5-6. First, this Argument was not made by Tax Abuse Intervenors at trial, in their Point Relied On, or in the Argument section of their Brief. It has been waived. Rule 84.13(a) (“allegations of error not briefed or not properly briefed shall not be considered in any civil appeal”).

Second, subsection 8(1) requires no such thing. It merely dedicates a percentage of the tobacco tax revenue to financing additional health care for such persons: “Moneys deposited in the Health Care Access and Treatment Account shall be appropriated by the general assembly solely to provide additional funds for the purposes of (1) providing medically necessary health care services for individuals with incomes that are 200% or less of the federal poverty guidelines . . .” S.L.F. 4. The Department of Social Services will determine “eligibility criteria” for those programs and services, and is required to “apply a preference” in favor of certain groups in determining the eligibility criteria. S.L.F. 4. Thus, the Department of Social Services will decide the scope of services to be provided after it knows how much tobacco tax revenue will be generated, whether federal matching funds will be available, the number of potential beneficiaries, and the optimal use of the money.

The Legislators next argue by implication that subsection 8(1) must be read to mandate provision of full health care to people making less than 200% of the federal poverty level, because subsection 8(2) includes the conditional language “to the extent funds are available.” Amici Br. 5–6. Subsection 8(2) includes conditional funding language, because it requires the Department to establish a fee schedule. To ensure that this directive is not interpreted to require additional funding beyond the tobacco tax revenue, subsection 8(2) includes conditional language: “The department of social services shall establish, *to the extent funds are available*, a Medicaid physician fee schedule that is comparable to the

Medicare physician fee schedule.” S.L.F. 4 (emphasis added). By way of contrast, subsection 8(1) does *not* mandate any particular level or type of coverage. Rather, the Department is merely provided with an allotment of money and a direction to establish eligibility criteria to provide additional medically necessary services to people making less than 200% of the federal poverty level. No fixed and definite financial obligation is created and conditional funding language was not needed.

The Legislators argue that federal Medicaid law will require additional funding beyond the tobacco tax revenues. Amici Br. 6-8. First, even if that were true, it would not prove a violation of article III, § 51, because the additional funding would be required by federal law and not the Proposed Amendment. *See Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 827 (Mo. banc 1990) (stating that courts will not “give advisory opinions as to whether a particular proposal would, *if adopted*, violate some superseding fundamental law”).

Second, federal law could conceivably require additional funding only if the “eligibility criteria” established by the Department of Social Services did not comply with Medicaid program requirements. In establishing eligibility criteria for the subsection 8(1) programs, the Department may take into account fiscal constraints, as the Legislators’ own authority expressly acknowledges: “States may restrict coverage as a matter of fiscal necessity.” *McNeil-Terry v. Roling*, 142 S.W.3d 828, 834 (Mo. App. 2004). States are limited, however, in that they

cannot impose fiscal constraints that interfere with their purposes in having offered the services in the first place. *Id.* If the Department feels the Medicaid requirements are overly restrictive, the Proposed Amendment allows it to apply for a “waiver of federal Medicaid standards.” S.L.F. 4. This Court must presume that the Department will follow the law and establish lawful eligibility criteria within the available funding. *See, e.g., Borden Co. v. Thomason*, 353 S.W.2d 735, 764 (Mo. banc 1962).

Third, the Proposed Amendment only permits, but does not require the subsection 8(1) funding to be used to provide Medicaid services: “As permitted by federal law, the department of social services *may* seek approval from the federal government and take all other necessary steps to qualify the payments described in subsection 8(1) as eligible for federal financial participation payments through the Missouri Medicaid program.” S.L.F. 4 (emphasis added). So, even if the Legislators’ worst fears come to pass and a program is set up that violates federal Medicaid law, there is a safety valve. The state can simply provide the services independent of the Medicaid program. Again, the Legislators’ own authority expressly notes that states are not bound by federal Medicaid law, if they provide services independent of the Medicaid program: “While a state plan must comply with all federal statutory and regulatory requirements, a state may give additional medical assistance under its own legislation, independent of federal reimbursement.” *Lankford v. Sherman*, 451 F.3d 496, 506 (8th Cir. 2006).

Finally, the Legislators argue that the funding is insufficient by quoting the fiscal note out of context.<sup>2</sup> Amici Br. 7-8. The full quote is provided below, with the omitted sentence emphasized in italics:

[The Division of Medical Services] also indicated that in order to provide healthcare for Missourians with income less than two hundred percent of federal poverty level, it is anticipated that the additional cost would exceed \$1.2 billion. This \$1.2 billion cost refers to the total cost of medical assistance payments to cover all Missourians with incomes less than 200% of federal poverty level. *The actual level of spending will reflect the revenue realized through the increase in the tobacco tax.*

Thus, the Auditor expressly stated that the Proposed Amendment does not require funding beyond the tobacco tax revenue. The Legislators' Brief omits that clarifying sentence. Amici Br. 7-8.

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<sup>2</sup> The Committee has moved to strike the fiscal note from Appellants' Appendix because it is not properly before this Court. The Committee responds to this portion of the Legislators' argument, in case the Court denies that Motion.

**B. Administrative Costs May Be Paid from the Tobacco Tax Proceeds.**

Like the Tax Abuse Intervenors, the Legislators argue that administrative costs cannot be paid pursuant to subsection 8. Amici Br. 9. They invoke the canon of construction that expression of one thing means the exclusion of another. Amici Br. 9. Because subsection 7 mentions “administration and management” and those words do not appear in subsection 8(1), they argue that administrative costs cannot be paid from the funds appropriated pursuant to subsection 8(1). Amici Br. 9.

Their argument fails at a practical level and as a matter of technical legal interpretation. First, their argument presumes that an appropriation to pay the administrative costs associated with providing health care to people making less than 200% of the federal poverty level would not be an appropriation that is “for the purpose” of providing health care to those persons. This argument borders on nonsensical. Clearly, an appropriation for administrative costs that are incurred as a result of providing health care services is “for the purpose of” providing those services.

Second, the legislators invoke the canon of construction that “expression of one thing means exclusion of another.” Amici Br. 9. That canon does not apply because Subsection 8(1) does not have a detailed list of program components like subsection 7. Subsection 7 and Subsection 8(1) both include a broad umbrella “purpose” for which a portion of the tobacco tax proceeds must be used.

Subsection 7 goes on to identify specific components that must be included within the statewide tobacco control program. One of those components is “administration and management.” Subsection 8(1) does not include a similar listing of components. Since subsection 8(1) does not even have a separate listing of program components, the canon of construction has no application.

**C. The Initiative Process Acts As A Check On The General Assembly.**

The Legislators have cited their special role in the state budgeting process. Amici Br. 4. As the people’s elected representatives, the constitution gave them the authority and power to make those choices in the first instance. But, in their constitution, the people of Missouri also reserved a check on that power: “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 (emphasis added). The right of initiative is an outlet for “those who have no access to or influence with elected representatives.” *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827. By signing the Initiative Petition, eight percent of the legal voters of Missouri have stated that they believe the General Assembly made the wrong budget choices and that a statewide tobacco control program and adequate health care for Missouri’s neediest citizens are sufficiently important to warrant separate funding. This Court should be very skeptical of legislative attempts to curtail the right of initiative. Legislators should

not be able to avoid accountability to the people by resorting to the courts. These issues must be decided by individual citizens in voting booths across Missouri.

**VIII. The Trial Court Erred As A Matter Of Law In Holding That Petition Circulators Who Registered With The Secretary of State, But Did Not Provide Every Piece Of Information Required By § 116.080.2 RSMo, Were Not Properly Registered Because The Circulators Complied Or Substantially Complied With § 116.080 In That The Circulators Reasonably Complied With The Registration Requirement of § 116.080.1 By Providing Their Contact Information To The Secretary of State And Strict Compliance With An Ambiguous Statute Should Not Be Required. (Committee’s First Point Relied On As Cross-Appellant.)**

The original cross-appeal brief discussed the problems with §§116.080.1 and .2. The first statute clearly requires petition circulators to register. The second discusses information that should be supplied to the Secretary of State but does not specifically say that information is required for a circulator to be registered. Both Tax Abuse Intervenors and the Secretary of State claim §§116.080.1 and 116.080.2 are clear and unambiguous. The Secretary of State says that “the logical upshot of these provisions is that if a circulator fails to

register *as required by 116.080.2*, the Secretary of State is obligated . . . to not count as valid the signatures submitted by those circulators.” SOS’s Second Br. 9–10 (emphasis added). The fact that the Secretary is forced to paraphrase the statute is instructive – on its face § 116.080.2 says nothing about registration. If § 116.080.2 said “in order to be registered, a circulator shall provide. . .” the statute might be clear. Instead, “register” or “registration” appears nowhere in § 116.080.2 and it is not clear that the section is a registration requirement. Therefore, this Court must construe the statute before it can turn to the significant constitutional issues implicated by the Secretary of State’s interpretation.

**A. Sections 116.080.1 and 116.080.2 Are At Best Ambiguous.**

While denying any ambiguity in the statute, Tax Abuse Intervenors and the Secretary of State both invoke rules of statutory construction in an attempt to say that § 116.080.2 contains registration requirements. By invoking rules of statutory construction, they have implicitly admitted that the statute is ambiguous. If the statute were clear, they would not need to discuss such rules. *See Farmers’ and Laborers’ Co-Op Ins. Ass’n v. Director of Revenue*, 742 S.W. 2d 141, 143 (Mo. 1987) (“When a statute is clear and unambiguous, extrinsic aids to statutory construction cannot be used.”). Since both briefs acknowledge the ambiguity of the statute, those rules must be discussed.

**B. The Correct Rule Of Construction Is A Liberal Reading In Favor Of Allowing The Signatures To Count.**

There are, of course, many rules of statutory construction. Counsel for the parties supporting the statute cannot agree on the rule or rules of construction that should apply. Both briefs discuss the doctrine of *in pari materia*. SOS's Second Br. 11; TAI Reply Br. 37. Of course, the doctrine of *in pari materia* begs the question of whether the two statutes involve the same subject matter or whether § 116.080.1 is a registration statute and § 116.080.2 is a separate requirement for information apart from the registration requirement. The Secretary of State engages in an "absurd result" analysis. SOS's Second Br. 11. Tax Abuse Intervenor discusses the rule that a specific statute controls over a more general statute. TAI Reply Br. 32. The Secretary of State does not engage in this last analysis, perhaps in acknowledgment that this rule of construction also begs the question of whether the two statutes deal with the same subject. In a final attempt to construe the statute, Tax Abuse Intervenor seems to claim that §§116.080.1 and 116.080.2 are in conflict – an argument not specifically advanced by the Committee – by quoting rules of construction indicating that the latter positioned statute should control when two statutes conflict. TAI Reply Br. 33. None of these rules is helpful.

Perhaps the reason counsel cannot agree on the proper rule of statutory construction is that the correct rule is devastating to their position. When dealing with statutes regulating the fundamental right to petition the government, "that construction 'of a law as would permit the disenfranchisement of large bodies of voters, because of an error of a single official, *should never be adopted where the*

*language in question is fairly susceptible of any other.’’ United Labor Committee of Mo. v. Kirkpatrick, 572 S.W.2d 449, 454 (Mo. banc 1978) (emphasis added; quoting Bowers v. Smith, 20 S.W.101, 103 (1892)). So the analysis is not whether this court can pick and choose from the various rules of statutory construction in an attempt to find a rule of construction that allows the Secretary of State to disenfranchise the 1,880 voters. The question is whether the statutes are “fairly susceptible of” any interpretation which does *not* disenfranchise them.*

The *United Labor* Court said it well:

Previous decisions of this court have discussed the importance of the initiative and referendum, emphasizing that procedures designed to effectuate these democratic concepts should be *liberally construed* to avail the voters with *every opportunity* to exercise these rights. The ability of the voters to get before their fellow voters issues they deem significant should not be thwarted in preference for technical formalities. *Id.* at 454. (emphasis added.)

There is indeed a fair interpretation of the statutes that gives those 1,880 voters the opportunity to be heard. That interpretation is laid out in the original brief. It simply requires reading the statutes to say that the registration requirement is found in § 116.080.1. Because § 116.080.2 never uses the word register, this court should not insert that word into the statute. Section 116.080.2

is just like the statutes at issue in *United Labor* in that it does not make failure to supply that information fatal to the signatures. § 116.080.2. Only the failure to register at all allows disqualification of the signatures. § 116.080.1. Such an interpretation does not produce an absurd result as argued by the Secretary of State. The legislature has specifically authorized the Secretary to promulgate regulations to fill in the details. Indeed, as the Secretary's brief discusses, she has unpromulgated policies in that regard. SOS's Second Br. 9 n. 2. By publishing these policies in accord with Chapter 536, she could define the registration process, but she has not. Therefore, as discussed in the prior brief, any reasonable effort to register is acceptable.

**C. In The Alternative, This Court Must Conduct A Substantial Compliance Analysis.**

Both responses to the cross appeal also dismiss any construction of the statute that would allow for a substantial compliance analysis, but neither rebut the basic premise that where the purpose of the statute is met, the doctrine of substantial compliance applies. The Secretary of State argues that the legislature did not intend to allow a substantial compliance analysis. SOS's Second Br. 12. In support, she cites another statute, § 116.100, which allows the Secretary of State to ignore "clerical and technical" errors in the organization of a petition. The existence of § 116.100 actually supports the Committee's position.

The legislature is presumptively aware of the case law. *Goldberg v. State Tax Commission*, 639 S.W.2d 796, 802 (Mo. banc 1982). As previously

discussed, substantial compliance is a well-recognized doctrine. If the legislature wants to prohibit the courts from engaging in the substantial compliance analysis, it must do so by clear and unambiguous language. *In re Estate of Williams*, 12 S.W.3d 302, 307 (Mo. banc 2000). By requiring the Secretary to disregard only “clerical and technical” errors, § 116.100 took away the ability of the courts to apply another substantial compliance test. Section 116.080 contains no substantial compliance guidance so the case law applies and a substantial compliance test is appropriate. As discussed in the Committee’s first brief, the elements of substantial compliance are met here because the purpose of the statute was accomplished even though every technical requirement may not have been met.

**IX. The Trial Court Erred As A Matter Of Law In Holding That §§ 116.080 and 116.120 RSMo, Are Constitutional Because Those Statutes Conflict With Article III, §§ 49, 50, and 53 of the Missouri Constitution In That They Condition The Validity Of Legal Voters’ Signatures On Whether Petition Circulators Properly Register. (Committee’s Second Point Relied On as Cross-Appellant.)**

Neither brief addresses the fundamental issue raised by Respondent Committee. The Constitution guarantees eight percent of legal voters the right to change laws through initiative petition, “independent of the general assembly.”

Mo. Const. art. III, §49. The Constitution guarantees that right upon obtaining a specific number of signatures of legal voters. Mo. Const. art. III, §§50 and 53. If §§ 116.080 and 116.120 allow or require what happened here – disqualification of the valid signatures of legal voters – they conflict with that right by denying the right of initiative to voters who have obtained the constitutionally required number of signatures.

**A. Tax Abuse Intervenors Do Not Address The Basic Issue.**

Tax Abuse Intervenors offer little defense concerning the statute’s direct conflict with the Missouri Constitution. They simply state that the Committee’s argument that eight percent of the people have the right to submit an issue to the ballot is “baseless” and that the argument means the proper number of names in any format would be sufficient. TAI Second Br. 45. Their response misses the mark. This case does not involve the General Assembly’s regulation of a part of the initiative petition process to which the constitution does not directly speak (*e.g.*, format of petition pages). Rather, in §§ 116.080.1 and 116.120, the General Assembly has redefined the number of signatures of legal voters that are required, in contravention of the constitutional mandate that 8% is sufficient.

**B. The Secretary of State’s Reliance On Article III, § 53 Is Misplaced, Because A Statute May Not Restrict A Constitutional Right.**

The Secretary of State puts up a stronger defense, arguing that article III, § 53, specifying that the Secretary of State shall be governed by the general laws

in submitting the initiative to the people, is *carte blanche* for the legislature to enact statutes concerning the initiative process. But, article III, § 53 is not legislative license to restrict the constitutional rights of the people. Certainly the legislature has the authority to provide the details to the initiative process in order to assist the voters in getting their issues to the ballot through an orderly process. But the legislature has no right to limit or restrict the right of initiative specifically reserved to the people “independent of the general assembly.” Mo. Const. art. III, § 49. See also *United Labor* 572 S.W.2d at 454 (citing *State ex rel. Elsas v. Missouri Workmen’s Compensation Commission*, 2 S.W.2d 796, 801 (Mo. banc 1928)).

The Secretary of State notes that – in *United Labor* – the Court said a statute making a defect fatal would be enforced “to the letter.” As a matter of statutory construction, that is certainly correct. If the statute does make a defect fatal, however, that does not end the inquiry. The Court must still consider whether that statute conflicts with the constitution and is therefore invalid. The Committee describes a direct conflict between §§ 116.080 and 116.120 and the constitution. In such a case, the outcome is clear: “In a contest between the two if the statute restricts a right conferred by the Constitution, the latter prevails.” *Id.* at 455 (quoting *State ex rel. Randolph County v. Walden*, 206 S.W.2d 979, 986 (Mo. banc 1947)).

These statutes prevent the submission of an initiative petition when its proponents have obtained the constitutionally required number of signatures. If

this Court adopts the interpretation of §§ 116.080 and 116.120 offered by the Secretary of State, those statutes directly conflict with article III, §§ 49, 50, 53. As such, the statutes must give way.

**C. The Cases Cited by Cross-Respondents Are Inapposite.**

Respondent Secretary attempts to analogize this case to *Barks v. Turnbeau*. However, that case is inapposite. In *Barks*, certain absentee ballots were invalidated for failure to comply with statutory requirements. *Barks v. Turnbeau*, 573 S.W.2d 677, 681 (Mo. App. 1978). Absentee balloting is a privilege created by statute; it is not a right under the constitution. *Id.* The legislature is free to condition that privilege. Similarly, Tax Abuse Intervenor cites at length from *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75 (Me. 2002). That case deals with a circulator's failure to comply with *constitutional* requirements for petition circulators. *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 78 (Me. 2002). The Committee does not challenge the requirement that it comply with the restrictions listed in the constitution and it has in fact done so. It is the statutory requirements that Respondent Committee challenges.

**X. The Trial Court Erred In Holding §§ 116.080 and 116.120, RSMo Are Constitutional Under The First Amendment to the United States Constitution Because Those Statutes Restrict Core Political Speech and Are Not**

**Substantially Related To An Important State Interest In  
That They Require The Disclosure Of The Names Of Paid  
Petition Circulators When Other Statutes Meet The  
State's Interest. (Committee's Third Point Relied On As  
Cross-Appellant.)**

If the effect of the statutes is to prohibit 1,880 people from communicating with their fellow citizens, such a restriction is in direct violation of the First Amendment to the United States Constitution. In light of the arguments advanced in the response briefs, it is worth simply repeating a sentence from the Committee's original brief: "While requiring petition circulators to register is not inherently unconstitutional, the penalty imposed *on legal voters* of having their signatures thrown out because of the petition circulators' failure to register is unconstitutional." Committee's First Br. 85.

All the parties agree that they are bound by the United States Supreme Court's analysis in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999). The *Buckley* Court struck down restrictions on petition circulators because they were not substantially related to an important state interest. In doing so, the *Buckley* court generally discussed the level of scrutiny applied to restrictions on the initiative process.

In this case, the Secretary construes the statutes to not only restrict the rights of circulators to gather names but to also disqualify signatures of individual petition signers. In light of this interpretation, it is not clear that the intermediate

level of scrutiny discussed in *Buckley* is sufficient. Rather, when a statute places a severe burden on speech, “exacting scrutiny” should apply. *Meyer v. Grant*, 486 U.S. 414, 420 (1988). Whatever label this Court uses, it should follow the Supreme Court’s directive that the importance of the First Amendment is “at its zenith” when an initiative is involved. *Id.* at 425. Under any analysis, the task is to identify the state’s interest and then determine whether Missouri’s statute is related to that interest. Under any of the standards, Missouri’s statutes fail the constitutional test.

**A. The Statutes Must Be Substantially Related To The State’s Interest In Fraud Prevention And Public Disclosure Of Special Interest Involvement.**

According to the Secretary of State, “Missouri has substantial state interests in fraud prevention and public disclosure of special interest involvement in the initiative process.” SOS’s Second Br. 19. There is no doubt that the Secretary’s statement in that regard is correct. The issue then is how the statutes at issue are related to that interest. The *Buckley* court says it must be “substantially” related in order to pass muster.

The Secretary asks this court not to impose a “strict scrutiny” standard, although the *Meyer* case seems to say one should apply. Although she never uses the phrase, the Secretary essentially argues for a “rational basis” test. *Id.* at 20. This Court should certainly not adopt the standard articulated by the Secretary of State, that the statutes pass muster so long as they “serve the state’s interest.” *Id.*

Under an “exacting scrutiny” test, the statute falls quickly. If this Court adopts the *Buckley* reasoning, a more in depth analysis is required. As with many First Amendment cases, *Buckley* must be read thoroughly. Although *Buckley* announces that a restriction must be “substantially related” to the state’s interest, the Court does not give a concise statement of when a statute is “substantially related” to an interest. What is clear is that it is insufficient for the state to simply articulate an interest and then claim the statute serves the interest. Instead, *Buckley* continues the requirement that the state must show that the restriction is “necessary . . . in order to meet its concerns.” *Meyer v. Grant*, 486 U.S. 414, 426 (1988). This requirement is apparent in *Buckley*’s striking down of monthly reports of the amounts paid to individual circulators based on the fact that Colorado had other means of achieving the state’s interest. Clearly the analysis requires the state to show that the statute is substantially, and not just tangentially, necessary to achieve the government interest.

**B. Disqualifying Signatures Of Innocent Petition Signers Does Nothing To Further The State’s Interests.**

Denying 1,880 legal voters the right to have their signatures on an initiative counted because a circulator did not supply certain information to the state is in no way related to the state’s interest in preventing fraud or disclosing special interest involvement. While some sort of penalty on the circulators might be related to such an interest, there is not even a rational basis for imposing a penalty on the signers of the petition. Given that the statute does not require registration until all

of the petitions have been circulated, the signers have no way of knowing, or controlling, whether a circulator has registered. Striking names of petition signers after the petition has been submitted in no way supports the state's interest in prohibiting fraud nor does it advance an interest in disclosure of special interest involvement in the petition process. The *Buckley* decision overturned laws that imposed restrictions on the circulators, but there is no indication that the law also restricted the rights of those who actually signed the petition. If Colorado's restriction on the rights circulators to make their voice heard violated the First Amendment, Missouri's infringement on the rights of circulators and innocent petition signers certainly does not pass constitutional muster under any level of scrutiny.

**C. The Statutes Are Also An Unreasonable Restriction On The First Amendment Rights of Circulators.**

Even if the statute only affected the circulators, the Committee's first brief discussed that the requirements of § 116.080 are not substantially related to fraud prevention or special interest disclosure because the state has other means -- means that do not infringe on the First Amendment -- to accomplish these goals. Tax Abuse Intervenors seem to concede that these other means exist by arguing that §§ 116.080.1 and 116.080.2 serve as a "safeguard" or "cross check" to other statutes. TAI Br. 48-49. This brief will not belabor the points here except to say that §§ 116.080.1 and 116.080.2 do indeed provide a cross check to other statutes. But the state's interest in having a redundant cross check is not an important

interest that justifies a restriction on the fundamental right to petition the government.

As discussed in previous briefs, the state can serve its interest in preventing fraud by being able to locate petition circulators after the fact. It has other means of accomplishing that goal without infringing so heavily on First Amendment rights. As discussed in *Buckley*, the state's interest regarding special interest influence is not furthered by knowing whether individuals receive payment for circulating petitions. The interest is satisfied by requiring disclosure by the payer, not the payee. Missouri's redundant and over-burdensome circulator registration requirements are not substantially related to important governmental interests.

## CONCLUSION

For these reasons, this Court should AFFIRM the judgment of the trial court.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)**

The undersigned certifies:

1. That this Brief complies with Rule 84.06(g) of this Court; and  
That this Brief contains 6,178 words according to the word count feature of Microsoft Word Version 2002 SP-2 software with which it was prepared.
  2. That the disks accompanying this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.
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**CERTIFICATE OF SERVICE**

I hereby certify that two true and accurate copies and one copy on diskette of the foregoing were served by hand-delivery, facsimile transmission, certified mail or United States mail, postage prepaid, this 2nd day of October, 2006, to:

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