
IN THE SUPREME COURT OF MISSOURI

RALPH BROWN,

Appellant,

vs.

ROBIN CARNAHAN, Missouri Secretary of State, THOMAS A. SCHWEICH, Missouri State Auditor, MISSOURIANS FOR HEALTH AND EDUCATION, DUDLEY MCCARTER, and PEGGY TAYLOR,

Respondents.

**Appeal from the Circuit Court of Cole County
The Honorable Judge Daniel Green**

**BRIEF OF RESPONDENTS ROBIN CARNAHAN
AND THOMAS A. SCHEWICH**

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STATEMENT OF FACTS

Plaintiff Ralph Brown challenges the official ballot title, consisting of the summary statement and fiscal note summary, as well as the fiscal note, for an initiative petition relating to taxes on tobacco products. (LF 6-24). Originally, there were six versions of the initiative petition submitted, but only one was circulated and turned in with signatures – version G. (LF 64-76).^{1/}

The initiative petition proposes taxes on cigarettes, roll-your-own tobacco, and other tobacco products. (LF 64-76). Proceeds from the taxes would be deposited in a newly created Health and Education Trust Fund for use in tobacco use prevention and quit assistance, and elementary, secondary, and higher education. (LF 64-76). The initiative petition would also amend provisions concerning the administration of the tobacco manufacturer escrow fund and bonding requirements. (LF 74-76).

The Attorney General and Secretary of State approved the form of the initiative petition and the Secretary prepared a summary statement as follows:

^{1/} Because the issues are all identical, and only one version was actually turned in with signatures, the trial court's final judgment and this brief does not differentiate between the versions.

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?

(LF 202). The summary statement prepared by the Secretary contains 99 words.

The Auditor also prepared a fiscal note and fiscal note summary for the proposed initiative petition, which was approved by the Attorney General. (LF 151-166). In preparing the fiscal note, the Auditor's office followed its normal procedure and solicited comments from state agencies and offices, local governments, and public agencies. (LF 151-166). Jon Halwes of the

Auditor's office compiled the fiscal note and reviewed the responses for completeness and reasonableness. (LF 151-166).

The fiscal note summary provides as follows:

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.

(LF 166). As required by law, the fiscal note summary is exactly 50 words, excluding articles.

On February 10, 2012, the Secretary certified the official ballot title, consisting of the summary statement and the approved fiscal note summary. (LF 202). Plaintiff filed this lawsuit challenging the summary statement, fiscal note, and fiscal note summary. (LF 6). The trial court rejected Plaintiff's claims, holding that the Secretary's summary statement and the Auditor's fiscal note and fiscal note summary are fair and sufficient. (LF 341-353).

SUMMARY OF THE ARGUMENT

More than a decade ago, this Court established the controlling standard for a ballot title – to make the “subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal.” *United Gamefowl Breeders Assoc. of Mo. v. Nixon*, 19 S.W.3d 137, 140 (Mo. banc 2000). Yet, the Plaintiff in this case, and many other challengers, have sought to change this standard by digging deeper and deeper in a misguided attempt to demonstrate supposed inaccuracies or missing details. So it is in this case, in which the Plaintiff has lost himself in the weeds of unnecessary details and unfounded inaccuracies.

Plaintiff challenges the Secretary’s summary statement as both missing details and inaccurate. For example, Plaintiff claims that four additional details should be included in the second (of three) bullet points in the Secretary’s summary statement. The details Plaintiff seeks to add to the summary statement, of course, are not required. But more striking is the realization that if those four details were added, the second bullet point alone would exceed 100 words – the limit for the entire summary statement.

Efforts to show inaccuracies in the Secretary’s summary statement likewise fail. The third bullet point, which Plaintiff claims is partially inaccurate, accurately conveys an increase in the amount certain tobacco manufactures must maintain in escrow and creates bonding requirements for

those same manufacturers. Instead of focusing on whether the Secretary's summary statement gives notice of the purpose of the proposed changes, Plaintiff is simply lost in the weeds.

The record in this case also overwhelmingly supports the trial court's judgment that the fiscal note and fiscal note summary are sufficient and fair. Plaintiff does not, in fact, challenge the trial court's finding that the fiscal note is sufficient and fair. The only challenge raised on appeal by Plaintiff as to the sufficiency and fairness of the fiscal note summary is his claim that using the phrase "[t]he revenue will fund only programs and services allowed by the proposal" violates § 116.175.3,^{2/} since it is not a "cost or savings" of the measure.

Plaintiff's argument is incorrect since that phrase is a reflection of the fiscal impact of the measure and properly delineates the scope of that cost or savings (*i.e.*, the new revenue can only be used for purposes stated in the measure). Section 116.175.3, does not say how the costs or savings are to be worded, and certainly does not limit the expression of costs or savings to just monetary figures. In fact, the statute does not limit the fiscal summary to only stating costs or savings as part of the fiscal impact. The purpose and

^{2/} All references to the Revised Statutes of Missouri will be to the 2011 Cumulative Supplement, unless otherwise noted.

wording of the statute, along with a prior decision utilizing similar language regarding the impact of the costs or savings, support the trial court's ruling that the phrase "[t]he revenue will fund only programs and services allowed by the proposal" is compliant with § 116.175.3. Therefore, the trial court's judgment that the fiscal note and fiscal note summary are sufficient and fair should be affirmed along with the Secretary's summary statement.

Finally, the law imposes a heavy burden on Plaintiff as the statute's constitutional challenger. His argument takes such a strained reading of the constitutional provision as to require that all doubts be resolved in his favor rather than the statute. Plaintiff's proposed construction of Art. IV, § 13, moreover, would call into question literally dozens of functions that the Auditor has carried on for many years. This Court should not permit those who oppose a ballot initiative on its merits to prevent determination of the merits at the ballot box rather than in the courtroom.

The Auditor believes that § 116.175 does not violate the last sentence of Art. IV, § 13. To reach the conclusion claimed by Plaintiff, the Court must ignore the words "*and investigations required by law*" from the third sentence of § 13. In fact, those words are never mentioned in the discussion and analysis of Plaintiff's brief. But it is a maxim of construction that all words must be given some meaning and equally that words are to be given their

plain and ordinary meaning. *Johnson v. State*, --- S.W.3d ----, May 25, 2012 (SC92351).

Plaintiff likely will take the position that an “investigation” as used in the statute merely means the collecting and evaluation (or assessment) of information done at the same time and as part of an audit. But the people need not have adopted the phrase “*and investigations as required by law*” if the Constitution is read as narrowly as Plaintiff requests. The collection and evaluation of information (an “investigation”) is an inherent part of any audit. The italicized phrase must mean something else. Plaintiff’s argument renders that language in the Constitution meaningless. Interpreting that phrase to read “investigations as required by law. . . relating to the receipt and expenditure of public funds” gives meaning to the phrase “investigations as required by law.” An example of the application of this reading is in § 137.073.6(2), which requires every county clerk for each taxing authority in their county to forward for review and approval the proposed tax rate for the upcoming year to determine if it complies with the taxing district’s tax ceiling.

The Auditor has never contended that the last sentence of § 13 is not a limitation. And the Auditor agrees that the sentence limits “investigations as required by law” to those “related to the supervising and auditing of the receipt and expenditure of public funds.” The collection of information

concerning the potential fiscal impact of a proposed initiative petition is related to the “receipt” of public funds in this case and “expenditure” of public funds in others. Section 13 does not contain any language that suggests that “audit” means only “post-audit.”

Alternatively, even if the Court finds § 116.175 to be unconstitutional (and assuming that the Court rejects the sufficiency issues raised by Plaintiff) there is no credible or legally logical argument that the electorate should be deprived of their franchise because of either the absence of a fiscal note or the identity of the drafter of a legally sufficient fiscal note. Nor does Plaintiff even attempt such an argument. The judicial branch, that is the most protective of the right to vote, should not become complicit with delaying and obstructive tactics by those that fear the electorate’s decision.

ARGUMENT

Standard of Review

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

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

Constitutional challenges to a statute are also reviewed *de novo*. A statute is presumed valid and will not be held unconstitutional unless it

clearly contravenes a constitutional provision. “The person challenging the statute’s validity bears the burden of proving the act clearly and undoubtedly violates the constitution.” *In re Brasch*, 332 S.W.3d 115, 119 (Mo. banc 2011). Courts are to “resolve all doubt in favor of the act’s validity,” and in so doing should “make every reasonable intendment to sustain the constitutionality of the statute.” *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984) (rejecting hotel’s constitutional challenges and affirming judgment on the pleadings).

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

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

challenging the summary statement to show it is “insufficient or unfair.”
§ 116.190.3.

In *United Gamefowl Breeders Assoc. of Mo. v. Nixon*, 19 S.W.3d 137 (Mo. banc 2000), this Court described the test for an “insufficient or unfair” ballot title as “whether the ballot title makes the subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal.” *Id.* at 140 (citing *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 14 (Mo. banc 1981)). Here, the Secretary’s summary statement makes the subject of the initiative petition evident with sufficient clearness, just as the trial court concluded.^{3/}

^{3/} Even if the Secretary’s summary statement was unfair or insufficient, it should be returned to the Secretary for any changes. The Missouri Constitution bestows upon the Secretary the authority to submit all initiatives or referendum petitions to the people. *See* Mo. Const. Art. III, § 53. Section 116.334 explicitly requires the Secretary to prepare a summary statement for a ballot initiative measure – and no one else. No provision of the Missouri Constitution or Chapter 116 permits a court to modify a summary statement prepared by the Secretary.

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

In reviewing a summary statement for a ballot initiative, the burden is on the party challenging the summary statement to show that the language is “insufficient or unfair.” § 116.190.3. Insufficient and unfair means “to inadequately and with bias, prejudice, deception, and/or favoritism” state the consequences of the initiative. *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo. App. W.D. 1994). As such, the test is “whether the language fairly and impartially summarizes the purposes of the measure, so that voters will not be deceived or misled.” *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 2006).

The Secretary prepares summary statements that endeavor to promote an informed understanding of the probable effect of a proposed amendment. *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. App. W.D. 2008). “[W]hether the summary statement prepared by the Secretary of State is the best language for describing the [initiative] is not the test.” *Bergman*, 988 S.W.2d at 92. Indeed, as the court of appeals has aptly noted, “[i]f charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions,” and “there are many appropriate and adequate ways of writing the summary ballot language.” *Asher v. Carnahan*, 268 S.W.3d 427, 431-32 (Mo. App. W.D. 2008).

One of the more comprehensive decisions from the court of appeals to address the standard for reviewing ballot summary language is *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451 (Mo. App. W.D. 2006). In that case, the court described the process and the applicable standards as follows:

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

* * *

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

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

The *Missourians Against Human Cloning* decision also emphasized that § 116.190 does not require the Secretary's summary statement to be the most specific or preferable summary for a particular initiative: "Even if [a plaintiffs'] substitute language would provide more specificity and accuracy in the summary statement, 'and even if that level of specificity might be preferable' " this is not the test. *Id.* at 457 (quoting *Bergman*, 988 S.W.2d at 92). Furthermore, the summary statement, which is limited to 100 words, "need not set out the details of the proposal." *United Gamefowl Breeders Assoc. of Mo.*, 19 S.W.3d at 141 (citing *Buchanan*, 615 S.W.2d at 14).

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

The Secretary's summary statement language in this case fairly and impartially sets out the purposes of the initiative petition. Plaintiff, however, focuses on supposedly important details that were left out of the Secretary's summary statement. Additionally, Plaintiff claims there are inaccuracies in the summary statement. Neither argument succeeds, and the Secretary's summary statement should be upheld as fair and sufficient.

1. The summary statement need not include every detail to be fair and sufficient.

Despite clear authority holding that summary statements need not set out every detail in the initiative petition, Plaintiff proceeds to point out

details that he believes should have been put in the Secretary's summary statement. Specifically, Plaintiff charges that in the second bullet point of the summary statement, "[t]he Summary Statement identified two and only two uses, while the truth is that the funds generated through the new tax may be used for many purposes." Appellant's Br. p. 38. This argument fails for several reasons.

First, and most obviously, the Secretary's summary statement does not indicate in any way that the use of Fund proceeds generated by the proposed tobacco tax are limited to "only" the uses described in the second bullet point. By no means are other uses excluded by terms such as "only," "exclusively," or "limited to." Instead, the Secretary selected the purposes from the initiative petition itself, which states that it is "[f]or the purpose of reducing public health care expenses and deaths from tobacco-related diseases, as well as providing additional moneys to be expended and used for tobacco use prevention and quit assistance; for elementary and secondary public school funding . . . and for public college and university funding."

The purposes of the initiative petition are captured in the second bullet point of the Secretary's summary statement as follows:

- use Fund proceeds to reduce and prevent tobacco use and for elementary, secondary, college, and university public school funding; and

(LF 8). Not surprisingly, Plaintiff does not dispute that the purposes included in the summary statement do in fact give sufficient notice of the uses for the Fund proceeds generated by the tobacco tax.

Instead of focusing on the purposes described in the initiative petition itself, Plaintiff suggests adding four more details to the second bullet point alone; including obscure and confusing details such as provide “replacement revenues for the funds that receive current tobacco tax revenues when tax revenues decrease due to the expected decrease in purchase of tobacco.” Appellant’s Br. p. 39. Even if Plaintiff’s argument were considered, he would do well to follow the definition of a “summary” that he provides in his own briefing – a “short restatement of the main points.” Webster’s Third New International Dictionary 2289 (2002) (*cited in* Appellant’s Br. p. 34).

Second, adding the four additional details Plaintiff suggests would take the second bullet point alone over the 100-word limitation. And the result would not be a more informed voter about the subject or purpose of the proposal. Indeed, there are numerous provisions of the initiative petition which spans nine pages of details and descriptions. It would be impossible for the Secretary to capture all of the details in the 100 words provided in the statute for summarizing a proposal. Thus, the standard is both clear and practical – “[w]ithin the 100 word limitation, the ballot title is not required to set out the details of the proposal or resolve every peripheral question related

to it.” *MML I*, 303 S.W.3d at 586 (citing *United Gamefowl Breeders*, 19 S.W.3d at 141).

Finally, Plaintiff turns to an interesting source of authority to challenge a summary statement, the “maxim of statutory construction *expressio unius est exclusio alterius*.” *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 352 (Mo. banc 2001); see Appellant’s Br. p. 39 (citing Black’s Law Dictionary 661 (9th ed. 2009)). This reference to a canon of construction demonstrates a misunderstanding of the maxim as well as summary statements.

Generally, if not exclusively, the maxim is used for *statutory construction*. Here, the Court is not being asked to construe a statute but to determine whether a *summary* of an initiative petition is unfair or insufficient. Statutory construction maxims have no place in assessing summaries, which by their very definition do not include every detail. In fact, controlling caselaw also makes clear that not all details – whether in a list or otherwise – need to be included in the summary statement.

In a related, yet equally unavailing argument, Plaintiff claims that leaving out additional details from a non-existent “list” is supposedly “compounded” by the Auditor’s fiscal note summary that states the “revenue will fund only programs and services allowed by the proposal.” The Auditor’s reference does not identify any programs or services, not even the purposes

described in the Secretary's summary statement. And it is true that the revenue will fund only programs and services allowed by the proposal.

Plaintiff does not contest that proceeds from the Health and Education Trust Fund, which would be created by the initiative petition and described in the summary statement, will be used "to reduce and prevent tobacco use and for elementary, secondary, college, and university public school funding" but instead requests the types of details that courts have consistently rejected. As stated above, "[w]ithin the 100 word limitation, the ballot title is not required to set out the details of the proposal or resolve every peripheral question related to it." *MML I*, 303 S.W.3d at 586 (citing *United Gamefowl Breeders*, 19 S.W.3d at 141).

2. The summary statement is accurate in its description of escrow accounts and bonding requirements.

The Secretary's responsibility is to prepare a summary statement that is fair and sufficient and provides an informed understanding of the probable effect of a proposed amendment. *Cures Without Cloning*, 259 S.W.3d at 82. Plaintiff claims that the summary statement in this case is partly inaccurate in its reference to escrow accounts and bonding requirements. Plaintiff suggests, for example, that the third bullet point is "absolutely wrong" in its description that the initiative petition would "increase the amount that

certain tobacco product manufacturers must maintain in their escrow accounts.” Appellant’s Br. p. 41. In fact, the description is absolutely accurate.

Currently, under § 196.1003(b)(2)(B) certain tobacco product manufacturers are required to place into escrow a percentage of sales in Missouri. They can then remove from escrow those amounts that are in excess of the State’s allocable share under the Master Settlement Agreement. *Id.* As a result, certain manufacturers that have sold a lot of tobacco products in Missouri have receive most of their escrow amounts back right away.

The proposed amendment to § 196.1003(b)(2)(B) seeks to modify this escrow arrangement so that these same manufacturers could only remove amounts from escrow if the amounts were in excess of a percentage of their nationwide sales. The only other ways for these manufacturers to remove amounts from escrow are waiting 25 years or in order to pay a judgment or settlement. Thus, the proposed amendment results in an “increase [in] the amount that certain tobacco product manufacturers must *maintain* in their escrow accounts” – just as the summary statement describes.

Plaintiff also claims that the reference in the summary statement to “bonding requirements” is wrong. According to Plaintiff, the use of “these manufacturers” at the end of the third bullet point should refer to the

“certain tobacco product manufacturers” at the beginning of the third bullet point, and not the “tobacco product manufacturer” referenced later. A natural reading of the third bullet point reaches this very conclusion. Indeed, the first reference to the plural “manufacturers” is matched by the reference in question to “manufacturers.” Thus, the summary statement’s description of the bonding requirements is accurate and the Plaintiff’s claims should be rejected.

II. The Trial Court Correctly Held That the Fiscal Note and Fiscal Note Summary are Sufficient and Fair Because the Processes Used Were Within the Statutory Authority of the Auditor as Provided by § 116.175, and the Resulting Fiscal Note and Fiscal Note Summary Adequately Inform the Public of the Fiscal Consequences of the Proposed Measure. – Responding to Appellant’s Point II.

A court’s role in initiative petition cases is limited. Where opponents of a measure (such as Plaintiff) bring suit, the court should give great deference to the State’s efforts. Again, the court’s “role is not to act as a political arbiter between opposing viewpoints in the initiative process.” *Missourians Against Human Cloning*, 190 S.W.3d at 456 (citing *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827). When called upon to intervene, courts “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.” *Id.* Furthermore, “Courts do not sit in judgment on the wisdom or folly of proposals.” *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827.

Challengers to a fiscal note and fiscal note summary “bear the burden of demonstrating in the first instance that the Auditor’s fiscal note and fiscal note summary are insufficient or unfair.” *MML I*, 303 S.W.3d 573 at 582 (citing *Cures Without Cloning*, 259 S.W.3d at 81). In *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo. App. W.D. 1994), the court declared that “the words insufficient and unfair as used in section 116.190.3, RSMo Supp. 1993, and applied to the fiscal note mean to inadequately and with bias, prejudice, deception and/or favoritism state the fiscal consequences of the proposed proposition.” The court also held that “[a]s applied to the fiscal note summary, insufficient and unfair means to inadequately and with bias, prejudice, or favoritism synopsis in [50] words or less, [] the fiscal note.” *Id.*

**A. The Auditor’s Process in Preparing the Fiscal Note
Complied With § 116.175, and the Information
Gathered Was Accurately Summarized.**

Section 116.175 provides the sole means by which a fiscal note and a fiscal note summary are prepared by the Auditor. Section 116.175.1 imposes a duty upon the Auditor to “assess the fiscal impact of a proposed measure.”

Subsection 1 goes on to describe the process by which the Auditor *may* gather information to assess the fiscal impact of a measure. Section 116.175.1 states,

... 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.

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

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

John Halwes is well aware of the statutory authority that he must work within, and is well aware of the processes approved by the court of appeals in the *Missouri Municipal League* cases. (Tr. 28). He carefully followed those processes in creating this fiscal note and fiscal note summary, as he does with each fiscal note and fiscal note summary. *Id.* Here, the evidence shows that the submissions of fiscal impact contained in the fiscal note are listed nearly verbatim as received from the submitting entities or individuals. (Tr. 35; Joint Exhibits, “J.Ex.”, 2, 7, 12, 17, 22, 27). In those submissions, there is supporting material for the Auditor’s statements in the fiscal note summary. (J. Ex. 2; LF 151-166).

The record in this case supports the fact that the fiscal note accurately summarized the information provided to the Auditor during the ten-day period granted opponents and proponents and the twenty-day total period given the Auditor to seek, receive back, analyze and assess information from state and local governmental bodies. (Tr. 29-20; J.Ex. 2, 7, 12, 17, 22, 27; LF

151-166). The court of appeals has repeatedly upheld this process of the Auditor for drafting fiscal notes. *See MML II*, __S.W.3d__, 2011 WL 3925612, at pages 7-8; *MML I*, 303 S.W.3d at 582.

In *MML I*, the plaintiffs claimed that the Auditor had failed to “independently assess” the fiscal impact of proposed measures when he compiled comments from government entities and, after reviewing them for “reasonableness and completeness,” transcribed them verbatim into the fiscal note. The court of appeals disagreed. 303 S.W.3d at 582. It held that the plain language of the statute does not mandate that the Auditor adopt another method, and found the current process adequate to satisfy statutory requirements. *Id.*

Subsequently, in *MML II*, the same plaintiffs tried a different tack, and argued that the Auditor’s process must first be promulgated as rules. The Court disagreed again. It noted the broad discretion granted the Auditor, for instance that he “*may* consult with state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal.” (emphasis in original), citing § 116.175.1. The court held: “The fact that the Auditor goes through a standard process to prepare fiscal notes and fiscal note summaries does not transform this discretionary role into one that must be formalized through rules and rulemaking procedures.” *Id.*

B. The Fiscal Note Summary Adequately and Fairly Synopsizes the Information Contained in the Fiscal Note While Conforming With § 116.175.

Plaintiff does not challenge the sufficiency and fairness of the fiscal note, and his sole challenge of the sufficiency and fairness of the fiscal note summary is the assertion that the Auditor reached beyond his authority as granted by § 116.175 by including the second sentence, “[t]he revenue will fund only programs and services allowed by the proposal.” Appellant’s Br. pp. 43-48. Not only is this sentence statutorily permitted by § 116.175, but it is necessary to fulfill the statute’s requirement that the Auditor assess the *fiscal impact* of the proposed initiative petition.

The fiscal note summary is arrived at after the compilation and assessment of the fiscal impact information contained in the fiscal note. (*See* § 116.175.1 and .3; Tr. 29-31; J. Ex. 2). The fiscal note summary for all six versions reads:

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.

(J. Ex. 2, 7, 12, 17, 22, 27; Joint Stipulation “JS” ¶ 19 as found at LF 321). This fiscal note summary fairly, and without bias or favoritism, synthesizes the fiscal note in fifty words or less, excluding articles. § 116.175.3.

Plaintiff asserts that the plain language of the statute limits the Auditor’s authority to stating the cost or savings to state or local government. Appellant’s Brief at 45. This interpretation would require that the court ignore the first and most important sentence of the statute which states, “the auditor shall assess the *fiscal impact* of the proposed measure”. § 116.175.1 (emphasis added). Section 116.175 does not define “fiscal impact.” Nor does it define “costs or savings.” In examining the issue raised by Plaintiff

... [we] must ascertain the intent of the legislature and give effect to that intent if possible by looking to the language used and by giving words their plain and ordinary meaning. [citation omitted]. When the statute fails to define a word, it is appropriate to derive the word’s plain and ordinary meaning from the dictionary.

Friends of Agriculture for the Reform of Missouri Environmental Regulations v. Zimmerman, 51 S.W.3d 64, 78 (Mo. App. W.D. 2001) (citations omitted); see *Hancock*, 885 S.W.2d at 49.

Since there are no definitions provided for “fiscal impact” in the statute, one looks to the following dictionary definitions:

“fiscal”- of or relating to taxation, public revenues, or public debt. *Merriam-Webster.com*. 2012. <http://www.merriam-webster.com> (18 June 2012).

“impact”- to have a direct effect or impact on. *Merriam-Webster.com*. 2012. <http://www.merriam-webster.com> (18 June 2012).

It is clear, then, that to fulfill his statutory duties under § 116.175, the State Auditor may examine issues relating to tax rates (current and/or prospective), revenue (current and/or prospective), public debt (current and/or prospective), and any other matter (*e.g.*, costs) related to those things in order to assess the effect of a proposed initiative petition upon the finances of public governmental bodies. This is consistent with the purpose of a fiscal note. “The purpose of a fiscal note is to inform the public of the *fiscal consequences of the proposed measure*.” *MML I*, 303 S.W.3d at 582 (emphasis added). Revenue gains or limits on the use of the new revenue is clearly a fiscal consequence. For nothing in § 116.175.3 provides for how the cost or

savings are to be specifically worded, and certainly does not limit the expression of costs or savings to just monetary figures. In fact, the statute does not limit the fiscal summary to *only* stating cost or savings as part of the fiscal impact. *See* § 116.175.3.

The fiscal note summary is arrived at after the compilation and assessment of fiscal impact information. *See* § 116.175.1 and .3. It is also important to note that “the fiscal note and fiscal note summary shall state the measure’s estimated cost or savings, if any, to state or local governmental entities.” § 116.175.3. Read in context with § 116.175.1, since the State Auditor may examine revenue, tax rates, public debt, and anything related thereto, there is a connection between the “fiscal impact” analysis and its resulting statement of “cost or savings.” Since “cost or savings” is not defined, we again look at the dictionary:

“saving(s)”- *a plural* : money put by money put by *b* :

the excess of income over consumption expenditures

—often used in plural. *Merriam-Webster.com*. 2012.

<http://www.merriam-webster.com> (18 June 2012).

“costs”- *a* : the amount or equivalent paid or charged

for something : price; *b* : *the outlay or expenditure (as*

of effort or sacrifice) made to achieve an object.

Merriam-Webster.com. 2012. <http://www.merriam-webster.com> (18 June 2012) (emphasis added).

It is clear from the common sense reading of the statute and the common understanding of the terms used in it that the Auditor first assesses the fiscal impact (on revenues, taxes, etc.) and from that assessment derives the costs or savings, if any, to state and local government. *See MML II; MML I; Hancock*, 885 S.W.2d at 49.

That the fiscal note summary may include new revenues and/or cuts to expenditures (since they are related to the fiscal impact costs of the proposal) and provide explanation is consistent with the *Hancock* case. The fiscal note summary in that case was:

This proposal would require state and local spending cuts ranging from \$1 billion to \$5 billion annually. *Cuts would affect prisons, schools, colleges, programs for the elderly, job training, highways, public health, and other services.*”

Hancock, 885 S.W.2d at 44 (emphasis added).

The fiscal note in *Hancock* “acknowledged that the exact amount of revenues that would be added to the calculation of Total State Revenue under the terms of the proposal were uncertain; the estimates ranged from \$1,440,000,000 to approximately \$5,400,000,000.” *Id.* The court in *Hancock*

found that in the fiscal note assessment process, the preparer of the fiscal note and fiscal note summary examined five categories of revenue, among other things. The appellate court reversed the trial court's finding that the fiscal note summary was insufficient and unfair. *Hancock*, 885 S.W.2d at 47-49.

The reference to additional revenue or possible increase in revenue in the fiscal note summary in this case is authorized by § 116.175 since that additional revenue or possible change in revenue is part of the calculation of “savings,” which is defined as the excess of income (revenue) over consumption expenditures. The phrase “[t]he revenue will fund only programs and services allowed by the proposal” is permissible to qualify and show that the use of the additional revenue is limited to programs and actions in the proposal, and not available for general use. This complies with the requirement to adequately inform voters about the possible fiscal consequences of the initiative petition.

The *Hancock* case is relevant and persuasive even though a different entity other than the state auditor prepared the fiscal note and fiscal note summary in that case. However, § 116.170.3, RSMo 1994, (in effect at the time of the *Hancock* case) contained the same “cost or savings” language as the current § 116.175.3. See § 116.170.3. So the *Hancock* analysis and

opinion provides support for the fiscal note and fiscal note summary prepared in this case.

As Mr. Halwes explained at trial, and the trial court agreed, part of the *fiscal impact* of a measure, then, is an understanding that there may be restrictions on how revenues created by a measure can be spent. (Pl. Ex. 33 at page 13 citing Halwes Deposition 46:7-48:17). Restrictions on how revenue is spent is clearly a subject that is *related to* revenue. In response to the argument that this phrase should be removed from the summary, the lower court stated, and the Auditor agrees, “[t]hose sentences [including the phrase at issue] are accurate summaries of the proposal and the fiscal impact comments received by the Auditor. Neither statement is inaccurate or unfairly prejudicial.” (Final Judgment at p. 10, LF 350). It is important for potential signers or voters to understand that the \$300 million in question will not be used for any purpose other than those prescribed by the initiative petition.

The purpose of a fiscal note is to inform the public of the fiscal consequences of a proposed measure. § 116.175.1. So long as the fiscal note conveys the fiscal consequences to the public adequately and without bias, prejudice, deceptions, and/or favoritism, the Auditor has met his responsibilities under the statute. *Hancock*, 885 S.W.2d at 49. Restrictions on newly created revenue are a very important fiscal consequence of a

proposed measure. Informing voters of this important consequence is necessary to comply with the duty mandated by the legislature in § 116.175, and the court of appeals in *Hancock*.

The Plaintiff asserts another meritless argument when he claims that the sentence “[t]he revenue will fund only programs and services allowed by the proposal” is misleading when read with the ballot summary, which alerts voters that funds generated by the initiative would be used for specific programs – and then provides an example of programs. (Appellant’s Brief at 47). The sentence in the fiscal note summary unequivocally advises that funds will be limited to “services allowed by the proposal” not to services discussed in general terms in the ballot summary. The Auditor believes that potential signers and voters considering the initiative petition would not be so careless in their reading of the fiscal note summary as to believe that “the proposal” refers to the 97 word ballot summary instead of the initiative as a whole. More importantly, there is no evidence to support a conclusion that signers or voters would be confused by the meaning of the language in the fiscal note summary.

Based on the foregoing discussion, the judgment of the trial court that the fiscal note summary is sufficient and fair should be affirmed.

III. Section 116.175 Does Not Conflict With Art. IV, § 13 of the Missouri Constitution Because the Constitution Permits the Legislature to Assign Investigations to the Auditor that Relate to the Receipt and Expenditure of Public Funds. – Responding to Appellant’s Point III.

The Auditor has never claimed that the preparation of fiscal notes or fiscal note summaries is part of an audit. Nor has the Auditor claimed that the last sentence of Art. IV, § 13 is not a limitation on the ability of the legislature to impose duties on the Auditor. Much of Plaintiff’s brief is, therefore, simply irrelevant to the issues in this case. Rather, the issue is how strictly those limitations of legislative authority are to be read and whether Plaintiff’s proposed reading is either logical or consistent with principles of constitutional construction. Plaintiff narrowly frames the question as whether Art. IV, § 13 expressly permits the legislature to require the Auditor to prepare fiscal notes and fiscal note summaries, but the more precise question is whether the Constitution prohibits that legislative assignment. *Farmer v. Kinder*, 89 S.W.3d 447 (Mo. banc 2002).

In effect, Plaintiff argues that the limiting clause is much more. That it is the empowering clause as well, thus strictly limiting the legislature’s authority to requiring duties only related to auditing. Plaintiff rewrites § 13 in two ways. First, he would read the specific enumeration of the Auditor’s

powers in Art. IV, § 13 to either eliminate the word “investigations” or make it redundant. Finally, he ignores the word “supervising” of the “receipt and expenditure of public funds” so as to limit the Auditor’s duty only to those relating to auditing of the receipt and expenditure of public funds.

The term “investigations” is not a term of art as used in the Constitution. Art. IV, § 13 explicitly provides that investigations can be assigned to the Auditor by the General Assembly. Investigations related to the receipt and expenditure of public funds are naturally related and associated with preparation of fiscal notes and fiscal note summaries of the fiscal impact of a proposed initiative. A fiscal note summary is intended to advise the voters about the potential cost or savings, if any, from adoption of the initiative.

Most importantly, Plaintiff’s argument violates rules of constitutional construction because it gives no meaning to the phrase “not related.” And yet, it would grant virtual free license to the legislature to assign to the Auditor duties of “investigations” without any limiting language. As long as some assignment fell within the scope of “investigations” it would be within the Auditor’s constitutional powers.

But by including the phrase “related to” the constitutional duties the people imposed a limitation on the scope of investigations by the Auditor and any other duties to those “related to the receipt and expenditure of public

funds.” “Related to” in its normal usage means “to show or establish a logical or causal connection between.” Webster’s Third New International Dictionary 1916 (1993). The question thus posited is whether preparation of a fiscal note is an investigation connected or associated with “the receipt and expenditure of public funds.” There should be no serious argument that costs to government are not connected to expenditures of public funds. Expenditures are costs.

Plaintiff would have this Court conclude that audits of the receipt and expenditure of public funds are the constitutional limit of the Auditor’s powers. But Art. IV, § 13 itself belies that contention. In addition to audits, the Constitution includes in the Auditor’s duties establishing accounting systems for all public officials of the state, investigations as provided by law and accounting and budgeting systems of political subdivisions. A fair reading of Art. IV, § 13 in its entirety must conclude that the people, when adopting the Constitution, must have envisaged that the legislature should be able to assign some duties to the Auditor beyond post-audits and establishing accounting and budgeting systems.

The fiscal note and fiscal note summary’s contents are established in § 116.175.3. “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 statute also specifies that proponents and opponents of a

measure may submit proposed statements of fiscal impact to the Auditor for inclusion in the fiscal note and assessment process as the Auditor prepares the fiscal note and fiscal note summary.

Plaintiff expends much argument criticizing the way the Auditor prepares fiscal notes. But that argument has nothing to do with the constitutionality of § 116.175 unless Plaintiff would concede that an independent assessment of fiscal impact would fall within the subject of an “investigation” under Art. IV, § 13. The standards and procedures the Auditor consisted of gathering of information (investigation) of potential impact from those likely to be effected by the initiative as well as its opponents and proponents. Section 116.175 does not require the Auditor to independently assess the fiscal impact of a proposed initiative. *MML I*, 303 S.W.3d at 582.

The Auditor does no analysis or evaluation of the correctness of the proposed impact statements, but only reviews for reasonableness and completeness. *Id.* The summary is by necessity a compilation of the various proposals which in 50 words is to summarize the various proposals, if you will, from high to low. The legislature labored under no fiction that the fiscal note and fiscal note summary would meet some standard of accuracy as it made the submission of proposals to the Auditor voluntarily and only allowed ten days for their submission by proponents and opponents and twenty days for

the Auditor's transmittal to the Attorney General. It is an "investigation" that is "related to the receipt and expenditure of public funds" and is, therefore, not prohibited by the Constitution.

IV. *Res Judicata* or Claim Preclusion in a Decision of a Lower Court Cannot Bar This Court's Determination of Whether § 116.175 is Constitutional. – Responding to Appellant's Point IV.

The Auditor does not deny that *res judicata* may, in theory, be asserted against the State within the same parameters it can be asserted against other parties. The government is bound by *res judicata* in the same manner private parties are bound. *Montana v. U.S.*, 440 U.S. 147, 157-158 (1979); *Alaska Dept. of Environmental Conservation v. E.P.A.*, 540 U.S. 461, 490 n.14 (2004) (acknowledging that preclusion principles apply against the United States, its agencies and its officers); *State ex rel. Nixon v. Jones*, 108 S.W.3d 187, 191 (Mo. App. W.D. 2003) (holding that the State was precluded under *res judicata* from re-litigating issues which could have been litigated in an earlier action). In order to invoke *res judicata*, a party must show that there are the same parties or parties in privity, same claims, and the disposition of the claim on the merits in an earlier lawsuit. *Southern Pac. R. Co. v. U.S.*, 168 U.S. 1, 48-49 (1897).

In *Montana*, the Supreme Court held that the federal government was precluded from bringing a claim in federal court that had already been adjudicated in state court.^{4/} *Montana*, 440 U.S. at 147. The controversy in *Montana* arose after the Montana Supreme Court declared a one percent tax on public construction contractors constitutional and the U.S. brought a secondary action on the same claim in federal court. *Id.* As the claims were identical and the matter was adjudicated on the merits in the state court, the Supreme Court held that Montana could successfully assert preclusion

^{4/} Though the United States was technically not a party to the first action, *Peter Kiewit Sons' Co. v. State Board of Equalization*, 505 P.2d 102 (1973) “*Kiewit I*”, the Court held that the U.S. had a sufficient “laboring oar” in the first action to justify asserting estoppel against the government in the second action, *Peter Kiewit Sons' Co. v. Department of Revenue*, 531 P.2d 1327 (1975) “*Kiewit II*”. *Montana*, 440 U.S. at 154. Though the Court discusses preclusion in this case in terms of “collateral estoppel” as the U.S. was technically not a named party in *Kiewit I*, later courts have held that a party in privity, like the U.S. in *Montana*, would be governed by *res judicata*. See *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 756-757 (1st Cir. 1994) (concluding that the *Montana* court did not mean to categorically eliminate privity in relation to *res judicata*).

against the federal government in the absence of significant legal changes or other compelling circumstances. *Id.* at 157-158.

Although generally claim preclusion may be asserted against the state as in *Montana*, there are limitations on what actions claim preclusion can be used against. Within the context of employment security, claim preclusion has been eliminated statutorily in actions against the state. § 288.215. The Court may also choose not to apply claim preclusion against the State where a matter is likely to come up in future litigation. *ITT Canteen Corp. v. Spradling*, 526 S.W.2d 11, 14 (Mo. 1975) (proceeding without applying *res judicata* where a statutory change may have effected a change to applicable law).

While claim preclusion may be asserted against the State and state actors, non-mutual collateral estoppel may not be asserted against the state.^{5/} *U.S. v. Mendoza*, 464 U.S. 154, 157-158 (1984) (holding that collateral

^{5/} Along with non-mutual collateral estoppel, equitable estoppel generally cannot be asserted against the State or state actors. *State ex rel. Capital City Water Co. v. Missouri Public Service Com'n*, 850 S.W.2d 903, 910 (Mo. App. W.D. 1993) (holding that the Company could not assert equitable estoppel against the Commission when the Commission deemed a contract imprudent after sending letters indicating that the contract was fine).

estoppel could not be used against the U.S. by a Filipino national in the U.S. seeking nationalization on constitutional grounds, where the U.S. had declined to appeal an adverse decision for another Filipino national on the same grounds). “The conduct of government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the government.”^{6/} *Id.* at 162-163. This Court extended the non applicability of non-mutual collateral estoppel to actions against Missouri and Missouri state actors in *Shell Oil Co. v. Director of Revenue*, in which it held that the Director of the Department of Revenue was not estopped from collecting taxes on aviation fuel based on the actions of a prior Director. 732 S.W.2d 178, 182 (Mo. banc 1987).

Claim preclusion can be effectively asserted against the State and state actors where the claim has already been adjudicated on the merits. The application of issue preclusion against the State is much more restricted, and

^{6/} After declining to apply non-mutual collateral estoppel against the United States, the Supreme Court reaffirmed that *res judicata* still constrains the United States in actions against the same party or parties in privity. *Mendoza*, 464 U.S. at 163.

collateral estoppel cannot be asserted against the State where there is non-mutuality of parties. This case is an example of issue, not claim, preclusion. Moreover, application of claim preclusion in these circumstances would permit a lower court ruling from being reviewed by the highest court when only the Auditor and not the State of Missouri, was a party to the other action. The Attorney General is given the duty of defending the constitutionality of Missouri statutes, but was not involved in the earlier Plaintiff actions.

V. Even if This Court Agrees with Plaintiff's Constitutional Claims, it Should Order the Initiative Placed on the Ballot With the Fiscal Note or Alternatively Order the Initiative Placed on the Ballot Without a Fiscal Note.

Plaintiff fails to discuss at all whether the proper remedy, if § 116.175 is unconstitutional, is the drastic measure of barring the initiative from the ballot. The Constitution prescribes no penalty for the Auditor's performance of an act beyond the scope of Art. IV, § 13 and it is unreasonable and unnecessary to restrict the constitutional right of the people to initiative by directing that an initiative proposal cannot be voted on because an unauthorized person prepared an otherwise sufficient fiscal note and fiscal note summary. The Constitution does not require *any* fiscal note and fiscal note summary.

The legislative goal in requiring a fiscal note and fiscal note summary is to give voters some information about potential effects of an initiative on cost or savings of a proposed initiative. That salutary goal is satisfied, no matter who prepares the fiscal note and fiscal note summary. The court's determination that the legislature could not require the Auditor to prepare that information should not invalidate the initiative itself.

Until 1997, the salutary purpose of fiscal notes and fiscal note summaries for initiatives, referendums and proposed constitutional amendments was conducted by the Oversight Division of the Committee on Legislative Research. These duties were imposed on the Auditor after this Court held that the statute requiring fiscal note summaries to be prepared by that Committee concerning initiative provisions was unconstitutional. *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392, 395 (Mo. banc 1996).

Faced with a dilemma of initiative proposals being placed on the ballot with no fiscal impact information or being potentially ineligible for placement on the ballot because of the lack of the statutorily required fiscal note and fiscal note summary, the legislature considered its options. Placing the duties on the Secretary of State was not practical since the Secretary already prepared ballot summaries and Art. IV, § 14, Mo. Const. provides “[n]o duty shall be imposed on him by law which is not related to [his duties as

prescribed in this constitution].” The Constitution likewise provides “[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....” Art. IV, § 15, Mo. Const. The Attorney General would not be a proper choice since he was already charged with the responsibility of approving the content and form of both the ballot summary and the fiscal note summary before certification by the Secretary of the State. Placement of the responsibility in the Governor’s office or an executive branch agency controlled by him was likely neither a palatable or desirable choice.

The State Auditor was not only a practical and logical choice, but undoubtedly appeared to the legislature to fall within the parameters of the Auditor’s constitutional authority because the fiscal impact of initiative petitions seems logically connected to investigations of fiscal matters and the receipt and expenditure of public funds.

By a 1908 amendment to the 1875 Missouri Constitution, the people of Missouri reserved to themselves the rights of referendum and initiative. An outgrowth of the Populist movement, referendum and initiative reflect a special power of the people to self-govern. Of course, the Missouri Constitution, then and now, only established the right, as it did with many other rights (such as the right to suffrage guaranteed by Art. I, § 25).

Protection of those rights and their implementation necessarily and foreseeably required that rules and procedures be established by the legislative branch.

Our courts have long recognized that the constitutional right of an initiative should have as few obstacles and impediments as possible. “Because the right of initiative is firmly grounded in our constitution, the courts of Missouri have established a pattern of allowing substantial latitude with regard to the technicalities of seeking to place an initiative measure on the ballot.” *Missourians Against Human Cloning*, 190 S.W.3d at 459 (Smart, J. concurring in part and dissenting in part). As a consequence, statutes may not limit or restrict the right to initiative. *State ex rel. Elsas v. Mo. Workmen’s Comp. Comm.*, 2 S.W.2d 796, 801 (Mo. banc 1928). This Court cast the principle in another way in *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827. Before 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. (emphasis added).

The requirement of a fiscal note and fiscal note summary as part of the initiative process (as well as legislation in the General Assembly) arises from statute, not the Constitution. The identity of the author of a fiscal note and fiscal note summary does not call into question the integrity of the election. A few years after *Missourians to Protect the Initiative Process*, this Court

reaffirmed that its paramount concern is determining whether or not the statute makes an irregularity fatal. *Committee for a Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503, 509 (Mo. banc 2006). The statute governing fiscal notes specifies no penalty for an irregularity in the preparation of a fiscal note. The *Committee for a Healthy Future* reiterated a long-standing principle “that courts will not be astute to make it fatal by judicial construction.” *Id.*

In *Thompson*, this Court ordered that the proposed initiative be placed on the ballot without a fiscal note. 932 S.W.2d at 395-396. Plaintiff presents no sound argument for the Court to overturn that precedent. If the Court believes that § 116.175 is unconstitutional, it should order the same relief herein. Alternatively, if, on the merits, the Court finds the fiscal note and fiscal note summary to be sufficient, it should place this measure on the ballot with the fiscal note as prepared.

CONCLUSION

For the foregoing reasons, the circuit court should be affirmed.

Respectfully submitted,

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CERTIFICATION OF SERVICE AND COMPLIANCE

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 10,513 words.

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