
IN THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

Jim Boeving, *et al.*,

Plaintiffs-Appellants,

v.

Raise Your Hand for Kids, *et al.*,

Intervenors-Respondents.

Appeal from the Circuit Court of Cole County, Missouri

The Honorable Jon E. Beetem

Circuit Court Nos. 16AC-CC00307; 16AC-CC00310; 16AC-CC00323

BRIEF OF INTERVENORS-RESPONDENTS RAISE YOUR HAND FOR
KIDS & ERIN BROWER

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PRELIMINARY STATEMENT

On May 7, 2016, Raise Your Hand for Kids (“Proponents”) submitted to the Secretary of State (“Secretary”) the valid signatures of 209,263 Missouri voters who have properly exercised their constitutional rights to propose a constitutional amendment to support early childhood health and education, funded through increases to Missouri’s cigarette tax. Because all constitutional and statutory requirements were met, the Secretary certified the initiative to appear on the ballot for voter approval this November as “Amendment 3.”

It is undisputed that citizen Proponents complied with every constitutional mandate and statutory procedural requirement over which they had control. Proponents timely submitted its petition by the constitutionally mandated deadline containing more than enough verified signatures from eight percent of legal voters in each of the six congressional districts. Every one of the 209,263 verified signatories were provided the full text of the measure. Although it is not constitutionally required, the measure was attached to a petition form approved by the Attorney General containing an “official ballot title” certified by both the Secretary and the Auditor. Proponents used the approved form to gather every single signature, and timely submitted the Petition to the Secretary.

Two months after Proponents timely submitted their Petition, this Court ordered a five-word addition to the summary statement to be included on the ballot. The Secretary has already certified the new ballot title to the local election authorities.

Now, relying on a tortured reading of initiative petition statutes, Opponents seek to retroactively invalidate every signature properly gathered and submitted to the Secretary because of this post-submission change to the official ballot title. Opponents' interpretation of Chapter 116 would essentially eliminate Proponents' constitutional right to initiate and would impermissibly elevate Opponents' limited statutory participation rights in this process over the constitutionally protected rights of citizen proponents. Opponents' interpretation would also let state officials' non-material title drafting error disenfranchise every single Missouri voter from passing on this proposed constitutional amendment that has already garnered tremendous support statewide. There is no appellate precedent for such a thorough deprivation of an innocent party's constitutional rights. The trial court properly rejected Opponents' construction of Chapter 116.

The trial court also properly found against Opponents on their claim that the measure improperly amends multiple articles of the Missouri Constitution. Finally, the trial court properly dismissed the remainder of Opponents' fallback substantive constitutional claims as unripe, some for a second time in this litigation.

The trial court's judgment should be affirmed.

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JURISDICTIONAL STATEMENT

Proponents concur in the jurisdictional statement with respect to Arrowood's appeal. However, the Boeving and Pund appeals raise issues within the exclusive jurisdiction of the Missouri Supreme Court. Mo. Const. art. V, § 3. Boeving and Pund Opponents claim that §§ 116.120 and 116.180 require invalidation of petition signatures solely because a court ordered a five-word revision to the official ballot title after Proponents filed their petition by the express deadline contained in Article III, §50 of the Missouri Constitution. By way of defense, Proponents counter that to retroactively invalidate their entire initiative petition, as requested herein, would essentially eradicate citizens' reserved initiative petition rights under Article III, §§ 49 through 53, and Article XII, § 2(b), of the Missouri Constitution. The trial court rejected Boeving and Pund Opponents' draconian reading of Chapter 116 and properly construed the statutory initiative provisions according to their plain meaning and to preserve Proponents' constitutional initiative rights.¹ The only way the Boeving and Pund Opponents can prevail, however, is to pursue a statutory construction that not only does not avoid a violation of Proponents' constitutional initiative rights, but creates one. Accordingly, the constitutionality of Chapter 116 as applied to this case

¹ *See* SC95902; SC95905 (dismissing appeals on constitutional claims by Proponents because they prevailed below). The trial court is presumed to have found in Proponents' favor on their constitutional defenses. *See State ex rel. State Highway Comm'n v. Wiggins*, 454 S.W.2d 899, 901–02 (Mo. banc 1970).

is front and center in this appeal. As such, the appeals fall within the exclusive jurisdiction of the Missouri Supreme Court. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985); *Wiggins*, 454 S.W.2d at 901–02.

Proponents raised their constitutional defenses at the earliest opportunity in a motion to dismiss, as defenses, and at trial and preserved them at each step of the judicial process. *See, Sharp v. Curators of Univ. of Missouri*, 138 S.W.3d 735, 738 (Mo. App. E.D. 2003). Moreover, Proponents' constitutional defenses present a case of first impression and thus, are real and substantial claims. *Dodson v. Ferrara*, ED 100952, 2015 WL 4456188, at *7 (Mo. App. E.D. July 21, 2015).

STATEMENT OF FACTS

With two exceptions, Proponents agree with Appellants' Statements of Facts. First, Pund's Statement of Facts Part F., is an argumentative retelling of the trial court record and judgment. The Legal File speaks for itself. Second, the following facts are relevant should the Court decide to reach Proponents' constitutional defenses.

Intervenors Raise Your Hand and Brower ("Proponents") are supporters of the Initiative Petition and ballot measure at issue in these cases ("Amendment 3"). Intervenors' Appendix ("IA") 03-04. They have and will continue to spend time and money to support the passage of Amendment 3. IA004. Proponents directed that Amendment 3 be filed; they raised financial resources, and committed time, to develop and draft Amendment 3, obtain the support of their fellow Missouri citizens, and place it on the ballot;

and they now advocate passage of Amendment 3 at the November 8, 2016 general election. IA035.

A. Proponents worked on preparing and gathering support for Amendment 3 from the 2014 general election until it filed its draft language in November 2015

Proponents' preparation of a constitutional initiative petition was laborious and time-consuming. First, citizens like the members of Raise Your Hand who band together to prepare an initiative petition must undertake substantial work even before they submit a sample sheet to the Secretary of State. IA033-34. To this end, immediately after the 2014 general election, Proponents began to study proposals for a new, statewide program to improve early childhood health and education in Missouri. IA004. This work coalesced into drafts of concrete proposed legislation in the late summer and early fall of 2015. IA005. Proponents prepared many proposals based on its study of the law and potential support for change (IA004-05), and ultimately settled on pursuing a constitutional amendment in November 2015 (IA005). It filed its Initiative Petition sample sheet, starting the pre-approval process, on November 20, 2015. *Id.*

The mandatory process for seeking state pre-approval of the form of the petition and the Secretary's certification of the official ballot title takes approximately 45 days. IA034. After this is complete, litigating a challenge to the official ballot title may take six months (or longer) pursuant to a statutory 180-day deadline in § 116.190.5, RSMo. *Id.*

Even after a constitutional amendment is conceived and planned, and state pre-approval is obtained (with or without ensuing litigation), it remains difficult to qualify a constitutional initiative petition for the ballot in Missouri. IA034. *Missouri Farm Bureau Fed'n v. Kirkpatrick*, 603 S.W.2d 947, 949 (Mo banc. 1980). This is so for several reasons. Missouri imposes a geographical distribution requirement, requiring that measures qualify in six of Missouri's eight congressional districts. *Id.* Second, Missouri has a heightened threshold for constitutional amendments; 8% of the voters (measured by the total vote in the last gubernatorial election) in each of the districts must approve placement of the measure on the ballot. *Id.* Practically, this requires obtaining the support of a broad swath of voters in a state that is already diverse. *Id.* Finally, the petition process itself is difficult. *Id.* Obtaining access to public places to gather signatures is challenging in Missouri for various reasons. Additionally, opponents often resort to "blocking" campaigns, in which paid contractors shadow circulators and physically attempt to impede signature gathering. IA034-35. Next, various statutory requirements relating to petition circulators, notaries, the form of signatures, the physical attachment of various petition pages without separation for several months, and the organization of petition pages add a layer of difficulty to the process. IA035. Finally, proponents must typically gather far more than the required number of signatures, as many voters who believe they are registered and qualified in a particular area actually are not. *Id.* All of these errors are caught in the validation of signatures by local election authorities, and the review of petition pages and oversight by the

Secretary of State. *Id.* All of these challenges presented themselves to Proponents with respect to Amendment 3. *Id.* Coping with these challenges has been expensive. *Id.*

B. Proponents collected signatures from Missouri voters in reliance on the Attorney General's and Secretary of State's approvals of the form of the Petition and the legal content of the official ballot title.

In early December 2015, Attorney General Chris Koster and the Secretary approved the form of the Initiative Petition. IA005; L.F.0203-0205. On January 4, 2016, Koster approved the form and legal content of the summary statement to be used in the Secretary's official ballot title. IA006; L.F.0207-0208. On January 5, 2016, the Secretary issued a Certification of Official Ballot Title for the Initiative Petition, L.F.0209, containing the text of the official ballot title so certified, comprised of a summary statement and fiscal note summary ("the January 5, 2016 official ballot title"). IA006. Proponents relied on the approvals from the Attorney General and the Secretary, and the January 5, 2016 official ballot title. *Id.* Proponents paid for the printing and the circulation of petitions, in the form approved by the Secretary and the Attorney General. *Id.*

C. The validity of the signatures gathered by Proponents in reliance on the Attorney General and Secretary's approval of the petition stand unopposed except through Opponents' claim regarding the legal effect of a post-filing change to the Official Ballot Title

Signatures for all 2016 general election initiative petitions were required to be submitted to the Secretary by May 8, 2016. *Id.* More than

150,000 valid signatures were required across at least six congressional districts. *Id.*

Proponents submitted over 330,000 signatures from individuals who represented themselves to be Missouri voters who supported placing the Initiative Petition on the November 2016 general election ballot. These 330,000 signatures were obtained over four months' time by Proponents, at considerable effort and expense. IA007. Proponents submitted to the Secretary at least 209,300 valid signatures of voters in the applicable Congressional district on petition pages in the form approved by the Secretary and the Attorney General and which contained the full text of the measure attached to every petition signature page. IA008.

The record indicates that the Secretary reviewed compliance with his directive regarding the form of the Petition—including the official ballot title—when Proponents submitted their petitions in May, 2016. When proponents deliver the petitions, the Secretary examines the petitions and issues a box receipt. The Secretary's initial examination checks for (1) "pages that have been collected by any person who is not properly registered . . . as a circulator"; and (2) "petition pages that do not have the official ballot title affixed to the page." Pund A19 (citing Section 116.190, RSMo). Petition pages that do not have the official ballot title affixed to the page are immediately eliminated from consideration. *Id.*

This process having been concluded, the signature totals reported in the Certificate of Sufficiency, IA014, stand unopposed by the Opponents. The

proponents submitted sufficient signature numbers in six of Missouri's eight congressional districts—congressional districts 1, 2, 3, 5, 6, and 7. *Id.*

Opponents put forward no evidence that any petition signature certified by the Secretary was from a voter who was misled into signing the petition. At a minimum, the 209,263 voters who signed the petition had the opportunity to review the full text of the measure, which was attached to every petition signature page for such voters as required by the Missouri Constitution. Pund A10.

The Secretary has already certified the ballot to Local Election Authorities for printing. § 116.240, RSMo. Unless removed by this Court, Amendment 3 will appear on the November 8, 2016 general election ballot with the ballot title certified by this Court as “sufficient and fair.” IA013.

D. Additional Facts Concerning the CBEC Fund

Prior to April 14, 2016, there had never been any monies deposited in or appropriated to the CBEC Fund. IA009. To make possible a constitutional argument that transferring any funds in the CBEC Fund to the newly-created fund constituted an unconstitutional appropriation by initiative, a tobacco lobbyist (and Amendment 3 opponent) donated \$100 to the fund. IA019-22. The tobacco lobbyist stated that he wanted the funds used by CBEC. The lobbyist's \$100 donation was initially placed into fund number 0610. IA009. The \$100 donation was transferred from Fund 0610 to Fund 0773 (the CBEC Fund) on April 14, 2016, without an appropriation. *Id.*

ARGUMENT

I. The trial court correctly ruled that Chapter 116 did not invalidate every single one of the signatures submitted to the Secretary on May 7, 2016 (Arrowood & Boeving’s Point I; Pund’s Point I).

A. Standard of Review

In the appeal of a court-tried civil case, the judgment of the trial court will 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.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Though the case was primarily tried on stipulated facts, the trial court made at least two additional fact findings entitled to deference: (1) that Opponents failed to introduce any evidence that a single voter was misled into signing the petition; and (2) that every petition signer whose signature was counted as valid by the Secretary had the opportunity to review the full text of the measure. Pund A10.

Moreover, Missouri courts recognize that judicial intervention in the initiative process is seldom appropriate. *Kuehner v. Kander*, 442 S.W.3d 224, 228 (Mo. App. W.D. 2014). “[W]hen a court is ‘called upon to intervene in the initiative process, [it] 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.* (citing *Brown v. Carnahan*, 370 S.W.3d 637, 645 (Mo. banc 2012)). This tenet is fundamental to this court’s standard of review. *Id.* Opponents cannot carry their burden to overturn the Secretary

of State’s certification of Amendment 3. § 116.200, RSMo; *Ketcham v. Blunt*, 847 S.W.2d 824, 830 (Mo. App. W.D. 1992).

B. Laws implementing the initiative process must be liberally construed and interpreted to avoid both unconstitutional interference with initiative rights and disenfranchisement of voters.

Opponents challenge the Secretary’s certification claiming §§ 116.120, 116.180, and 116.190.4 permit the retroactive invalidation of an initiative petition timely submitted in compliance with every constitutional requirement. Such an interpretation contravenes Missouri’s long-standing rule that “the provisions under which the people exercise the power of initiative must be liberally construed so as not to interfere with the initiative process.” *Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608 (Mo. banc 1982) (citing *State ex rel. Voss v. Davis*, 418 S.W.2d 163 (Mo. 1967)).²

² Pund seems to claim that a statute must be utterly ambiguous to benefit from liberal construction and as such Chapter 116 can still be read to support his position (Br. at 18). He is wrong. Under canons of constitutional avoidance, there need only be some “fairly susceptible” interpretation that avoids state officials’ errors to disenfranchise the voting public. *United Labor*, 572 S.W.2d at 453–54. “[Liberal] constructions, by necessity, may not always be the ones first suggested by the plain language of the statute” *Vote Yes*, L.F.0582. Notwithstanding Pund’s argument that liberal construction does not permit a court to morph a statute to say something that it plainly cannot be read to say (Br. at 18–20), if a statute cannot be liberally construed

Liberal construction of initiative laws advances two related goals. First, it recognizes that by Missouri citizens' original design, "[t]he initiative power set forth in art. III, §50 of the Missouri Constitution is broad and is not laden with procedural detail." *United Labor Committee of Mo. v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. banc 1978). "[P]rocedures designed to effectuate [the initiative] should be liberally construed to avail the voters with every opportunity to exercise these rights." *Id.* As a matter of constitutional law, courts interpret the statutes implementing the initiative process broadly to make effective the people's reserved powers. *Id.*

Second, "[A] construction of a law as would permit the disfranchisement 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." *Bowers v. Smith*, 20 S.W. 101, 103 (Mo. 1892). This is Missouri's initiative petition-specific application of the doctrine of constitutional avoidance. "[I]f one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838–39 (Mo. banc 1991).

The provisions of Chapter 116 at issue here present an especially compelling case for liberal construction because they relate to the petition process which is reserved to the people. Notwithstanding Opponents'

to avoid a conflict with the constitutional initiative right, the statute is invalid. *See, e.g., Rekart*, 639 S.W.2d at 608.

contentions to the contrary, the General Assembly is *not* acting under Missouri citizens’ express grants of authority to manage elections using “general laws.” The people of Missouri constitutionally reserved the right to amend their constitution by the initiative, “*independent of the general assembly.*” Mo. Const. art. III, § 49 (emphasis added). Crucially, Article III, § 53 provides the only express grant of legislative authority to regulate the initiative process. L.F.0580 – 0583. *Vote Yes to Stop Double Taxation*, Cole County Circuit Court, Case No. 10AC-CC00504, p. 19–20 (Aug. 31, 2010) (Wilson, J.).³ But such authority *relates only to the actual submission of the measure to the people*—the voting at an election—and even then, only to control the duties of officers such as the Secretary and the Attorney General.⁴

³ After Judge Wilson entered his decision, the Secretary of State agreed to certify the initiative, and Judge Wilson agreed to vacate his memorandum of opinion declaring certain statutes as unconstitutional legislative infringements on the initiative right. L.F.0561; *Vote Yes to Stop Double Taxation v. Carnahan*, Amended Final Judgment, Cole County Circuit Court, Case No. 10AC-CC00504 (Sept. 2, 2010) (Wilson, J.).

⁴ “In *submitting the same to the people* the secretary of state and all other officers shall be governed by general laws.” Mo. Const. art. III, § 53 (emphasis added). Missouri citizens retained precisely the same limitations when they delegated authority to the legislature to implement the constitutional amendment process; “law” may intercede only for *submittal* to voters at the election—*not* for petition circulation: “All amendments proposed by the general assembly or by the initiative *shall be submitted to the electors for*

Missouri citizens did *not* delegate authority for the legislature to interfere with or impede the petition circulation or submission process. *Id.* To be sure, “Minor details may be left for the legislature without impairing the self-executing nature of constitutional provisions . . . but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purposes, and must not in any particular attempt to narrow or embarrass it.’” *United Labor*, 572 S.W.2d at 455 (quoting *State ex rel. City of Fulton v. Smith, State Auditor*, 194 S.W. 302, 305 (Mo. banc 1946)).

Accordingly, not all parts of Chapter 116 are created equal. Where (as here) the General Assembly legislates regarding the circulation and submission stage, acting outside of citizens’ delegation of authority to provide rules for initiative elections, there is all the more reason to be skeptical of entirely novel requirements that could allow state officials’ purportedly benevolent “pre-screening” duties to completely defeat an initiative. Courts cannot “permit the failure of [a third person], whatever his reason, to defeat the initiative submission *in spite of the fact that the proper number of voters have done all they can to comply with the initiative procedure.*” *United Labor*, 572 S.W.2d at 454) (emphasis added); *see also Bowers*, 20 S.W. at 103. As shown below, these interpretive principles aid a plain-text review of the relevant statutes, and show that the trial court correctly read Chapter 116.

their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election...” Mo. Const. art. XII, § 2(b) (emphasis added).

Boeving and Pund slice and dice *United Labor's* discussion of *Kasten v. Guth*, in an attempt to morph the court's decision to support their argument. In both cases, Opponents claim to locate a special rule that is exactly the opposite of the prevailing rule of liberal construction: any time a statute makes an irregularity fatal, Opponents claim, the Supreme Court is obligated to uphold the statute and cannot test its constitutionality. Neither *Kasten* nor *United Labor* so holds, and neither case was decided in favor of Opponents.

In *Kasten*—an election contest case, not involving the initiative—there was evidence that some ballots cast and counted did not contain judge's or clerk's initials and did not have black stickers placed over numbers marked on ballots. *Kasten v. Guth*, 395 S.W.2d 433, 435 (Mo. 1965). The appellant argued that votes from certain election districts should be voided. *Id.* Accordingly, it was not necessary for the *Kasten* court to consider whether the statute at issue *would be constitutional* if applied to disenfranchise voters,⁵ whether by its plain text or otherwise. *See id.*

Likewise, in *United Labor*, the court counted signatures for an initiative even though the evidence demonstrated that significant numbers of signatures were fraudulently notarized. 572 S.W.2d at 453–54. The *United Labor* court held that under a liberal construction, the applicable statute did

⁵ *Kasten* is also distinguishable because it simply considers a general law relating to elections, not the citizen-reserved constitutional right to initiative in which (as shown above) the General Assembly's power to build procedural hurdles for petitioners is sharply limited by the constitution itself.

not invalidate voters' signatures. *Id.* at 454–56. Relevant here, *United Labor* also contrasted the error of a notary to the error of a voter:

These actions of third parties involved in the initiative process should not operate to deny the larger body of honest persons who have done all they can do to place this measure on the November ballot the opportunity for its submission to the entire electorate.

Id. at 457. *United Labor* applied the two-step process the Missouri Supreme Court later followed in *Rekart* and *Upchurch v. Blunt*; courts liberally construe statutes to conform to the initiative right. *See id.* at 454–56. If the statute cannot be construed to avoid infringing or impeding the initiative right, the statute is invalid. *Rekart*, 639 S.W.2d at 608; *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 517 (Mo. banc 1991).

C. The trial court correctly determined that Chapter 116 does not invalidate initiative signatures due to a post-petition submission ballot language change.

1. Chapter 116 allows circulators to follow the law and make the ballot; it does not create traps or impose duties that are impossible to meet

The trial court properly determined that sections, 116.120, 116.180, and 116.190, which burden petition circulation to mandate use of an “official ballot title” not required by the constitution, can only be reconciled with the constitution when such provisions are read to impose burdens Missouri citizens can actually meet. If any signature is to be stricken because of non-compliance, it can only be because a petition circulator had it in his or her

power to use the correct ballot title, but chose not to do so. It so happens that this interpretation is also the most natural reading of Chapter 116.

Section 116.120 requires that the Secretary check the petitions to ensure they include the official ballot title “when” the petition “is submitted.” This provision confirms that the statutes are focused on the use of the correct ballot title during the *circulation* phase, something that can (and must) be checked right away, even before signature verification. The statute provides as follows:

When an initiative... petition is submitted to the secretary of state, he or she shall examine the petition to determine whether it complies with the Constitution of Missouri and with this chapter... Signatures on petition pages that do not have the official ballot title affixed to the page shall not be counted as valid.

The Secretary’s actual policy reflects this understanding as well:

The Secretary issues the proponents a box receipt and the examination process can begin immediately upon receipt of the petition pages. The examination specifically includes two checks: (1) for “pages that have been collected by any person who is not properly registered with the secretary of state as a circulator; and (2) for “petition pages that do not have the official ballot title affixed to the page.” [§ 116.120.1, RSMo.] Such pages can be immediately eliminated from consideration, for the statute says that signatures on those pages “shall not be counted as valid.” *Id.*

Here, Plaintiffs have made no showing that upon presentation to the Secretary, any of the pages did “not have the official ballot title affixed to the page.” Their only showing is that the pages did not have the ballot title later certified by the Court of Appeals.

Pund A10-A11.

Opponents impermissibly expand § 116.120 into an interminable requirement that reaches forward to encompass any future official ballot title revision and reaches back to retroactively invalidate all signatures using the only available version of the title. The General Assembly chose its words far more carefully, plainly delineating *the precise time* when the secretary is to examine the petition to check that the official ballot title has been affixed: “[w]hen an initiative or referendum petition is submitted[.]” This makes all the difference. The General Assembly properly recognized that *post-submission* ballot title changes cannot, consistent with due process and citizens’ constitutional initiative rights, penalize proponents who faithfully affixed the then-current ballot title while they circulated, and “submitted” the petitions in exactly the form required of them. Other laws and regulations confirm this interpretation, fixing the date for evaluating a petition either at the “date of submission” or “date of signature” time. § 116.110, RSMo (petition signers may not withdraw their signature after the petition is submitted); §§ 116.080, 116.040, RSMo (circulator registration determined at time petition is submitted); 15 CSR 30-15.010 (voter names and addresses valid if correct as of the date the voter signed the petition). Opponents’ convoluted reading of §§ 116.180 and 116.190 fared no better. Even more

than §116.120, the text of § 116.180 makes clear that the “ballot title” mandate applies to circulators when it remains within their power to comply; and likewise, circulators suffer the penalty of not “counting” their fellow citizens’ signatures only when they have failed to follow a duty that was within reach. The legislature’s use of a single sentence clarifies the cause and effect: “Persons circulating the petition shall affix the official ballot title to each page of the petition prior to circulation and signatures shall not be counted if the official ballot title is not affixed to the page containing such signatures.”

Again, the Secretary’s and trial court’s view of the statute follows the logical, plain text reading. “The ‘official ballot title’ referenced in Section 116.180, RSMo, must be ‘the official ballot title’ certified by the Secretary of State and delivered to the proponents. Here, that is the official ballot title certified by the Secretary on January 5, 2016.” Pund A15.

Proponents complied with § 116.180 by affixing the official ballot title certified by the Secretary in effect during petition circulation. IA007-08; Pund A18. Section 116.180 also contains an express time for a petition circulator to “affix” the official ballot title: “prior to circulation.” Proponents did precisely that. IA007-08. No other ballot language was certified until July 18, 2016, more than two months *after* the constitutionally required petition submission date.⁶ L.F.0210; Mo. Const. art. III, § 50.

⁶ As the circuit court recognized, in some future case, this Court may be asked to determine the effect of a change to the official ballot title when, before signature turn-in, a court changes the official ballot title. Here,

Pund appears to agree that the invalidity of signatures flows from the circulators failing to affix the title. Br. at 22–23. In contrast, Boeving selectively quotes § 116.180 to obscure who is supposed to affix the official ballot title and when. By dividing up the legislature’s simple cause-and-effect sentence, Boeving makes it appear that the failure to “count” signatures is a consequence that can suddenly spring up at any time the ballot title is revised—regardless of whether circulators failed to attach the official ballot title at the time of circulation. Br. at 16–17. But again, Section 116.180 belies that interpretation and directs “[p]ersons circulating the petition [to] affix the official ballot title to each page of the petition *prior to circulation . . .*” (emphasis added).

Opponents’ related argument concerning 116.190.4 also fails, as it simply relies on their’ flawed reading of § 116.180 above. Section 116.190.4 explains what happens when a court revises the language of an official ballot title. It states: “for the purposes of section 116.180, the secretary of state shall certify the language which the court certifies to him.” But the “purposes” of § 116.180 after the petition has already been submitted are limited. First, the Secretary must certify the official ballot title and deliver the court-certified title to the proponents. Pund A17. There is no dispute that the Secretary complied. L.F.0210. Second, as explained above, circulators shall “affix the official ballot title to each page of the petition prior to circulation.” § 116.180. But by the time the Secretary delivered the new ballot

Opponents affixed the only official ballot title language that existed at the time of petition circulation and signature turn-in.

title to the Proponents in this case, they had not had possession of the petition pages for 10 weeks. There was nothing for them to do. (Indeed, requiring them to affix new ballot language would, in this case, conflict with the express “time to affix” requirement in § 116.180.) There being no possible duty for circulators at this late point, the signatures they gathered could not possibly be stricken for failing to attach a revised ballot title.

Contrary to Opponents interpretation, § 116.190.4 *does not* state or require—as it could have—that the Secretary invalidate signatures gathered on petition pages for which petitioners affixed the only available official ballot title because the title was revised post-submission. Instead, the legislature directed the Secretary to use the revised ballot language for one task: certification and delivery of a new ballot title under § 116.180. If the legislature had intended the Secretary to skip over these steps and simply declare the petition insufficient, it could and would have said so. But we must assume it did not so intend, because if insufficiency is the automatic result of a post-submission ballot title change, the requirements of certification and delivery would be meaningless and superfluous. *Cf. Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013) (courts presume the legislature did not use superfluous language).

Boeving also argues that the trial court’s interpretation renders § 116.190 meaningless. Br. at 22–26. On the contrary, § 116.190.4 is the provision that requires the Secretary to issue a new official ballot title, which the Secretary did and which will now appear on the November 2016 ballots. It is Opponents’ interpretation that renders §116.190.4 meaningless. Not only

does it assign the Secretary superfluous tasks, as mentioned above, it also renders provisions in §§ 116.185 and 116.195 meaningless.

Section 116.185 permits a title change for identical or substantially identical ballot issues before the ballot is printed. If a title change would result in invalidating every signature and the petition itself, as Opponents maintain, then this provision is unnecessary. Additionally, §116.195 requires the State to pay the costs of reprinting ballots because of a court-ordered ballot title change. According to Opponents, a court ordered title change after ballot printing (which is even later in the process than this case) would nullify every signature gathered with an earlier title and invalidate the entire petition. If that were the case, the State would never be liable for reprinting costs and this provision would be meaningless. Clearly §§116.185 and 116.195 contemplate that ballot language may change late in the election season, after all ballot measures have been certified, and, in the case of § 116.195, even after ballots are printed. The legislature used the term “statewide ballot measure” in §§ 116.185 and 116.195 to specifically include a “constitutional amendment submitted by initiative petition.” Section 116.010, RSMo. If the ballot title for an initiative or referendum petition could not change after petitions have been submitted and ballots have been printed, the legislature’s use of the term “statewide ballot measure” would be improvident. *Cf. Bateman*, 391 S.W.3d at 446.

In short, the trial court correctly determined that courts can and should construe Chapter 116 in a way that avoids invalidating the 209,263 signatures of Missouri voters.

2. **The trial court’s construction of Chapter 116 promotes the goals of the initiative process and avoids unconstitutional results.**

By submitting 209,263 valid signatures (330,000 total signatures) Proponents demonstrated that any state interest in making sure such measures have requisite support, is fully met. *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 463–64 (Mo. App. W.D. 2006) (Smart, J., concurring in part and dissenting in part). The circulated petitions already contained the full text of the measure as required by the Missouri Constitution. *Id.* “[A] ballot summary ambiguity is easily curable by the interested citizen at the petition stage (because the language of the initiative is attached to the petition), and the cost and burden of recirculating petitions is so great, that it would tend to frustrate constitutional objectives in such a case to require recirculation of the petitions.” *Id.* at 463 (citing *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402, 405 (Mo. banc 1984)). *See also* IA033-35. The November 8, 2016, general election will occur using the ballot title certified by the court of appeals as “sufficient and fair.” *Missourians Against Human Cloning*, 190 S.W.3d at 463–64; IA013. Changing the ballot title for voters when they enter the voting booths this November ensures that voters approve changes to the constitution that they do, in fact, desire to approve. *Id.*; *see also* *Union Elec. Co.*, 678 S.W.2d at 405 (stating in a sufficiency challenge: “We believe that the trial court was unduly concerned about the title and content of the circulated petitions. . . . The full act appeared on the

back of each petition We cannot see how the signers could have been deceived or misled at this stage of the initiative process.”).

The trial court’s construction also advances the state’s recognized interest in giving “all who actually desire the passage of the proposed measure every opportunity to obtain the required number on a petition” See *United Labor*, 572 S.W.2d at 454 (citations omitted). In contrast, Opponents’ interpretation unconstitutionally (and unpredictably) operates to deprive initiative proponents of months of constitutionally provided signature gathering time. *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 517 (Mo. banc 1991) (citing Art. III, § 50; Art. XII, § 2(b)).

The initiative process requires that proponents be able to rely on signatures that they have obtained. *Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608 (Mo. banc 1982). Where, as here, there is no evidence that a single voter was misled into signing a petition (Pund A10)—let alone that a single voter wants to remove his or her signature for any reason at all, as in *Rekart*—there is no basis for punishing proponents and petition signers, or for disenfranchising all Missouri voters. Proponents and petition signers followed all of the constitutional and statutory requirements given them.

Finally, Opponents’ construction of Chapter 116 dis-incentes the speedy determination of ballot title litigation, a need that even the General Assembly belatedly recognized in enacting the 180-day deadline that was the subject of earlier disputes between the parties here. Proponents who truly believe a title is misleading voters should want to move quickly to stop the alleged mistake. But if all signatures gathered using the old ballot title are

automatically invalid, opponents' incentive is exactly the opposite: to string out the litigation for the full 180-day period. At worst, this drastically shortens the window of time for petition circulation using a new title. Even better, if the 180 days runs after the petitions are submitted, opponents can kill the petition by default so long as any revision at all is made to the title. The mere process of designing the official ballot title for circulated petitions—a legislatively-devised voter “aid” not even required by the constitution—becomes the punishment for proponents and voters alike. Voters' exercise of their initiative rights will not depend on the level of support for a measure, as the constitution contemplates, but instead, on the manner in which state officials and litigants game the fight over the ballot title. Any reading of Chapter 116 which allows such a distortion of Missourians' initiative rights must be rejected.

D. No legal decision supports Opponents' proposed construction of Chapter 116.

Boeving cites a pair of 2006 trial court judgments as the primary legal authority embracing his signature argument. Br. at 23–25. The *Tuohey* decisions are unpersuasive for the reasons disclosed therein. Boeving A42–A49; L.F.0549–0552. Neither *Tuohey* decision solely relied on Opponents' arguments to this Court. The initiative proponents in the *Tuohey* cases failed to comply with the statutory requirements in section 116.100, governing the petition submission process, and the Court held that the “Secretary of State properly rejected the Initiative Petition” on that basis. Boeving A44, A46 (proponents “ran out of time” and “made a conscious decision to include with

their petition disorganized or noncompliant pages”). “The Initiative Petition was described by Director of Elections Betsy Byers as the second worst organized initiative petition submitted to the Secretary of State’s Office during her tenure.” Boeving A46. The *Tuohey* court held, “Section 116.100 does not allow the Secretary of State to disregard the proponents' conscious decision to submit hundreds of petition pages that intentionally fail to comply with the organizational requirements therein.” Boeving A46. The *Tuohey* court’s statements regarding the official ballot title were not essential to the judgment. However, those judgments both rely on § 116.175, RSMo, concerning the fiscal note summary. While an interested petition signer can review the full text of the measure to cure any defect in the summary statement, the same is not true of the fiscal note summary, which the auditor authors utilizing fiscal impact submissions received and his knowledge of state government. Moreover, the *Tuohey* decisions are not persuasive in their interpretation of § 116.180 or their constitutional analysis.

Boeving also cites *Dotson v. Kander*, 464 S.W.3d 190 (Mo. banc 2015), for support. Br. at 25. But *Dotson* does not aid Opponents. *Dotson* concerned a referred constitutional amendment and solely related to ballot language used at the election. *Dotson*, 464 S.W.3d at 192–200. Here, there is no dispute that the official ballot title certified by the Court of Appeals is fair and sufficient. Moreover, there is no dispute that every petition signer had an opportunity to review the full text of the measure before signing. *Missourians Against Human Cloning*, 190 S.W.3d at 463-64; IA013.

Boeving's reliance on *Moore v. Brown*, 165 S.W.2d 657, 663 (Mo. banc 1942) as evidence of a longstanding policy regarding the importance of a fair ballot title is also misplaced. Br. at 26. Unfortunately for Boeving, the ballot title was not at issue in *Moore*. 165 S.W.2d at 662.⁷

E. There is no factual or legal basis for Arrowood or Boeving to claim estoppel based on Proponent's position on intervention in Boeving I.

First, Boeving cites *Prentzler v. Carnahan*, 366 S.W.3d 557 (Mo. App. W.D. 2012), for the proposition that initiative petition signers—as opposed to proponents—do not have a sufficient interest to intervene in an official ballot title action. Br. at 19. While this statement is true, it actually works against Boeving. The *Prentzler* appellants appealed the denial of a motion to intervene as of right. *Prentzler*, 366 S.W.3d at 559. They contended that they had signed the petition, and their signatures would be invalidated if a court changed the official ballot title. *Id.* at 562. The *Prentzler* court affirmed, specifically noting the absence of case law supporting an argument that a change to the official ballot title would invalidate any signatures. *Id.* at 562, 564.

⁷ *Moore* upheld a statute requiring an initiative to attach the full text of a constitutional amendment, including provisions impliedly amended or repealed. *Id.* As more fully explained below, Amendment 3 does not impliedly amend or repeal any constitutional provisions. *See* Part IV, *infra*.

Second, Boeving overstates the relevance of the Court of Appeals' decision in *Allred v. Carnahan*. 372 S.W.3d 477, 485 (Mo. App. W.D. 2012). The *Allred* court did not analyze whether the secretary of state may count signatures on initiative petition pages if a court authors a change to the official ballot title after the petition was submitted. *See id.* Similar to *Prentzler*, *Allred* concerned the standard for intervention in a ballot title lawsuit. *Id.* at 480. The *Allred* court noted that the disposition of a ballot title case could frustrate the efforts a proponent takes to organize, support, and fund an initiative petition campaign. *Id.* at 485. This statement is obviously true, and is in no way dependent on whether a change to the ballot title invalidates signatures. The *Allred* court additionally noted that initiative proponents have an interest in a quick resolution of ballot title litigation. *Id.* The mere pendency of a lawsuit may quell support and donations in favor of an initiative. *See id.* The *Allred* court correctly stated that a proponent's interest in expeditious resolution of a ballot title case differs from the secretary of state and state auditor, who take a "time-neutral view of the litigation." *Id.* Proponents' interest in an expedient resolution satisfied the minimal showing needed to justify intervention as a matter of right. *See id.* The trial court properly determined that *Allred* does not support Opponents' statutory construction argument.

Third, Boeving overstates a quote from Proponents Motion to Intervene, in January, in the previous Boeving case. In that case, Proponents noted—using the permissive word "may," rather than "shall" or "must"—that initiative opponents have long argued any change to the official ballot title

invalidates all signatures previously gathered. It is undisputed that the official ballot title action did not challenge any of the signatures gathered by Raise Your Hand and that the effect of a ballot title change on signature collection was (and is) an open question. *Cf. Prentzler*, 366 S.W.3d at 562. Proponents correctly noted that an adverse ruling in the official ballot title action promised to create a new line of attack in a sufficiency challenge under § 116.200, RSMo. The instant litigation proves Proponents' point. Opponents have sought to use the official ballot title as a political and legal weapon against the initiative. Additionally, Opponents' repetitive litigation caused Proponents to spend substantial time and resources. But as a result, almost every attack raised by opponents in *Boeving I* was defeated; hundreds of thousands of signatures were obtained; Amendment 3 was certified; and it is currently slated for the November 2016 ballot using a revised ballot title.⁸

⁸ *Boeving's* unpled (and unpreserved) "estoppel" argument lacks merit. *See Br.* at 26–28. As explained above, Proponents have never claimed and would never claim that revisions to the ballot title automatically invalidate signatures; no court has ever held that proponents need to surrender the validity question in order to intervene in Section 116.190 cases; the question was never actually litigated; no court found the signatures would be invalid; and Proponents' positions in *Boeving I* and *II* are entirely consistent. This Court even noted in its *Boeving I* opinion that the validity of signatures was not at issue. L.F.0952. And even if none of this were true, *Boeving* makes no factual showing that Proponents slowed the ballot title litigation or otherwise imposed some detriment on him. *Boeving's* claim of estoppel merely shows

II. If Chapter 116 invalidates signatures due to a post-petition submission ballot language change, Chapter 116 unconstitutionally interferes with Proponents' reserved right to propose initiated amendments. (Arrowood & Boeving's Point I; Pund's Point I).

A. Standard of Review

Proponents incorporate by reference the Standard of Review section set forth *supra* at page 8. Taking the stipulated facts as true, this presents a question of law; the standard of review is de novo.

If Chapter 116 requires state action that is not mandated under the Missouri Constitution, and that action completely extinguishes citizens' reserved right to amend the Constitution by the initiative, then it is unconstitutional. *See, e.g., Upchurch*, 810 S.W.2d 515; *Rekart*, 639 S.W.2d 606; *United Labor*, 572 S.W.2d 449. Opponents' strained reading of Chapter 116 is custom-built precisely for this to occur: state actors will have seized control of the process from Missouri citizens by unilaterally preparing, compelling petitioners to use, and then successively reviewing and revising (many times, to petitioners' detriment) the official ballot title at the petition circulation stage. Conflicts between different branches of state government on the required content of the ballot title will have made it impossible for citizens to comply with the General Assembly's extra-constitutional requirement to "affix" ballot titles to petitions, dooming the initiative.

that he is desperate to find any reason whatsoever to block a vote on Amendment 3.

B. Statutory “official ballot title” requirements cannot impermissibly interfere with or impede initiative rights guaranteed by the Missouri Constitution.

The Missouri Constitution sets forth the primary requirements of the initiative process in Article III, § 50. The provision under the Missouri Constitution for an “official ballot title” appears only in Article XII, § 2(b), *and relates only to the voting ballots*:

All amendments proposed by the general assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto, at which he may submit any of the amendments.

Nothing in the Constitution authorizes or mandates inclusion of an “official ballot title” on petition pages during circulation. Article XII, § 2(b)’s “official ballot title” is only constitutionally required after a constitutional amendment is “proposed . . . by the initiative.” As then-Circuit Judge Paul Wilson wrote in a lengthy and well-reasoned decision in 2010, the constitution does not permit the legislature to interpose requirements that interfere with the right of the initiative. *Vote Yes*, L.F.0580–0583. The constitution does not permit the legislature to borrow the official ballot title that Article XII requires inside voting booths at the election, and transplant it to burden the initiative petition rights reserved by the people under Article III. *See id.*

Boeving mis-cites Article III, § 53 to claim that “the initiative ‘shall be governed by general laws.’ ” Br. at 16. In fact, as noted above in Point I, § 53 only provides that “[i]n submitting [an initiative or referendum petition] to the people the secretary of state and all other officers shall be governed by general laws.” Section 53 does not grant the legislature plenary authority over the people’s reserved right to the initiative, and certainly not over the petition circulation and submission process.

Opponents also argue that despite the fact that Proponents did all they could to comply with the initiative procedure, the error of state officials voids Proponents’ initiative rights. Opponents’ construction of Chapter 116 is illogical and unconstitutional. *See Rekart*, 639 S.W.2d at 608. Proponents circulated all of its petitions using the official ballot title certified by the Secretary of State on January 5, 2016. IA007. This wasn’t just good practice, it was required by law, regardless of Proponents’ opinion of the ballot title. §§ 116.120; 116.180, RSMo. When, two months after Proponents submitted its petition, the Secretary certified a new official ballot title, the only constitutional (and statutory) remedy is the remedy Opponents already received: the revised official ballot title will on the ballot in November. IA013. Opponents—and the courts—cannot simply erase the right to the initiative in the Missouri Constitution and months of work by thousands of citizens.

C. Opponents’ construction of Chapter 116 violates the express petition signature gathering period contained in the Missouri Constitution.

Opponents cannot answer a central question posed by their interpretation: what should petition signers have done differently to exercise their constitutional right to place Amendment 3 on the ballot? *See, e.g., United Labor*, 572 S.W.2d at 454–55. Opponents’ only proposed solution is to force an unconstitutional bargain: to avoid a complete loss of their petition rights, proponents must agree to forfeit eight⁹ of the eighteen months the constitution requires be held open for qualifying a measure. They must begin the initiative process so early that all ballot language disputes are fully litigated, eliminating any possibility of change, before petition circulation even begins.

But Opponents’ proposed timeline for petition circulation, waiting eight months after a proposal is submitted, is its own constitutional violation: it dramatically truncates the eighteen month petition circulation period protected by the Missouri Constitution. *Upchurch*, 810 S.W.2d at 517 (invalidating part of Chapter 116 that cut eight months from the then 20-month period by preventing a proponent from submitting an initiative petition sample sheet to the secretary of state more than one year before the constitutionally mandated signature turn-in date.). The constitution protects proponents’ right to circulate a petition from the day after a general election (November 5, 2014, here) until six months before the next general election

⁹ For Amendment 3, the time from initiative petition sample sheet to a court-ordered ballot language change was almost eight months. Compare Joint Pund A29 (submitted November 20, 2015) with L.F.0210 (ballot language change certified July 18, 2016).

(May 8, 2016). If Opponents are right, and Chapter 116 implicitly prevented Raise Your Hand from circulating its petition from January 5, 2016 through May 8, 2016, Chapter 116 would violate the Missouri Constitution. *Id.* (citing Art. III, § 50; Art. XII, § 2(b)); *United Labor*, 572 S.W.2d at 454–55 (“Legislation cannot limit or restrict the rights conferred by the constitutional provision.” (citations and internal quotations omitted)).

This is, in fact, the general rule, and Missouri is not alone in holding unconstitutional laws that retroactively eliminate the initiative right. Other states similarly provide that post-submission changes to the official ballot title do not invalidate an initiative.¹⁰

¹⁰ *Pedersen v. Bennett*, 230 Ariz. 556, 557, 288 P.3d 760, 761 (2012) (accepting petition despite incorrect ballot title); *Kromko v. Superior Court In & For County of Maricopa*, 168 Ariz. 51, 811 P.2d 12 (1991) (same); *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725 (Alaska 2010) (court ordered change to ballot title did not invalidate a petition); *Costa v. Superior Court*, 37 Cal. 4th 986, 1012, 128 P.3d 675, 689 (2006) (discrepancies between the two versions of the initiative measure did not warrant withholding the measure from the ballot). *Cf. Walmsley v. Martin*, 2012 Ark. 370, 423 S.W.3d 587 (2012) (refusing to certify initiative for ballot because the Arkansas Constitution provides: *At the time of filing petitions the exact title to be used on the ballot shall by the petitioners be submitted with the petition . . .*” (emphasis added)).

D. Opponents construe Chapter 116 to impose a “death penalty” for voter signatures that is not tailored to advance any legitimate goal of Article III.

Invalidating every signature as Opponents request would penalize initiative proponents and voters and essentially eradicate their right to initiate through no fault or action of their own. This offends all notions of due process and bears no relation to any legitimate governmental interest in the stability of the initiative process. *Rekart*, 639 S.W.2d at 608 (finding permitting signature withdrawal after signature turn-in unconstitutionally interfered with and impeded the initiative power). Not only is the voter “death penalty” unconstitutional on its face, it fails any level of scrutiny, it certainly triggers—and fails—strict scrutiny. *Cf. Weinschenk v. State*, 203 S.W.3d 201, 215–16 (Mo. banc 2006) (applying strict scrutiny to violations of fundamental rights under substantive due process and equal protection theories). The initiative power is a fundamental right whereby Missourians may amend their constitution (including amendments that affect other fundamental rights). *See id.* Opponents’ interpretation of Chapter 116 would impose a severe and impermissible burden on Proponents’ right to the initiative. *Id.*

Here, and in the case of every group of voters whose petition have progressed far, constitutional requirements that ensure stability in the initiative process have already been met. *See* Mo. Const. art. III, § 50; *Rekart*, 639 S.W.2d at 608 (“Section 50 sets out the requirements of the initiative,”). This is an arduous process and requires months or years of

planning. *See* IA033-35. There is no evidence that the constitutionally-required restrictions on the initiative process are inadequate to protect its stability.

Opponents cannot distinguish Missouri Supreme Court precedent that has rejected even more narrowly tailored signature invalidating rules at issue in this case. For example, in *Rekart*, 639 S.W.2d at 608, the Missouri Supreme Court considered whether individuals who signed a petition could withdraw their signatures after the petition was submitted. Although this right of withdrawal could hardly be more closely tailored to the state's interest in ensuring that those who sign a petition actually want the proposal to make the ballot, the court still said, "no." *Id.* at 607–09. Opponents here failed to prove that any voter signed the petition, but was misled, or later changed her mind about submitting the measure to her fellow citizens for a vote. The *Rekart* plaintiffs met this evidentiary burden, but the Supreme Court still held—despite solid proof that individuals wanted to withdraw their support—that initiative proponents may rely on the signatures they obtain and submit. *Id.* at 608.

Here, Opponents point only to this Court's *Boeving I* decision reversing the trial court, the Attorney General, and the Secretary to find that five words, "which fee shall increase annually," should be inserted at the end of a bullet point. This change accounts for an inflationary adjustment to one of proponents' two revenue sources, thereby avoiding the potential that a voter who (in the voting booth this November) cannot review the full text of the measure will be misled. But the court's holding does not address whether

petition-signers actually were misled, or, even if so, whether this was so serious that it would have led the requisite number of voters to withhold their signatures. It is a far cry from *Rekart*, where petition signers solemnly requested to withdraw their support for the initiative. The failure in *Rekart* of even an affirmative representation that a signer no longer wanted to vote on an initiative forecloses Opponents' claims here. The Missouri Supreme Court has made clear that "Proponents of an initiative petition must be able to rely upon signatures they have obtained." *Id.* at 608.

III. The trial court correctly ruled that Opponents' constitutional claims are not ripe before the election and, in any event, are meritless (Arrowood & Boeving's Points II-IV; Pund's Points II and III).

A. Standard of Review

Proponents incorporate by reference the Standard of Review section set forth *supra* at page 8. This presents a question of law; the standard of review is *de novo*.

In pre-election challenges to constitutional amendments, Courts must attempt to harmonize an initiative's language with article III, section 51 of the Missouri Constitution. *Committee for a Healthy Future v. Carnahan*, 201 S.W.3d 503, 510 (Mo banc 2006). Accordingly, Opponents bear a "heavy burden" to show that the unconstitutionality is "obvious" and not even "debatable." *Knight v. Carnahan*, 282 S.W.3d 9, 22 (Mo. App. W.D. 2009). Only facial claims are ripe before an initiative is submitted to voters, and that is rare. "This exception [to the prohibition against pre-election review] comes into play where the constitutional violation in a proposed measure is

so obvious as to constitute a matter of form.” *Knight v. Carnahan*, 282 S.W.3d 9, 21 (Mo. App. W.D. 2009); *United Gamefowl Breeders Ass’n of Missouri v. Nixon*, 19 S.W.3d 137, 139 (Mo. banc 2000) (pre-election, courts only review “those threshold issues that affect the integrity of the election itself, and that are so clear as to constitute a matter of form.”).

B. Summary

Opponents have two tasks: they must not only show that all of their constitutional claims are ripe (or “facial” claims, in the peculiar way that term is used in ballot title cases); they must also show that they win on their claims. Opponents fail on both tasks.

It is important to note at the outset that Opponents have abandoned or materially changed the substantive constitutional arguments they raised below. First, Arrowood abandons her main “taxation” argument, which claimed that taxing certain tobacco manufacturers was unconstitutional. *See* L.F.0013. Second, Arrowood’s other “taxation” argument, which claimed that Amendment 3 unconstitutionally surrenders the power to tax, has been transformed into an Article III, § 51 challenge. *See* L.F.0012-0013. Third, Arrowood now attempts to argue that Amendment 3 violates a new provision of the Constitution, Article I, Section 7—a point never pled or argued below, and therefore, not preserved. L.F.0008-0017. Fourth, Pund’s related argument (her Point III) is now cursory and abandons any attempt to explain how Amendment 3 violates Missouri’s religion clauses. Pund now simply argues that merely because Amendment 3 states that another portion of the Missouri Constitution (one of the religion clauses) “shall not limit”

disbursement of funds, Amendment 3 is for a “purpose” prohibited by the Constitution. This sharply narrowed argument waives any other claim about how or why Amendment 3 violates Missouri’s religion clauses.

C. Opponents’ constitutionality claims are unripe because they are substantive, not facial.

Because Opponents cannot show that Amendment 3 is *facially* unconstitutional, their constitutional claims are unripe. *Knight*, 282 S.W.3d at 21. Claims also are not “facial” if they depend on extrinsic facts. Because courts must attempt to harmonize an initiative’s language with the Constitution, including article III, § 51, such a finding is rare.

Arrowood uses “facial” to mean every constitutional challenge that does not allege a specific, “as-applied” injury to a plaintiff. Br. at 30. Pund first cites part of the proper standard (that a defect be “so obvious as to constitute a matter of form”) (*Id.*), but then proposes a different test: if a challenge can be determined based on the “text” of the measure, it is “facial.” *See* Br. at 34. Both Opponents seem to rely on authority that distinguishes between facial and “as applied” challenges for purposes of determining standing in other types of constitutional cases; neither cites any Missouri ballot title case applying their proposed standard for what is “facial.” That is because, as discussed above, Missouri courts mean something very different when they recognize pre-election “facial” challenges to initiatives. Otherwise, what was a narrow exception to the general unripeness of constitutional challenges will become the new rule, since almost all Section 116.200 challenges are not “as-applied” and almost all rely on the “text” of the measure. Instead, Missouri

courts are clear that, because of the court's duty to "attempt to harmonize all provisions of [an] initiative's proposal with the constitution," a constitutionality argument that is merely "debatable" cannot be reviewed pre-election because it is, by its very nature, not one of "those threshold issues that affect[s] the integrity of the election itself, and that [is] so clear as to the constitute a matter of form." *Knight*, 282 S.W.3d at 22.

If they are not invalid outright, Opponents' claims are at best debatable, making them unripe. Section III.E, below, explains why Opponents' claims are at best "debatable."

Opponents' appropriations argument (Arrowood and Pund Point II) is not "facial" for an additional reason: it relies on extrinsic facts. Because Amendment 3 must be reconciled with the non-appropriation requirement of Article III, § 51, Opponents can only prevail if, at a minimum, there is at least some money to be "appropriated" (under Opponents' theory) in the Coordinating Board for Early Childhood ("CBEC") Fund on Amendment 3's effective date. But it is undisputed that the CBEC Fund sat empty from its creation many years ago until mid-April of this year, when a tobacco lobbyist "donated" \$100 for the purpose of making this very constitutional argument. IA009. The donation was not even made directly into the CBEC Fund, but had to be moved there (by administrative action, without an appropriation) from another fund. *Id.*

This "procured fact" does not suggest that the initiative was submitted in an invalid form or that the initiative otherwise violates Article III, § 51. Pursuant to 116.050, RSMo, the Secretary determines form when a sample

sheet is submitted. *See also* § 116.332.1, RSMo. A fact “procured” by initiative opponents in April 2016 does not invalidate the form of the initiative, which was approved in December 2015. IA005; L.F.0203-0205.¹¹ Further, it suggests that little is needed—not even an appropriation—to shift small amounts between these particular funds, and it could happen again, especially if this is the only impediment to Amendment 3. IA009. But as shown below, Opponents’ arguments have many other flaws.

D. Opponents’ constitutionality claims are meritless.

Even if this Court finds that a claim presents a facial challenge and is therefore ripe, each of them lacks merit.

1. Amendment 3 does not violate constitutional provisions regarding appropriations (Article III, § 51)

Article III, § 51 of the Missouri Constitution provides, in pertinent part:

¹¹ Opponents’ form argument is inconsistent with the broad initiative right described by the Missouri Supreme Court in *Earth Island Institute. Compare Knight v. Carnahan*, 282 S.W.3d 9, 19 (Mo. App. W.D. 2009) (“By its plain meaning, section 116.050 . . . require[s] the inclusion of those sections impliedly repealed because provisions in the measure are “so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force.”), *with Earth Island Institute v. Union Electric Co.*, 456 S.W.3d 27, 32–37 (Mo. banc 2015) (in order to avoid interference with the petition process, an initiative petition was deemed to have repealed by implication a statute that was passed after the petition was submitted, but before it was placed before voters).

“The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution.” Opponents incorrectly claim that by restructuring the oversight board for two related funds, Amendment 3 “appropriates” money in violation of article III, § 51.

a. Nothing in Amendment 3 is an appropriation.

Opponents’ arguments fail at step one. “An appropriation is legislative authority to spend a certain amount of money for a stated purpose. *See* Mo. Const. art IV, § 23.” *Chastain*, 420 S.W.3d at 557 (Wilson, J., concurring); *see also* Pund Br. 31 (citing *State ex rel. Sikeston R-VI School Dist. v. Ashcroft*, 828 S.W.2d 372, 375 (Mo. banc 1992)). Nothing in Amendment 3 authorizes removing money from the state treasury without an appropriation from the General Assembly. Pund A29-A32; *see* Mo. Const. art. III, § 36.

Amendment 3 does not convey the authority to withdraw funds from the state treasury. Pund A29; *see Conservation Fed’n of Mo. v. Hanson*, 994 S.W.2d 27, 30-31 (Mo. banc 1999) (general assembly may still pass appropriations consistent with constitutional trust fund for conservation). An appropriation is something the legislature passes to allow a state agency to spend money—not a command (like Amendment 3) to organize the statutory or constitutional structure of the funds that hold revenues. § 21.260, RSMo. (“Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose.”). *State ex rel. Fath v. Henderson*, 160 Mo. 190, 60 S.W. 1093, 1097 (Mo. 1901) (act creating a fund which must be appropriated before it can be

withdrawn from the treasury is not an appropriation). Because the General Assembly must still appropriate the \$100 currently sitting in the CBEC Fund, even if it is transferred into Amendment 3's Early Childhood Health and Education Trust Fund, the reorganization cannot constitute an appropriation within the meaning of Article III, Section 51.

b. Any Potential Monies in the CBEC Fund are not being earmarked for a new purpose.

The new Fund will receive not only hundreds of millions of dollars in new revenues, but also, potentially, the \$100 that Amendment 3 opponents recently "planted" in the empty Coordinating Board for Early Childhood ("CBEC") Fund to create their claim. Opponents simply assume that Amendment 3 earmarks the \$100 for some purpose distinct from whatever purpose was permissible for CBEC Fund monies, converting a fund reorganization into an earmarking, or perhaps even into a disguised appropriation. (Boeving even informs this Court that the \$100 is being "seized." Br. 33.) That is incorrect. In fact, the new Fund may be spent for activities of the new Early Childhood Commission ("ECC"), a successor to the CBEC which assumes all of its duties. And the CBEC Fund existed (but was never used) solely to fund those CBEC activities now being assumed by the ECC.

Amendment 3 reforms the existing CBEC as the ECC. The CBEC Fund, a special trust fund managed by the CBEC, is consolidated with the new fund created by Amendment 3 to hold new tax revenues, called the Early Childhood Health and Education Trust Fund, so that both sets of revenues

are managed by the ECC as the successor organization. *See* Proposed Section 54(b)1-2. The ECC stands in the CBEC’s shoes, and expressly assumes the “Coordinating Board’s programs, duties, obligations, powers, assets, and liabilities[.]” Amendment 3 therefore imposes no new obligations on the state, nor does it mandate a change in the purposes for which the \$100 in the CBEC Fund (to the extent it remains) is to be spent. Pund A29-A32. The ECC can use the \$100 to continue the very same activities as its predecessor, the CBEC.

How will this work in practice? As discussed above, Amendment 3 contemplates that, just as with the old CBEC Fund, the General Assembly will appropriate monies in the ECC’s new fund. *See, e.g.*, proposed Section 54(c).3 (“The additional actual costs incurred by the state in collecting and enforcing the taxes and fees imposed by this section may be paid from moneys appropriated from the Early Childhood Health and Education Trust Fund for that purpose”). The \$100 can (but need not) be traced and disbursed as a separate account, in accordance with § 210.102.2, RSMo. Either way, the \$100 will not be spent until it is appropriated. That appropriation may begin as a request from the CBEC’s successor to use the \$100 for the same activities for which the CBEC could have used them. While there are rules for the distribution of funds in the new Fund, nothing in Amendment 3 requires the \$100 to be used for purposes inconsistent with the CBEC Fund. Contrary to Boeving’s claim, for example, there is no requirement that the \$100 must be used for other activities, such as smoking cessation. Ultimately, the \$100 will be appropriated—if ever—pursuant to

the familiar process involving the request from CBEC's successor and the general assembly.

c. Amendment 3 does not fall within the category of initiatives recognized as violating Article III, § 51.

Cases interpreting the constitutional prohibition on appropriations by initiative make clear that it was meant to address concerns that are not implicated by Amendment 3. In *City of Kansas City v. Chastain*, the Missouri Supreme Court described the purpose of the Article III, Section 51, as prohibiting “an initiative that, either expressly or through practical necessity, requires the appropriation of funds to cover the costs associated with the [initiative].” 420 S.W.3d at 555. The *Chastain* court reversed the trial court and upheld a proposed ordinance on constitutionality grounds when the proposed initiated ordinance did not “create financial obligations for the city.” *Id.* at 556. Here, Amendment 3 does not require the expenditure of any amount in excess of the revenues in the Early Childhood Health and Education Trust Fund.

The *Chastain* decision correctly identified the danger that the drafters of Missouri's 1945 Constitution had in mind when they included a prohibition on using the initiative to appropriate existing state revenues. *See, e.g., Moore v. Brown*, 262, 165 S.W.2d 657, 659 (Mo. banc 1942) (“The measure was to be known on the ballot as Amendment No. 5, and provided in substance that there shall ‘annually stand appropriated out of any money in the general revenue of the State of Missouri the sum of \$29,000,000,’ to pay a monthly grant to designated incapacitated persons over 65 years old, and in aid of

dependent children.”). No such danger exists in this case because nothing in Amendment 3 creates financial obligations for the state, either expressly or “through practical necessity.” *See id.* at 555 . This “practical necessity” rationale was the basis for the decisions in *Kansas City v. McGee*, 269 S.W.2d 662, 666 (Mo. 1954), and *State ex rel. Card v. Kaufman*, 517 S.W.2d 78, 79–81 (Mo. 1974).

Amendment 3 does nothing more than ensure that the successors to CBEC and the CBEC Fund remain bound together. Opponents provide no persuasive reasons for this Court to intervene. Moreover, Opponents rely on an overly broad interpretation of Article III, Section 51 that would prohibit initiative petitions any time a proponent made substantial revisions to a governmental body that administers a fund. This leads to absurd and unworkable results that would impair citizens’ ability to use the initiative process to effect government reforms. But retaining the ability to make such reforms was surely one reason citizens reserved a broad initiative power under Article III, Section 49. No Missouri appellate court has upheld this interpretation of Article III, Section 51, and it contravenes the language used by the Supreme Court in *Chastain*. 420 S.W.3d at 555. Therefore, Amendment 3 does not constitute an “appropriation” within the meaning of Article III, Section 51.¹²

¹² 81A C.J.S. States § 415 (“Where the constitution does not define an appropriation or specify when or how an appropriation by law must be made, these matters are proper subjects for judicial interpretation.”).

2. Amendment 3 does not violate the Blaine Amendment or any related provision of the initiative power (Article IX, § 8; Article III, § 51)

Amendment 3 contains a carve-out provision under which distributions of funds to support early childhood education and healthcare programs would “not be limited or prohibited by the provisions of Article IX, section 8,” a provision which by its express terms applies only to the general assembly and various local bodies. Pund A31. Article IX, section 8 is, of course, the so-called Blaine Amendment, which purports to prohibit the “general assembly” and local bodies from making an “appropriation” or “pay[ing]” public funds in aid of various religious groups. *See generally* art. IX, § 8. Opponents complain that Amendment 3’s carve-out would violate the combination of the Blaine Amendment and Article III, § 51. This is incorrect; initiated amendments may carve-out restrictions in certain constitutional provisions. *See, e.g., Kuehner v. Kander*, 442 S.W.3d 224, 229–30 (Mo. App. W.D. 2014).

Opponents’ argument is no more successful if one reads Article III, § 51 to prohibit use of the initiative for “any other purpose prohibited by the constitution,” regardless of whether that “use” is an appropriation. *See Payne v. Kirkpatrick*, 685 S.W.2d 891, 903 (Mo. App. W.D. 1984) (construing “for any other purpose prohibited by this constitution,” clause to apply to “[t]he initiative,” not just an “appropriation.”). *Payne* held that Article III, § 51 does not apply if the pre-existing constitutional prohibition only applies to “the general assembly.” In *Payne*, the wagering provision in the constitution only limited the action of the “general assembly,” and did not limit “powers

reserved to the people by virtue of [Article III] § 49 [the initiative].” *Id.* at 904. The same is true of the Blaine Amendment, which only limits appropriations by the “general assembly” and various local bodies not applicable here. *See* art. IX, § 8. It cannot apply here.

Regardless, Amendment 3 does not require any state funds to go to any religious school or religious organization. Arrowood rightly abandoned her argument that this carve-out diverges from the central purpose of the initiative. Amendment 3 seeks to apportion revenues from the Early Childhood Health and Education Trust Fund across the state. The Blaine Amendment carve-out permits this to occur with vigor, funding improvements in early childhood programs even in areas of Missouri that currently lack public institutions that provide early childhood health and education services.

Arrowood’s Article I, §§ 7–8 arguments were never presented to the trial court, and were accordingly not preserved. *See State ex rel. Houska v. Dickhaner*, 323 S.W.3d 29, 33 (Mo. banc 2010). However, they also fail as a matter of law. Courts must attempt to harmonize an initiative’s language with Article III, section 51 of the Missouri Constitution, and other constitutional provisions, in pre-election constitutionality challenges to initiated constitutional amendments. *Committee for a Healthy Future v. Carnahan*, 201 S.W.3d 503, 510 (Mo banc 2006). Article I, §§ 7–8 limit the provisions in Amendment 3. Arrowood does not explain how the provisions are irreconcilable or how Amendment 3 violates a purpose prohibited by Article I, § 7. Amendment 3, if voters pass it on November 8, merely creates

an explicit and permissible carve-out from the potential reach of a preexisting constitutional provision.

3. Amendment 3 does not does not surrender, suspend, or contract away the power to tax (Article X, Section 2; Article III, § 51).

Nothing in the text of Amendment 3 purports to limit the general assembly’s power to tax for state purposes or the general assembly’s power to authorize counties and other political subdivisions to tax for county, municipal and other corporate purposes. Arrowood has not and cannot point to a provision of Amendment 3 that purports to limit the taxing power of the general assembly. Arrowood cites—but then ignores—the key qualifier:

“except as authorized by this constitution.” Mo. Const. art. X, § 2. “When an act is specifically authorized by the constitution, [Article X, § 2] does not apply.” *State ex rel. Bd. of Health Ctr. Trustees of Clay County v. County Comm’n of Clay County*, 896 S.W.2d 627, 632 n.4 (Mo. banc 1995).

Amendment 3 does not violate, amend, or repeal Article X, § 2; as an initiated constitutional amendment, Amendment 3 does precisely what Article X, § 2 permits, and can easily be harmonized: Amendment 3 provides another constitutional mechanism whereby taxes are implemented.

Arrowood is also incorrect that the prohibition on surrender, suspending, or contracting away the power to tax is implicated merely by referencing an extrinsic measure that may change, such as an inflation adjustment. *See, e.g.*, §§ 143.011 (adjusting income tax brackets based on the Consumer Price Index, or its successor index) § 290.502 (adjusting minimum

wage based on Consumer Price Index for Urban Wage Earners and Clerical Workers, or its successor index), RSMo. Additionally, the General Assembly currently incorporates the Master Settlement Agreement’s inflation adjustment in the escrow deposit law for certain tobacco manufacturers. § 196.1000, RSMo. These statutory ties to third-party inflation adjustments are permissible, and so too is the constitutionally-permitted tie within Amendment 3.

IV. The trial court correctly rejected Arrowood’s multiple article claims (Arrowood/Boeving Point V).¹³

A. Standard of Review

Proponents incorporate by reference the Standard of Review section set forth *supra* at page 8.

B. Summary

Arrowood has abandoned her “single-subject” challenge¹⁴ and now argues only that Amendment 3 impermissibly amends more than one article of the Constitution. However, Arrowood has substantially changed her argument on what provisions are amended and has added an “implied

¹³ On page 46 of Arrowood’s Brief, this is also referred to as numeral VI.

¹⁴ This argument fails as a matter of law. *See Committee for a Healthy Future v. Carnahan*, 201 S.W.3d 503, 511–12 (Mo banc 2006) (An initiative petition is permitted to raise and disburse a tax.). Amendment 3’s central purpose is to advance early childhood health and education.

amendment” challenge(L.F.0014-0017). These new arguments were not preserved, *Houska*, 323 S.W.3d at 33, but, regardless, they fail.

C. Amendment 3 does not amend more than one article, Article IV.

The trial court correctly determined that Arrowood’s multiple article challenge fails as a matter of law. “A proposal may amend several articles in the constitution so long as all proposals are germane to a single purpose.” *Committee for a Healthy Future*, 201 S.W.3d at 511 (citing *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 830–31 (Mo. banc 1990)); *see also Moore v. Brown*, 165 S.W2d 657, 662 (Mo. banc 1942).

Amendment 3, though, does not amend multiple articles. *See, e.g., Kuehner*, 442 S.W.3d at 229–30 (holding that proposed amendment could exclude one particular subject matter from the scope of the collective bargaining right otherwise granted to teachers by a preexisting constitutional provision). A “mere reference . . . [to another constitutional provision] does not directly or by implication amend [that provision].” *Id.* at 229. A constitutional amendment may “affect” a constitutional provision—even a fundamental right in the constitution—without “amending” such provision. *Id.* at 230. Amendment 3 can be harmonized with the constitution.

Amendment 3 expressly amends only Article IV of the Missouri Constitution. Before the trial court, Arrowood argued that Amendment 3 also amends Articles III and IX. L.F.0015. On appeal, Arrowood abandons her Article III argument and, for the first time, contends that Amendment 3 amends Articles I and X. Arrowood Br. at 46. Arrowood’s new arguments with respect to Articles I and X were not preserved and are improper.

Arrowood also brings a new argument challenging the petition as improperly containing “implied amendments.” *See* L.F.0015. In any event, Arrowood’s arguments lack merit.

Amendment 3 does not amend Article I. Arrowood claims Amendment 3 amends Article I, §§ 7 and 8, Arrowood Br. at 46, but Arrowood does not explain how Amendment 3 amends any provision in Article I. Amendment 3 does not amend (or even reference) Missouri’s establishment clause, Article I § 7. That provision remains intact to forbid the taking of any money “from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof . . .” Mo. Const. art. I, § 7. No provision of Amendment 3 is irreconcilable with Article I § 7. Amendment 3 does not require any state funds to go to be spent in aid of any church, sect, or denomination of religion, or in aid of any religious teacher. Intervenors believe that Arrowood’s challenge regarding Article I, § 8 is a typographical error. Amendment 3 does not amend the freedom of speech, nor any other provision in Article I, § 8.

Next, Amendment 3 does not amend Article IX, § 8, the Blaine Amendment. Amendment 3 simply provides that the Blaine Amendment will not apply to limit the distribution of funds in the narrow case of distributions from the Early Childhood Health and Education Trust Fund. *See Kuehner*, 442 S.W.3d at 229–30.

Amendment 3 does not amend Article X. Arrowood claims “Article X, sections 1 & 2 allow taxation only by the General Assembly or political subdivisions to whom they have delegated that power.” Arrowood Br. at 48.

In fact, Article X, § 2 provides that “[t]he power to tax shall not be surrendered, suspended or contracted away, except as authorized by this constitution.” Amendment 3 does not surrender, suspend, contract away, or otherwise limit the power to tax. *See* Mo. Const. art. X, § 1. (describing the power to tax). Nothing in the text of the initiative purports to limit the general assembly’s power to tax for state purposes or the general assembly’s power to authorize counties and other political subdivisions to tax for county, municipal and other corporate purposes. Amendment 3 and Article X, § 2 are not irreconcilable. Therefore, Amendment 3 does not impliedly amend Article X, § 2.

Amendment 3 also does not violate the prohibition on “implied amendments.” *Kuehner*, 442 S.W.3d at 231 (measure need not include all provisions affected, impacted, or modified by a proposed measure, because such a requirement would tend to stifle the initiative process). As described above, Amendment 3 only amends Article IV; Arrowood’s ‘implied amendment’ arguments were not preserved, but, regardless, they fail. *Id.* at 231–32.

Conclusion

Opponents fail to identify any point of error in the trial court’s reasoned opinion. No category of Opponents’ claims should block Missouri voters from voting “yes” or “no” on an early childhood health and education measure that 209,263 of their fellow citizens wanted to place on the ballot. With respect to signatures, the trial court correctly determined that Chapter 116 does not require petitioners to “affix” a Secretary of State-certified ballot title that

courts had not revised until long after petitions were submitted. Nor does Chapter 116 allow the Secretary to refuse to count signatures where the ballot title had not received its five-word revision either during circulation or at submission. Construing Chapter 116 any other way violates the constitution by completely eliminating proponents' and Missouri voters' rights solely because of the seesawing decisions of state actors. Opponents' fallback substantive constitutional claims against Amendment 3 are not only unripe but are meritless. Finally, Amendment 3 plainly deals with a single-subject.

This Court should affirm the trial court's judgment against the Opponents and in favor of Defendant-Respondent Kander and Proponents. Proponents respectfully submit that Missouri's voters should be allowed the opportunity to vote on Amendment 3, and it should become part of our constitutional commitment to early childhood health and education.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT
RULES 84.06(B) AND MISSOURI COURT OF APPEALS WESTERN
DISTRICT LOCAL RULE XLI**

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and Missouri Court of Appeals Western District Local Rule XLI and, according to the word count function of Word by which it was prepared, contains 13,766 words, exclusive of the cover, the Table of Contents and Table of Authorities, the Certificate of Service, this Certificate of Compliance, the signature blocks, and the Appendix.

The undersigned further certifies that the electronic copy of this brief filed with the Court is in PDF format and complies with Missouri Supreme Court rules and is virus-free.

/s/ Jane E. Dueker
*Attorney for Intervenors-Respondents
Raise Your Hand for Kids & Ms. Erin
Brower*

CERTIFICATE OF SERVICE

The undersigned here certifies that on this 7th day of September, 2016, the foregoing and the accompanying Appendix were filed electronically with the Clerk of Court, therefore to be served electronically by operation of the Court's electronic filing system upon the following:

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