

IN THE SUPREME COURT OF MISSOURI

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Case No. SC88018

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COMMITTEE FOR A HEALTHY FUTURE, INC, et al.  
Respondents/Cross-Appellants,

v.

ROBIN CARNAHAN, MISSOURI SECRETARY OF STATE,  
Respondent/Cross-Respondent,

and

LOUIS SMITHER, et al.,  
Appellants/Cross-Respondents,

and

CHRIS KEMPH, et al.,  
Cross-Respondents.

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Appeal from the Circuit Court of Cole County  
Case No. 06AC-CC00707  
Honorable Thomas J. Brown, III

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Brief of *AMICUS CURIAE* Representative Carl Bearden, Speaker Pro Tem of the Missouri House of Representatives, Representative Alan Icet, Budget Chair of the Missouri House of Representatives and Senator Charles Gross, Appropriations Chair of the Missouri Senate in Support of the Appeal of Appellants/Cross-Respondents Louis Smither, et al.

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## INTRODUCTION

Representative Carl Bearden is the Speaker Pro Tem of the Missouri House of Representatives and a former Budget Chair. Representative Alan Icet is the current Budget Chair in the Missouri House of Representatives. Senator Charles Gross is the Chair of the Appropriations Committee in the Missouri Senate. (hereinafter collectively the “Legislators”). Representatives Bearden and Icet and Senator Gross are vitally interested in this case because the proposed Tobacco Tax Initiative will have a direct and negative impact on their duties as Missouri legislators. Representatives Bearden and Icet and Senator Gross have a unique perspective on the issues based on their responsibilities in connection with the budget for the State of Missouri.

**I. THE PROPOSED TOBACCO TAX INITIATIVE PETITION VIOLATES THE MISSOURI CONSTITUTION AS IT WILL APPROPRIATE EXISTING STATE REVENUES TO PAY FOR SERVICES COSTING IN EXCESS OF THE AMOUNT OF REVENUE GENERATED BY SAID INITIATIVE**

Article III, Section 51 of the Missouri Constitution states, in pertinent part, as follows:

The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby...

Mo. Const., Art. III, Sec. 51. *State ex rel. Card v. Kauffman*, 517 S.W.2d 78 (Mo. 1974). The trial court's decision finding the proposed Tobacco Tax Initiative Petition ("Initiative") sufficient should be reversed as the Initiative violates the the foregoing section of the Missouri Constitution by appropriating state revenues to pay for its mandates. The Initiative fails to provide for the funding of administrative costs if the funds raised by the Initiative are exhausted.

Section 12 of the Initiative states that "The net proceeds from the tax imposed by this section shall constitute new and additional funding for the initiatives and programs described in this section and shall not be used to replace existing funding as of July 1, 2006 for the same or similar initiatives or programs." Section 12, however, does not address what will occur when the revenues raised by the initiative are inadequate to fund the "initiatives and programs" it creates.

Particularly troubling is the fact that some sections of the Initiative mandating specific "initiatives and programs" do deal with this issue while others do not. For example, Section 8(2) states that funds shall be appropriated for the purpose of "...supplemental payments for primary care and specialist physician services rendered to Missouri Medicaid beneficiaries...The department of social services shall establish, **to the extent funds are available**, a Medicaid physician fee schedule that is comparable to the Medicare physician fee schedule..." (Emphasis added). This limiting language is not, however, present in Section 8(1) which requires the provision of "...medically necessary health care services for individuals with incomes that are 200% or less of the federal poverty guidelines,

including services provided through the Medicaid or State Children’s Health Insurance Programs...”

Some recipient of these funds will surely assert that the presence of a funding limitation for some of the mandates makes it clear that those mandates without such a limitation must be funded by the State from other revenue sources if the funds raised by Initiative are exhausted. The decision reached in *McNeil-Terry v. Roling*, 142 S.W.3d 828 (Mo.App. 2004) is supportive of such an argument. In that case the Division of Social Services attempted to limit certain Medicaid related dental services arguing “...the legislature’s failure to appropriate funds for dental services for Medicaid –eligible adults conferred on the Division the right to limit such dental services.” *Id.* at 834-5. The section of statute under which such services were provided, however, did not **expressly** state the provision of the services were subject to appropriation while other sections of the statute did state that the services provided under those other sections were subject to appropriation by the general assembly. *Id.* The Court found that in the absence of the express limitation, the services were not subject to appropriation. *Id.* As such, the legislature would have to fund the mandates of Section 8(2) from other sources including General Revenue if the receipts from the tobacco tax were insufficient to cover these mandates. This is then an unfunded mandate in violation of the Missouri Constitution.

The Initiative also presents a problem from the legislative point of view because of existing case law relating to the limitation of optional services once

those services have been provided. The *McNeil-Terry* decision discussed above involved the provision by the state of Missouri of certain optional dental services for Medicaid-eligible adults. *Id.* at 834. The Court found that the “...reduction in dental services also conflicts with the federal Medicaid regulation requiring that services, including optional services like dental care, ‘be sufficient in amount, duration, and scope to reasonably achieve its purpose.’” *Id. citing* 42 C.F.R. section 440.230(b). The Division of Social Services argued “...that Missouri’s budgetary constraints constitute sufficient justification for limitations on coverage for dental services.” *Id.* The Court ruled, however, that “In light of Missouri’s having chosen to offer dental services, it is obligated by federal law to offer sufficient coverage to achieve the federal purpose of dental service.” *Id.* Federal courts have also indicated a willingness to mandate expenditures by the State of Missouri in connection with such optional services. *Lankford v. Sherman*, 451 F.3d 496 (8<sup>th</sup> Cir. 2006). Thus, the legislature will be hard pressed to refuse to fund from other sources the “initiatives and programs” mandated under section 8(2) of the Initiative if the revenue raised by it is insufficient to pay for such mandates. Again this constitutes an unconstitutional unfunded mandate.

Furthermore, the problem of a shortfall of revenue raised by the Initiative to pay for services mandated by the Initiative appears very likely to arise. The Director of Medical Services “...indicated that in order to provide healthcare for Missourians with income less than two hundred percent of federal poverty level, it is anticipated that the additional cost would exceed \$1.2 billion. This \$1.2 billion

cost refers to the total cost of medical assistance payments to cover all Missourians with incomes less than 200% of federal poverty level.” Missouri State Auditor’s Office Fiscal Note (06-03) (Appellants/Cross-Respondents Appendix A97). Later in that same note, it is reported that the Governor’s Office estimated the net new revenues from the tax at \$407.0 million for fiscal year 2008, \$410.7 million for fiscal year 2009 and \$414.4 million for fiscal year 2010. *Id.* at A99. In order to cover the shortfall apparent from these estimates, the legislature would have to increase appropriations from General Revenue dramatically in violation of the Missouri Constitution.

**II. THE PROPOSED TOBACCO TAX INITIATIVE PETITION VIOLATES THE MISSOURI CONSTITUTION AS IT MANDATES INCURRING ADMINISTRATIVE COSTS WITHOUT PROVIDING THE REVENUE TO PAY FOR THEM**

This Court should reverse the trial court’s decision determining that the Initiative is sufficient as the Initiative violates Article III, Section 51 of the Missouri Constitution by mandating incurring administrative costs without providing revenue to pay for such costs.

Section 8 of the Initiative states that the money “...deposited in the Health Care Access and Treatment Account shall be appropriated by the General Assembly **solely** to provide additional funds...” to pay for “medically necessary health care services...” for certain individuals. (Emphasis added). This section of

the Initiative does not specifically state that the funds raised may be used to pay for the administrative costs necessarily incurred in providing such services.

In their brief Respondents/Cross Appellants assert that this language means that the funds can be used for administrative costs associated with those medically necessary healthcare services as the terms of the Initiative should be broadly construed. See Brief of Respondents/Cross Appellants at 71. The Legislators, however, foresee from their experience the likelihood that a recipient of the benefits will assert that payments of administrative costs are not payments for the provision of medically necessary healthcare services. In support of such an assertion, the recipient could cite to Section 7 of the Initiative. That section concerns money deposited in the Tobacco Use Prevention, Education and Cessation Account and, unlike Section 8, specifically allows expenditures for “administration and management.” “It is an elementary principle of statutory construction, as well as established law in Missouri, that the expression of one thing means the exclusion of another.” *Wicklund v. Handoyo*, 181 S.W.3d 143,152 (Mo.App. 2005). If such a recipient was successful, the legislature would be facing a constitutional mandate to fund these administrative costs from some fund other than the revenues raised by the tax created by the Initiative. Those funds would have to be appropriated from the general fund resulting in the appropriation of existing state revenues. Again, this demonstrates that the Initiative is an unconstitutional unfunded mandate.

Moreover, the provision of these services will assuredly cause administrative costs to be incurred by entities other than the Division of Social Services as it is impossible to parse out the impact of implementing the “initiatives and programs” on all budgets. For example, will the Governor or the Attorney General or the Auditor have to add staff? Allocating all such additional administrative costs to the Initiative simply is not feasible and, thus, those agencies bearing the burden will face an unfunded mandate as well.

### **CONCLUSION**

This Court should reverse the trial court’s decision determining that the proposed Tobacco Tax Initiative Petition is sufficient as the Initiative violates Article III, Section 51 of the Missouri Constitution by appropriating existing state revenues to pay for the costs of its mandates that exceed the revenue raised by the Initiative and as it mandates the incurring of administrative costs without providing the revenue for pay for them.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 29, 2006, I caused copies of the foregoing Brief of AMICUS CURIAE Representative Carl Bearden, Speaker Pro Tem of the Missouri House of Representatives, Representative Alan Icet, Budget Chair of the Missouri House of Representatives and Senator Charles Gross, Appropriations Chair of the Missouri Senate in Support of the Appeal of Appellants/Cross Respondents Louis Smither, et al. and a compact disk containing a copy of the brief in Word Format that has been scanned for viruses, to be served on the following via U.S. Mail:

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**CERTIFICATE OF COMPLIANCE**  
**PURSUANT TO RULE 84.06(c) AND 84.06(g)**

I hereby certify that this brief uses a proportional-spaced typeface, double-spaced Times New Roman 13-point, and contains 2,214 words and thereby complies with the work limitations contained in Supreme Court Rule 84.06(b).

I further certify that the accompanying compact disk containing a copy of the foregoing brief, required to be filed by Supreme Court Rule 84.06(g), has been scanned for viruses and is virus-free.

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42 C.F.R. Section 440.230(b).....A1

All other authorities cited herein have been included in briefs already filed with the Court.