

SC92564

IN THE SUPREME COURT OF MISSOURI

VICTOR ALLRED,

Respondent/Cross Appellant,

vs.

ROBIN CARNAHAN, Missouri Secretary of State, et al.,

Appellant/Cross Respondent,

And

MISSOURI JOBS WITH JUSTICE,

Respondent/Cross Appellant.

Appeal from the Circuit Court of Cole County
The Honorable Jon E. Beetem

BRIEF OF APPELLANT/CROSS RESPONDENT AUDITOR
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JURISDICTIONAL STATEMENT

Plaintiff filed an action in the Circuit Court of Cole County challenging the summary statements prepared by the Secretary of State and the fiscal notes and fiscal note summaries prepared by Missouri Auditor Thomas Schweich for two initiative petitions proposing to amend existing law establishing and regulating the state minimum wage law. The trial court determined that § 116.175 RSMo 2000, imposing the duty upon the Auditor to prepare fiscal notes and fiscal note summaries for initiative petitions was unconstitutional as violating Art. IV, § 13 of the Mo. Const. Because this appeal involves the constitutionality of a statute, jurisdiction is properly with the court.

STATEMENT OF FACTS

Thomas A. Schweich, the Missouri State Auditor, appeals from a judgment of the circuit court holding unconstitutional § 116.175, RSMo. 2000, assigning the duty to the Auditor to prepare fiscal notes and fiscal note summaries for proposed initiative petitions. The trial court held that the statute violates Art IV, § 13, Mo. Const., because the statute assigns duties to the Auditor prohibited by the constitutional provision. Respondent Victor Allred has filed a cross appeal of the trial court's findings that the Secretary of State's ballot summary and the Auditor's fiscal note and fiscal note summary were not insufficient, unfair, biased or misleading. For clarity this brief will only make reference to the provisions of the record on appeal believed germane to the sole constitutional issue presented herein.

On October 4, 2011 Missouri Jobs with Justice filed two proposed initiative petitions seeking changes in the required minimum wage rate. (LF 12; JS Trial ¶ 18). The Secretary of State sent both petitions to the Auditor for preparation of a fiscal note and fiscal note summary required by §116.175. (Tr. 36). The Auditor sent requests for comments about additional costs or savings if the petition was adopted to a number of entities including local governments and state agencies. (LF 44, 58). Only twenty state agencies and seven local governments responded to his request or sent comments. (LF 45-48, 59-62, 116). Section 116.175 also provides that proponents and opponents

of the petition may file comments about fiscal impacts within 10 days of the Auditor's receipt from the Secretary of State. A proponent filed a fiscal impact response. (LF 44, 58). No opponent of the ballot proposal made any response. (LF 44, 58). Under law, the Auditor has 20 days from receiving the proposed petition to consider comments he has been provided and transmit the fiscal note and fiscal note summary to the Attorney General for approval as to form. § 116.175.

On November 17, 2011, Victor Allred (hereinafter "Allred") filed a petition in the Cole County Circuit Court alleging that both the ballot summary prepared by the Secretary of State and the fiscal note and fiscal note summary prepared by the Auditor violated §116.190 because they were insufficient, misleading, biased and unfair. (LF 8). No allegation was made that §116.175 was unconstitutional. Missouri Jobs with Justice was finally allowed to intervene after an interlocutory appeal and various motions for judgment on the pleadings were filed after a round of discovery.

Just 20 days before the scheduled trial of this case Allred requested leave to file an amended petition raising for the first time the

constitutionality of §116.175 RSMo¹ (LF 113, 117). On the first day of trial, May 1, 2012, the court granted leave over Auditor's objection that the constitutional issue was not timely raised. (Tr. 7-10). The trial court then heard evidence including from an employee who prepares fiscal notes and fiscal note summaries for the Auditor and two expert witnesses. The Auditor does not believe that any of this testimony is relevant to the present constitutional issue but out of fairness will summarize the testimony as to how the fiscal notes and fiscal note summaries were prepared. The Auditor sends request for fiscal impact comments to various state agencies and local governments. (JS Trial ¶ 19). Not all responded. (Tr. 80, 85-87). The Auditor's office then reviews the submissions to see if they appear complete, relevant, have an identifiable source and appear reasonable. (Tr. 32-33, 48, 82-83; JS Trial ¶ 20). The Auditor does not do an independent study to determine what fiscal impact could result. He compiles all responses with only minor editing in the fiscal note. The responses are generally placed

¹ Constitutional questions must be raised at the first opportunity. *State v. Chambers*, 891 S.W.2d 93, 103–04 (Mo. banc 1994). The lateness of Allred's constitutional challenge would deserve a separate point on appeal but for the fact that similar cases raising the same issue are now before the court.

verbatim in the fiscal note. (Tr 31; JS Trial ¶ 22). Proponents and opponents are permitted to submit fiscal comments. (JS Trial ¶ 19) No opponents submitted a fiscal comment. (LF 44, 58).

The trial court found that § 116.175 violates Art. IV, § 13 of the Missouri Constitution. The Auditor appeals.

POINTS RELIED ON

THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON BEHALF OF PLAINTIFF BECAUSE ART. IV, § 13 OF THE MISSOURI CONSTITUTION DOES NOT BAR PREPARATION OF FISCAL NOTES AND FISCAL NOTE SUMMARIES BY THE AUDITOR CONCERNING INITIATIVE PETITIONS AS DIRECTED BY RSMO. §116.175, RSMO IN THAT SUCH FISCAL NOTES AND FISCAL NOTE SUMMARIES ARE AUTHORIZED BY § 13'S PROVISION PERMITTING THE LEGISLATURE TO ASSIGN OTHER AUDITS AND INVESTIGATIONS AND OTHER DUTIES TO THE AUDITOR RELATED TO THE SUPERVISING AND AUDITING OF THE RECEIPT AND EXPENDITURE OF PUBLIC FUNDS.

Missouri Municipal League v. Carnahan,

303 S.W.3d 573, (Mo. App. 2010)

§ 116.175, RSMo.

Mo. Const. Art. IV, § 13

SUMMARY OF THE ARGUMENT

The Auditor argues that the trial court ruled incorrectly in finding that his preparation of fiscal notes and fiscal note summaries for initiative petitions as required by the legislature violates the Missouri Constitution. The trial court erred in its ruling for two reasons. First, Art. IV, § 13 permits the legislature to direct the Auditor to perform audits and investigations which are related to the supervising and auditing of the receipt and expenditure of public funds. Secondly, fiscal notes and fiscal note summaries for initiative petitions are reasonably related to the receipt and expenditure of public funds.

THE STATUTORY REQUIREMENT OF THE AUDITOR²

1. Except as provided in § 116.155, RSMo, upon receipt from the Secretary of State's office of any petition sample sheet, joint resolution or bill, *the auditor shall assess the fiscal impact of the proposed measure.* The State Auditor may consult with the state departments, local governmental entities, the general assembly and others with knowledge

²The Auditor is also required by law to prepare fiscal notes and fiscal note summaries for joint resolutions submitting proposed constitutional amendments to the people or laws requiring a vote of the people where the legislature does not prepare its own summaries. § 116.170, RSMo 2000.

pertinent to the cost of the proposal. Proponents or opponents of any proposed measure may submit to the State Auditor a proposed statement of fiscal impact estimating the cost of the proposal in a manner consistent with the standards of the governmental accounting standards board and § 23.140, RSMo, provided that all such proposals are received by the State Auditor within ten days of his or her receipt of the proposed measure from the Secretary of State.

2. Within twenty days of receipt of a petition sample sheet, joint resolution or bill from the Secretary of State, the State Auditor shall prepare a fiscal note and a fiscal note summary for the proposed measure and forward both to the Attorney General.
3. The fiscal note and fiscal note summary shall state the measures estimated cost or savings, if any, to state or local governmental entities. The fiscal note summary shall contain no more than fifty words, excluding articles, which shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure. §116.175, RSMo.

ART. IV, § 13 OF THE MISSOURI CONSTITUTION

“The State Auditor shall have the same qualifications as the Governor. He shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury

at least once annually. *He shall make all other audits and investigations required by law*, and shall make an annual report to the Governor and General Assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. *No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds.*” (emphasis added)

STANDARD OF REVIEW

Constitutional challenges to a statute are reviewed *de novo*. A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision. “The person challenging the statute’s validity bears the burden of proving the act clearly and undoubtedly violates the constitution.” *In re Brasch*, 332 S.W.3d 115, 119 (Mo. banc 2011) *reh’g denied* (Mar. 29, 2011). Courts are to “resolve all doubt in favor of the act’s validity,” and in so doing should “make every reasonable intendment to sustain the constitutionality of the statute.” *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984) (rejecting hotel’s constitutional challenges and affirming judgment on the pleadings).

ARGUMENT

By a 1908 amendment to the 1875 Missouri Constitution, the people of Missouri reserved to themselves the rights of referendum and initiative. An

outgrowth of the Populist movement, referendum and initiative reflect a special power of the people to self-govern. Of course, the Missouri Constitution, then and now, only established the right, as it did with many other rights (such as the right to suffrage guaranteed by Art. I, § 25). Protection of those rights and their implementation necessarily and foreseeably required that rules and procedures be established by the legislative branch. Such statutes may not limit or restrict the right to initiative. *State ex rel. Elsas v. Mo. Workmen's Comp. Comm.*, 2 S.W.2d 796, 801 (Mo. banc 1928). The requirement of a fiscal note and fiscal note summary as part of the initiative process (as well as legislation in the General Assembly) arises from statute, not the Constitution. Fiscal notes have the obvious purpose of providing decision makers (voters or legislators) with some information about the potential fiscal impact of legislative enactments or those approved by initiative. *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573, 582 (Mo. App. W.D. 2010). The last sentence of Art. IV, § 13 concerning the Auditor states: “No duty shall be imposed upon him by law which is not *related to the supervising* and auditing of the receipt and expenditure of public funds.” Similar language of limitation is in the Constitution concerning the Secretary of State (Art. IV, § 14) and the Treasurer (Art. IV, § 15).

Until 1997, the salutary purpose of fiscal notes and fiscal note summaries for initiatives, referendums and proposed constitutional amendments was conducted by the Oversight Division of the Committee on Legislative Research. These duties were imposed on the Auditor after this Court held that the statute requiring fiscal summaries to be prepared by that committee concerning initiative provisions was unconstitutional. *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392, 395 (Mo. banc 1996). Faced with a dilemma of initiative proposals being placed on the ballot with no fiscal impact information or not being eligible for placement on the ballot because of the lack of the statutorily required fiscal note and fiscal note summary, the legislature considered its options. Placing the duties on the Secretary of State was not practical since she already prepared ballot summaries and Art. IV, § 14, Mo. Const. provides “[n]o duty shall be imposed on him by law which is not related to [his duties as prescribed in this constitution].” The Constitution likewise provides “[n]o duty shall be imposed on the State Treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds...” Art IV, § 15. The Attorney General would not be a proper choice since he was already charged with the responsibility of approving the content and form of both the ballot summary and the fiscal note and summary before certification by the Secretary of the State. Placement of the responsibility in the Governor’s

office or an executive branch agency controlled by him was likely neither a palatable or desirable choice. The State Auditor was not only a practical and logical choice, but undoubtedly appeared to the legislature to fall within the parameters of the Auditor's constitutional authority because the fiscal impact of initiative petitions seems logically connected to investigations of fiscal matters and the receipt and expenditure of public funds.

WHAT ARE FISCAL NOTES AND FISCAL NOTE SUMMARIES

The fiscal note and fiscal note summary's contents are established in Section 116.175.3, RSMo. "The fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities." The statute also specifies that proponents and opponents of a measure may submit proposed statements of fiscal impact to the Auditor for inclusion in the fiscal note and assessment process as the Auditor prepares the fiscal note and fiscal note summary.

Those are the standards and procedures the Auditor is to follow in performing his constitutional duties. Section 116.175, RSMo does not require the Auditor to independently assess the fiscal impact of a proposed initiative. *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573, 582 (Mo. App. W.D. 2010).

The Auditor does no analysis or evaluation of the correctness of the proposed impact statements, but only reviews for reasonableness and

completeness. *Id.* The summary is by necessity a compilation of the various proposals which in 50 words is to summarize the various proposals, if you will, from high to low. The legislature labored under no fiction that the fiscal note and summary would meet some standard of accuracy as it made the submission of proposals to the Auditor voluntary and only allowed ten days for their submission by proponents and opponents and twenty days for the Auditor's transmittal to the Attorney General.

**FISCAL NOTES ARE RELATED TO THE AUDITOR'S
CONSTITUTIONAL DUTIES**

Words used in constitutional provisions must be viewed in context; their use is presumed intended, and not meaningless surplusage. *Roberts v. McNary*, 636 S.W.2d 332,335 (Mo. banc 1982). The words used in unconstitutional provisions are interpreted so as to give effect to their plain, ordinary and natural meaning. *Boone County Court v. State*, 631 S.W.2d 321, 324 (Mo. banc 1982). The commonly understood meaning of words is derived from the dictionary. *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. banc 1983).

Plaintiff's argument and the trial court's judgment would effectively rewrite the last sentence of Art. IV, § 13 to read "[n]o duty shall be imposed on him by law which is not {related to} the supervising and auditing of the receipt and expenditure of public funds." This is obviously a strict

interpretation of the provision. But more importantly, it violates rules of constitutional construction because it gives no meaning to the phrase “not related.” And yet it would grant virtual free license to the legislature to assign to the Auditor duties of “investigations” without any limiting language. As long as some assignment fell within the scope of “investigations” it would be within the Auditor’s constitutional powers. But by including the phrase “related to” the constitutional duties the people imposed a limitation on the scope of investigations by the Auditor and any other duties to those “related to the receipt and expenditure of public funds”. “Related to” in its normal usage means “to show or establish a logical or causal connection between.” Webster’s Third New International Dictionary 1916 (1993). The question thus posited is whether preparation of a fiscal note is connected or associated with “the receipt and expenditure of public funds.” There should be no serious argument that costs to government are not connected to expenditures of public funds. Expenditures are costs. Plaintiff would have this Court conclude that audits of the receipt and expenditure of public funds are the constitutional limit of the Auditor’s powers. But Art. IV, § 13 itself belies that contention. In addition to audits, the Constitution includes in the Auditor’s duties establishing accounting systems for all public officials of the state, investigations as provided by law and accounting and budgeting systems of political subdivisions. A fair reading of Art. IV, § 13 in its entirety

must conclude that the people when adopting the Constitution must have envisaged that the legislature should be able to assign some duties to the Auditor beyond post-audits and establishing accounting and budgeting systems.

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

ESTIMATES OF FISCAL IMPACT IN COST OR SAVINGS REQUIRES CONSIDERATION OF REVENUE

Any consideration of cost or savings must include a consideration of additional revenue, if any, from the initiative, presuming the General Assembly would want voters to be advised of the potential *net* cost, if any.

Preparation of fiscal notes and summaries for initiatives likewise deals with anticipated revenues and costs. The 1875 Constitution permitted the legislature to determine all the duties of state-wide elected officials. In the years leading up to the 1944 Constitutional Convention a hodgepodge of

duties having no rational basis were assigned to different officials. Thus, individual officers built up power and patronage through new functions and duties secured from the legislature. *Board of Public Buildings v. Crowe*, 363 S.W.2d 598, 608 (Mo. banc 1963). The 1945 Constitution was intended to constrain that legislative power.³ *Id.* In that case the Board of Public Buildings wished to place the proceeds of revenue bond sales and income from rental of state properties to state agencies in the custody of the Treasurer. Opponents argued that the funds were not really state funds and that the Treasurer could not serve as custodian because of Art. IV, § 15. The court rejected that argument and held that the Treasurer would be holding monies in the “nature of a special state fund” and that as a result “the essential and substantive duties of the Treasurer are not altered or extended.” *Id.*

An overly restrictive view of the constitutional limit of duties that can be assigned by the Legislature to the Auditor could have other drastic effects. As stated earlier, the Constitution also contains restrictions on the Legislature’s ability to assign duties to the Treasurer and Secretary of State. In fact, they are arguably even more limiting. Yet the Legislature has vested investigation and enforcement of State Securities Law, Chapter 409,

³ The Auditor collected some taxes and the Secretary of State sold driver’s licenses.

RSMo, to the Secretary of State. Those are obviously not related to elections and keeping state records. Only by a most liberal view can they be seen as relating to corporations, and some securities do not. The Treasurer administers the Unclaimed Property Law, RSMo. § 447.010, RSMo et seq. Only a legal fiction could characterize those as state funds.

The changes in the 1945 Constitution were intended to address particular evils that had resulted from unfettered discretion in the Legislature to assign duties to state-wide elected officials. *Board of Public Buildings v. Crowe*, 363 S.W.2d at 607. But avoidance of that evil does not have to mean that the Legislature is forbidden to assign tasks to the various officials which have a natural and logical relationship to the official's specific constitutional duties. The Constitution prescribes no penalty for the Auditor's performance of an act beyond the scope of Art. IV, § 13 and it is unreasonable and unnecessary to restrict the constitutional right of the people to initiative by directing that an initiative proposal cannot include a particular fiscal note and fiscal note summary.

CONCLUSION

The Auditor requests this Court's order reversing the trial court's judgment and ordering that this initiative petition may be placed on the ballot, if sufficient signatures are garnered with the fiscal note and fiscal note summary prepared by the Auditor.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served, on June 8, 2012, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 3,695 words.

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