

IN THE SUPREME COURT OF MISSOURI

STEPHEN J. REUTER,)
)
 Respondent,)
)
 vs.) Case No. SC92574
)
 ROBIN CARNAHAN and THOMAS SCHWEICH,)
)
 Appellants,)
)
 MISSOURIANS FOR RESPONSIBLE LENDING)
 and JAMES J. BRYAN, et al.,)
)
 Appellants.)
)

Appeal from the Circuit Court of Cole County, Missouri
 Nineteenth Judicial Circuit
 The Honorable Daniel R. Green, Judge

BRIEF OF APPELLANTS JAMES J. BRYAN AND
 MISSOURIANS FOR RESPONSIBLE LENDING

Heidi Doerhoff Vollet, #49664
 Dale C. Doerhoff, #22075
 William E. Peterson, #63158
 COOK, VETTER, DOERHOFF
 & LANDWEHR, P.C.
 231 Madison Street
 Jefferson City, MO 65101
 Telephone: (573) 635-7977
 Facsimile: (573) 635-7414

Attorneys for Appellants James J. Bryan and
 Missourians for Responsible Lending

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	vii
Jurisdictional Statement	1
Statement of Facts	2
A. Legal Framework for Initiative Petitions	2
1. Constitutional Provisions	2
2. Statutory Provisions	2
B. Current Consumer Lending Law and the Proposed Initiative Petition at Issue in This Litigation	5
C. The Secretary of State’s Summary Statement.....	8
D. The Auditor’s Fiscal Note and Fiscal Note Summary	9
1. The Auditor’s typical procedure for preparing Fiscal Notes and Fiscal Note Summaries	10
2. DIFP’s and the Department of Revenue’s responses to the Auditor.....	11
3. Dr. Haslag’s submission as an opponent of the Initiative Petition	12
4. The Auditor’s preparation of the Fiscal Note and Fiscal Note Summary.....	13
E. Certification of the Official Ballot Title.....	15
F. Ballot title litigation before the circuit court.....	15

1.	Filing of the four Industry Suits	15
2.	Pre-trial procedure.....	17
3.	The March 27, 2012 trial.....	18
4.	Conclusion of the March 27, 2012 trial	24
5.	The Circuit Court’s April 5, 2012 order.....	26
6.	Post-trial intervention by James Bryan and Missourians for Responsible Lending and Request to Stay and/or Vacate the Circuit Court’s Judgment	27
7.	The Circuit Court’s April 17, 2012 Final Judgment and Denial of Post-trial Motion to Stay/Vacate.....	30
G.	Submission of Signatures to the Secretary of State.....	30
H.	Transfer to this Court	31
	Points Relied On.....	32
	Standard of Review	34
	Argument.....	36
I.	The circuit court erred as a matter of law in ruling that the Fiscal Note and Fiscal Note Summary were insufficient and unfair for failure to include state and local revenues that allegedly would be reduced due to closure of private installment lenders stores because Plaintiffs’ only evidence at trial of a quantified fiscal impact from the closure of such lenders (namely, the testimony of Dr. Durkin) was a legally insufficient basis for setting aside the fiscal note in that § 116.175 allows opponents to submit fiscal impact information to the Auditor for inclusion in the	

fiscal note only if they do so within ten days of the Auditor’s receipt of an initiative petition from the Secretary of State and § 116.175 imposes a 20-day overall deadline for the Auditor to prepare a fiscal note, and Dr. Durkin’s testimony was first offered at trial on March 27, 2012, some 253 days after the ten-day window for providing such submissions had expired on July 18, 2011 and some 243 days after the Auditor’s 20-day window for completing the fiscal note had expired on July 28, 2011, and because failure to enforce the fiscal impact submission deadlines for opponents would result in an unconstitutional burden on proponents’ Article III, sec. 49 right of initiative..... 36

A. Section 116.190’s “insufficient or unfair” standard places a heavy burden on those challenging a fiscal note or fiscal note summary..... 36

B. Section 116.190 does not permit opponents to prove that a fiscal note or fiscal note summary is “insufficient or unfair” based on evidence that would be untimely under § 116.175. 38

1. The plain language of § 116.175 establishes a ten-day deadline for opponents to provide fiscal impact submissions to the Auditor 41

2. Enforcement of the statutory time limits will avoid unconstitutional burdens on the People’s right of initiative. 42

II. The circuit court erred as matter of law in ruling that the Summary Statement was insufficient and unfair for not having included specific detail about the annual

percentage rate of the Initiative Petition’s proposed interest rate cap because the Summary Statement drafted by the Secretary of State was not insufficient, unfair or likely to deceive voters in that the Secretary’s Summary Statement fairly, adequately, and accurately put potential petition signers and voters on notice of the subject and purpose of Initiative Petition, which is “to limit the annual rate of interest, fees, and finance charges for payday, title, installment, and consumer credit loans,” and deference is given to the Secretary’s Summary, which need not use the “best” language possible to describe a measure and which need only provide a general title similar to legislative titles that would suffice under constitutional clear title analysis 47

- A. A summary statement is not “insufficient or unfair” if it accurately identifies the general subject matter of the proposed initiative petition 48
- B. The Secretary’s Summary Statement fairly and adequately puts petition signers and voters on notice of the subject matter of the Initiative Petition 51
- C. The circuit court applied an improper standard in analyzing the Summary Statement..... 54
- D. The circuit court’s revisions to the summary statement transformed a fair and sufficient summary into a misleading summary that wrongly implied that the Initiative Petition will “allow” a new, higher interest rate on loans, when the Initiative Petition will impose a rate cap..... 58

E. The circuit court’s judgment burdens the proponents’ right
to engage in the initiative petition process..... 59

Conclusion..... 61

Certificate of Compliance with Rule 84.06(b) 62

Certificate of Service 63

Appendix (separately bound)

Volume I:

April 17, 2012 Second Amended Final Judgment A-00001

Mo. Const. art. III, secs. 49-52 A-00009

§ 116.175, RSMo (cum. supp. 2011) A-00011

§ 116.180, RSMo (2000)..... A-00013

§ 116.190, RSMo (cum. supp. 2011) A-00015

§ 116.334, RSMo (2000)..... A-00016

Joint Exhibit 1 - Initiative Petition..... A-00018

Joint Exhibit 4 - Certification of Official Ballot Title A-00022

Joint Exhibit 3 - Fiscal Note A-00023

Volume II:

Plaintiffs’ Exhibit 7 – Haslag Submission A-00042

Plaintiffs’ Exhibit 14 – Durkin Report..... A-00062

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>All Am. Painting, LLC v. Fin. Solutions & Assocs, Inc.</i> , 315 S.W.3d 719 (Mo. banc 2010)	35
<i>Allred v. Carnahan</i> , 2012 WL 1071226 (Mo. App. W.D. April 2, 2012)	27
<i>Asher v. Carnahan</i> , 268 S.W.3d 427 (Mo. App. W.D. 2008)	50
<i>Bergman v. Mills</i> , 988 S.W.2d 84 (Mo. App. W.D. 1999).....	33, 37, 50
<i>Butler v. Mitchell-Hugeback, Inc.</i> , 895 S.W.2d 15 (Mo. banc 1995)	40
<i>Commerce Bank v. Mo. Div. of Finance</i> , 762 S.W.2d 431 (Mo. App W.D. 1988)	42
<i>Committee For A Healthy Future, Inc. v. Carnahan</i> , 201 S.W.3d 503 (Mo. banc 2006)	34, 42, 43, 46, 58
<i>Corvera Abatement Tech. v. Air Conservation Com'n</i> , 973 S.W.2d 851 (Mo. banc 1998)	53, 54
<i>Cures Without Cloning v. Pund</i> , 259 S.W.3d 76 (Mo. App. W.D. 2008).....	48, 52
<i>Fust v. Attorney General</i> , 947 S.W.2d 424 (Mo. banc 1997)	49
<i>Hagely v. Board of Educ. of Webster Groves School Dist.</i> , 841 S.W.2d 663 (Mo. banc 1992)	40
<i>Hancock v. Secretary of State</i> , 885 S.W.2d 42 (Mo. App. W.D. 1994).....	32, 37, 48
<i>Home Builders Ass'n v. State</i> , 75 S.W.3d 267 (Mo. banc 2002)	53

Jackson County Sports Complex Authority, 226 S.W.3d 156
 (Mo. banc 2007) 49, 53

Lonergan v. May, 53 S.W.3d 122 (Mo. App. W.D. 2001)..... 42

Marre v. Reed, 775 S.W.2d 951 (Mo. banc 1989) 40

McCollum v. Director of Revenue, 906 S.W.2d 368 (Mo. banc 1995) 43

Missouri Municipal League v. Carnahan, 303 S.W.3d 573 (Mo. App. W.D.
 2010)..... 11, 33, 37, 50, 51, 56, 58

Missouri Municipal League v. Carnahan, 2011 WL 3925612
 (Mo. App. W.D. 2011) 50, 53

Missouri State Med. Ass’n v. Missouri Dept. of Health,
 39 S.W.3d 837 (Mo. banc 2001) 53

Missourians Against Human Cloning v. Carnahan,
 190 S.W.3d 451 (Mo. App. W.D. 2006) 34, 37, 43, 44, 50, 60

Missourians to Protect the Initiative Process v. Blunt,
 799 S.W.2d 824 (Mo. banc 1990) 34, 42, 43, 46, 58

Morgan v. Jewell Const. Co., 91 S.W.2d 638 (Mo. App. 1936) 40

Overfelt v. McCaskill, 81 S.W.3d 732 (Mo. App. W.D. 2002)..... 32, 37, 51, 57

Ponca Finance Co., Inc. v. Esser, 132 S.W.3d 930 (Mo. App. W.D. 2004) 5

Prentzler v. Carnahan, 2012 WL 985839 (Mo. App. W.D. Mar. 26, 2012) 17

Silcox v. Silcox, 6 S.W.3d 899 (Mo. banc 1999) 43

State ex inf. McKittrick v. Murphy, 148 S.W.2d 527 (Mo. banc 1941)..... 42

State ex rel. Humane Society of Missouri v. Beetem, 317 S.W.3d 669
 (Mo. App. W.D. 2010) 34, 48, 49

State ex rel. Jackson County v. Spradlin, 552 S.W.2d 788 (Mo. banc 1975) 43

Thoroughbred Ford, Inc. v. Ford Motor Co., 908 S.W.2d 719
 (Mo. App. E.D. 1995)..... 32, 41, 42

Union Elec. Co. v. Kirkpatrick, 606 S.W.2d 658 (Mo. banc 1980) 50, 53

United Gamefowl Breeders Ass’n of Mo. v. Nixon,
 19 S.W.3d 137 (Mo. banc 2000). 33, 49, 50, 51, 53, 56, 57

White v. Director of Revenue, 321 S.W.3d 298 (Mo. banc 2010)..... 34, 35

Wigley v. Capital Bank of Southwest Missouri, 887 S.W.2d 715
 (Mo. App. S.D. 1994). 54

Constitutional Provisions

Mo. Const. art. III, sec. 49 2, 29, 32, 36, 49

Mo. Const. art. III, sec. 50 2, 49

Mo. Const. art. III, sec. 53 2

Mo. Const. art. V, sec. 3 1

Statutes

§ 116.010, RSMo 3

§ 116.025, RSMo 56

§ 116.130, RSMo..... 30, 31

§ 116.130.2, RSMo..... 31

§ 116.050, RSMo..... 56

§ 116.150.3, RSMo..... 31

§ 116.175, RSMo..... *passim*

§ 116.175.1, RSMo..... 3, 40, 41, 42, 45, 47

§ 116.175.2, RSMo..... 9, 41

§ 116.175.3, RSMo..... 3

§ 116.175.5, RSMo..... 4, 44

§ 116.180, RSMo..... 3, 4

§ 116.190, RSMo..... *passim*

§ 116.190.3, RSMo..... 4, 37

§ 116.190.4, RSMo..... 4

§ 116.260, RSMo..... 56

§ 116.290, RSMo..... 56

§ 116.332, RSMo..... 2

§ 116.334, RSMo..... 3, 33, 48

§ 116.334, RSMo..... 48

§ 367.518(4), RSMo 54

§ 408.100, RSMo..... 5

§ 408.130, RSMo..... 54

§ 408.500, RSMo..... 6

§ 408.505, RSMo..... 6

§ 408.505.3, RSMo..... 6

§ 408.506, RSMo..... 6

Rules

Rule 57.03(b)(4) 18

Rule 52.04..... 28

Other Authorities

12 C.F.R. § 226.17(a). 54

F.B. Hubachek, *The Development of Regulatory Small Loan Laws*, Journal of Law and Contemporary Problems, Vol. 8, No. 4, Winter 1941, page 135 5

Missouri State Auditor’s Report No. 2001-35, “Division of Finance and Regulation of Instant Loan Industry,” p. 23 (May 9, 2001), *available at* <http://www.auditor.mo.gov/press/2001-36.pdf> 5

Missouri Division of Finance, Report to General Assembly pursuant to section 408.506, RSMo. (January 4, 2011), *available at* <http://finance.mo.gov/consumercredit/documents/2011PaydayLenderSurvey.pdf> (last visited May 29, 2012)..... 6

Webster’s New Twentieth Century Unabridged Dictionary (2nd ed. 1970) 59

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the current matter based upon Article V, Section 3 of the Missouri Constitution. Plaintiffs Northcott and Potashnick challenged the constitutionality of § 116.175, RSMo, which is within the exclusive jurisdiction of this Court pursuant to Article V, sec. 3 of the Missouri Constitution. This Court ordered all appeals arising from the same judgment to be transferred from the Court of Appeals to this Court and heard at the same time as the Northcott cross-appeal.

STATEMENT OF FACTS

A. Legal Framework for Initiative Petitions.

1. *Constitutional provisions*

Article III, sec. 49 of the Missouri Constitution reserves to the people the power to propose and enact laws and constitutional amendments independent of the General Assembly. A petition proposing a law must (1) be signed by five percent of the legal voters in each of two-thirds of the congressional districts in the state, (2) contain a specified enacting clause and the full text of the measure, (3) contain a single subject, which shall be clearly expressed in the petition's title, and (4) be filed with the Secretary of State not less than six months before the election. Mo. Const. art. III, sec. 50.

Article III, sec. 53 states that the Secretary of State and other officers "shall be governed by general laws" in submitting initiative petitions to the people. Aside from restricting appropriation through initiative petition, there are no other constitutional requirements respecting initiative petition procedures.

2. *Statutory provisions*

Section 116.332, RSMo.¹ requires persons seeking to circulate an initiative petition for signatures to submit a sample sheet to the Secretary of State in the form in which it will be circulated. If the Secretary of State approves the form of the sample sheet, state officials prepare a fiscal note and official ballot title for the measure before the petition is circulated. The official ballot title, which appears on the ballot if the

¹ All citations are to Revised Statutes of Missouri (2000) unless otherwise indicated.

initiative petition receives sufficient signatures to qualify for such placement, consists of a “summary statement” and “fiscal note summary.” § 116.010(4), RSMo.

Section 116.334, RSMo. charges the Secretary with preparing the summary statement, which is to be “a concise statement not exceeding one hundred words” that is “in the form of a question using language neither intentionally argumentative nor likely to create prejudice either for or against the measure.” § 116.334, RSMo.

Section 116.175 (cum. supp. 2011) requires the State Auditor to prepare the fiscal note and fiscal note summary within 20 days of receipt of the petition sample sheet from the Secretary of State. Pursuant to § 116.175.3 (cum. supp. 2011) , the Auditor’s fiscal note and fiscal note summary must “state the measure’s estimated cost or savings, if any, to state or local governmental entities.” The fiscal note summary may 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.” § 116.175.3, RSMo. (cum. supp. 2011) Opponents and proponents may submit to the Auditor a proposed statement of fiscal impact “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.” § 116.175.1, RSMo.

Following review and approval by the Attorney General of the legal content and form of the fiscal note, fiscal note summary, and summary statement, the Secretary of State certifies an official ballot title for the measure. § 116.180, RSMo. The official ballot title consists of the summary statement, immediately followed by the fiscal note summary, which is to appear in a separate paragraph. *Id.*

Pursuant to § 116.180, RSMo., “[p]ersons circulating the petition must 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.”

Any citizen may challenge the official ballot title or fiscal note by bringing an action in the Circuit Court of Cole County within ten days after the official ballot title is certified by the Secretary of State. § 116.190, RSMo. (cum. supp. 2011) The petition filed in circuit court must state the reason or reasons why the summary statement, fiscal note summary, and/or fiscal note is “insufficient or unfair.” § 116.190.3, RSMo. (cum. supp. 2011)

Insofar as the action challenges the summary statement, the circuit court in its decision must certify the summary statement portion of the official ballot title to the Secretary of State. § 116.190.4, RSMo. (cum. supp. 2011) Insofar as the action challenges the fiscal note or fiscal note summary, the circuit court may either certify the fiscal note or the fiscal note summary portion of the official ballot title to the Secretary of State or remand the fiscal note or fiscal note summary to the Auditor for preparation of a new fiscal note or fiscal note summary pursuant to the procedures set forth in § 116.175, RSMo. (cum. supp. 2011) *Id.*

Pursuant to § 116.175.5 (cum. supp. 2011), a fiscal note or fiscal note summary that does not satisfy the requirements of § 116.175 (cum. supp. 2011) “also shall not satisfy the requirements of section 116.180,” which, as noted above, requires the official ballot title to be affixed to each page of the petition prior to circulation and states that signatures shall not be counted if the official ballot title is not so affixed.

B. Current Consumer Lending Law and the Proposed Initiative Petition at Issue in This Litigation

Beginning as early as 1929, Missouri law has historically imposed a two-digit annual interest rate limit on loans.² Since 1951, the rate cap for consumer credit loans was in § 408.100, RSMo. In 1998, however, the General Assembly deregulated the interest rate and eliminated § 408.100's rate limit altogether.³

Today in Missouri, payday, car title, and other consumer installment loans frequently carry interest rates as high as 400 percent A.P.R. (Northcott L.F. 223-224 (Bryan Affidavit), L.F. 242-243 (Hill Affidavit), L.F. 248-249 (Gerth Affidavit), L.F. 254 (Schulte Affidavit); Francis L.F. 152-153 (Bryan Affidavit), L.F. 171-172 (Hill Affidavit), L.F. 177-178 (Gerth Affidavit), L.F. 182-183 (Schulte Affidavit); Prentzler L.F. 159-160 (Bryan Affidavit), L.F. 178-179 (Hill Affidavit), L.F. 184-185 (Gerth Affidavit), L.F. 189-190 (Schulte Affidavit); Reuter L.F. 113-114 (Bryan Affidavit), L.F.

² F.B. Hubachek, *The Development of Regulatory Small Loan Laws*, Journal of Law and Contemporary Problems, Vol. 8, No. 4, Winter 1941, page 135.

³ Missouri State Auditor's Report No. 2001-36, "Division of Finance and Regulation of Instant Loan Industry" p. 23 (May 9, 2001), *available at* <http://www.auditor.mo.gov/press/2001-36.pdf>. *See also Ponca Finance Co., Inc. v. Esser*, 132 S.W.3d 930, 932 (Mo. App. W.D. 2004) (upholding loan agreement specifying annual interest rate of 125.96 percent because current version of "[s]ection 408.100 very clearly states that the parties can agree to any interest rate, with no limit").

132-133 (Hill Affidavit), L.F. 138-139 (Gerth Affidavit), L.F. 143-144 (Schulte Affidavit)) For at least 13 years, Missouri community groups and faith-based networks have sought, but were unsuccessful in achieving, state legislative reform to end what they have seen as predatory lending practices that are harming their communities and congregations. (See Northcott L.F. 253-254, ¶2-3 (Schulte Affidavit) L.F. 242-243 (Hill Affidavit; Francis L.F. 152-153 (Bryan Affidavit), L.F. 171-172 (Hill Affidavit), L.F. 177-178 (Gerth Affidavit), L.F. 182-183 (Schulte Affidavit); Prentzler L.F. 159-160 (Bryan Affidavit), L.F. 178-179 (Hill Affidavit), L.F. 184-185 (Gerth Affidavit), L.F. 189-190 (Schulte Affidavit); Reuter L.F. 113-114 (Bryan Affidavit), L.F. 132-133 (Hill Affidavit), L.F. 138-139 (Gerth Affidavit), L.F. 143-144 (Schulte Affidavit))

During the last decade, the only law passed by the Missouri General Assembly with respect to a consumer lending limit came in 2002, when the General Assembly enacted § 408.505, RSMo. (cum. supp. 2011) Section 408.505 prohibits lenders licensed under § 408.500, RSMo. from recouping accumulated interest and fees in excess of 75 percent of the initial loan amount on any single loan under this section (commonly known as payday loans). See § 408.505.3, RSMo. (cum. supp. 2011) This law did little to change the landscape, however, because it allows payday loans to carry as much as \$75 in interest and fees on a two-week \$100 loan, a charge which equates to 1,980 percent A.P.R. In 2011, the average cost of a payday loan in Missouri was 444 percent A.P.R.⁴

⁴ See Missouri Division of Finance, Report to General Assembly pursuant to section 408.506, RSMo. (January 4, 2011), available at

Faced with legislative inaction, proponents of fair lending practices sought to take their case directly to the people. On July 7, 2011, Missouri citizen and retired United Methodist minister James J. Bryan submitted to Secretary of State Robin Carnahan a sample sheet for a proposed initiative petition that would restore an interest rate limit to Missouri law (the Initiative Petition). (Northcott L.F. 9, 223-224; Francis L.F. 12, 152-153; Prentzler L.F. 11, 159-160; Reuter L.F. 13, 113-114) The Initiative Petition is sponsored by Missourians for Responsible Lending, a Missouri campaign committee and statewide coalition of individuals and community, labor, and religious organizations committed to working to end predatory loan rates. (Northcott L.F. 223-224; Francis L.F. 152-153; Prentzler L.F. 159-160; Reuter L.F. 113-114)

A copy of the Initiative Petition appears at age. A-00018 in the Appendix to this brief and in the Legal Files for these appeals. (*See* Northcott L.F. 24; Francis L.F. 25; Prentzler L.F. 27; Reuter L.F. 122) As stated therein, the purpose of the Initiative Petition is:

to prevent lenders, such as those who make what are commonly known as payday loans, car title loans, and installment loans, which have typically carried triple-digit interest rates as high as three hundred percent annually or higher, from charging excessive fees and interest rates that can lead families into a cycle of debt by:

<http://finance.mo.gov/consumercredit/documents/2011PaydayLenderSurvey.pdf> (last visited June 1, 2012).

- (1) Reducing the annual percentage rate for payday, title, installment and other high cost consumer credit and small loans from triple-digit interest rates to thirty-six percent per year;
- (2) Extending to veterans and others the same thirty-six percent rate limit in place for payday and title loans to active military families as enacted by the 109th United States Congress in 10 U.S.C. § 987; and
- (3) Preserving fair lending by prohibiting lenders from structuring other transactions to avoid the rate limit through subterfuge.

(App. A-00018; Northcott L.F. 25; Francis L.F. 26; Prentzler L.F. 28; Reuter L.F. 123)

To accomplish these objectives, the Initiative Petition would amend chapters 367 and 408, RSMo. to prohibit persons making or offering (1) consumer credit loans, (2) unsecured loans of \$500 or less, or (3) consumer installment loans from imposing interest, fees and finance charges that exceed 36 percent A.P.R. The proposed statutory amendments would also prohibit lenders from engaging in any device or subterfuge intended to evade the limit. (App. A-00019-21, Northcott L.F. 25-27; Francis L.F. 26-28; Prentzler L.F. 28-30; Reuter L.F. 123-125)

C. The Secretary of State's Summary Statement

On behalf of Missourians for Responsible Lending, Rev. Bryan submitted a proposed summary statement to the Secretary of State for consideration for the official

ballot title.⁵ (Northcott L.F. 224; Francis L.F. 153; Prentzler L.F. 160; Reuter L.F. 114)
 The Secretary of State declined to use Rev. Bryan's proposal and independently drafted her own summary statement. (*Id.*) The Secretary's summary statement reads:

Shall Missouri law be amended to limit the annual rate of interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?

(Northcott L.F. 44; Francis L.F. 50; Prentzler L.F. 49; Reuter L.F. 15)

D. The Auditor's Fiscal Note and Fiscal Note Summary

The Auditor received the Initiative Petition from the Secretary of State on July 8, 2011. (Northcott L.F. 9; Francis L.F. 13; Prentzler L.F. 12; Reuter L.F. 13) Under § 116.175.2 (cum. supp. 2011), the Auditor had until July 28, 2011 to prepare the fiscal note and fiscal note summary.

⁵ The proposed summary statement submitted by Rev. Bryan provided:

Shall Missouri law be amended to:

- Reduce the annual interest rate for payday, title, installment and other high cost consumer credit and small loans from triple-digit interest rates to 36%?
- Extend to veterans and others the same rate limit already in place for active military families?
- Preserve fair lending by preventing lenders from structuring other transactions to avoid the rate limit?

(Northcott L.F. 236; Francis L.F. 165; Prentzler L.F. 172; Reuter L.F. 126)

1. The Auditor's typical procedures for preparing fiscal notes and fiscal note summaries.

In preparing a fiscal note, the Auditor's normal policy and procedure is to send copies of the initiative petition to various state and local governmental entities requesting that the entities review the same and provide the Auditor with information regarding the entities' estimated costs or savings, if any, if the proposed initiative is adopted. Joint Stip. ¶ 20. It generally takes the state and local governmental entities seven to ten days to provide the Auditor with the requested fiscal impact information. 03/27/12 Tr. 81-82.⁶ The Auditor reviews the submissions of state and local governmental entities, along with the submissions of proponents and opponents of the proposed measure, for completeness and reasonableness.⁷ Joint Stip. ¶ 22. The Auditor's normal process is to include in the fiscal note the information provided by state and local governmental entities, proponents,

⁶ All transcript citations in the records on appeal are to the transcript of the March 27, 2012 trial before Judge Green unless otherwise indicated.

⁷ The Auditor's review for completeness consists of making sure that the entity's response conveys a complete representation of what the entity intended to send and is reasonably related to the proposal and to the suggested fiscal impact reported by the entity. If the Auditor has any questions regarding the submissions from other entities, the Auditor may follow up with that entity. If the Auditor finds a response to be unreasonable, that affects the weight given to that response in preparing the fiscal note summary. Joint Stip. ¶ 22.

and opponents of the proposed measure. Then, the Auditor takes into account all submissions and drafts the fiscal note summary based upon the fiscal note. Joint Stip. ¶ 24. The Court of Appeals upheld the validity of this procedure in *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573, 582 (Mo. App. W.D. 2010).

2. *DIFP's and the Department of Revenue's responses to the Auditor.*

In this case, the Auditor's office followed its normal procedure in requesting information from state and local governmental entities and incorporating their responses into the fiscal note. As relevant here, officials from the Missouri Department of Insurance, Financial Institutions and Professional Registration (DIFP) reviewed the Initiative Petition and anticipated that it would result in no cost or savings to DIFP. They informed the Auditor that if adoption of the measure resulted in a reduction of fee revenue from consumer credit entities, DIFP anticipated that it would spend a correspondingly smaller amount to regulate those entities. 03/27/12 Tr. 22-23, 107; Joint Ex. 3, p. 2; App. A-00022. Officials from the Department of Revenue similarly indicated that the Initiative Petition would have no impact on their department. Joint Ex. 3, p. 2; App. A-00022.

3. *Dr. Haslag's submission as an opponent of the Initiative Petition.*⁸

On July 18, 2011, Joseph Haslag, an economics professor at the University of Missouri and an opponent of the Initiative Petition, submitted to the Auditor a fiscal impact statement. 03/27/12 Tr. 120, 124-125; Plaintiffs' Exhibit 7; App. A-00042. Dr. Haslag had been retained and paid to prepare this fiscal impact statement by Charles Hatfield, counsel for Respondents/Cross-Appellants Peggy Northcott and Larry Potashnick and for Respondent Steven Reuter. Tr. 155. A copy of Dr. Haslag's submission was admitted as Plaintiffs' Exhibit 7 at trial and appears at p. A-00042 of the Appendix to this brief.

Dr. Haslag's fiscal impact statement concluded, in contrast to DIFP and the Department of Revenue's views, that there would be state revenue losses if the Initiative Petition were to become law.

Dr. Haslag's fiscal impact conclusions flowed from his belief that the Initiative Petition's rate limit would cause payday and title lending stores to cease doing business in Missouri because they would be unable to meet their variable costs. Plaintiffs' Ex. 7, p. 29-30, 32-33; App. A-00045-46, 48-49; Tr. 126.

Dr. Haslag calculated his estimated state revenue losses from such closures as follows. First, he used payday lending profit information derived from an Ernst & Young

⁸ Missourians for Responsible Lending did not submit a fiscal impact statement to the Auditor. Nor did any other proponent. (Northcott L.F. 224-225; Francis L.F. 153-154; Prentzler L.F. 160-161; Reuter L.F. 114-115; App. A-00023)

study to estimate that Missouri's 1,066 payday lending stores collectively generate approximately \$57 million gross domestic product (GDP) annually. Then Dr. Haslag used what he said were historical averages indicating that 3.8 cents from every dollar of Missouri's GDP is collected as general revenue, and he multiplied \$57 million by .038 to arrive at an estimate that the State would lose \$2.17 million general revenue annually if all payday lending stores closed. Tr. 127-128, Plaintiffs' Ex. 7, p. 31-32; App. A-00048-49.

Dr. Haslag further calculated that the Initiative Petition would result in lost licensing fee revenues of \$319,800 because payday lenders each pay a \$300 annual licensing fee to the Division of Finance. Plaintiffs' Ex. 7, p. 32; App. A-00048.

Dr. Haslag performed similar general revenue and lost fee calculations for title lenders, which he believed would also close as a result of the Initiative Petition. *Id.* p. 33; App. A-00049.

Finally, Dr. Haslag's fiscal impact submission included an estimate that the Initiative Petition would result in payment of \$10.08 million in unemployment insurance benefits as a result of the closure of payday and title lending stores, which Dr. Haslag considered to be a cost to the State. Plaintiffs' Ex. 7, p. 35; App. A-00051.

4. The Auditor's preparation of the Fiscal Note and Fiscal Note Summary.

John Halwes, the person at the Auditor's office responsible for preparing fiscal notes and fiscal note summaries for initiative petitions, reviewed Dr. Haslag's analysis and included it, along with the responses of the state and local governmental entities that had responded to the Auditor's fiscal note queries, essentially verbatim in the fiscal note

(Fiscal Note). Tr. 12-13, 21. The entire Fiscal Note is 14 pages in length. Dr. Haslag's analysis takes up 10 of those 14 pages. A copy of the Fiscal Note was admitted at trial as Joint Exhibit 3 and is reproduced at p. A-00023 in the Appendix to this brief.

In formulating the fiscal note summary (Fiscal Note Summary) and reaching conclusions about fiscal impact on behalf of the State Auditor, Mr. Halwes relied heavily on Dr. Haslag's analysis. Tr. 24-25. The Fiscal Note Summary prepared by Mr. Halwes reads:

State governmental entities could have annual lost revenue estimated at \$2.5 to \$3.5 million that could be partially offset by expenditure reductions for monitoring industry compliance. Local governmental entities could have unknown total lost revenue related to business license or other business operating fees if the proposal results in business closures.

Joint Ex. 3, 36; App. A-00036

Mr. Halwes confirmed at trial that he derived the \$2.5 to \$3.5 million range in the Fiscal Note Summary from Dr. Haslag's lost license fee and lost general revenue figures. Tr. 31-32; 77-79.

Mr. Halwes further testified that he did not include Dr. Haslag's prediction of lost unemployment benefits in the Fiscal Note Summary because unemployment benefits are paid from an enterprise fund that is funded by private business contributions, not through a governmental fund. Tr. 38-40.

E. Certification of the Official Ballot Title

The Summary Statement and Fiscal Note Summary for the Initiative Petition were timely approved by the Attorney General. Joint Stip., ¶14. On August 9, 2011, the Secretary of State certified the official ballot title for the measure. (Prentzler L.F. 13; Reuter L.F. 15; Northcott L.F. 10; Francis L.F. 15) A copy of the certification was admitted as Joint Exhibit 4 and appears in the Appendix to this brief at p. A-00022. The official ballot title reads:

Shall Missouri law be amended to limit the annual rate of interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?

State governmental entities could have annual lost revenue estimated at \$2.5 to \$3.5 million that could be partially offset by expenditure reductions for monitoring industry compliance. Local governmental entities could have unknown total lost revenue related to business license or other business operating fees if the proposal results in business closures.

(Prentzler L.F. 13, 49; Reuter L.F. 15; Northcott L.F. 10, 44; Francis L.F. 15, 50; App. A-00022.)

F. Ballot title litigation before the circuit court.

1. Filing of the four industry suits.

Within ten days after the Secretary of State's certification of the official ballot title, opponents of the Initiative Petition filed four separate, yet nearly identical, lawsuits (the Industry Suits) claiming that the Summary Statement, Fiscal Note, and Fiscal Note

Summary were insufficient and unfair within the meaning of § 116.190, RSMo. (cum. supp. 2011) (*See* Prentzler L.F. 10-25; Reuter L.F. 12-20; Northcott L.F. 8-15; Francis L.F. 11-24) Plaintiffs Northcott and Francis and their co-plaintiffs raised constitutional claims that are the subjects of their cross-appeals.

The circuit court case styles for the Industry Suits were:

- *Northcott v. Carnahan, et al.*, Case No. 11AC-CC00557
- *Francis v. Carnahan, et al.*, Case No. 11AC-CC00546.
- *Prentzler v. Carnahan, et al.*, Case No. 11AC-CC00549; and
- *Reuter v. Carnahan, et al.*, Case No. 11AC-CC00552.

Plaintiff-Respondent/Cross-Appellants Northcott and Larry Potashnick are identified in their petition as the owners and operators of a litigation financing company licensed with the Missouri Department of Insurance. (Northcott L.F. 9) Plaintiff-Respondent/Cross-Appellant Francis is identified as a customer of installment loan companies in Missouri, and Troy Hoover is identified as an employee of Western Shamrock, Inc., which offers installment loans and which Francis and Hoover claim will be negatively affected by the Initiative Petition. (Francis L.F. 12) Plaintiff-Respondent Prentzler has been identified as an executive with a Kansas-based payday loan company QC Holdings Inc., the largest payday loan and consumer installment loan lender in the State of Missouri.⁹ Plaintiff-Respondent Reuter is identified in his petition as an

⁹ See http://www.stltoday.com/news/local/govt-and-politics/political-fix/article_1898f5ca-ccd5-11e0-bc25-0019bb30f31a.html (last visited June 1, 2012).

employee and part owner of American Credit Services, LLC, a consumer installment lending business licensed with the Missouri Division of Finance. (Reuter L.F. 12)

2. *Pre-trial proceedings*

The four Industry Suits were initially assigned to different judges, but were ultimately transferred to the Honorable Daniel Green, Circuit Judge.

Beginning in September 2011, George Dennis Shull and Jerry Stockman, persons who support and signed the Initiative Petition, moved to intervene in each of the Industry Suits. After first ruling that Mr. Shull and Mr. Stockman should be allowed to intervene in the *Prentzler* and *Reuter* suits, Judge Green reversed course on January 30, 2012 and dismissed them from the *Prentzler* and *Reuter* cases and denied them intervention in the *Northcott* and *Francis* cases. (Prentzler L.F. 121-122; Reuter L.F. 83-85; Northcott L.F. 168-169; Francis L.F. 123-124)

In another initiative petition case heard the same day (*Allred v. Carnahan*), Judge Green denied intervention to the entity that had submitted an initiative petition to the Secretary of State, effectively ruling that no proponent of an initiative petition could participate in § 116.190 litigation brought by their political opponents.

Mr. Shull and Stockman appealed the denial of intervention as of right in the Industry Suits to the Court of Appeals, Western District, which heard their appeals and the *Allred* appeal on March 22, 2012. On March 26, 2012, the day before trial was scheduled for all four Industry Suits, the Court of Appeals issued an opinion affirming the denial of intervention as of right to Shull and Stockman. *Prentzler v. Carnahan*, 2012 WL 985839 (Mo. App. W.D. Mar. 26, 2012). As a result, Mr. Shull and Mr. Stockman

were limited to participation as amici in the Industry Suits. (The *Allred* appeal remained undecided until after the conclusion of the trial in the Industry Suits.)

With respect to pre-trial discovery, Plaintiffs served written discovery and took a Rule 57.03(b)(6) deposition of the Auditor's corporate representative. The State Defendants served no written discovery and took no depositions. While they were parties to the *Prentzler* and *Reuter* cases, Shull and Stockman served discovery on those plaintiffs and requested disclosure of testifying experts. But because Shull and Stockman were never permitted to intervene in the *Northcott* and *Francis* cases, they were never able to serve discovery on the plaintiffs in those cases and never able to force them to disclose any experts.

3. *The March 27, 2012 trial.*

All four Industry Suits were tried on a common record before Judge Green on March 27, 2012. The parties entered a joint stipulation, and Plaintiffs called three witnesses and offered documentary evidence, interrogatory responses from the Auditor, and deposition designations from the Rule 57.03(b)(4) deposition of the Auditor. As for live witnesses, Plaintiffs Northcott and Potashnick called John Halwes. Plaintiff Prentzler called Dr. Haslag as an expert, and Plaintiffs Francis and Hoover called Thomas Durkin as an expert. Dr. Durkin was a surprise expert who had not been previously disclosed or deposed.

The State defendants offered no evidence. Tr. 219

a. Mr. Halwes' testimony

Mr. Halwes testified about the Auditor's fiscal note process and preparation of the Fiscal Note and Fiscal Note Summary in this case, including his reliance on Dr. Haslag's analysis in drafting the Fiscal Note Summary. Tr. 12-25. Mr. Halwes testified that he had found reasonable Dr. Haslag's prediction that the Initiative Petition would result in closure of payday and title lenders. Tr. 23-24. Mr. Halwes agreed that Dr. Haslag's submission did not include an analysis of costs that may be associated with closure of installment lenders (sometimes referred to as "510 lenders") and consequently the Fiscal Note likewise did not include such costs. Tr. 29.

b. Dr. Haslag's testimony

As relevant here, Dr. Haslag testified that his July 18, 2011 fiscal impact submission did not include revenue losses that may have stemmed from 510 lender closures. He said his submission had been limited to estimating losses from closure of payday and title lenders. Tr. 130-131.

Even so, Dr. Haslag did not opine at trial that the Auditor's Fiscal Note was insufficient for not having included an analysis of 510 lenders.¹⁰ When questioned by

¹⁰ In his opinion testimony, Dr. Haslag identified one reason that he believed the Fiscal Note was insufficient, and three reasons why he believed the Fiscal Note Summary was insufficient. *See* Tr. 138-150. None of these alleged failings related to installment lenders, and all of the alleged failings were rejected by Judge Green and need not be elaborated upon here as Prentzler did not file a cross appeal.

counsel for Francis and Hoover whether the Initiative Petition would impact 510 lenders, Dr. Haslag answered, “Honestly, I didn’t study that group, so I can’t say definitively that I know what the answer is.” Tr. 151. After stating that he did not know what the impact on 510 lenders would be, Dr. Haslag agreed that closure of installment lenders would increase the negative impact on the State and local governmental entities. However, Dr. Haslag refused to state that not including information about 510 lender effects in the Fiscal Note and Fiscal Note Summary rendered the Fiscal Note or the Fiscal Note Summary insufficient. When questioned on this topic by counsel for Plaintiffs Francis and Hoover, Dr. Haslag stated only that he thought that the 510 lender impact issues were “questions that should be addressed and should be analyzed.” Tr. 153.

Judge Green himself asked Dr. Haslag about potential costs associated with closure of 510 lenders. In response to the Court’s questions, Dr. Haslag admitted that he had never been asked to calculate potential costs from closure of 510 lenders and that he could not tell the court what those costs might be. Tr. 170.

c. Dr. Durkin’s testimony

Plaintiff Francis and Hoover’s surprise expert, Thomas Durkin, was the last witness called to testify. Dr. Durkin is a retiree from the Division of Research and Statistics of the Board of Governors of the Federal Reserve System in Washington, D.C., where he was most recently Senior Economist. Tr. 172; Plaintiffs’ Ex. 14, p. 1; App. A-00062; Plaintiffs’ Ex. 13. He was also employed for six years by American Financial Services Association, the national trade association for consumer installment lenders. Plaintiffs’ Ex. 13, p. 1.

Dr. Durkin indicated that he had been asked by counsel for Plaintiff Francis and Hoover to examine certain factual information about installment lending in the State of Missouri and provide opinions about (1) installment lending trends should Missouri adopt a 36 percent A.P.R. interest rate ceiling, and (2) the impact of such trends on revenues and expenses of the State of Missouri. Plaintiffs' Ex. 14, p.1; App. A-00052.

In response to these questions, Dr. Durkin opined that adoption of the Initiative Petition would cut 510 lenders' revenues by some 60 percent and have a probable effect of causing Missouri's 510 lending industry to soon disappear. Ex. 14, p. 7; App. A-00068. While Dr. Durkin admitted repeatedly that he was unfamiliar with Missouri fiscal note requirements (*e.g.*, Tr. 202, 204), he opined that the Fiscal Note should have included five 510-lender-related cost items that, in his view, would together result in an estimated \$14.589 million in additional costs to the State in year one and an additional \$5.944 million in costs to the State in year two. Ex. 14, p. 15; App. A-00076. The five cost items were (1) declines in state sales tax revenues due to 510 lenders closing and 510 customers in turn no longer being able to make as many retail purchases as they could if 510 lenders were still in business, (2) declines in state income taxes due to 510 lender employees being laid off and the laid-off 510 lender employees in turn having less wages on which to pay income tax, (3) declines in state sales tax revenues due to "belt tightening" of laid-off 510 lender employees who would have to reduce their retail purchases due to lack of wages, (4) increases in state unemployment claims from laid-off 510 lenders, and (5) declines in state business income revenues due to 510 lenders closings.

To arrive at his estimates, Dr. Durkin used a different methodology than Dr. Haslag. Tr. 215. For his first cost component, Dr. Durkin indicated that he looked at data provided to him by 510 lenders and consumer survey information he had obtained from the Federal Reserve Board. This information, he said, allowed him to estimate that 510 lenders made \$850 million in loans in Missouri in 2009 and 2010 and might use 15 percent of loan monies to make retail purchases that are subject to state sales tax, which is levied at a rate of 4.225 percent. Ex. 14, p. 8-9 & n.2; App. A00069-70. Dr. Durkin then opined that if installment loans were not made because of 510 lender closures, consumers would not make these retail purchases, and the State would not receive state sales tax on the purchases, resulting in a loss to the State of \$5.44 million in sales tax revenue. Ex. 14, p. 9, 15; App. A-00070, 00076.

The second item in Dr. Durkin's cost estimate was an estimate of lost state personal income taxes resulting from employee layoffs from closure of 510 lenders. Here, Dr. Durkin again relied on information he obtained directly from 510 lenders to estimate that employee salaries exceeded 20 percent of installment lenders' \$200 million total operating income, or \$40 million. Ex. 14, p. 9; App. A-00070. Dr. Durkin assumed that half of the laid-off employees would find new jobs, but the other half would not, resulting in the remaining laid-off employees not paying 6 percent state income tax on \$20 million in earnings they would lose from being laid off. Dr. Durkin calculated the state impact of lost income taxes based on lost salaries for laid-off employee at \$1.2 million in year one. Ex. 14, p. 9-10, 15; App. A-00070-71, A-00076.

Dr. Durkin's third cost component was an estimate of lost state sales tax due to "belt tightening" by these same laid-off 510 lender employees. Ex. 14, p. 15; App. A-00076. Here, Dr. Durkin estimated that the laid-off 510 lender employees would have otherwise spent all or most of the estimated \$20 million in lost earnings on retail purchases subject to the 4.225 percent state sales tax. Ex. 14, p. 10; App. A-00071. By not having money to make these retail purchases because of being laid off, Dr. Durkin estimated that the State would lose some \$0.845 million in state sales tax. Ex. 14, p. 10, 15; App. A-00070, A-00076.

Dr. Durkin's fourth cost component was \$6.6 million in state unemployment compensation he estimated would need to be paid to the laid-off 510 lender employees. Ex. 14, p. 10, 15; App. A-00076, A-00076. Dr. Durkin's estimate was based on 2,200 employee displacements at \$317.60 per worker for 9.5 weeks apiece. Ex. 14, p. 10; App. A-00071. Dr. Durkin stated that he concluded that there would be 2,200 employees because he "heard at a professional convention from a lawyer who operated here in the State of Missouri that there were about 2,200 employees" in the 510 lending industry. Tr. 192; Ex. 14, p. 10, n.3; App. A-00071.

Dr. Durkin's final cost component was \$.504 million in lost business income taxes that he believed would no longer be paid once 510 lenders went out of business. Ex. 14, p. 10, 15; App. A-00070, A-00076.

At trial, Plaintiffs presented no evidence that the data Dr. Durkin obtained from 510 lenders to produce his cost estimates, or the survey information that Dr. Durkin

obtained from the Federal Reserve Board, had been available to the Auditor as the Auditor prepared the Fiscal Note.

In cross examination, Dr. Durkin also admitted that opponents could have submitted the 510 lender cost information to the Auditor within the ten-day time period set forth in § 116.175 for providing such submissions, but had not done so. Tr. 200-201. Dr. Durkin further agreed that none of the state entities responding to the Auditor's July 2011 fiscal note queries had included in their responses the information that Dr. Durkin was providing for the first time at trial through his testimony and report. Tr. 207-210.

4. *Conclusion of the March 27, 2012 trial.*

After the conclusion of the evidence, the parties presented closing arguments on the adequacy of the Summary Statement, Fiscal Note, Fiscal Note Summary, and other claims raised by the Plaintiffs. The adequacy of the Summary Statement was treated as a question of law.

After hearing the parties' arguments, Judge Green stated as follows with respect to the Fiscal Note:

And, Mr. Moore [counsel for the auditor], the part that troubles me is, is I think Mr. Halwes is extremely competent and I think you've got a good point that you work with what you're given. But it seems to me if you put a number down on paper, it has to be an accurate number and I don't see anybody -- on some respect it seems a little bit of sandbagging to have 10 of the 13 pages be your expert's testimony then say it's no good, but I don't

know. I never could get Dr. Durkin and Dr. Haslag's testimony to merge as to whether what Dr. Haslag did was conclusive or not.

... I would be interested to know [in post-trial briefing] ... about whether the fiscal note summary has to be accurate as of the time it was prepared. And with the information given, it would seem that it would be inviting sandbagging to not tell somebody what to do or something and then attack it later.

But it also seems that if you buy into Dr. Haslag's opinion, which quite frankly, I'm not sure I was prepared to do so as much as Mr. Halwes did, but once you buy into it and you say it's 2.5 to 3.5, you probably have to consider everything, but there's a lot of assumptions in his opinion that I wouldn't necessarily buy into that apparently Mr. Halwes did, which that's his job, not mine.

Tr. 249-250.

With respect to the Summary Statement, Judge Green commented that he was troubled by the Secretary of State's decision not to include the specific interest rate that the Initiative Petition would enact, even though he believed that the Secretary of State had made a good argument that whether the summary was the "best" is not the test under § 116.190. Tr. 248-249.

Judge Green allowed parties and amici to file post-trial briefs. The Plaintiffs, the Secretary of State, and Amici Shull and Stockman filed post-trial briefs. The Auditor did not file a post-trial brief.

5. *The Circuit Court's April 5, 2012 order.*

On Thursday, April 5, 2012, Judge Green entered a judgment that had been drafted by counsel for Plaintiffs Northcott and Potashnick. A copy of the April 5, 2012 judgment appears at pages 326-332 of the Northcott Legal File.

In the judgment, Judge Green concluded that the Fiscal Note and Fiscal Note Summary were “inadequate” and “unfair” and must be remanded to the Auditor to be redone because the Fiscal Note did not include an analysis of costs that may be associated with the closure of 510 lenders. Northcott L.F. 329-331.

The circuit court also concluded that the Secretary of State's Summary Statement was “insufficient, unfair and likely to deceive voters” because it did not state the exact percentage of the 36 percent annual interest rate limit of the Initiative Petition. Northcott L.F. 328. Noting that Federal Truth in Lending laws and state law required written disclosure to borrowers of the exact interest rate in a loan contract, the circuit court held that the “same standard must be applied to the Secretary of State's summary statement,” and thus, an “explicit statement of the limit” was required. *Id.*

In the judgment, the court certified a new summary statement to the Secretary of State, which amended the original summary as follows:

Shall Missouri law be amended to ~~limit~~ **allow** the annual rates **up to**
a limit of **36% including** interest, fees, and finance charges for

payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?¹¹

See Northcott L.F. 331.

The circuit court decided all other claims not specifically addressed in the judgment against the Plaintiffs and in favor of the Defendants. Northcott L.F. 332.

6. Post-trial intervention by James Bryan and Missourians for Responsible Lending and Request to Stay and/or Vacate the Circuit Court's Judgment.

On Monday, April 9, 2012, Rev. Bryan and Missourians for Responsible Lending moved to intervene in each of the Industry Suits, relying on the Court of Appeals' opinion in *Allred v. Carnahan*, 2012 WL 1071226 (Mo. App. W.D. April 2, 2012), which had been released after the March 27, 2012 trial and had reversed Judge Green's intervention ruling in the *Allred* case and held that persons in Rev. Bryan's and Missourians for Responsible Lending's position were entitled to intervention as of right in § 116.190 litigation. (Northcott L.F. 211; Francis L.F. 139; Prentzler L.F. 146; Reuter L.F. 100)

Rev. Bryan and Missourians for Responsible Lending submitted affidavits in support of intervention noting that since the Secretary of State certified the official ballot title for the Initiative Petition, Missourians for Responsible Lending had raised and

¹¹ The bold-faced text shows the additions made by the circuit court, while the stricken through text is the Secretary's original summary statement.

expended money, and exerted considerable effort to qualify the Initiative Petition for the November 2012 ballot through a largely volunteer and grassroots effort and that Missourians for Responsible Lending could not re-gather the required more than 90,000 signatures before the May 6, 2012 constitutional deadline if it had to start from scratch at that point, as Plaintiffs' counsel had been quoted in the press as saying was the result of the circuit court's ruling. See Francis L.F. 144; Northcott L.F. 215; Prentzler L.F. 151; Reuter L.F. 105 (noting Prentzler's counsel had been quoted as saying, "As a result of Judge Green's ruling, 'the old signatures can't count, and they're going to have to start again with the new language.'").

Rev. Bryan and Missourians for Responsible Lending also sought to stay and/or vacate the circuit court's judgment. The motion stated that while Rev. Bryan and Missourians for Responsible Lending did not believe that the circuit court's April 5, 2012 judgment should disqualify any signatures gathered thus far in support of the Initiative Petition, to the extent a court might hold otherwise and bind Rev. Bryan and Missourians for Responsible Lending by such a ruling, Rev. Bryan and Missourians for Responsible Lending were indispensable parties to Plaintiffs' litigation pursuant to Rule 52.04 because equity and good conscience would not permit Plaintiffs' litigation to have proceeded, and the Court's judgment to stand without their participation because the outcome of the litigation would effectively deny them the right to have a fair and meaningful opportunity to exercise their constitutional right to propose laws by initiative. (Northcott L.F. 211; Francis L.F. 139; Prentzler L.F. 146; Reuter L.F. 100)

The motion further stated that the circuit court's April 5, 2012 judgment was unconstitutional to the extent that it could be interpreted to require the invalidation of signatures gathered to date based on (1) failings by the Secretary of State in preparing a summary statement which failings were solely within the control of the Secretary of State and over which Rev. Bryan and Missourians for Responsible Lending had no control and (2) failings by the State Auditor in preparing a fiscal note and fiscal note summary which failings were proved by evidence not available to the Auditor and which was generated by opponents of the initiative petition long after the statutory time period for preparing the fiscal note had expired. To invalidate an initiative petition on such grounds that were outside movants' control, Rev. Bryan and Missourians for Responsible Lending argued, would place an unconstitutional burden on their right of initiative secured by Article III, sec. 49 of the Missouri Constitution. (Francis L.F. 145-146; Northcott L.F. 216-217; Prentzler L.F. 152-153; Reuter L.F. 106-107)

Following a hearing on April 10, 2012, Judge Green granted Rev. Bryan and Missourians for Responsible Lending intervention in the cases and took the motion to stay and/or vacate under advisement. 4/10/12 Tr. 42.

At the same hearing, counsel for Plaintiffs Francis and Hoover requested a modification to the circuit court's April 5, 2012 judgment to reflect that certain constitutional claims that Francis and Hoover had raised were dismissed as not ripe, rather than adjudicated on the merits. 4/10/12 Tr. 45-46.

7. *The Circuit Court's April 17, 2012 Final Judgment and Denial of Post-Trial Motion to Stay/Vacate.*

On April 17, 2012, the circuit court entered a final judgment that changed the April 5, 2012 judgment so as to dismiss Plaintiff Francis and Hoover's constitutional arguments as unripe, but was otherwise analyzed the Plaintiffs' summary statement, fiscal note, and fiscal note summary claims the same as the April 5, 2012 judgment. A copy of this judgment appears at pp.A-00001-8 in the Appendix to this brief. It is the judgment from which these appeals lie.

Rev. Bryan and Missourians for Responsible Lending filed notices of appeal to the Court of Appeals, Western District, on April 25, 2012.

On May 1, 2012, Judge Green denied Rev. Bryan and Missourians for Responsible Lending's motion to stay and/or vacate the judgment. (Northcott L.F. 7; Francis L.F. 8; Prentzler L.F. 8; Reuter .F. 11) However, due to conflicting rulings by various divisions of the Circuit Court of Cole County in § 116.190 initiative petition cases, no new fiscal note or official ballot title has been prepared for the Initiative Petition.

G. Submission of Signatures to the Secretary of State

On May 6, 2012, Missourians for Responsible Lending submitted the Initiative Petition to the Secretary of State, along with approximately 180,000 signatures in support, nearly twice the constitutional minimum needed to qualify for the ballot.¹²

¹² Under § 116.130, RSMo, the Secretary of State must distribute the petition to local election authorities for verification of signatures, who must report back their results

H. Transfer to this Court

On May 14, 2012, this Court ordered all appeals pending in the Court of Appeals, Western District, that stemmed from the circuit court's April 17, 2012 judgment to be transferred to this Court.

to the Secretary of State by 5:00 p.m. on July 31, 2012. § 116.130, RSMo. The Secretary of State has until 5:00 pm on the 13th Tuesday prior to the general election to certify sufficiency of a petition, or if the petition falls under the provisions of § 116.130.2 (random sampling) two weeks after the date the election authority certifies the results of the petition verification, whichever is later. § 116.150.3, RSMo.

POINTS RELIED ON

I.

The circuit court erred as a matter of law in ruling that the Fiscal Note and Fiscal Note Summary were insufficient and unfair for failure to include state and local revenues that allegedly would be reduced due to closure of private installment lenders stores because Plaintiffs' only evidence at trial of a quantified fiscal impact from the closure of such lenders (namely, the testimony of Dr. Durkin) was a legally insufficient basis for setting aside the fiscal note in that § 116.175 allows opponents to submit fiscal impact information to the Auditor for inclusion in the fiscal note only if they do so within ten days of the Auditor's receipt of an initiative petition from the Secretary of State and § 116.175 imposes a 20-day overall deadline for the Auditor to prepare a fiscal note, and Dr. Durkin's testimony was first offered at trial on March 27, 2012, some 253 days after the ten-day window for providing such submissions had expired on July 18, 2011 and some 243 days after the Auditor's 20-day window for completing the fiscal note had expired on July 28, 2011, and because failure to enforce the fiscal impact submission deadlines for opponents would result in an unconstitutional burden on proponents' Article III, sec. 49 right of initiative.

§ 116.190, RSMo.

§ 116.175, RSMo. (cum. supp. 2011)

Hancock v. Secretary of State, 885 S.W.2d 42 (Mo. App. W.D. 1994).

Thoroughbred Ford, Inc. v. Ford Motor Co., 908 S.W.2d 719 (Mo. App.

E.D. 1995).

II.

The circuit court erred as matter of law in ruling that the Summary Statement was insufficient and unfair for not having included specific detail about the annual percentage rate of the Initiative Petition’s proposed interest rate cap because the Summary Statement drafted by the Secretary of State was not insufficient, unfair or likely to deceive voters in that the Secretary’s Summary Statement fairly, adequately, and accurately put potential petition signers and voters on notice of the subject and purpose of Initiative Petition, which is “to limit the annual rate of interest, fees, and finance charges for payday, title, installment, and consumer credit loans,” and deference is given to the Secretary’s Summary, which need not use the “best” language possible to describe a measure and which need only provide a general title similar to legislative titles that would suffice under constitutional clear title analysis.

§ 116.190, RSMo.

§ 116.334, RSMo.

United Gamefowl Breeders Ass’n of Mo. v. Nixon, 19 S.W.3d 13733 (Mo. banc 2000).

Missouri Municipal League v. Carnahan, 303 S.W.3d 573 (Mo. App. W.D. 2010).

Bergman v. Mills, 988 S.W.2d 84 (Mo. App. W.D. 1999).

STANDARD OF REVIEW

This case involves a pre-election challenge to a proposed initiative petition brought by opponents of the underlying initiative petition. “When courts are called upon to intervene in the initiative process, they 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.” *Committee For A Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503, 507 (Mo. banc 2006) (quoting *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990)). “Prior to a vote on an initiative, the role of a court is to ‘consider only those threshold issues that affect the integrity of the election itself.’” *State ex rel. Humane Society of Missouri v. Beetem*, 317 S.W.3d 669, 673 (Mo. App. W.D. 2010) (quoting *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006)). “[The] court’s role ‘is not to act as a political arbiter between opposing viewpoints in the initiative process.’” *Id.* at 673 (quoting *Missourians Against Human Cloning*, 190 S.W.3d at 456).

As with other court-tried civil cases, “the trial court’s judgment 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.” *White v. Director of Revenue*, 321 S.W.3d 298, 307-08 (Mo. banc 2010). “In reviewing a particular issue that is contested, the nature of the appellate court’s review is directed by whether the matter contested is a question of fact or law. When the facts relevant to an issue are contested, the reviewing court defers to the trial court’s assessment of the evidence.” *Id.* at 308. If the evidence is uncontested, “no deference is given to the trial court’s findings.” *Id.*

“Evidence is uncontested in a court-tried case when the issue before the trial court involves only stipulated facts and does not involve resolution by the trial court of contested testimony; in that circumstance, the only question before the appellate court is whether the trial court drew the proper legal conclusions from the facts stipulated.” *Id.* Evidence also is uncontested when a party “has admitted in its pleadings, by counsel, or through the [party’s] individual testimony the basic facts of [other party’s] case.” *Id.* (quoting *All Am. Painting, LLC v. Fin. Solutions & Assocs. Inc.*, 315 S.W.3d 719, 723 (Mo. banc 2010)). In such cases, the issue is legal, and there is no finding of fact to which to defer. *White*, 321 S.W.3d at 308.

ARGUMENT

I.

The circuit court erred as a matter of law in ruling that the Fiscal Note and Fiscal Note Summary were insufficient and unfair for failure to include state and local revenues that allegedly would be reduced due to closure of private installment lenders stores because Plaintiffs' only evidence at trial of a quantified fiscal impact from the closure of such lenders (namely, the testimony of Dr. Durkin) was a legally insufficient basis for setting aside the fiscal note in that § 116.175 allows opponents to submit fiscal impact information to the Auditor for inclusion in the fiscal note only if they do so within ten days of the Auditor's receipt of an initiative petition from the Secretary of State and § 116.175 imposes a 20-day overall deadline for the Auditor to prepare a fiscal note, and Dr. Durkin's testimony was first offered at trial on March 27, 2012, some 253 days after the ten-day window for providing such submissions had expired on July 18, 2011 and some 243 days after the Auditor's 20-day window for completing the fiscal note had expired on July 28, 2011, and because failure to enforce the fiscal impact submission deadlines for opponents would result in an unconstitutional burden on proponents' Article III, sec. 49 right of initiative.

A. Section 116.190's "insufficient or unfair" standard places a heavy burden on those challenging a fiscal note or fiscal note summary.

Persons seeking to challenge the Auditor's fiscal note or fiscal note summary for a statewide ballot measure bear a heavy burden. Under § 116.190, RSMo., such challengers "bear the burden of demonstrating in the first instance that the Auditor's

fiscal note and fiscal note summary are ‘insufficient’ and ‘unfair’” within the meaning of § 116.190, RSMo. *Missouri Municipal League*, 303 S.W.3d at 582; *Overfelt v. McCaskill*, 81 S.W.3d 732, 737 (Mo. App. W.D. 2002) (the “party challenging the language of the fiscal note ... bears the burden of establishing that it was insufficient or unfair” within the meaning of § 116.190).

The Court of Appeals has interpreted the “words insufficient and unfair as used in § 116.190.3, RSMo., and applied to the fiscal note mean to inadequately and with bias, prejudice, deception and/or favoritism state the fiscal consequences of the proposed proposition.” *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo. App. W.D. 1994); *Missouri Municipal League*, 303 S.W.3d at 581. In interpreting the same “insufficient or unfair” standard as applied to the Secretary of State’s summary statement portion of the official ballot title, Missouri case law is clear that courts must give deference to the state official’s work. Whether the state official’s work is “the best” is not the test. *Missourians Against Human Cloning*, 190 S.W.3d at 457 (quoting *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999)). Even if opponents provide proposed language that “is more specific . . . even if that level of specificity might be preferable. . .” the state official’s work may not be set aside unless that work was truly deficient in some significant way. *Bergman*, 988 S.W.2d at 92.

B. Section 116.190 does not permit opponents to prove that a fiscal note or fiscal note summary is “insufficient or unfair” based on evidence that would be untimely under § 116.175.

In this case, it was undisputed at trial that the Auditor’s office prepared the Fiscal Note and Fiscal Note Summary by soliciting input from state and local governmental entities as to how the Initiative Petition might impact their budgets and by incorporating those responses and Dr. Haslag’s fiscal impact statement essentially verbatim into the Fiscal Note. Tr. 17. It was also undisputed that Dr. Haslag’s fiscal impact statement was the only fiscal impact statement provided to the Auditor’s office within § 116.175’s ten-day statutory timeframe for opponents to provide such submissions.

The circuit court nevertheless concluded that the Auditor’s Fiscal Note and Fiscal Note Summary were insufficient and unfair within the meaning of § 116.190, RSMo. based on the following evidence:

- Mr. Halwes’ testimony that the Fiscal Note and Fiscal Note Summary did not include an analysis of what the fiscal consequences to governmental entities might be as a result of 510 lenders going out of business if the Initiative Petition is adopted;
- Dr. Haslag’s testimony that his fiscal impact statement did not include analysis of what the fiscal consequences to governmental entities might be as a result of 510 lenders going out of business if the Initiative Petition is adopted; and

- Dr. Durkin's opinion testimony first disclosed at the March 27, 2012 trial, that the Initiative Petition would cause:

(1) state sales tax revenues to decline by approximately \$5.44 million because 510 lenders would close and 510 customers in turn would no longer be able to make as many retail purchases as they could if 510 lenders were still in business,

(2) state income taxes to decline by \$1.2 million because 510 lender employees would be laid off and the laid-off 510 lender employees would in turn have less wages on which to pay income tax,

(3) state sales tax revenues to decline by approximately \$0.845 million because 510 lenders would close and their laid-off employees would in turn have to reduce their retail purchases, and

(4) state business income to decline by \$.504 million because closed 510 lenders would no longer pay business income taxes.

As noted in the facts section of this brief, Dr. Durkin agreed that the fiscal impact information he was providing at trial was not made available to the Auditor while the Auditor was preparing the Fiscal Note and Fiscal Note Summary, and Dr. Durkin's testimony and expert report indicate that Dr. Durkin's opinions were based on information that Dr. Durkin obtained from 510 lenders and other sources, such as Federal Reserve Board consumer survey data, not shown to have been within the Auditor's reach. *See supra* Part F.3.c.

This case thus raises a question of statutory interpretation that has not yet been addressed in a Missouri appellate decision: May a political opponent of an initiative petition successfully set aside the Auditor's fiscal note and fiscal note summary as being "insufficient or unfair" under § 116.190 through expert opinion testimony the substance of which was (1) neither submitted to the Auditor within § 116.175's ten-day time frame for opponents to provide fiscal impact statements to the Auditor (2) nor otherwise shown to have been within the Auditor's reach during the 20-day time period in which the Auditor had to prepare the fiscal note and fiscal note summary?

Standard rules of construction confirm that the answer to the above question should be an emphatic, "No." In construing statutes, the Court's primary responsibility is to ascertain the intent of the General Assembly from the language used and to give effect to that intent, considering words used in their plain and ordinary meaning. *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995). "Provisions of the entire legislative act must be construed together and, if reasonably possible, all provisions must be harmonized." *Hagely v. Board of Educ. of Webster Groves School Dist.*, 841 S.W.2d 663, 667 (Mo. banc 1992). "Related clauses are to be considered when construing a particular portion of a statute." *Id.*, citing *Marre v. Reed*, 775 S.W.2d 951, 953 (Mo. banc 1989). *Accord Morgan v. Jewell Const. Co.*, 91 S.W.2d 638, 640 (Mo. App. 1936) ("resort should be had to all parts of an act in order to arrive at the true meaning of any of the provisions thereof").

1. *The plain language of § 116.175 establishes a ten-day deadline for opponents to provide fiscal impact submissions to the Auditor.*

Under these principles, § 116.190's "insufficient or unfair" standard must be interpreted in light of the requirements that § 116.175 imposes on the Auditor in preparing fiscal notes and fiscal note summaries and on other persons in providing fiscal impact information to the Auditor. Section 116.175.1 requires the Auditor to "assess the fiscal impact of the proposed measure" and allows the Auditor to "consult with state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal." Section 116.175.2 imposes a 20-day deadline on the Auditor for drafting fiscal notes and fiscal note summaries and providing them to the Attorney General for review.

With respect to fiscal note submissions by opponents of a particular measure, § 116.175.1 provides:

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

§ 116.175.1, RSMo (emphasis added).

Statutory phrases beginning with the word "provided," such as the emphasized phrase above, are sometimes called a proviso. *Thoroughbred Ford, Inc. v. Ford Motor*

Co., 908 S.W.2d 719, 729 (Mo. App. E.D. 1995). “The function of a proviso is ‘to create a condition precedent; to except something from the enacting clause; to limit, restrict, or qualify the statute in whole or in part; or to exclude from the scope of the statute that which otherwise would be within its terms.’” *Id.* (quoting *Commerce Bank v. Mo. Div. of Finance*, 762 S.W.2d 431, 434 (Mo. App. W.D. 1988)). *See also Lonergan v. May*, 53 S.W.3d 122, 130 (Mo. App. W.D. 2001) (The term “[p]rovided’ can either introduce a condition or exception ... synonymous with ‘if,’ or it can be used as a conjunction meaning ‘and.’”) (citing *State ex inf. McKittrick v. Murphy*, 148 S.W.2d 527, 532 (Mo. banc 1941)).

The meaning of § 116.175.1’s proviso is plain and unambiguous. If opponents wish to submit fiscal impact information to the Auditor, they must do so within a ten-day window to have it considered. Because Dr. Durkin’s fiscal impact information was not provided until trial, some 253 days after the ten-day window expired, and some 243 days after the Auditor’s 20-day time period for completing the fiscal note expired, it cannot serve as a basis for proving insufficiency or unfairness under § 116.190 inasmuch as the Auditor could not have been under any obligation to include in the Fiscal Note and Fiscal Note Summary any opponent information that was not timely submitted as required by § 116.175.1.

2. *Enforcement of the statutory time limits will avoid unconstitutional burdens on the People’s right of initiative.*

Interpreting the § 116.190 “insufficient or unfair” standard in this manner is also supported by two other principles of statutory construction – that (1) statutes should be

interpreted to avoid unjust, absurd, unreasonable, confiscatory or oppressive results, *McCollum v. Director of Revenue*, 906 S.W. 2d 368, 369 (Mo. banc 1995); *State ex rel. Jackson County v. Spradlin*, 522 S.W.2d 788, 791 (Mo. banc 1975), and (2) if a statute is susceptible of two interpretations, and only one is constitutional, the constitutional construction is preferred, *see, e.g., Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999) (“Where feasible to do so, the statute will be interpreted to be consistent with the constitution with all doubts to be resolved in favor of validity.”).

The People’s reservation of the right of initiative is a fundamental right enshrined in our state constitution. As this Court has described it, nothing in Missouri’s constitution “so closely models participatory democracy in its pure form.” *Committee For A Healthy Future, Inc.*, 201 S.W.3d at 507 (quoting *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827). “Through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the people.” *Id.*

Because the initiative process allows those without substantial resources or political power to participate in government, courts must “act with restraint, trepidation and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course.” *Committee For A Healthy Future*, 201 S.W.3d at 507 (quoting *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827). And Missouri courts have always “liberally construed” constitutional and statutory provisions relative to the initiative process in order to further effectuate the People’s power to initiate law. *Id. See also Missourians Against Human Cloning*, 190 S.W.3d at

458 (“[T]he courts of Missouri have established a pattern of allowing substantial latitude with regard to the technicalities of seeking to place an initiative measure on the ballot.”) (Smart, J., concurring in part and dissenting in part).

But if § 116.190 were interpreted to allow proof of insufficiency or unfairness by an opponent’s fiscal impact information that had never been made available to the Auditor during the § 116.175 time frames, the result would be a tremendous burden on the People’s right of initiative and endless litigation for the Auditor. Instead of a statutory scheme that requires opponents to timely provide fiscal impact information for inclusion in a fiscal note as it is being drafted, the statutory scheme would create an enormous incentive for opponents to sandbag the Auditor by withholding fiscal impact information until it could be sprung at a § 116.190 trial.

In addition, because § 116.175.5 purports to disqualify signatures gathered under a ballot title prepared before a fiscal note or fiscal note summary has been set aside under § 116.190, allowing opponents to engage in such sandbagging would give opponents an unconstitutional virtual veto power over proponents’ ability to qualify any measure for the ballot in the first place. Any political opponent with the wherewithal to hire an economist who, like Dr. Durkin, could generate estimates about ill-defined economic ripple effects of a proposed measure, could torpedo the proponents’ signature gathering efforts by withholding those calculations during the fiscal note preparation process and

then springing them on the Auditor and its over-worked and underprepared counsel at a § 116.190 trial.¹³

This is exactly what occurred in this case. Partisans are attempting to use the judiciary to prevent the initiative process from taking its course. Rev. Bryan and Missourians for Responsible Lending do not have unlimited funds to advance their cause

¹³ Due to lack of adequate trial preparation and the surprise nature of Dr. Durkin's testimony, the Auditor's office was unable to deal effectively with Dr. Durkin as a witness. Trial counsel for the Auditor was literally reading Dr. Durkin's expert report for the first time as Dr. Durkin testified on the stand. When time for cross-examination arrived, the Auditor's counsel was shooting in the dark with ineffective questioning, which was not surprising since counsel was not able to even thoroughly read Dr. Durkin's report during direct examination and had no idea what Dr. Durkin might say in response to adverse questioning. Had the Auditor had the opportunity to have reviewed his report in advance and taken his deposition, the Auditor could have developed at trial points that are more obvious in hindsight. At a minimum, Dr. Durkin's calculations were one-sided and based solely on assumed losses of state sales and income tax revenues resulting from 510 lender closures and employee lay-offs. They did not purport to take into account the gains in sales and income tax revenues that would result from citizens who are freed from exorbitant interest rates in having more money to spend on tax-generating purchases and the multiplier effect of increased consumer spending for local goods and services.

of reforming predatory lending practices they have seen harming their communities and congregations. They cannot employ mega-lobbies and super-lobbyists to further their aims. They do not have instant entrée to the Missouri General Assembly. But they do have the initiative petition process through which they have sought to “take their cause directly to the people”¹⁴ so that the voters of this State may decide in November whether to limit the annual rate of interest, fees, and finance charges for payday, title, installment, and consumer credit loans.

When they submitted the Initiative Petition nearly a year ago, Rev. Bryan and Missourians for Responsible Lending were forced to rely on the Auditor to do an adequate job. They had no input into the Auditor’s preparation of the Fiscal Note or Fiscal Note Summary. And far from favoring Rev. Bryan or Missourians for Responsible Lending in the Fiscal Note or Fiscal Note Summary, the Auditor incorporated fiscal note information submitted by Dr. Haslag, which was paid for by well financed political opponents with a vested interest in defeating citizen-backed efforts to enact reasonable rate limits.¹⁵

¹⁴ *Committee For A Healthy Future, Inc.*, 201 S.W.3d at 507 (quoting *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827).

¹⁵ In its 2011 Annual Report to its investors, for example, QC Holdings, the employer of Respondent Prentzler, stated “We have already spent substantial amounts opposing the efforts to place this initiative on the ballot. If the initiative obtains the required signatures and otherwise meets the legal requirements to place the initiative on

But Plaintiffs were not satisfied with having convinced the Auditor to accept Dr. Haslag's fiscal note estimates. Dr. Durkin was retained to provide yet further estimates that were unveiled for the first time at trial. The People's right of initiative under the Missouri Constitution would be critically undermined if § 116.175.1's unambiguous time limits are not enforced in this case. This Court should hold that § 116.190 does not permit Plaintiffs' use of Dr. Durkin's surprise testimony as a means to block the initiative process from taking its course.

II.

The circuit court erred as matter of law in ruling that the Summary Statement was insufficient and unfair for not having included specific detail about the annual percentage rate of the Initiative Petition's proposed interest rate cap because the Summary Statement drafted by the Secretary of State was not insufficient, unfair or likely to deceive voters in that the Secretary's Summary Statement fairly, adequately, and accurately put potential petition signers and voters on notice of the subject and purpose of Initiative Petition, which is "to limit the annual rate of interest, fees, and finance charges for payday, title, installment,

the Missouri ballot for November 2012, we will spend substantial additional amounts to defeat the proposal." QC Holdings 2011 10-K Annual Report (filed March 14, 2012)

available *at*

<http://www.gurufocus.com/StockLink.php?type=sec&symbol=QCCO&date=2012-03-14&report=10-K>.

and consumer credit loans,” and deference is given to the Secretary’s Summary, which need not use the “best” language possible to describe a measure and which need only provide a general title similar to legislative titles that might suffice under constitutional clear title analysis.

- A. A summary statement is not “insufficient or unfair” if it accurately identifies the general subject matter of the proposed initiative petition.**

Section 116.334, RSMo. tasks the Secretary of State with preparing a “summary statement” for proposed initiative petitions. By statute, the summary statement is to be a “concise statement” that is “in the form of a question using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.” § 116.334.1, RSMo. Section 116.190 permits the circuit court to set aside the Secretary of State’s summary if the summary is “insufficient” or “unfair.”

As is the case with § 116.190 fiscal note or fiscal note summary claims, persons challenging a summary statement bear a heavy burden. A summary statement is insufficient or unfair within the meaning of § 116.190 if it “inadequately” (meaning especially lacking adequate power, capacity, or competence) “and with bias, prejudice, deception and/or favoritism states the consequences of the initiative.” *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 81 (Mo. App. W.D. 2008) (quoting *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo. App. W.D. 1994) (brackets omitted). The question of whether a summary fails the “insufficient or unfair” standard “is essentially a question of law,” reviewed *de novo* on appeal. *State ex rel. Humane Society of Missouri*, 317 S.W.3d at 674; *see also id.* at 672 (“the trial judge, who is educated and skilled in the

English language, is able to determine as a matter of law whether the Secretary's summary is prejudicial").

The standard placed on summary statement challengers is high because of the importance of the People's constitutional right to engage in the initiative process set forth in Article III, sec. 49. Recognizing this right, this Court has held that "[b]efore the people vote on an initiative, courts may consider only those threshold issues that affect the integrity of the election itself, and that are so clear as to constitute a matter of form." *United Gamefowl Breeders Ass'n of Mo. v. Nixon*, 19 S.W.3d 137, 139 (Mo. banc 2000).

United Gamefowl Breeders Association v. Nixon, is illuminating not only as to the limited role courts play in the initiative process, but also as to the proper substantive test that should be applied when assessing whether a summary statement is "insufficient or unfair." This is because in *United Gamefowl Breeders*, this Court equated the § 116.190 test for sufficiency and fairness of a summary statement with the test for whether an initiative petition has a constitutionally "clear title," as required by Article III, sec. 50 of the Missouri Constitution. 19 S.W.3d at 140-141. In constitutional clear title cases, this Court has repeatedly affirmed that a bill's "title need only 'indicate in a general way the kind of legislation that was being enacted'" in order to adequately and fairly apprise the public of a pending law's subject matter. *Jackson County Sports Complex Authority*, 226 S.W.3d 156, 161 (Mo. banc 2007) (quoting *Fust v. Attorney General*, 947 S.W.2d 424, 429 (Mo. banc 1997)). From the notice provided by the title, individuals can then look to the proposed law itself for greater detail about the proposed law's precise provisions.

Consistent with clear title analysis, Missouri courts have held that a summary statement “is sufficient and fair if it ‘makes the subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal.’” *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573, 583 (Mo. App. W.D. 2010) (quoting *United Gamefowl Breeders*, 19 S.W.3d at 140) (emphasis added). In other words, in a summary statement, “[a]ll that is required is that the language fairly summarizes the proposal in a way that is impartial and does not deceive or mislead voters.” *Missouri Municipal League v. Carnahan*, 2011 WL 3925612, *4 (Mo. App. W.D. 2011). *Accord Union Elec. Co. v. Kirkpatrick*, 606 S.W.2d 658, 660 (Mo. banc 1980) (the purpose of the ballot title “is to give interested persons notice of the subject of a proposed [law] to prevent deception through use of misleading titles.”) (emphasis added).

Whether “the summary statement prepared by the Secretary of State is the best language for describing the initiative” is not the test. *Missourians Against Human Cloning*, 190 S.W.3d at 457 (quoting *Bergman*, 988 S.W.2d at 92). Courts have recognized that “there are many appropriate and adequate ways of writing the summary ballot language” that is sufficient and fair. *Asher v. Carnahan*, 268 S.W.3d 427, 432 (Mo. App. W.D. 2008) (“If charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions” all of which may be sufficient and fair). *Id.* at 431. Similarly, a summary statement is not insufficient or unfair simply because “the language proposed by [the opponents] is more specific . . . even if that level of specificity might be preferable. . . .” *Bergman*, 988 S.W.2d at 92.

It is also firmly established that “not every detail of a proposal needs to be set out within the confines of the 100 word limit for summary statements.” *Missouri Municipal League*, 303 S.W.3d at 584 (citing *United Gamefowl Breeders*, 19 S.W.3d at 141). That “aspects of the ballot initiative or consequences resulting therefrom” are not included “does not render the summary statement either insufficient or unfair.” *Overfelt*, 81 S.W. 3d at 739.

B. The Secretary’s Summary Statement fairly and adequately puts petition signers and voters on notice of the subject matter of the Initiative Petition.

Comparing the Secretary of State’s Summary Statement with the Initiative Petition to which it pertains reveals that the Secretary’s Summary Statement easily passes § 116.190 muster. In this case, the Summary Statement pertains to an initiative petition that would amend chapters 367 and 408, RSMo. to prohibit persons making or offering (1) consumer credit loans, (2) unsecured loans of \$500 or less, or (3) consumer installment loans from imposing interest, fees and finance charges that exceed 36 percent A.P.R. The proposed statutory amendments would also prohibit lenders from engaging in any device or subterfuge intended to evade the limit. (App. A-00019; Northcott L.F. 25-27; Francis L.F. 26-28; Prentzler L.F. 28-30; Reuter L.F. 123-125) The stated purposes of the amendments are to:

to prevent lenders, such as those who make what are commonly known as payday loans, car title loans, and installment loans, which have typically carried triple-digit interest rates as high as three hundred

percent annually or higher, from charging excessive fees and interest rates that can lead families into a cycle of debt by:

- (1) Reducing the annual percentage rate for payday, title, installment and other high cost consumer credit and small loans from triple-digit interest rates to thirty-six percent per year;
- (2) Extending to veterans and others the same thirty-six percent rate limit in place for payday and title loans to active military families as enacted by the 109th United States Congress in 10 U.S.C. § 987; and
- (3) Preserving fair lending by prohibiting lenders from structuring other transactions to avoid the rate limit through subterfuge.

(App. A-00019; Northcott L.F. 25; Francis L.F. 26; Prentzler L.F. 28; Reuter L.F. 123)

The Secretary's Summary Statement for the Initiative Petition reads:

Shall Missouri law be amended to limit the annual rate of interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?

(Northcott L.F. 44; Francis L.F. 50; Prentzler L.F. 49; Reuter L.F. 15)

The Summary Statement accurately summarizes Initiative Petition's subject and purpose of limiting the annual rates for payday, title, installment, and consumer credit loans, and it does so using language that is fair and impartial. *Cures Without Cloning*, 259 S.W.3d at 81. There is nothing "inadequate" about the summary statement. It adeptly

advises readers of the subject matter and purpose of the proposed law. There is no “bias, prejudice, deception and/or favoritism” present. It unquestionably gives interested persons notice of Initiative Petition’s subject and does not contain any deceptive or misleading information. *Missouri Municipal League*, 2011 WL 3925612 at *4; *Union Elec. Co.*, 606 S.W.2d at 660. The integrity of the initiative process is not affected by this Summary Statement. *See United Gamefowl Breeders*, 19 S.W.3d at 139.

Indeed, the Secretary of State’s Summary Statement here gives considerably more information about the Initiative Petition than legislative titles upheld under analogous constitutional clear title requirements.¹⁶ In the clear title context, this Court has routinely upheld titles that consist of broad, non-specific general topics or subject matters. In *Jackson County Sports Complex Authority*, for example, a bill entitled “relating to political subdivisions” fairly apprised the public of the bill’s diverse provisions falling within that subject. 226 S.W.3d at 161-62. Titles as broad as “relating to health services” and “relating to environmental control” have also been upheld as constitutionally clear. *See, e.g., Missouri State Med. Ass’n v. Missouri Dept. of Health*, 39 S.W.3d 837, 841 (Mo. banc 2001) (public fairly apprised of subject matter of bill entitled “relating to health services”); *Corvera Abatement Tech. v. Air Conservation*

¹⁶ Like a summary statement, the purpose of the constitutional clear title requirement is meant “to keep ‘legislators and the public fairly apprised of the subject matter of pending laws.’” *Jackson County Sports Complex Authority*, 226 S.W.3d at 161 (quoting *Home Builders Ass’n v. State*, 75 S.W.3d 267, 269 (Mo. banc 2002)).

Com'n, 973 S.W.2d 851, 861–62 (Mo. banc 1998) (public fairly apprised of subject matter of bill entitled “relating to environmental control”).

C. The circuit court applied an improper standard in analyzing the Summary Statement.

The circuit court did not vacate the Summary Statement because any of the language used was unfair or deceptive. Instead, the circuit court based its judgment concerning language that was not included. Specifically, the circuit court vacated the summary statement for not expressly stating that the Initiative Petition would place a 36 percent cap on interest, fees, and finance charges for various types of consumer credit loans.

The circuit court’s April 17, 2012 judgment indicates that the circuit court believed that federal regulations¹⁷ under the Truth and Lending Act, provisions from two Missouri statutes unrelated to the initiative petition process,¹⁸ and a breach of contract case¹⁹ established the materiality of specific interest rates and that “[t]he same standard must be applied to the Secretary’s summary statement.” Second Amended Final Judgment, p. 4; App. A0004.

¹⁷ 12 C.F.R. § 226.17(a).

¹⁸ §§ 367.518(4) and 408.130.1(6), RSMo.

¹⁹ *Wigley v. Capital Bank of Southwest Missouri*, 887 S.W.2d 715 (Mo. App. S.D. 1994).

But federal Truth in Lending requirements and state contract cases are irrelevant to the limited inquiry a court should undertake in assessing the fairness and sufficiency of a summary statement. Those legal requirements and cases apply to loans and contracts. The Summary Statement is not a loan or a contract. It is simply a method by which petition signers and voters are put on notice of the general subject of a political matter in which they, as citizens, may have an interest.

The circuit court's judgment setting aside the Summary Statement in the name of providing more specifics to petition signers and voters is out of step with the limited purpose of summary statements and § 116.190 case law. An official ballot has never been intended to serve as the key source of information for citizens on political matters or to provide them with all the information they may need to make an informed decision. For example, candidates for office are listed on a ballot solely by name and party designation, and it is incumbent on citizens to take whatever steps they feel are necessary to educate themselves on the candidate before casting their vote. Just as we expect citizens to inform themselves about the specific views on various political issues that a candidate may espouse, citizens who consider signing or voting for an initiative petition are expected to look beyond the summary statement before deciding what to do. Indeed, Chapter 116 itself provides for several other methods for state official to provide more specific information to the public about an initiative petition's provisions, further supporting the conclusion that the official ballot title is not intended to be the vehicle for conveying specific details. For example, the full text of an initiative petition must be

attached to the signature pages being circulated to the public. § 116.050, RSMo.²⁰ Under § 116.260, the Secretary of State must designate newspapers in each county in which the full text of statewide ballot measures shall be published. At least two copies of the full text of each statewide ballot measure must be posted at each polling place. § 116.290. Pursuant to § 116.025, RSMo., the Secretary of State must also prepare “fair ballot language that fairly and accurately explains what a vote for and what a vote against the measure represent,” which is then posted in all polling places.

The circuit court’s judgment in this case is also out of step with reported initiative petition and clear-title case law. In § 116.190 cases, Missouri courts have repeatedly confirmed that “not every detail of a proposal needs to be set out within the confines of the 100 word limit for summary statements.” *Missouri Municipal League*, 303 S.W.3d at 584. In the judgment and briefing below, neither the circuit court nor the four sets of plaintiffs cited any initiative petition case in which a summary statement was invalidated for an alleged failure to provide more specifics about the underlying proposal.

In fact, case law reveals that whenever a challenger’s claim has been based on a request for more details, Missouri courts have uniformly rejected the claim. In *United Gamefowl Breeders*, the challengers sought to invalidate a proposed statutory amendment that would prohibit fighting involving animals. 19 S.W.3d at 138. The challengers

²⁰ The Secretary of State’s office also publishes on its official website the full text of initiative petitions approved for circulation. See http://www.sos.mo.gov/elections/s_default.asp?id=petitions (last visited June 1, 2012).

claimed, among other things, the summary statement was deficient because it “d[id] not mention the exemptions within [the proposed statutory amendment], for filmmaking, hunting, farming, poultry-raising, gamefowl-raising, and rodeos.” *Id.* at 140. This Court rejected the argument because the summary statement did not need to “set out the details of the proposal.” *Id.* at 141.

Likewise, the Court of Appeals in *Overfelt* rejected a details argument that the summary statement should have covered where revenues generated by the initiative petition’s proposed tax would be used and that it would create a Life Sciences Research Board. 81 S.W. 3d at 738. The Court of Appeals found that the existing summary statement was “set forth in language that does not appear likely to deceive or mislead voters or any other interested parties as to the purpose of the measure” and thus was sufficient and fair. *Id.* at 739. “While there may be aspects of the ballot initiative or consequences resulting therefrom that Appellant would have liked to have seen included in the summary statement, their exclusion does not render the summary statement insufficient or unfair.” *Id.*

In this case, the circuit court cited *Overfelt v. McCaskill* to justify vacating the Secretary of State’s Summary Statement. According to the circuit court, *Overfelt* required a summary statement to “describe the ‘main points’ of the initiative” or else be set aside. Second Amended Final Judgment, p. 3; App. A-00003. But *Overfelt* does not use the phrase “main points” and, in any event, confirmed that not every detail needs to be included in the summary.

The circuit court further stated that it believed a rewrite was necessary because “[t]he initiative legislation itself derives its very meaning and purpose from the 36% limit. . . .” Second Amended Final Judgment, p. 4; App. A-00004. In other words, the circuit court believed that § 116.190 gave it a roving commission to identify a metaphysical “meaning and purpose” in the Initiative Petition and to brush aside the Secretary’s summary if that “meaning and purpose” was not reflected therein. Such an approach is completely untethered to any case law and invites a level of judicial activism inconsistent with this Court’s admonitions that courts are to “act with restraint, trepidation, and a healthy suspicion of . . . partisan[s]” like the Plaintiffs who are seeking to thwart the initiative petition process. *Committee For A Healthy Future*, 201 S.W.3d at 507 (quoting *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827)).

D. The circuit court’s revisions to the summary statement transformed a fair and sufficient summary into a misleading summary that wrongly implied that the Initiative Petition will “allow” a new, higher interest rate on loans, when the Initiative Petition will impose a rate cap.

What make the circuit court’s errors in handling this matter all the more egregious is its attempted Summary Statement revision. As noted above, the circuit court revised the Summary Statement in the following manner:

Shall Missouri law be amended to ~~limit~~ **allow** the annual rates **up to a limit** of **36% including** interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?

The circuit court's addition of the words "allow [rates] up to" 36 percent actually turns the summary from one that is sufficient and fair into one that fails the "insufficient or unfair" standard. The term "allow" is defined as "to give permission to or for; permit."²¹ As rewritten, the circuit court's summary statement suggests that current law does not allow annual rates up to 36 percent and that the Initiative Petition would actually increase a rate limit to 36 percent. This is patently misleading in light of the fact that these loans presently average triple-digit annual rates and the Initiative Petition would limit and restrict them to 36 percent A.P.R., not "allow" them to go "up" to 36 percent. *See Missouri Municipal League*, 303 S.W.3d at 588 (striking portion of summary statement suggesting that a proposed amendment would newly allow landowners to receive just compensation when they could already receive just compensation).

E. The circuit court's judgment burdens the proponents' right to engage in the initiative petition process.

Finally, the circuit court's judgment should be reversed as an unconstitutional burden on Rev. Bryan and Missourians for Responsible Lending's right to engage in the initiative process. Rev. Bryan and Missourians for Responsible Lending submitted the Initiative Petition for pre-circulation approval nearly one year ago. They relied on the

²¹ allow. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://dictionary.reference.com/browse/allow> (accessed: June 1, 2012). *Accord Webster's New Twentieth Century Unabridged Dictionary* (2nd ed. 1970), p. 49 (defining allow to mean "to grant, give, or yield," "to afford," or "to permit").

Secretary of State to adequately perform her summary statement duties. She performed those duties by independently drafting her own summary statement which differed from Rev. Bryan's and Missouriians for Responsible Lending's preferred summary. (Northcott L.F. 224; Francis L.F. 153; Prentzler L.F. 160; Reuter L.F. 114)

Since receiving the certification of the official ballot title for the Initiative Petition, Rev. Bryan, Missouriians for Responsible Lending, and its coalition partners have circulated the Initiative Petition for signatures using volunteers and clergy who are deeply concerned about the existing predatory practices in their community. As a result of their considerable efforts, they submitted some 180,000 signatures to the Secretary on May 6, 2012, the deadline for such submission, nearly twice the constitutional minimum.

In this case, the circuit court's decision to vacate the summary statement would severely frustrate constitutional objectives." *Missourians Against Human Cloning*, 190 S.W.3d at 463 (Smart, J., concurring in part and dissenting in part). Plaintiffs have and certainly will continue to argue that the Initiative Petition cannot be placed on the ballot if the circuit court's decision stands because the decision invalidates all the collected signature. In other words, Plaintiffs' view is that circuit court's decision would not simply frustrate constitutional objectives, it would foreclose them. If Plaintiffs' view prevailed, all the time, effort and expense put in by Rev. Byran, Missouriians for Responsible Lending, and its coalition partners in pursuing their constitutional right to initiate law would be for naught.

For all the reasons outlined above, such a result would be untenable and a miscarriage of justice. The circuit court's judgment cannot stand.

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court's April 17, 2012 judgment, certify the Secretary of State's Summary Statement and the Auditor's Fiscal Note and Fiscal Note Summary as sufficient and fair, and issue such other and further relief as justice may require.

Respectfully submitted,

**COOK, VETTER, DOERHOFF &
LANDWEHR, P.C.**

By /s/ Heidi Doerhoff Vollet
Heidi Doerhoff Vollet, #49664
Dale C. Doerhoff, #22075
231 Madison Street
Jefferson City, MO 65101
Telephone: (573) 635-7977
Facsimile: (573) 635-7414

*Attorneys for Appellants/Cross Respondents
James Bryan and Missourians for Responsible
Lending*

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies further certifies that the foregoing brief that:

- (1) this brief contains the information required by Rule 55.03;
- (2) this brief complies with the limitations contained in Rule 84.06(b); and
- (3) there are 15,545 words in this brief;

/s/ Heidi Doerhoff Vollet

Heidi Doerhoff Vollet

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Clerk of the Court on this 1st day of June, 2012, to be served by operation of the Court's electronic filing system on all counsel of record, as follows:

Michael Shabsin
mshabsin@sherandshabsin.com
Charles W. Hatfield
chatfield@stinson.com
Khristine A. Heisinger
kheisinger@stinson.com
Attorneys for Respondent Reuter

Jeremiah Morgan
Jeremiah.Morgan@ago.mo.gov
Patricia J. Churchill
Patricia.Churchill@ago.mo.gov
Attorneys for Appellant Carnahan

Darrell Moore
Darrell.Moore@auditor.mo.gov
Whitney Miller
Whitney.Miller@auditor.mo.gov
Ronald Holliger
Ronald.Holliger@ago.mo.gov
Attorneys for Appellant/Cross-Respondent Schweich

John Campbell
jcampbell@simonlawpc.com
Dale K. Irwin
dirwin@scimlaw.com
Attorneys for Appellants/Cross-Respondents Shull & Stockman

COOK, VETTER, DOERHOFF & LANDWEHR, P.C.

By /s/ Heidi Doerhoff Vollet

Heidi Doerhoff Vollet #49664
Dale C. Doerhoff #22075
William E. Peterson #63158
231 Madison Street
Jefferson City, MO 65101
Telephone: (573) 635-7977
Facsimile: (573) 635-7414
hvollet@cddl.net
ddoerhoff@cddl.net
wpeterson@cddl.net

Attorneys for Missourians for Responsible Lending and James J. Bryan