IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD80001 (consolidated with WD80002 & WD80004)

JIM BOEVING, PATTY ARROWOOD, ROBERT E. PUND
and ROBERT A. KLEIN
Appellants,
v.

MISSOURI SECRETARY OF STATE JASON KANDER
Respondent,
and
RAISE YOUR HAND FOR KIDS, *et al.*,
Respondents.

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

BRIEF OF APPELLANTS JIM BOEVING AND PATTY ARROWOOD

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JURISDICTIONAL STATEMENT

This appeal arises from a decision of the Cole County Circuit Court. As plaintiffs below, Boeving and Arrowood brought their actions under Section 116.200, RSMo Supp. 2015, challenging the Secretary of State's determination that Initiative Petition 2016-152 is sufficient for inclusion on the November 2016 ballot. (L.F. 0671). Boeving alleged the Secretary failed to follow statutory requirements in certifying the measure. The Trial Court found that the Secretary did comply with the statutes (L.F. 0624-0625). Arrowood alleged the Secretary certified an initiative that did not comply with the Constitution. (L.F. 0008). The Trial Court determined Arrowood's constitutional challenges to the initiative petition are not ripe. (L.F. 0628). Jurisdiction lies with the Western District of the Missouri Court of Appeals. Section 477.070, RSMo 2000.[1]

[1] All statutory references in this Brief are to the Revised Statutes of Missouri (2000) unless otherwise indicated.

STATEMENT OF FACTS

A. Facts regarding Boeving's appeal of the Secretary of State's Summary Statement

On November 5, 2014, the Missouri Secretary of State began accepting initiative petition "sample sheet" filings to place measures on the ballot for the 2016 general election. (L.F. 1052). A year later, on November 20, 2015, Raise Your Hand for Kids ("RYH4K") proposed an initiative to the Secretary to amend Article IV of the Missouri Constitution by adding Sections 54, 54(a), 54(b), and 54(c) (the "Initiative Petition"). (L.F. 0192). On January 5, 2016, the Secretary issued a Certification of Official Ballot Title for the Initiative Petition. ("January 5 ballot title"). (Joint Exhibit 6, L.F. 0209). The official ballot title is comprised of a summary statement and a fiscal note summary. Section 116.010(4), RSMo.

Ten days later, on January 15, 2016, Jim Boeving filed a lawsuit challenging the sufficiency and fairness of both the summary statement and the fiscal note summary portions of the January 5, 2016 official ballot title, *Boeving v. Kander, et al.*, Case No. 16AC-CC00016 (Cole County Cir. Ct.) ("*Boeving I*"). (L.F. 0194). Twelve days later, on January 27, 2016, RYH4K moved to intervene in the action, advising the Court that RYH4K had a sufficient interest to intervene because RY4K would gather signatures on the Jan. 5 ballot title and that if the Court ruled in Boevings's favor, signatures gathered

with the Jan. 5 title "may not be counted as valid." (A. 37 at ¶ 14).[2] The Trial Court granted the motion to intervene. *See* Docket Entry dated February 17, 2016 in *Boeving I.*

The case was set for a trial on April 28, 2016. *See* Docket Entry dated April 28, 2016 in *Boeving I.* On May 7, 2016, the day before the constitutional deadline for submitting initiative petitions for the November 2016 ballot, RYH4K submitted all petition pages for IP 2016-152 to the Secretary. (L.F. 0194). Every petition page for IP 2016-152 submitted to the Secretary contained the January 5 ballot title. (L.F. 0194).

On May 19, 2016, after a bench trial, the Cole County Circuit Court entered judgment in *Boeving I* finding the ballot title insufficient and unfair. (L.F. 0194). Because the Trial Court had ruled in Boeving's favor on some counts and against Boeving on other counts, Boeving, the State Auditor and RYH4K all appealed to this Court. *See* Docket Entry dated May 20, 2016 in *Boeving I.*

On July 8, 2016, this Court found the January 5 ballot title unfair and insufficient and ordered it re-written. *Boeving v. Kander*, --- S.W.3d ---, 2016 WL 3676891, W.D. 79694 (July 8, 2016). (L.F. 0194). Specifically, this Court concluded the summary statement portion of the January 5 ballot title was: "likely to mislead voters, and fails to accurately summarize the equity assessment fee which the initiative petition proposes to establish …" *Boeving*, 2016 WL 3676891 at *6. To correct the misleading ballot title, this Court certified a corrected summary statement portion to the Secretary "to be included in the official ballot title." *Boeving*, 2016 WL 3676891 at *18; (L.F. 0194). On July 18,

[2] The Trial Court took judicial notice of all the filings in *Boeving I.* (L.F. 0193-0194).

2016, the Secretary, following the directive of this Court, issued a Certification of Official Ballot Title for IP 2016-152 containing the language certified to the Secretary by this Court ("the July 18 official ballot title"). (Joint Exhibit 7, L.F. 0195, 0210).

B. Facts regarding the Secretary's certification of sufficiency

None of the petition pages RYH4K submitted to the Secretary contained the July 18 official ballot title ordered by this Court and certified by the Secretary. (L.F. 0195). As of July 18, 2016, the local election authorities had begun the process of verifying signatures, but this process was not yet completed. (L.F. 0195). On August 9, 2016, the Secretary issued a Certificate of Sufficiency of Petition for IP 2016-152, certifying that there were a sufficient number of valid signatures for the initiative to appear on the November ballot as Amendment 3 and the initiative met the Constitutional and statutory requirements for placement on the ballot. (Joint Exhibit 8, L.F. 0195, 0211). When the Secretary certified that there were a sufficient number of valid signatures for IP 2016-152 to appear on the November ballot as Amendment 3, the Secretary included signatures from pages that had the January 5 ballot title found by this Court to be insufficient, unfair, and likely to mislead voters. (L.F. 0195). None of the signatures the Secretary certified contained the July 18 official ballot title ordered by this Court and certified by the Secretary of State. (L.F. 0195).

C. Facts regarding Arrowood's challenge

Arrowood also sued within the statutory time limits and challenged the initiative on the grounds that it was being used for purposes prohibited by the Constitution. (L.F. 0008). The specific challenges were that the initiative: (1) transfers funds from one state

fund to another and dedicates those funds for specific purposes (Joint Exhibit 1, L.F. 0200 at Section 54(a).1); (2) allows funds generated by a new tax to be distributed without regard to Article IX, Section 8 (*Id*. at Section 54(b)(2)); and (3) sets an equity assessment fee which will vary based on the Master Settlement agreement (*Id*. at Section 54(c)2.a) which is a contract signed by Missouri's Attorney General, a group of tobacco companies and several other states. None of the parties to the Master Settlement Agreement are political subdivisions or have been delegated the power to tax by the General Assembly under Article X, section 1. (Joint Exhibit 9, L.F. 0223). Arrowood also alleged the initiative amends more than one article of the constitution. (L.F. 0008).

The Trial Court found that the Secretary had complied with his obligations under Chapter 116 and declined to compel the Secretary to reverse his decision pursuant to Section 116.200. (L.F. 0624-0625; A. 22-23).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN FAILING TO COMPEL THE SECRETARY TO REVERSE HIS DECISION THAT THE INITIATIVE PETITION WAS SUFFICIENT BECAUSE THE SECRETARY FAILED TO FOLLOW THE REQUIREMENTS OF SECTION 116.120 RSMO IN THAT THE SECRETARY COUNTED SIGNATURES ON PETITION PAGES WITH A LEGALLY INSUFFICIENT AND UNFAIR BALLOT TITLE AND NONE OF THE SIGNATURES COUNTED WERE ON PAGES CONTAINING THE OFFICIAL BALLOT TITLE CERTIFIED BY THIS COURT AND THE SECRETARY HIMSELF.

United Labor Comm. of Missouri v. Kirkpatrick, 572 S.W.2d 824 (Mo. banc 1978).

Moore v. Brown, 165 S.W.2d 655 (Mo. banc 1942).

Cures without Cloning v. Pund, 259 S.W.3d 76 (Mo. App. 2008).

II. THE TRIAL COURT ERRED IN REFUSING TO REVERSE THE SECRETARY'S DECISION THAT THE INITIATIVE WAS SUFFICIENT BECAUSE THE INITIATIVE IS UNCONSTITUTIONAL IN THAT IT APPROPRIATES EXISTING FUNDS IN VIOLATION OF ARTICLE III, SECTION 51 OF THE MISSOURI CONSTITUTION.

City of Kansas City v. Chastain, 420 S.W.3d 550 (Mo. banc 2014).

Kansas City v. McGee, 269 S.W.2d 662 (Mo. 1954).

Moore v. Brown, 165 S.W.2d 655 (Mo. banc 1942).

III. THE TRIAL COURT ERRED IN REFUSING TO REVERSE THE SECRETARY'S DECISION THAT THE INITIATIVE WAS SUFFICIENT BECAUSE THE INITIATIVE IS UNCONSTITUTIONAL IN THAT IT ADVANCES PURPOSES PROHIBITED BY THE CONSTITUTION IN VIOLATION OF ARTICLE III, SECTION 51 OF THE MISSOURI CONSTITUTION, TO WIT, PROVIDING PUBLIC FUNDS TO RELIGION IN VIOLATION OF ARTICLE I, SECTIONS 7 AND 8 AND ARTICLE IX SECTION 8.

City of Kansas City v. Chastain, 420 S.W.3d 550 (Mo. banc 2014).

Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F. 3d 779 (8th Cir. 2015).

Paster v. Tussey, 512 S.W.2d 97 (Mo. banc 1974).

IV. THE TRIAL COURT ERRED IN REFUSING TO REVERSE THE SECRETARY'S DECISION THAT THE INITIATIVE WAS SUFFICIENT BECAUSE THE INITIATIVE IS UNCONSTITUTIONAL IN THAT IT ADVANCES PURPOSES PROHIBITED BY THE CONSTITUTION IN VIOLATION OF ARTICLE III, SECTION 51, TO WIT, CONTRACTING AWAY THE POWER TO TAX IN VIOLATION OF ARTICLE X, SECTION 2.

City of Kansas City v. Chastain, 420 S.W.3d 550 (Mo. banc 2014).

State ex rel. Bd. of Health Center Trustees of Clay County v. County Comm'n of Clay County, 896 S.W.2d 627 (Mo. banc 1995).

State ex rel. Gordon v. Becker, 49 S.W.2d 146 (Mo. 1932).

V. THE TRIAL COURT ERRED IN REFUSING TO REVERSE THE SECRETARY'S DECISION THAT THE INITIATIVE WAS SUFFICIENT BECAUSE THE INITIATIVE IS UNCONSTITUTIONAL IN THAT IT AMENDS MORE THAN ONE ARTICLE OF THE CONSTITUTION BY AMENDING BY IMPLICATION PORTIONS OF ARTICLE IX, SECTION 8, ARTICLE I, SECTION 7, ARTICLE I, SECTION 8, AND ARTICLE X, SECTION 2.

State ex rel. McNary v. Stussie, 518 S.W.2d 630 (Mo. 1974).

Kuehner v. Kander, 442 S.W.3d 224 (Mo. App. 2014).

Turner v. State, 245 S.W.3d 826 (Mo. banc 2008).

STANDARD OF REVIEW

The parties tried the matters below on stipulated facts and joint exhibits. Thus, the only question on appeal is whether the Trial Court drew the proper legal conclusions, which this Court reviews *de novo. Missouri Mun. League v. Carnahan*, 303 S.W.3d 573, 580 (Mo. App. 2010) *(*citing *Overfelt v. McCaskill*, 81 S.W.3d 732, 735 (Mo. App. 2002)).

INTRODUCTION

This brief is on behalf of two plaintiffs below, Boeving and Arrowood, who brought separate challenges to the same initiative petition. Boeving challenges the Secretary of State's decision to count signatures on an initiative that contained an unfair and misleading ballot title. Arrowood challenges the Secretary's decision to place the initiative on the ballot when the initiative is facially unconstitutional because it uses the initiative process in a ways that are prohibited by the Constitution.

A. Signatures gathered using a misleading ballot title may not be counted during the certification process.

As to the signature challenge, this Court previously found the Summary Statement portion of the ballot title used to collect signatures on Initiative Petition 2016-152 was "likely to mislead voters" and "failed to adequately inform voters of the initiative's probable effects." *Boeving*, 2016 WL 3676891 at *6, 11. Pursuant to statutory authority, this Court certified fair and sufficient language to use in the official ballot title "for purposes of Section 116.180." Section 116.190.4, RSMo. (L.F. 0194). The Secretary followed that statutory directive and certified the official ballot title on July 18, 2016. (Joint Exhibit 7, L.F. 0195, 0210). None of the petition pages RYH4K submitted to the Secretary contained this Court's official ballot title language as certified on July 18. (L.F. 0195). Instead, all the signatures collected and submitted to the Secretary were obtained with the misleading ballot title. (L.F. 0195). The first issue presented in this Appeal is whether initiative petition signatures collected under a misleading and unlawful ballot

title may be counted by the Secretary of State toward the constitutionally required number of signatures necessary to submit a measure for vote at the general election.

Chapter 116 prescribes the statutory procedures for placing initiative petitions on the ballot. When the Secretary counts signatures, the legislature has made the law unmistakably clear: "Signatures on petition pages that do not have the official ballot title affixed to the page shall not be counted as valid." Section 116.120, RSMo. The Trial Court's conclusion that signatures on petition pages with the misleading and supplanted ballot title could be counted as sufficient cannot be reconciled with the statute. Consistent with Section 116.180, Section 116.190, Section 116.120, and Section 116.200, this Court should reverse the Circuit Court judgment and enjoin the Secretary from certifying the measure and enjoin all other election officers from printing the measure on the ballot.

B. The measure is facially unconstitutional and cannot be placed on the ballot.

Even if this Court affirms the Trial Court's decision on Boeving's claims, Arrowood's claims provide a separate basis to reverse the Secretary's decision to certify the Initiative Petition as sufficient because the Initiative Petition does not comply with the Constitutional restrictions on the use of the initiative.

"The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution." Article III, section 51. This provision establishes two independent limitations on the use of the initiative. First, it prohibits earmarking of existing funds through what has become known as "appropriation by the initiative." *See, e.g. Kansas*

City v. McGee, 269 S.W.2d 662, 665 (Mo. 1954). Second, and equally important, it establishes that the initiative power cannot be used "for any other purpose prohibited by this constitution." The proposed measure Defendant Kander certified for the ballot on its face appropriates existing funds in violation of Article III, Section 51's first proscription. The initiative also violates constitutional prohibitions on the use of public funds for religious institutions, contracting or surrendering the power to tax, and amending multiple articles of the Constitution.

The Secretary of State erred in issuing a Certificate of Sufficiency because the initiative does not comply with the constitution in several respects. "It is the secretary of state who is charged with the ultimate administrative determination as to whether the petition complies with the Constitution of Missouri and with the statutes. It is the courts who are charged with the ultimate judicial determination as to whether, under the Constitution and laws, the petition is sufficient or insufficient for the ballot." *Ketcham v. Blunt*, 847 S.W.2d 824, 830 (Mo. App. 1992).

Appellants request this court reverse the decision of the Trial Court below and enter the decision the Trial Court should have issued, enjoining the Secretary from placing the measure on the November ballot. *Axsom v. Thompson*, 197 S.W.2d 326, 331 (Mo. App. 1946).

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO COMPEL THE SECRETARY TO REVERSE HIS DECISION THAT THE INITIATIVE PETITION WAS SUFFICIENT BECAUSE THE SECRETARY FAILED TO FOLLOW THE REQUIREMENTS OF SECTION 116.120 RSMO IN THAT THE SECRETARY COUNTED SIGNATURES ON PETITION PAGES WITH A LEGALLY INSUFFICIENT AND UNFAIR BALLOT TITLE AND NONE OF THE SIGNATURES COUNTED WERE ON PAGES CONTAINING THE OFFICIAL BALLOT TITLE CERTIFIED BY THIS COURT AND THE SECRETARY HIMSELF.

The requirements of Section 116.180, Section 116.190, and Section 116.120 RSMo. mandate that signatures gathered under a ballot title declared by the courts to be misleading cannot be counted when determining sufficiency of an initiative petition. The proponents turned in signatures on petition pages that did not have the official ballot title language ordered by this Court under Section 116.190 and certified by the Secretary of State on July 18. All of the petition pages contained a ballot title which this Court has declared legally insufficient, unfair and misleading. The Trial Court's conclusion that the Initiative Petition containing the unfair ballot language was sufficient cannot be reconciled with the statutory directives not to count signatures on pages that lack the official ballot title. As set forth in detail below, this Court should reverse the judgment of the Trial Court and enjoin the Secretary and election officials in Missouri from placing the matter on the ballot.

A. Chapter 116 Requires a Finding that the Petition is Insufficient because the Signatures on Pages that Lack the July 18 Official Ballot Title are Invalid.

The Constitution allows an initiative to be submitted to the voters only when it is signed by eight percent of the legal voters in each of two thirds of the congressional districts. MO. CONST. Article III, section 50. The Constitution gives the legislature the authority to enact requirements for the submission of initiatives and further mandates that the Secretary of State follow those statutory requirements. MO. CONST. Article III, Section 53 (the initiative "shall be governed by general laws"). "In submitting initiatives to the people, the secretary of state and all other officers shall be governed by general laws." *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516-517 (Mo. banc 1991). The "general laws" are the statutes. *See State ex rel. Kinloch Telephone Co. v. Roach*, 190 S.W. 862 (Mo. 1916); *State ex inf. Dalton v. Halekamp Lumber Co.*, 340 S.W.2d 678 (Mo. 1960).

Signatures on an initiative petition are to be counted by the Secretary of State to determine if the measure may be submitted to the people. The general laws forbid the Secretary from counting certain signatures as valid: signatures that were collected by unregistered circulators "shall not be counted as valid" (Section 116.120.1); signatures of voters "from counties other than the one designated by the circulator in the upper right-hand corner on a given page shall not be counted as valid" (Section 116.060); and

signatures on pages that do not have the official ballot title "shall not be counted as valid."[3]

This last requirement was so important that the legislature declared it twice – in both Section 116.120 and Section 116.180. "The validity of the signatures is the heart of the ultimate determination of the sufficiency of an initiative petition for the ballot." *Ketcham v. Blunt*, 847 S.W.2d 824, 830 (Mo. App. 1992) (quoting *United Labor Comm. of Missouri v. Kirkpatrick*, 572 S.W.2d 449, 455 (Mo. banc 1978)). The legislature has gone to great length to provide general laws explaining the Secretary's obligation when signatures are gathered with a misleading ballot title – those signatures may not be counted.

1. The Legislature Declared Invalid any Signature Gathered without the Official Ballot Title.

"The uppermost question in applying statutory regulation . . . is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter." *United Labor Comm. of Missouri*, 572 S.W.2d at 456. In two separate places, the legislature made clear that each petition page must have the official ballot title affixed in order for the signatures to be counted. Section 116.180 requires all petition pages to contain "the official ballot title" and warns persons circulating the petitions that

[3] The general laws also require the Secretary to reject measures that do not follow certain administrative requirements such as submitting all signature pages at one time, ordering the pages by county and numbering the pages sequentially. Section 116.100 RSMo.

"signatures shall not be counted if the official ballot title is not affixed to the page containing such signatures." Section 116.180.

Section 116.120 yields the same result and requires the Secretary of State to examine submitted signature pages "to determine whether [the petition submission] complies with the Constitution of Missouri and with this chapter." Section 116.120.1, RSMo. Although the legislature directed that signatures on pages that lack the official ballot title "shall not be counted" in Section 116.180, it re-emphasized that directive within Section 116.120 when it outlined the Secretary's counting rules: "Signatures on petition pages that do not have the official ballot title affixed to the page shall not be counted as valid." Where the legislature provides a specific statutory remedy for failure to follow the statutory requirements, the application of the remedy is constitutional and the court is required to enforce it. As such, the law must be followed and the proposed initiative must be rejected as insufficient. *United Labor Comm. of Missouri*, 572 S.W.2d at 453-454 (citing *Kasten v. Guth*, 395 S.W.2d 433, 435 (Mo. 1965)).

2. The Legislature compelled that any Official Ballot Title Re-written by the Courts under Section 116.190 must be used "for purposes of Section 116.180."

The Trial Court held that because the signatures submitted had the original ballot title approved by the Secretary of State – but later altered by this Court and the Secretary, it was proper to count signatures. Chapter 116 governs the submission of initiative petitions; no section within Chapter 116 envisions that there could be two official ballot titles – one prepared by the Secretary and another written by the Court. Section 116.180

assigns to the Secretary the initial duty to prepare the official ballot title for an initiative petition. Here, the Secretary initially discharged that duty on January 5, 2016. The Secretary does not always have the final word, though, on what shall be included in the official ballot title. Citizens such as Boeving have the right to challenge the Secretary's decision and a successful challenge has meaningful consequences.

Section 116.190 establishes the process to challenge the sufficiency and fairness of the ballot title initially prepared by the Secretary. By legislative design (and for legitimate practical purposes), this challenge occurs on an expedited timetable. The challenge has to be initiated within ten days. Section 116.190.1. "The action shall be placed at the top of the civil docket" and it has to be "fully and finally adjudicated within one hundred eighty days of filing, including all appeals" unless the time period is extended for good cause. Section 116.190 RSMo. The purpose of these expedited challenges is to root out the misleading and insufficient ballot titles as quickly as possible, and before they can be used and relied upon in the initiative process. A misleading ballot title must not be used to gather signatures. So the Courts are charged with addressing any challenges and either re-certifying the Secretary's ballot title or ordering that ballot title modified to address any deficiencies. *Id.*

Those who gather signatures using a title being challenged through this expedited process do so at their own risk. Missouri's courts previously acknowledged that signatories to an initiative petition are not entitled to have their signature counted. *Prentzler v. Carnahan*, 366 S.W.3d 557, 563 (Mo. App. 2012). The Secretary of State has the right to reject a petition as insufficient if it does not comply with the statutory

requirements. *Id*. at 563. Thus, signers of the initiative "have no control over whether their signatures will ultimately be counted for purposes of qualifying the initiative petition for the ballot . . ." *Id.*

The proponents of the initiative at issue here understood the consequences of a successful challenge to the ballot title. In Boeving's 116.190 challenge to the initial ballot title, Intervenor-Respondents RYH4K sought to intervene to stop any changes to the ballot title. They told the Trial Court that if the ballot title were changed, any signatures gathered under the misleading title would not be valid. *See* Motion to Intervene, ¶ 14, *Boeving I* ("It is important that the precise form and ballot title approved by the Secretary of State be approved in this case, as signatures gathered using a different form or ballot title may not be counted as valid.").

Indeed, it is the proponents' unique interest in expediting the action and preserving the validity of the signatures that gives them standing for intervention. *See, e.g., Allred v. Carnahan*, 372 S.W.3d 477, 485 (Mo. App. 2012) ("[S]ince May 6th is the deadline for submitting signatures in support of initiative petitions, . . . [the proponent] has a critical interest in seeing to it that the litigation is concluded in a timely fashion. The State defendants acknowledged taking a time neutral view of the litigation.").

Intervention is allowed because of the impact a 116.190 would have on already gathered signatures. The "crucial interest" in concluding the litigation is so that the proponents have sufficient time to gather signatures on a legally sufficient and valid ballot title. The Trial Court's ruling that signature may be submitted and counted even

though the ballot title was misleading is contrary to prior decisions of this Court on why intervention of proponents is proper.

Missouri courts have routinely allowed organizations that proposed initiative petitions and were actively seeking to have them placed on the ballot to intervene in Section 116.190 actions because of their interest in having a fair ballot title for signature gathering. If there was no threat of injury to the proponents, there was no reason for them to be allowed intervention. *See Busch v. Carnahan*, 320 S.W.3d 757, 759 (Mo. App. 2010); *Mo. Municipal League v. Carnahan*, 303 S.W.3d 573, 579 (Mo. App. 2010); *State ex rel. Humane Soc'y of Mo. v. Beetem*, 317 S.W.3d 669, 671 (Mo. App. 2010); *Missourian's Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 453 (Mo. App. 2006); *Overfelt v. McCaskill*, 81 S.W.3d 732, 734 (Mo. App. 2002); *Ketcham v. Blunt*, 847 S.W.2d 824, 825 (Mo. App. 1992)." *Allred*, 372 S.W.3d at 488.

Intervenor RYH4K was right to be concerned about the ballot title. Boeving succeeded in his Section 116.190 challenge to the Secretary's January 5 title which led to court-certified changes. These changes meant that the original title was void and replaced. As Missouri's courts have held, the courts are not authorized to write a second official ballot title. *See Cures without Cloning v. Pund*, 259 S.W.3d 76, 83 (Mo. App. 2008) ("the court was not authorized to rewrite the entire summary statement"). In the event that the Court invalidates and revises the summary statement in a challenge under Section 116.190, the Court is to "certify the summary statement portion of the official ballot title to the Secretary of State." The Secretary is then required to certify the revised language in the official ballot title "for the purposes of section 116.180." Section

116.190.4, RSMo. Section 116.180 in turn requires this official ballot title to appear on the petition pages. Then Section 116.120 requires the Secretary to verify that the correct official ballot title appear on the petition that is turned in for signature counting and to reject signatures on pages without the correct title.

This Court's decision in *Boeving I* illustrates the statutory process. The Court did not write a completely new ballot title; rather it certified language for "inclusion in the official ballot title." In doing so, this Court acknowledged that it was reviewing and making necessary corrections to the one official ballot title. This decision was consistent with prior case law. *Cures without Cloning*, 259 S.W.3d at 83. There can be only one official ballot title, and it must include the language emerging from the Section 116.190 challenge. The title certified by the Courts under 116.190 is the ballot title and it replaces completely the Secretary's initial title which is void and has no effect.

B. Respondents' Position Renders Section 116.190 Meaningless.

In the Trial Court, RYH4K and Secretary Kander argued that because RYH4K had submitted their petition pages before this Court's decision invalidating the January 5, 2016 ballot title, the statutory requirement that this Court's changes to the official ballot title should be used "for purposes of Section 116.180" should have no effect. It is impossible to harmonize the statutes with this position and respondents have no authority for it.[4]

[4] Secretary Kander's position below seemed to be that if the ballot title was modified before the signatures were turned in, the signatures would not count, but the turning in of

The official ballot title that emerged from the Section 116.190 challenge is the title that, "for the purposes of Section 116.180" must be affixed “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.” Section 116.180. The courts are not authorized to disregard statutory directives; neither is the Secretary of State. The July 18, 2016 official ballot title certified by the Secretary of State after the Section 116.190 review becomes the official ballot title referenced in Section 116.180. When the signatures are submitted to the Secretary, the official ballot title must be the correct one if and as modified by the Courts. Section 116.120 RSMo.

The Secretary of State’s position here is a new one, inconsistent with the way prior Secretaries interpreted the law. In 2006, then-Secretary Carnahan faced the same issue. Petitioners supporting a change to eminent domain law submitted signatures on pages containing a ballot title that had been found unfair and insufficient by the Courts only a few days before the signatures were turned in. Secretary Carnahan followed statutory requirements and refused to count the signatures because the courts had found the official ballot title insufficient. The Certificate of Insufficiency issued by Secretary Carnahan stated:

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signatures somehow changes the statutory scheme. The statutes draw no such distinction and Secretary Kander did not explain below where the line should be drawn – would a finding of a misleading ballot title the day before turn in invalidate signatures or would the finding need to be a year before turn in?

> The petition has an insufficient official ballot title affixed to the petition pages. See Sections 116.175 and 116.180, RSMo. On April 17, 2006 (corrected order dated April 27, 2006) the official ballot title was determined insufficient based on the fiscal note summary by the Circuit Court of Cole County. In accordance with section 116.175, a fiscal note summary that is found insufficient does not meet the requirements for petition circulation pursuant to section 116.180, RSMo.

Judgment and Order, *Tuohey, et al. v. Markenson, et al.*, Case No. 06AC-CC00424 (Cole County Cir. Ct. July 24, 2006) (L.F. 0554; A. 42). Secretary Carnahan's decision was challenged in Cole County Circuit Court and the Trial Court (the Hon. Richard G. Callahan) affirmed the decision not to certify the initiative petition submitted with the misleading ballot title as sufficient. The initiative proponents did not appeal the decision. This case is indistinguishable and the same result should obtain here. Secretary Carnahan's and Judge Callahan's interpretations were correct, a ballot title that has been "found insufficient does not meet the requirements for petition circulation."

Pursuant to Sections 116.120 &116.180, the Secretary of State has no discretion but to declare the signatures invalid when the official, sufficient and not misleading ballot title is missing from the petition pages. *See* Judgment and Order, *Tuohey v. Carnahan, et al.*, Case No. 06AC-CC00423 (Cole County Cir. Ct. July 24, 2006) (L.F. 0551). Although the petition pages here purportedly have a sufficient number of registered voter signatures, the petition pages contain a ballot title that has been found misleading by the courts. Every signature that was gathered was done so using a signature page that had a

misleading statement at the top of it. The legislature has provided a specific statutory remedy for when the official ballot title is not affixed to the petition pages: the signatures are invalid.

The policy behind the legislative scheme is sound. If the Secretary of State writes a ballot title that is misleading, as the one at issue here was, citizens may challenge that title. "It makes perfect sense that the election statutes should provide for immediate review of the adequacy of the ballot title, which will be attached to the Initiative when signatures are gathered and presumably used by citizens to determine whether they will sign the petition." *Reeves v. Kander*, 462 S.W.3d 853, 858 (Mo. App. 2015). If a court finds that the title was misleading, it would not be appropriate to allow a measure on the ballot when the signatures were gathered using a misleading title. Therefore, no signatures gathered using a misleading title can be counted as valid. The principle against misleading voters in the election process is so important as to allow post-election ballot title challenges if the pre-election challenge cannot be completed in time. *See Dotson v. Kander*, 464 S.W.3d 190 (Mo. banc 2015).

In *Dotson*, the Supreme Court concluded that unfair and misleading ballot language – when included on the ballot at the election – can be grounds for an election contest to invalidate the results of the election. This is entirely consistent with the legislative directive not to count the signatures as valid *unless* they have the official ballot title affixed to the petition pages. To hold as the Trial Court did here would allow signatures gathered under a misleading ballot title to be counted in qualifying the measure for the ballot. Boeving's position and Secretary Carnahan's decision in 2006 –

that signatures may not be counted when gathered with a misleading title affixed -- are the longstanding policy in Missouri. *See Moore v. Brown*, 165 S.W.2d 657, 663 (Mo. banc 1942) (affirming decision to enjoin placement of initiative on ballot because *inter alia* it "would be a fraud on the signers of an initiative petition to procure their signatures on the inducement that it proposes a constitutional amendment greatly in their interest when in fact it makes other undisclosed changes greatly to their detriment").

Secretary Kander's position, upheld by the Trial Court, is contrary to the statutes and is terrible public policy which will generate incentives for creation of and reliance upon misleading ballot titles without consequence. The legislature did not intend for misleading ballot titles to be used for any purpose in the initiative process.

C. Proponents are Estopped from Asserting that the Signatures Count because they Previously told the Court the Signatures Would not Count.

The proponents of the initiative were aware of this very issue and should be estopped from arguing the signatures are valid. Judicial estoppel is an equitable doctrine created by courts to prevent parties from taking contrary positions during the course of a lawsuit, and is invoked by a district court at its discretion. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Missouri has long recognized the doctrine of judicial estoppel. *United Fire & Cas. Co. v. Thompson*, 949 F. Supp. 2d 922, 928–32 (E.D. Mo. 2013) (citing *Monterey Dev. Corp. v. Lawyer's Title Ins. Corp.*, 4 F.3d 605, 609 (8th Cir.1993).

Missouri courts consider three factors when applying the doctrine. The factors are whether:

1. A party's later position is clearly inconsistent with its earlier position;
2. The party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in that later proceeding would create the perception that either the first or the second court was misled; and
3. The party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

United Fire & Cas. Co, 949 F. Supp. at 928–32 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001) (internal citations and quotations omitted)).

With regard to the first element, courts hold that for judicial estoppel to apply, the court would need to be convinced that a party "clearly represented to the court in prior cases [an inconsistent position]." *Leonard v. S.W. Bell Corp. Disability Income Plan*, 341 F.3d 696, 702 (8th Cir. 2003) (refusing to apply doctrine of judicial estoppel because nothing led the court to conclude the "integrity of the judicial process" was compromised.")

In *Boeving I*, RYH4K told the Trial Court they should be allowed to intervene because they had an interest in preserving any signatures gathered on the initiative ballot title: "It is important that the precise form and ballot title approved by the Secretary of State be approved in this case, as signatures gathered using a different form or ballot title may not be counted as valid." Motion to Intervene, ¶ 14, *Boeving I* (A. 37). The Trial

Court in *Boeving I* relied on these statements in allowing intervention despite Plaintiff's opposition to intervention.

Proponents now take the opposition position – that even though the "precise form and ballot title" were not approved the signatures *may* now be counted as valid. This is precisely the change in position judicial estoppel prohibits. *City of St. Louis v. United Rys. Co. of St. Louis*, 174 S.W. 78, 85 (Mo. 1914) ("Parties litigant are not allowed to assume inconsistent positions in court; to play fast and loose; to blow hot and cold. Having elected to adopt a certain course of action, they will be confined to that course which they adopt."); *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137, 144 (Mo. App. 2011) (". . . one party will not be allowed to take "clearly inconsistent" legal positions on any given day according to that party's whims.").

RYH4K's new position is an unfair detriment to Boeving, who litigated the prior case with RYH4K as an intervenor engaged in active litigation. RYH4K was on notice that Boeving considered the ballot title misleading, but RYH4K made no effort to expedite the litigation or to resolve the question. Instead RYH4K waited until they lost the 116.190 challenge and then changed their position.

II. THE TRIAL COURT ERRED IN REFUSING TO REVERSE THE SECRETARY'S DECISION THAT THE INITIATIVE WAS SUFFICIENT BECAUSE THE INITIATIVE IS UNCONSTITUTIONAL IN THAT IT APPROPRIATES EXISTING FUNDS IN VIOLATION OF ARTICLE III, SECTION 51 OF THE MISSOURI CONSTITUTION.

If the Court reverses Trial Court based on the first point relied on, the Arrowood challenges are moot. But Arrowood's challenge provides a separate basis for rejecting the initiative – it does not comply with Constitutional requirements.

MO. CONST. Article III, section 51 sets forth substantive limitations on the initiative power: "The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution." Subsection 1 of section 54(a) of the proposed Initiative Petition on its face does what the Constitution prohibits because it transfers the balance of a currently-existing state fund, the Coordinating Board for Early Childhood Fund to the fund newly created by the proposed Initiative Petition, the Early Childhood Health and Education Trust. This appropriates presently existing state funds and sets them aside for another use in violation of the limits of Article III, Section 51.

The Trial Court found Arrowood's claim that the Initiative Petition violates section 51 not ripe because of the "uncertainty surrounding the potential appropriation of funds." (L.F. 0627-0628). This conclusion was erroneous. Whether the proposed Initiative Petition appropriates currently-existing state funds can be determined on the face of the initiative. Under clear precedent from this Court and the Missouri Supreme

Court, the facial constitutionality of the proposed initiative is ripe for pre-election review at the time the Secretary certifies the measure for inclusion on the ballot. As set forth more fully below, Arrowood's challenge is ripe for review and this Court should conclude that the proposed initiative appropriates existing funds in violation of the limitations on the Initiative Power.

A. Arrowood's Constitutional Challenge to the Petition is Ripe for Judicial Review.

Arrowood is entitled to pre-election review of the facial constitutionality of the proposed initiative. "A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles, California v. Patel*, 135 S.Ct. 2443, 2449 (U.S. 2015); *see also Coyne v. Edwards*, 395 S.W.3d 509, 520 (Mo. banc 2013) (facial challenge alleges that legislation "is defective on its face" whereas as applied challenge alleges that legislation "operates unconstitutionally as to [a party] because of [that party's] particular circumstances"). The proposed initiative, in a specific section, appropriates existing state funds in violation of Article III, Section 51's limitation on the initiative power. This is not a claim that the Initiative Petition "operates unconstitutionally as to [Arrowood] because of [Arrowood's] particular circumstances." *Coyne*, 395 S.W.3d at 520. Instead, her claims challenge the constitutionality of the proposed initiative.

"Missouri law authorizes courts to conduct pre-election review of the facial constitutionality of an initiative petition. The idea underlying this rule is that pre-election review of the facial constitutionality of an initiative petition is warranted given the cost

and energy expended relating to elections and to avoid the public confusion generated by avoiding a speedy resolution of a question." *City of Kansas City v. Chastain*, 420 S.W.3d 550, 554-55 (Mo. banc 2014) (internal quotations removed); *see also State ex rel. Hazelwood Yellow Ribbon Committee v. Klos*, 35 S.W.3d 457, 469 (Mo. App. 2000) ("We conclude, therefore, that such pre-election judicial review is both permissible and appropriate in cases where the proposed ballot measure is clearly facially unconstitutional.").

To the extent the case law has previously equivocated on the issue of ripeness, this Court has acknowledged that the Supreme Court's *Chastain* decision settled the matter. *Reeves*, 462 S.W.3d at 857-858 ("There can no longer be any doubt that Missouri law authorizes courts to conduct pre-election review of the facial constitutionality of an initiative petition. . . Missouri courts have reviewed these challenges on a number of occasions—*following* a final determination by the election authority as to whether to certify the initiative for the ballot.") (emphasis in original). Once the Secretary has certified the initiative petition for the ballot, "a judicial opinion as to whether the constitutional requirements have been met is no longer hypothetical or advisory," and the case becomes ripe. *Id.* at 859.

Here, Defendant Kander certified the Proposed Measure for the ballot on August 9, 2016. Arrowood's constitutional claim that the initiative unconstitutionally appropriates funds is therefore ripe for adjudication.

B. The Proposed Initiative Unquestionably Appropriates Existing State Funds on its Face.

Subsection 1 of section 54(a) of the proposed Initiative Petition on its face transfers the balance of a currently-existing state fund, the Coordinating Board for Early Childhood Fund to the newly created Early Childhood Health and Education Trust Fund. The initiative reads as follows:

> There is hereby created the Early Childhood Health and Education Trust Fund. The fund shall consist of all moneys collected as provided in Section 54(c) and shall also include the balance of the Coordinating Board for Early Childhood Fund, which shall cease to exist as a discrete fund after its proceeds are transferred into the Early Childhood Health and Education Trust Fund.

(Joint Exhibit 1, L.F. 0200 at Section 54(a).1) (emphasis added). The Coordinating Board for Early Childhood Fund was created by the Missouri legislature in Section 210.102, RSMo. This fund consists of state appropriations, grants, donations, fees, interest, and moneys obtained from any other available source. Section 210.102.4 RSMo.

Presently, the Coordinating Board for Early Childhood Fund is to be used to carry out the broad purposes of the Coordinating Board for Early Childhood set forth in Section 210.102.3, all of which relate to early childhood issues. *See, e.g.,* Section 210.102.3(2) ("improving the development of children from birth through age five"); Section 210.102.3(3) ("improve services for children from birth through age five"). As the Missouri Department of Social Services announces, "The Missouri Coordinating Board

for Early Childhood is the state's public/private entity for coordinating a cohesive system of early childhood programs and services intended to support the healthy development and school readiness of all Missouri children from birth through age five."[5]

The language of the initiative clearly limits the new Early Childhood Health and Education Trust Fund – including those funds which presently reside in the existing Coordinating Board for Early Childhood Fund – to be used "only for purposes which are authorized by this section." (Joint Exhibit 1, L.F. 0200 at Section 54(a).1). The initiative changes those purposes, the funds will not be limited to Missouri children "from birth through age five." Indeed, it will require between 5 and 10 percent of the funds to be spent "to provide evidence-based smoking cessation and prevention programs for Missouri pregnant mothers and youth." (*Id*. at Section 54(a).1.c). Children from birth through age five are typically neither pregnant nor in need of smoking cessation services. This mandatory use of the seized funds is both new and different from the funds' presently existing purposes.

The Missouri Constitution is clear: the initiative power may not be used to appropriate existing funds. MO. CONST. Article III, section 51. The Initiative Petition takes an existing state fund – which currently has a balance – transfers it into a new fund, and then changes the uses of the money.

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[5] Description of the Coordinating Board for Early Childhood from the Missouri Department of Social Services, available at: http://dss.mo.gov/cbec/ (last accessed August 30, 2016).

"The plain language of article III, section 51 generally prohibits the appropriation of money by initiative, except that an initiative may appropriate revenues created by the initiative proposal." *Chastain*, 420 S.W.3d at 555. "The people, therefore, by the constitution expressly prohibited an appropriation law being voted through the initiative unless the law at the same time provides the revenue." *State ex rel. Card v. Kaufman*, 517 S.W.2d 78 (Mo. 1974). Under this rule, it is constitutionally permitted for the initiative to create its own new revenue stream, as this initiative does in Section 54(c), but it may not set aside existing funds to be used for the initiative purposes as the initiative does in Section 54(a).

There have been relatively few attempts to appropriate funds by initiative in recent years, because the Supreme Court settled the issue long ago. In *Kansas City v. McGee*, 269 S.W.2d 662, 665 (Mo. 1954) (emphasis added), the proposed initiative was enjoined from placement on the ballot because it "attempts to use the initiative for the appropriation of money not created nor provided for by said proposed ordinance, and in attempting so to do said proposed ordinance *is not a lawful subject for the exercise of the power of initiative*." The initiative here does the same; it uses the initiative to set aside money not created by the proposed initiative. This is not to say that it is unlawful to transfer existing funds from one purpose to another, but simply that it cannot be accomplished through the initiative process. *See State ex rel. Card*, 517 S.W.2d at 81 (distinguishing between amendments originating in the legislature and those that "originate as an exercise of the power of the electors by way of initiative petition"). The

constitutional prohibition on appropriating existing revenues through the initiative preserves important distinctions between legislative function and the initiative process.

C. Factual issues related to the Funds are not Germane to the Constitutional Prohibition on Appropriation.

The Trial Court, in rejecting this constitutional challenge, focused on "uncertainty surrounding the potential appropriation of funds." (L.F. 0627-0628). The Trial Court deferred judgment on the constitutionality of the measure claiming that it was necessary to know whether, at the time Amendment 3 takes effect, it will affect anything other than "new money". (L.F. 0627-0628). The Trial Court's decision confused appropriations with expenditures. Appropriation is the "act of setting aside a sum of money for a public purpose." Black's Law Dictionary, Ninth Edition, p. 118. Expenditure is "the act or process of paying out; disbursement." Black's Law Dictionary; *see also Local Union No. 1256 AFSCME v. City of Hubbard*, 503 N.E.2d 544, 545 (Oh. Ct. App. 1986) (noting the dictionary definitions and pointing out that "expenditure" is "not the same as appropriation.") As described above, the proposed Initiative Petition on its face directs that "the balance of the Coordinating Board for Early Childhood Fund" shall be "transferred into the Early Childhood Health and Education Trust Fund." (Joint Exhibit 1, L.F. 0200 at Section 54(a).1). Contrary to the Trial Court's conclusion, there is no "uncertainty" surrounding this requirement – the appropriation of the Coordinating Board for Early Childhood Fund into the Early Childhood Health and Education Trust Fund will happen automatically if the initiative is passed. This is the "setting aside a sum of money for a public purpose." This is appropriation. It is prohibited by the Constitution.

The Trial Court's opinion, which does not enforce the constitutional proscription on appropriation by initiative, will only invite further mischief in the future. Initiative petitions cannot seize existing state funds and set them aside for another purpose. This Constitutional limitation exists on the initiative process regardless of the purpose of the initiative, and regardless of the quantum of funds that are appropriated. Once the courts begin to engage in the factual inquiries suggested by the Trial Court, the constitutional limitations on the initiative power will erode. For example, citizens wishing to impose greater fiscal discipline could propose an initiative to restructure the existing state employee retirement funds and, by initiative, transfer the content of the existing fund to a newly created fund for the same purpose with new and different restrictions on the use of the funds. The Missouri Constitution's limits on appropriation by initiative should foreclose these efforts to seize existing state funds for other purposes *ab initio*. As the Missouri Supreme Court held in 1954, "If the proposed ordinance in this case is in fact an appropriation ordinance, then it is fatally defective…" *McGee,* 269 S.W.2d at 665.

This initiative, on its face, appropriates existing state funds. This is forbidden by MO. CONST. Article III, section 51. "Any other interpretation would permit a violation of the plain mandate of section 51 of the Constitution." *McGee,* 269 S.W.2d at 666. This Court should reverse the judgment of the Trial Court, declare the Initiative Petition as insufficient because of its violation of MO. CONST. Article III, section 51, and enjoin the Secretary and other election officials from placing it on the ballot pursuant to Section 116.200.

III. THE TRIAL COURT ERRED IN REFUSING TO REVERSE THE SECRETARY'S DECISION THAT THE INITIATIVE WAS SUFFICIENT BECAUSE THE INITIATIVE IS UNCONSTITUTIONAL IN THAT IT ADVANCES PURPOSES PROHIBITED BY THE CONSTITUTION IN VIOLATION OF ARTICLE III, SECTION 51 OF THE MISSOURI CONSTITUTION, TO WIT, PROVIDING PUBLIC FUNDS TO RELIGION IN VIOLATION OF ARTICLE I, SECTIONS 7 AND 8 AND ARTICLE IX SECTION 8.

Appropriation by initiative is specifically called out in the Constitution, but MO. CONST. Article III, section 51 also limits the use of the initiative power for "any other purpose prohibited by this Constitution." Direct prohibitions in the Missouri Constitution are relatively scarce, but where the Constitution establishes prohibited conduct, the initiative cannot be used to circumvent the prohibition. This limitation is consistent with the underlying theory of Missouri's – and America's – limited democracy. Certain cherished rights and liberties are vouchsafed in the Constitution of Missouri and the United States in order to protect them from "the tyranny of the majority." "It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

Here, the proposed initiative – on its face – seeks to circumvent Missouri constitutional prohibitions on the use of public funds to aid religious organizations or

religious schools. The Trial Court incorrectly concluded that this facial challenge to the constitutionality of the proposed measure was not ripe for judicial review. This challenge is clearly ripe, and the proposed initiative unquestionably seeks to evade the Missouri constitutional prohibitions on public funding of religious organizations or religious schools. For the reasons set forth in detail below, this Court should reverse the Trial Court's judgment and enjoin the Secretary and other election officials from placing this unconstitutional initiative on the ballot in November.

A. This Facial Challenge is Ripe for Review.

Arrowood is entitled to pre-election review of the facial constitutionality of the proposed initiative. "A facial challenge is an attack on a statute itself as opposed to a particular application." *Patel*, 135 S.Ct. at 2449; *see also Coyne*, 395 S.W.3d at 520 (facial challenge alleges that legislation "is defective on its face" whereas as applied challenge alleges that legislation "operates unconstitutionally as to [a party] because of [that party's] particular circumstances"). Arrowood contends that the proposed initiative would allow public funds to be used for religious institutions, in violation of the constitution and its restrictions on the initiative power. This is not a claim that the Initiative Petition "operates unconstitutionally as to [Arrowood] because of [Arrowood's] particular circumstances." *Coyne*, 395 S.W.3d at 520. Instead, her claims challenge the constitutionality of the proposed initiative.

As discussed above, Missouri law authorizes courts to conduct pre-election review of the facial constitutionality of an initiative petition once the Secretary has certified the initiative petition for the ballot. Here, Defendant Kander certified the Proposed Measure

for the ballot on August 9, 2016. Arrowood's claim that the initiative does that which is prohibited by the constitution by allowing public funds to be used for religious institutions is therefore ripe for adjudication.

B. The Measure seeks to Circumvent the Missouri Constitutional Prohibitions on Public Funds to Aid Religion.

The constitution prohibits the "taking of money from the public treasury, either directly or indirectly, in aid of any church sect, or denomination of religion." MO. CONST. Article I, section 7. This prohibition is repeated in MO. CONST. Article IX, section 8: "Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose or to help to support or sustain" any school controlled by a religious organization.

These two provisions in the Missouri Constitution "declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution." *Paster v. Tussey*, 512 S.W.2d 97, 101-02 (Mo. banc 1974). Both state and federal courts have repeatedly recognized that Missouri's wall of separation between church and state is higher than what is required by the First Amendment to the U.S. Constitution. *See St. Louis University v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721 (Mo. banc 2007); *Americans United v. Rogers*, 538 S.W.2d 711, 720 (Mo. banc 1976); *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 787-88 (8th Cir. 2015). Last year, the Eighth Circuit recognized that "the long established constitutional policy of the State of Missouri . . .

insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment." *Trinity Lutheran Church of Columbia, Inc.*, 788 F.3d at 784.

RYH4K's initiative, on its face, circumvents the constitutional prohibition on distributing public monies to religious institutions. In the last sentence of Section 54(b)(2) of the Proposed Initiative, the measure states: "Distributions of funds under this amendment shall not be limited or prohibited by the provisions of Article IX, section 8." (Joint Exhibit 1, L.F. 0200-0201 at Section 54(b)(2)). By including this language, the initiative purports to exempt the funds generated by the measure from the prohibition of Article IX, section 8. Although the initiative is silent as to the prohibition in Article I, section 7, by expressly exempting funds generated by the initiative's tax from the provisions of Article IX, section 8, the initiative's clear directive is that these funds will be available for distribution by government agencies to religious organizations. This purpose is clearly and directly prohibited by the Missouri Constitution. Article III, section 51 prohibits the initiative from being used to circumvent this prohibition.

IV. THE TRIAL COURT ERRED IN REFUSING TO REVERSE THE SECRETARY'S DECISION THAT THE INITIATIVE WAS SUFFICIENT BECAUSE THE INITIATIVE IS UNCONSTITUTIONAL IN THAT IT ADVANCES PURPOSES PROHIBITED BY THE CONSTITUTION IN VIOLATION OF ARTICLE III, SECTION 51, TO WIT, CONTRACTING AWAY THE POWER TO TAX IN VIOLATION OF ARTICLE X, SECTION 2.

As discussed above, Article III, section 51 limits the use of the initiative power for "any other purpose prohibited by this Constitution." Here, the proposed initiative – on its face –circumvents the Missouri constitutional prohibition on surrendering or contracting away the power to tax. MO. CONST. Article X, section 2. The Trial Court incorrectly concluded that this facial challenge to the constitutionality of the proposed measure was not ripe for judicial review. This challenge is clearly ripe, and the proposed initiative unquestionably evades the Missouri constitutional prohibition on contracting away the power to tax by giving parties to a contract – and not the legislature – the power to set the tax. For the reasons set forth in detail below, this Court should reverse the Trial Court's judgment and enjoin the Secretary and other election officials from placing this unconstitutional initiative on the ballot in November.

A. This Facial Challenge is Ripe for Review.

Arrowood is entitled to pre-election review of the facial constitutionality of the proposed initiative. "A facial challenge is an attack on a statute itself as opposed to a particular application." *Patel*, 135 S.Ct. at 2449; *see also Coyne*, 395 S.W.3d at 520

(facial challenge alleges that legislation "is defective on its face" whereas as applied challenge alleges that legislation "operates unconstitutionally as to [a party] because of [that party's] particular circumstances"). Arrowood contends that the proposed initiative, in a specific section, contracts away the power to tax by allowing a contract to set a tax increase, in violation of Article X, section 2. This is not a claim that the Initiative Petition "operates unconstitutionally as to [Arrowood] because of [Arrowood's] particular circumstances." *Coyne*, 395 S.W.3d at 520. Instead, her claims challenge the constitutionality of the proposed initiative.

As discussed above, Missouri law authorizes courts to conduct pre-election review of the facial constitutionality of an initiative petition once the Secretary has certified the initiative petition for the ballot. Here, Defendant Kander certified the Proposed Measure for the ballot on August 9, 2016. Arrowood's claim that the initiative does that which is prohibited by the constitution by contracting away the power to tax is therefore ripe for adjudication.

B. The Measure Seeks to Circumvent the Missouri Constitutional Prohibition on Contracting Away the Power to Tax.

The RYH4K Initiative Petition contracts away the power to tax, a purpose expressly prohibited by the Constitution. Article X of the Constitution governs taxation. Article X, section 2 provides "the power to tax shall not be surrendered, suspended or contracted away, except as authorized by this constitution." Section 1 of Article X vests the taxing power for state purposes in the General Assembly and allows the General Assembly to delegate power to other political subdivisions.

> "'Other political subdivisions' is defined in article X, section 15, as 'townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax.' In other words, article X, section 1, gives the power to tax to political subdivisions which have the power to tax. Taken together, these two sections require that a political subdivision's power to tax is contingent upon a grant of authority to tax by the legislature. . ."

State ex rel. Bd. of Health Center Trustees of Clay County v. County Comm'n of Clay County, 896 S.W.2d 627, 632 (Mo. banc 1995).

Therefore, the Constitution specifically limits taxing authority to only the General Assembly and those to whom they delegate. The Constitution prohibits the contracting away of a tax except as already authorized by the Constitution in Article X, section 2. *See City of St. Louis v. Western Union Telegraph Co.*, 760 S.W.2d 577 (Mo. App. 1988); *Western Taney Cnty. Fire Prot. Dist. v. City of Branson*, 334 S.W.3d 627 (Mo. App. 2011). Contracting away the power to tax is taxation without representation, which is "inconsistent with the American idea of government . . ." *State ex rel. Gordon v. Becker*, 49 S.W.2d 146, 151 (Mo. 1932); *see also Bally's LeMan's Family Fun Centers, Inc. v. Director of Revenue*, 745 S.W.2d 683, 686 (Mo. banc 1988) (Welliver, J., dissenting) ("This case . . . represent[s] the most flagrant taxation without representation . . . result[ing] in

taxation by judicial interpretation, not taxation by legislative enactment by duly elected representatives of the people.").

The RYH4K initiative establishes an "equity assessment fee" on cigarettes manufactured by “non-participating manufacturers.” (Joint Exhibit 1, L.F. 0201 at Section 54(c)2.a). The term non-participating manufacturer is not defined in the proposed constitutional amendment but rather by reference to "the Master Settlement Agreement entered into by the State of Missouri and certain tobacco manufacturers on November 23, 1998." (*Id*.). On its face, the Initiative Petition imposes a tax on a certain group of businesses based not on any law, but on how they are defined in a contract – a contract to which the non-participating manufacturers are not a party and which can be amended by the parties to the contract. (Joint Exhibit 9, L.F. 0355). The entities taxed under the initiative are not defined by any law.

But the Initiative Petition goes even further to authorize the equity assessment fee to be increased based on the Master Settlement Agreement. "T]he rate of the equity assessment fee shall be sixty seven cents per package of twenty cigarettes. . . the equity assessment fee shall be adjusted each year in accordance with the Inflation Adjustment in the Master settlement Agreement." (Joint Exhibit 1, L.F. 0201 at Section 54(c)2.a).

The Master Settlement Agreement is a contract between the Missouri Attorney General, over 40 other states and several major tobacco manufacturers and can be amended by agreement of the signatories. (Joint Exhibit 9, L.F. 0355) ("This Agreement may be amended by a written instrument executed by all Participating Manufacturers affected by the amendment and by all Settling States affected by the amendment."). None

of the parties to the Master Settlement Agreement are political subdivisions or have been delegated the power to tax by the General Assembly under Article X, section 1. None of them have the authority to contract away the taxing power of the State. That may only be done by the General Assembly.

Further, the inflation adjustment mechanism that will be applied annually to the tax is not set forth in the initiative. Rather, the initiative simply refers to the settlement agreement without setting forth any details of how the annual tax increase will operate. Because the initiative refers to a contract to set a tax increase, it has surrendered the power to tax to an agreement between private tobacco companies and over 40 states and territories.

The Initiative Petition taxes non-participating tobacco manufacturers based on how they are defined in a contract – not any law passed by a government entity. The "non-participating manufacturers" are not participants in the Master Settlement Agreement. The Initiative Petition therefore allows some tobacco manufacturers (who are parties to a contract with the state) to agree to tax their competitors (the non-participating manufacturers). Because the Master Settlement Agreement may be amended, the competitors have the power to control the tax rate and even who is taxed. As a result, the RYH4K initiative contracts away the power to tax, which is prohibited by the Missouri Constitution.

VI. THE TRIAL COURT ERRED IN REFUSING TO REVERSE THE SECRETARY'S DECISION THAT THE INITIATIVE WAS SUFFICIENT BECAUSE THE INITIATIVE IS UNCONSTITUTIONAL IN THAT IT AMENDS MORE THAN ONE ARTICLE OF THE CONSTITUTION BY AMENDING BY IMPLICATION PORTIONS OF ARTICLE IX, SECTION 8, ARTICLE I, SECTION 7, ARTICLE I, SECTION 8, AND ARTICLE X, SECTION 2.

The Trial Court correctly found Arrowood's claim that the initiative amends more than one article of the constitution was ripe for review, but erred in dismissing the claim. At trial, RYH4K argued that the violations of the restriction on funds for religious purposes and contracting away the power to tax should be overlooked because their initiative is a Constitutional amendment specifically authorizing these things. This argument only strengthens Arrowood's claim that the initiative, on its face, violates Article III, section 50. "Petitions for constitutional amendments shall not contain more than one amended and revised article of this constitution."

The RYH4K petition expressly amends Article IV of the Constitution. (Joint Exhibit 1, L.F. 0200). The text of the initiative also exempts its expenditures from Article IX, section 8 and allows taxation by a body other than the General Assembly or those to whom the power is delegated, in direct conflict with Article X, sections 1 & 2. Of course, RYH4K does not specifically disclose that it is altering these other sections of the Constitution. The issue for the Court is whether this later enactment results in a direct inconsistency between the two measures. If it does, there is an amendment by

implication. *State ex rel. McNary v. Stussie*, 518 S.W.2d 630, 635 (Mo. 1974); *see also Kuehner v. Kander*, 442 S.W.3d 224, 229 (Mo. App. 2014) (suggesting that initiative may impliedly amend an article when it impairs a fundamental right included in such article). "Amendments by implication are not favored." *Fisher v. Waste Management of Missouri*, 58 S.W.3d 523, 525 (Mo. banc 2001).

In *McNary*, the issue facing the court was whether a statute adopted by the General Assembly that year had the effect of amending an already-existing statute. The court found the new statute amended the already-existing statute by implication, citing an 1870 Missouri Supreme Court case.

> The doctrine applied in Maguire simply recognizes that occasions do occur in which some repugnance or inconsistency exists between two statutes adopted by the legislature. In such a situation, the court will attempt to reconcile them and apply both, but if this is not possible and both cannot stand, the later act will be held to have repealed by implication the earlier of the two acts, thereby giving effect to the most recently expressed legislative intent of the General Assembly. However, the doctrine applies only when the two inconsistent statutes each purport to be complete and independent legislation. 82 C.J.S. Statutes s 262a, p. 432. Furthermore, repeal by implication is not favored.

McNary, 518 S.W.2d at 635.

Although repeal by implication "is not favored," the Proposed Initiative admits that it "changes, repeals, or modifies by implication, or may be construed to change,

repeal or modify by implication, Article IV of the Missouri Constitution and the following provisions of the Missouri Revised Statutes…." (Joint Exhibit 1, L.F. 0200 at Notice). It fails to acknowledge, however, that it is also amending by implication Articles I, IX, and X of the Missouri Constitution.

As discussed above, Article I, section 7 and Article IX, section 8 prohibit taking money from the state treasury – directly or indirectly – for religious purposes. The RYH4K initiative amends by implication those articles to allow Missouri to do so for the purposes outlined in this initiative. The initiative and the original provisions of the Constitution cannot both stand, so there is a direct conflict between the initiative and Article IX, section 8 and Article I, section 7. In the event of a direct conflict, "the later-enacted provision, even when there is no specific repealing clause, repeals the first statute to the extent of any conflict with the second." *Turner v. State*, 245 S.W.3d 826, 828 (Mo. banc 2008). Since the Proposed Initiative seeks to amend by admission Article IV and amend by implication Articles I and IX, it violates the limits of Article III, Section 50.

Similarly, Article X, sections 1 & 2 allow taxation only by the General Assembly or political subdivisions to whom they have delegated that power. The RYH4K initiative amends those sections to allow a contract between parties other than those listed in the Constitution to determine the tax. There is no way for the court to recognize and apply both the initiative and the already-existing sections of the Constitution, so this initiative must also be amending by implication Article X. *See Levinson v. State*, 104 S.W.3d 409, 412 (Mo. banc 2003) ("the later-enacted statute repeals the first statute to the extent of any conflict with the second"). Because the initiative amends more than one article of the

Constitution, the Trial Court erred in finding the initiative did not violate Article III, section 50.

CONCLUSION

For the foregoing reasons, the Trial Court's judgment should be reversed. This Court should enter the judgment that should have been entered below, reverse the Secretary's determination that Initiative Petition 2016-152 is sufficient for inclusion on the November 2016 ballot and enjoin the Secretary and any local official from taking steps to include the initiative on the ballot.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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The undersigned counsel further certifies that pursuant to Rule 84.06(c), this brief:

(1) contains the information required by Rule 55.03;

(2) complies with the limitations in Rule 84.06 and Local Rule XLI;

(3) contains 11,456 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2010; and

(4) the brief was scanned and found to be virus-free.

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