IN THE SUPREME COURT OF MISSOURI

No. SC95924

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

REPLY BRIEF OF APPELLANTS JIM BOEVING AND PATTY ARROWOOD

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In this consolidated appeal, this Court is faced with two tasks: (1) interpreting the statutory requirements and consequences when the ballot title initially certified by the Secretary is declared misleading and insufficient; and (2) ascertaining the facial constitutionality of the proposed initiative petition. This Court should reverse the Trial Court on both grounds and enjoin the Secretary from placing the measure on the ballot

I. 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 primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning." *State ex rel. Golden v. Crawford*, 165 S.W.3d 147, 148 (Mo. banc 2005). The people "are entitled to a reasonable enforcement of the initiative law enacted by their representatives." *United Labor Committee of Missouri v. Kirkpatrick*, 572 S.W.2d 449, 465 (Mo. banc 1978). Although statutory provisions related to the initiative should be construed liberally, that liberal construction must yield to "express statutory language declaring that petitions which fail to comply with the requirements shall not be counted." *United Labor*, 572 S.W.2d at 456. "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." *Id.* (quoting *Kasten v. Guth*, 395 S.W.2d 433, 435 (Mo. banc 1965)).

Here, the statutory language is clear: the official ballot title that emerges from a Section 11.190 ballot title challenge becomes the ballot title "for the purposes of Section 116.180." Section 116.190.4.[1] Circulators are warned that "signatures shall not be counted if the official ballot title is not affixed to the page containing such signatures." Section 116.180. The legislature likewise commanded the Secretary of State: "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. These statutory commands are unequivocal: the signatures shall not be counted.

In response, the Secretary and Intervenors ask this Court to ignore these statutory commands and engraft a judicial exception, allowing the Secretary to ignore a misleading ballot title for purposes of Section 116.120 and his decision on sufficiency. Their argument is essentially that 116.120 should be re-written to say "signatures on petition pages that do not have the official ballot title affixed to the page shall not be counted as valid *UNLESS THE TITLE WAS CHANGED AFTER THE SIGNATURES WERE SUBMITTED.*" This Court should reject the invitation to re-write the statute.

Respondents argue that the Secretary may count signatures because the ballot title had not been re-written at the time the signatures were turned in. The statutes only

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

envision one "official ballot title," not two. *See* Section 116.010, RSMo. (defining "official ballot title" as the summary statement and fiscal note summary which shall be placed on the ballot).

Although on the circumstances of this case, it is admittedly a harsh result for the proponents of the initiative, it is what the statutes command and those statutes must be enforced "to the letter." Following the precise language of the statute does not offend the Constitution of Missouri.

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.

Chapter 116 sets forth the legislative requirements for submission of initiative petitions at the general election. This Court and the Eighth Circuit have confirmed the constitutionality of the statutory scheme. *See Missouri Roundtable for Life v. Carnahan*, 676 F.3d 665 (8th Cir. 2012) (affirming constitutionality of ballot title and fiscal note requirements); *Scott v. Kirkpatrick*, 513 S.W.2d 442 (Mo. banc 1974) (affirming constitutionality of statutory requirement that initiative signers must be registered voters). The provisions of Chapter 116 relevant to this appeal should be "interpreted *in pari materia* to determine their meaning." *Investors Title Co. v. Hammonds*, 217 S.W.3d 288, 296 (Mo. banc 2007).

In *United Labor*, this Court concluded that failure to comply with certain affidavit and notarization requirements in the statutes was not fatal to the validity of the signatures precisely because the legislature did not declare it to be fatal. "We cannot give the 'shall

or mandatory' language . . . greater importance, in the absence of express statutory language declaring that petitions which fail to comply with the requirements shall not be counted." *United Labor*, 572 S.W.2d at 456. Here, the legislature has twice provided the express statutory language absent in *United Labor*, that the signatures "shall not be counted." Sections 116.180; 116.120. This Court should enforce the statutory command "to the letter." *United Labor*, 572 S.W.2d at 456.

1. Section 116.180 and Section 116.190 Work Together to Prevent Voters from Being Misled and to Ensure Consistency of Presentation of Initiatives to the Voters.

Section 116.010 defines the "official ballot title" as that which "shall be placed on the ballot and, when applicable, shall be the petition title for initiative or referendum petitions." Section 116.010(4). Section 116.180 imposes two requirements: the Secretary must deliver the official ballot title within three days of certification, and the circulators of initiative petitions must affix the official ballot title to their petition pages. Section 116.180 serves two salutary purposes: (1) ensure that voters are not misled with an inaccurate description of the measure; and (2) ensure that the "official ballot title" in the polling place is the same as the "official ballot title" that is shown to signers of initiative petitions. In submissions of constitutional amendments, the "official ballot title" even has a constitutional dimension. *See* MO. CONST. Article XII, section 2(b).

Together, these requirements limit voter confusion and promote a consistent understanding of the measure throughout the initiative process. In the case of an unchallenged official ballot title, the statutory construction is straightforward: petition

pages that do not have the official ballot title "shall not be counted." Sections 116.180; 116.120.

The legislature recognized that the Secretary of State might not provide a sufficient and fair ballot title and allowed a challenge by any citizen under Section 116.190 RSMo. The time period to initiate the challenge is short – ten days – and the litigation must be expedited. Sections 116.190.4 ("The action shall be placed at the top of the civil docket."); 116.190.5 (the "action must be fully and finally adjudicated within one hundred eighty days of filing"). The reason for this expedited treatment is obvious: an unfair ballot title should not be used to gather signatures. Quick litigation allows all interested parties to resolve the matter and obtain a fair ballot title.

In the event a ballot title challenge is successful – *as here* –the certified title that emerges must be used "for the purposes of section 116.180." Section 116.190.4. In creating its remedies, "the legislature apparently weighed the interests of the citizenry in getting ballot initiatives on the ballot in a timely fashion against the interests of those opposing the language to be utilized on the official ballot title." *Knight v. Carnahan*, 282 S.W.3d 9, 20 (Mo. App. 2009) (quoting *Overfelt v. McCaskill*, 81 S.W.3d 732, 736 n. 3 (Mo. App. 2002)).

This Court must "presume that the legislature intended every word of a statute for a purpose, and that every word has meaning." *Hewitt v. St. Louis Rams P'Ship*, 409 S.W.3d 572, 574 (Mo. App. 2013). Here, these words can only mean that the certified ballot title emerging from the Section 116.190 challenge must be delivered by the Secretary (as Section 116.180 requires) and must be used and affixed to the petition

pages (as Section 116.180 requires). If the certified ballot title emerging from the Section 116.190 challenge is not affixed to the petition pages, the signatures "shall not be counted." Section 116.180.

The Secretary, in response, indicates that after the petition pages have been turned in "there are no further purposes of Section 116.180 outstanding." (Kander Br. at 18.) The proponents likewise urge that the purposes of the statute "after the petition has already been submitted are limited." (RYH4K Br. at 18.) But Respondents' contentions ignore the underlying purposes of Section 116.180 and Section 116.190: preventing voters from being misled and ensuring ballot consistency throughout the process. Those purposes would both be frustrated by an interpretation that allows signatures obtained under a misleading, invalidated, and no longer certified official ballot title to be counted as sufficient to qualify the petition for the ballot. Just as importantly, the Respondents' interpretation would treat the statutory command to use the certified ballot title emerging from the expedited ballot title challenge "for the purposes of Section 116.180" as extraneous. This Court should not "interpret a statute so as to render some phrases mere surplusage." *Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193, 196 (Mo. banc 2009).

The requirements of a statute should not vary based on factual circumstances unless the legislature so commands. As this Court recognized in *United Labor*, "express statutory language declaring that petitions which fail to comply with the requirements shall not be counted" must be enforced "to the letter." *United Labor*, 572 S.W.2d at456.

2. Section 116.120 Likewise Directs the Secretary Not to Count Signatures on Petition Pages That Lack the Official Ballot Title.

While Section 116.180 commands that an unfair ballot title cannot be used for obtaining signatures, the law likewise prevents the Secretary from counting any signature gathered using an unfair title. When the Secretary reviews initiative petitions for sufficiency as Sections 116.120 and Section 116.150 require, the legislature again gave "express statutory language:"[2] "Signatures on petition pages that do not have the official ballot title affixed to the page shall not be counted as valid." There is no exception for ballot titles that were changed by the courts or for situations when those changes occur after signatures are submitted. Whether the official ballot title is the unchallenged title initially certified or the revised certified ballot title pursuant to Section 116.190, if petition pages "do not have the official ballot title affixed to the page," they shall not be counted.

Section 116.120 allows for the possibility that signatures may have been gathered on titles that were previously invalidated. If and when that occurs, the Secretary is given the same direction as petition circulators: signatures lacking the official ballot title "shall not be counted." Once again, this preserves the twin purposes of the ballot title requirement: it prevents voters from being misled at the time of signing or confused at the time of voting.

[2] *United Labor*, 572 S.W.2d at 456.

Until this case, the Secretary treated the legislature's command as unequivocal. Judgment and Order, *Tuohey, et al. v. Markenson, et al.*, Case No. 06AC-CC00424 (Cole County Cir. Ct. July 24, 2006). Although, as the Secretary points out, the change in the official ballot title in the *Tuohey* case occurred before the signatures were submitted to the Secretary (by a few days), the statute did not change. Respondents RYH4K identify certain other factual distinctions between the petitions submitted to the Secretary in *Tuohey* and this case, but none of those bear on the Secretary's decision not to count signatures submitted on pages with an invalidated ballot title nor do they change the language of the statute. The statute, then as now, commanded that the signatures on pages that do not have the official ballot title "shall not be counted as valid." Section 116.120, RSMo. The interpretation of the statute should not change depending on the day that circulators submit their signatures.

By repeating the requirement in Section 116.120 that the signatures "shall not be counted," the legislature acknowledged that the "official ballot title" could change between the day the petitions were submitted and the date of the Secretary's certification, as occurred in this case. Section 116.120 therefore directs the Secretary to determine – at the time of his certification decision – whether the petition pages contain the official ballot title as it then exists. And this is what happened here. Before the Secretary certified the petition as sufficient, the official ballot title changed because it was "likely to mislead voters, and fails to accurately summarize the equity assessment fee which the initiative petition proposes to establish." *Boeving v. Kander*, --- S.W.3d ---, 2016 WL 3656891, W.D. 79694, at *6 (July 8, 2016). When the Secretary made his certification decision,

each and every signature had been obtained under that misleading ballot title. Section 116.120 is clear: those signatures "shall not be counted as valid."

Respondents urge the Court to add words to Section 116.120 to freeze the "official ballot title" at the time the petition pages are submitted to the secretary of state. But it is undisputed that the signatures had not been counted at that time nor had they been counted on July 18 when the ballot title was changed. Moreover, Respondents' construction of the statute cannot be reconciled with the legislature's own definition of "official ballot title", i.e. "that which shall be placed on the ballot." Section 116.010(4). The correct interpretation, which harmonizes Sections 116.010, 116.180, 116.190, and 116.120 is that if the official ballot title (whether unchallenged or as emerging from the 116.190 challenge) is not on the petition pages, the Secretary cannot certify the petition as sufficient for inclusion on the ballot. This is clearly what the legislature intended and what the words say.

And as Missouri courts have concluded, "it makes perfect sense." *Reeves v. Kander*, 462 S.W.3d 853, 858 (Mo. App. 2015). The expedited ballot tile challenge under Section 116.190 makes sure that Missouri citizens have an adequate ballot title before it is "used by citizens to determine whether they will sign the petition." *Id*.

To discount the statutory imperative, Respondent RYH4K relies extensively on dicta in Judge Smart's partial concurrence in *Missourians against Human Cloning v. Carnahan*, 190 S.W.3d 451, 463-64 (Mo. App. 2006) (Smart J., concurring in part and dissenting in part) (RYH4K Br. at 21-22). By Judge Smart's own admission, the issue of whether signers of the initiative petition would be misled was "not addressed at all, in this

court at least." *Id.* at 463. The provisions of *Union Electric Co. v. Kirkpatrick*, 678 S.W.2d 402 (Mo. banc 1984), that they rely on are likewise acknowledged as not just dictum, but the dreaded "*obiter dictum*."[3] *Id.* As Judge Smart himself recognized, "sections 116.010(4) and 116.180 contemplate that generally the same 'official ballot title' (including the summary statement and the fiscal note and summary) would appear both on the petitions and the ballot." *Id.*

3. The Statutory Language will Limit and Discourage Efforts to "game the fight over the ballot title"

Intervenors complain that this logical, plain language interpretation of Chapter 116 will leave initiative rights dependent "on the manner in which state officials and litigants game the fight over the ballot title." (RYH4K Br. at 23.) Citizens – whether initiative opponents or proponents – who believe that a ballot title is insufficient or unfair only have the provisions of Section 116.190 available to them. Initiative proponents, by contrast, are constantly engaged in an effort to "game the fight over the ballot title." Prior to drafting initiative proposals, proponents engage focus groups to assist them "formulate political strategy, craft messaging, and analyze how the opponent's political messaging might resonate with the public." *State ex rel. Humane Soc'y v. Beetem*, 317 S.W.3d 669, 672 (Mo. App. 2010). Proponents submit multiple variations of substantively similar

[3] In an election challenge case, one judge of this Court recently recognized the "the dangers of *obiter dictum*, particularly when . . . that issue was not briefed or argued." *Shoemeyer v. Kander*, 464 S.W.3d 171, 176 (Mo. banc 2015) (Stith, J., dissenting).

initiatives to see whether the proponents receive a ballot title they believe to be favorable. *See Missouri Roundtable for Life*, 676 F.3d at 670 (noting initiative proponents "submitted thirteen proposed ballot initiatives to the Missouri Secretary of State").

In fact, Mr. Greim, who represents RYH4K, personally submitted eighteen separate initiatives related to the tobacco tax to the Secretary of State in 2015. On August 19, 2015, Mr. Greim submitted six initiative petition sample sheets. After the Secretary certified official ballot titles, Appellant Mr. Boeving challenged the official ballot title for three of those six petitions in *Boeving v. Missouri Secretary of State*, et al., Case No. 15AC-CC00482 (filed October 15, 2015). Mr. Greim withdrew the challenged petitions and the case was dismissed in December 2015.

On September 17, 2015, Mr. Greim submitted eleven additional initiative petition sample sheets. After the Secretary certified official ballot titles for these eleven petitions, Mr. Boeving challenged the official ballot title for ten of them. *Boeving v. Missouri Secretary of State*, et al., Case No. 15AC-CC00521 (filed November 13, 2015). Mr. Greim withdrew the challenged petitions and the case was dismissed in February 2016.

On November 20, 2015, after submitting seventeen initiative petitions, four of which had unchallenged Official Ballot Titles, Mr. Greim submitted one additional initiative petition sample sheet, which became the petition at issue in this case. Through

this process, five of Mr. Greim's submissions were approved for circulation by the Secretary of State.[4]

While these facts surely permit an inference that it is the proponents of this initiative who are attempting to "game the fight over the ballot title," none of their conduct is outside of the scope of Chapter 116. Proponents and opponents of initiatives must comply with the statutory requirements. They cannot take advantage of statutory requirements and then cry foul when the statutes don't advance their political agenda. The legislature's command that the signatures "shall not be counted" if they do not contain the official ballot title must be enforced.

4. Respondents' Reliance On Section 116.185 And Section 116.195 Is Misplaced.

Respondents also rely on two unrelated provisions in support of their position: Section 116.185, which allows for changes to avoid placement of identical issues on the ballot, and Section 116.195, which requires the State to pay the costs of reprinting ballots due to a court-ordered ballot change. Neither provision is relevant here, nor would a plain language reading of Section 116.120 render them meaningless.

[4] *See* Initiatives 2016-081 (version 1); 2016-083 (version 3); 2016-085 (version 5); 2016-113 (version 15); and 2016-152 (the petition in this case). The certified ballot titles are available on the Secretary of State's website at: https://www.sos.mo.gov/default.aspx?PageID=1731 (last accessed September 8, 2016).

Section 116.185 allows for provisions of identical (or nearly identical) ballot measures to be retitled. As Missouri's history shows, two measures that touch on the same subject occasionally are presented to voters at the same election. *See, e.g. State ex inf. Ashcroft ex rel. Bell v. City of Fulton*, 642 S.W.2 617, 620 (Mo. banc 1982) (noting that "both joint resolutions which submitted [constitutional] amendments to the voters called for repeal of the same section"); *Gabbert v. Chicago, Rock Island & Pac. Ry.*, 70 S.W. 891 (Mo. banc 1902) (same). Until the Secretary certifies initiative petitions for the ballot, however, the identity of measures that will appear on the ballot cannot be ascertained. Section 116.120 directs the Secretary that if petitions do not have the official ballot title *at the time he certifies them*, the signatures "shall not be counted." Section 116.185 has nothing to do with counting signatures for certification. Rather it allows the Secretary to review all the measures certified for the ballot and change the ballot title *after certification* in order to avoid voter confusion.

Respondents' reliance on Section 116.195 is yet further afield. Section 116.195 clarifies that when a court-ordered change to the ballot language requires reprinting of the ballot, the State of Missouri, and not the local election authorities, must pay the costs of those court-ordered changes. This applies to legislative initiatives as well as citizen initiatives and does not preclude or foreclose the interpretation of the statutes that Appellants urge here. If the legislature has submitted a measure for voter approval, and the courts order a change to the title after certification, the state must pay for printing.

5. Respondents Cannot Claim Reliance on the Invalidated Ballot Title and Should be Estopped From Doing So.

Respondents claim they relied on the Secretary's originally certified ballot title, but they knew that its validity had been challenged. RYH4K told the courts that their signatures "may not be counted as valid" to convince the Trial Court to allow them to intervene in Boeving I. (A. 37). While they now claim they meant to say those signatures "might" not be counted as valid, the statutes were clear when RYH4K intervened: they "shall not be counted as valid." Having relied on this threat to justify their intervention, it is unfair under plain judicial estoppel principles to permit them to change their position on the validity of the signatures.

When a government official makes an unlawful decision later corrected by the courts, it is not unjust to foreclose any prior reliance on that unlawful decision. The proponents did not have a proper ballot title until the court certified the correct one in July. Prior to that time, the proponents were operating under a disputed ballot title that was misleading and deceptive. It is similar to when a statute has been found void. When the court finds a statute to be unconstitutional, the decision has retroactive effect. *Trout v. State*, 231 S.W.3d 140, 148 (Mo. banc 2007). "An unconstitutional statute is no law and confers no rights. This is true from the date of its enactment, and not merely from the date of the decision so branding it." *Id*. (quoting *State ex rel. Miller v. O'Malley*, S.W.2d 319, 324 (Mo. banc 1938)). Those who relied on the challenged ballot title did so at their own risk.

Intervenors could have moved to accelerate the litigation even beyond the statutory requirements, but did not. Instead, they proceeded with the hope the ballot title would be declared sufficient and fair and gathered signatures without a full resolution. But their strategy did not pan out. The signatures collected under the insufficient and unfair ballot title cannot be counted pursuant to the directives of the Missouri legislature.

B. The Statutes Requiring Official Ballot Titles to be Placed on Petition Pages are Constitutional

The statute's plain language means the Secretary's decision must be reversed, so RYH4K argues the statute must be unconstitutional. They say they have a constitutional right to submit laws using the initiative – and they do – but the Constitution expressly makes the submission of initiative petitions subject to "general laws." MO. CONST. Article III, section 53. The constitution is more specific when submitting a Constitutional amendment. It must "be submitted to the electors for their approval or rejection by official ballot title *as may be provided by law*...." MO. CONST. Article XII, section 2(b) (emphasis added). These provisions require "the application of general law, as enacted by the general assembly, to the process of submitting initiatives to the people." *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991). The legislature's "power to enact reasonable implementations of a constitutional directive is generally recognized." *State ex rel. Upchurch*, 810 S.W.2d at 516. The Court will only invalidate statutes if they "conflict with a constitutional provision or provisions." *State ex rel. Upchurch*, 810 S.W.2d at 516.

The Missouri Constitution expressly requires the submission of constitutional amendments to the people by "official ballot title." MO. CONST. Article XII, section 2(b). As described in Section II.A.1 above, the Missouri legislature, in a reasonable effort to implement the constitutional directives of Article XII and Article III has crafted Sections 116.180, 116.190, and 116.120 to make sure that the constitutional amendment is presented through one official ballot title. The statutes require the official ballot title to be consistent throughout the amendment process, from petition circulation to certification of sufficiency by the Secretary of State to the appearance on the general election ballot. Rather than conflict with the constitutional provision, the statutory commands are clearly in harmony with the Constitutional requirements for constitutional amendments.

Although the statutory application in this case will leave this initiative off the ballot in this general election cycle, that result does not render the statutes unconstitutional. This Court is no stranger to keeping submitted initiatives off the ballot without offending the Missouri Constitution. Although Article III, section 50 allows "legal voters" to sign initiative petitions, this Court concluded it was constitutional for the legislature to limit signers to "registered voters." *Scott v. Kirkpatrick*, 513 S.W.2d 442 (Mo. 1974). The result in that case – as here – is that the proposed initiative did not appear on the ballot. In *Moore v. Brown*, this Court concluded that the proposed initiative petition, though it had sufficient signatures, could not be on the ballot because of its substantive unconstitutionality. *See Moore v. Brown*, 165 S.W.2d 657, 664 (Mo. banc 1942) ("restraining the certification of the amendment for submission to the voters").

Breaching statutory requirements has consequences, and sometimes they are harsh.[5] The so-called "death penalty" for voters that Respondents complain of (RYH4K Br. at 33) is just as acceptable in Missouri as the *actual* death penalty for capital crimes.

Missouri courts have previously concluded that, under the Missouri Constitution, initiative signers "are not ensured the right to have their signatures counted." *Prentzler v. Carnahan*, 366 S.W.3d 557, 563 (Mo. App. 2012) (rejecting intervention from initiative petition signatories). As is clear in Chapter 116, if petitions do not comply with the requirements of Chapter 116, "the Secretary of State has the right to reject the petition as insufficient." *Id.* Indeed, in *Dotson*, this Court concluded that a legislatively-initiated amendment to the Constitution could be challenged after the election in the event that it passed. *See Dotson v. Kander*, 435 S.W.3d 643, 645 (Mo. banc 2014) ("judicial review of a claim that a given ballot title was unfair or insufficient (when not previously litigated and finally determined) is available in the context of an election contest should the proposal be adopted"). There is no stronger affront to the expressed will of the electorate than the possibility that the election would be overturned, but that is what this Court

[5] If the Courts can require a private company to dismantle a multi-million dollar power plant erected in reliance on the issuance of a permit, *see Stopaquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005) (affirming injunction requiring company to dismantle power plant), they can likewise constitutionally conclude that the petitions submitted here were insufficient because the signatures were gathered under a misleading ballot title.

expressly affirmed in *Dotson* could result from a misleading and prejudicial official ballot title.

Intervenors complain that they did everything within their power to place their proposal on the November 2016 ballot. This is flatly untrue. They had myriad options available to them to get their proposal on the ballot within the time allowed by the Missouri Constitution. First, and most obviously, they could have filed their proposal sooner. *See Reeves*, 462 S.W.3d at 858 (noting that proposed initiative was presented to Secretary on December 2, 2014). Indeed, in the *Reeves* case, the ballot title challenge was resolved in the Court of Appeals on June 9, 2015, *id.*, more than two months before proponents here had begun their first round of dummy submissions, and more than *five* months before this initiative was first presented to the Secretary. Failing an earlier effort, the proponents could have circulated Versions 1, 3, 5 of their initiative beginning on October 16, 2015 or version 15 on November 14, 2015, after ten days passed without a challenge to the official ballot title. The suggestion that the resulting correct and natural interpretation of the statutes impermissibly infringes on their ability to submit an initiative to the voters cannot be reconciled with the realm of available options.

Finally, Respondents contend that the challenge should fail because there was no evidence that a voter was misled. (RYH4K Br. at 7) In 2010, the Court of Appeals issued a writ to restrain discovery into individual perceptions of language in the official ballot title. "[R]andom perceptions . . . are not relevant to the determination of whether the Secretary's language is unfair." *State ex rel. Humane Society v. Beetem*, 317 S.W.3d 669, 674 (Mo. App. 2010). Should this Court conclude that such evidence is necessary, it

would create a whole host of mini-trials and issues with evidentiary burden on top of the already expedited election contest litigation. How many voters would have to be misled? The Court of Appeals foreclosed this type of inquiry in 2010; this Court should not reopen it now.[6]

Although challenges to official ballot titles are relatively common, decisions overturning them are relatively rare. The ballot title "need not set out the details of the proposal," nor does it have to "provide the best summary." *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012). So long as "the language fairly and impartially summarizes the purposes of the initiative," it will survive judicial scrutiny. *Id.* Here, the ballot title was so misleading to be invalidated by both the Circuit Court *and* the Court of Appeals. It is not unconstitutional for the legislature to command that signatures gathered in reliance on a misleading ballot title "shall not be counted." This Court should enforce the legislative command "to the letter." *United Labor*, 572 S.W.2d at 456.

[6] Respondents RYHFK reach deep and urge this Court to rely on a vacated opinion of the Cole County Circuit Court. The trial judge in that case, now an august member of this Court, would doubtless recognize that "a vacated decision is deprived of its precedential effect." *Salitros v. Chrysler Corp.*, 306 F.3d 562, 575 n.2 (8th Cir. 2002).

II. ARROWOOD'S CONSTITUTIONAL CLAIMS ARE RIPE FOR REVIEW

As the Western District Court of Appeals recognized in its Order transferring this case to this Court, "the issues appear to be ripe for pre-election judicial review as they 'affect the integrity of the election itself, and . . . are so clear as to constitute a matter of form.'" *Boeving, et al. v. Kander, et al.*, ---S.W.3d ---, W.D. 80001 (September 8, 2016 Order); *see also City of Kansas City v. Chastain*, 420 S.W.3d 550, 554-55 (Mo. banc 2014). Respondents argue that pre-election review should only be available for claims that an initiative petition violates the form requirements of the Constitution and Chapter 116. However, Missouri courts have made clear that when "the issue of law raised is so clear or settled" it may "constitute matters of form." *State ex rel. Hazelwood Yellow Ribbon Committee v. Klos*, 35 S.W.3d 457, 468 (Mo. App. 2000). The Constitution itself makes clear that the initiative cannot be used for an unconstitutional purpose or for the appropriation of funds under MO. CONST. Article III, section 51; therefore Arrowood's claims constitute a matter of form.

A. The Initiative Petition Unconstitutionally Appropriates Funds

Respondents assert that Arrowood's claim of appropriation by initiative is not ripe because it relies on extrinsic facts. That is mistaken. 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. Whether there is money in the existing fund is irrelevant. The transfer of the fund is an appropriation, or "the act of setting aside a sum of money for a public purpose." Black's Law Dictionary, Ninth Edition, p. 118. It is

not necessary to know whether there will be money in the fund at a certain point in time. All that is required is that the Initiative Petition takes an existing fund and sets it aside (appropriates it); that is what the Constitution forbids.

Respondents next claim the Initiative Petition does not convey the authority to withdraw funds from the state treasury and therefore is not an appropriation. The Initiative Petition does not have to withdraw funds from the state treasury to effectuate an appropriation. If it sets aside funds for a purpose, it is appropriating them. On its face, subsection 1 of section 54(a) of the Initiative Petition transfers the balance of a currently-existing state fund, the Coordinating Board for Early Childhood Fund ("CBEC Fund") to the newly created Early Childhood Health and Education Trust Fund. From there, the money that was in the CBEC Fund may only be used for the purposes allowed in the Initiative Petition. This is an appropriation by initiative and is forbidden by MO. CONST. Article III, section 51.

Respondents defend the transfer of the existing fund because they allege the Initiative Petition does not mandate a change in the purposes for which the existing fund is to be spent. As discussed in Appellants' initial brief, the language of the Initiative Petition 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 purposes of the new fund differ from the purposes of the CBEC Fund. Specifically, the new fund 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). The CBEC Fund's stated purpose is "to support the healthy development and school readiness of all Missouri children from birth through age five."[7] Smoking cessation and prevention programs for Missouri pregnant mothers and youth are not purposes germane to the healthy development and school readiness of Missouri children from birth through age five. This mandatory use of the transferred fund is both new and different from the funds' presently existing purposes.

Because the Initiative Petition appropriates funds on its face, it violates MO. CONST. Article III, section 51.

B. The Initiative Petition Unconstitutionally Allows the Use of Public Funds for Religious Institutions

Respondents cite to *Kuehner v. Kander*, 442 S.W.3d 224 (Mo. App. 2014) for their argument that Initiative Petitions may carve out restrictions in certain constitutional provisions, and that is what Section 54(b)(2) of the Initiative Petition does. In *Kuehner*, the court found that "[t]he *mere reference* to [a constitutional provision] does not directly or by implication amend" such provision. *Kuehner*, 442 S.W.3d at 229 (emphasis added). Further, the proposed measure in *Kuehner* "in no way impair[ed] the fundamental right" at issue in that case. *Id*. Here, by contrast, the Initiative Petition seeks to impair the

[7] 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).

fundamental guarantee that public funds will not be used for religious institutions by expressly exempting funds generated by the measure. This is clearly and directly prohibited by the Missouri Constitution.

Respondents further argue that the Blaine Amendment only limits appropriations by the General Assembly and various local bodies, which are not applicable here. This argument ignores MO. CONST. Article I, section 7[8], which provides that "no money shall *ever* be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion . . ." (emphasis added). This section is not limited to appropriations by the General Assembly or local bodies; it applies to any and all public funds. By creating an exception to the Blaine Amendment, the Initiative Petition does what is prohibited by the Constitution: authorizes the use of public funds for religious purposes.

C. The Initiative Petition Unconstitutionally Contracts Away the Power to Tax

Article X, Section 2 of the Constitution prohibits surrendering, suspending or contracting away the power to tax except as authorized by "this constitution." Section 1 of Article X provides the circumstances under which the power may be surrendered or contracted away – when the general assembly grants power to political subdivisions.

[8] Respondents allege Arrowood's Article I, section 7 argument was not presented to the Trial Court. In fact, this argument can be found in Arrowood's Petition (L.F. 0011 at ¶ 27).

Amendment 3 does what the Constitution prohibits because it allows a tax, in the form of a so-called equity assessment fee, to be levied and adjusted based on a contract. The type of product taxed – cigarettes manufactured by a non-participating manufacturer – is subject to definitions not established by the legislature but rather contained in a private contract. And the tax may increase based on factors contained in a private contract.

Respondent RYH4K argues this taxation defined by a contract with non-elected tobacco companies is fine because it does not "limit the power of the general assembly to tax." But that is not the issue; the issue is surrendering the power to tax to third parties. RYH4K sole argument that surrendering the power to tax is fine seems to be the phrase "except as authorized by this Constitution" contained at the end of section 2. Apparently RYH4K thinks they can amend away the prohibition by simply changing the constitution.

The problem with that theory is that RYH4K may not use the initiative to do what is prohibited by the Constitution. MO. CONST. Article III, section 51. "This constitution" – the current constitution – prohibits delegating away the power to tax except to political subdivisions as authorized by Article X, section 1. "This constitution" does not allow an initiative to allow taxes to be set by an outside contract.

RYH4K also argues that it is permissible to tie a tax to an outside measurement such as the CPI. That might be true, but that is not what Amendment 3 does. Instead Amendment 3 allows the tax to be adjusted based on what a contract says. That contract, which today references the CPI, could be amended to use a different measure or to abandon the CPI all together. While the general assembly or a political subdivision would

have the power to impose a tax to be adjusted by the CPI, non-elected entities may not do so. The tax cannot be set and adjusted according to a contract.

III. THE INITIATIVE PETITION AMENDS MORE THAN ONE ARTICLE OF THE CONSTITUTION

Initiative petitions seeking to change the Constitution shall not contain more than amended and revised article of the constitution. MO. CONST. Article III, section 50. Respondents claim they are not amending more than one article, but they beg the question. As discussed above, using public funds for religious purposes is banned in two different articles, yet the initiative allows money to be spent and contains an express exemption from one prohibition. Because the Initiative Petition is carving out funds it raises from the blanket ban on religious uses, it is amending that blanket ban.

Similarly, the Initiative Petition expressly authorizes taxes to be imposed based on definitions and an escalator mechanism in a private contract, it conflicts with existing provisions in Article X. Respondents point out that the MO. CONST. Article X section 2 contains the language "except as authorized by this constitution." This argument is their doom. Article X prohibits delegating away the power to tax outside of government entities, but Respondents say they can change that with their amendment to Article IV. The language in the initiative amends Article IV on its face, but it also amends Article X to allow something Article X would otherwise expressly prevent.

CONCLUSION

For the foregoing reasons, the Trial Court's judgment should be reversed. This Court should 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

The undersigned counsel certifies that on this 12th day of September, 2016, a true and correct copy of the foregoing brief was served on the following by eService of the e-Filing System:

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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 7,732 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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