IN THE COURT OF APPEALS OF THE STATE OF MISSOURI
WESTERN DISTRICT

JIM BOEVING, PATTY ARROWOOD, ROBERT E. PUND and ROBERT A. KLEIN, **Appellants,**	)	
vs.	)	**Case No. WD80001 (consolidated with WD80002 & WD80004)**
JASON KANDER, Secretary of State of Missouri, **Respondent,**	)	
RAISE YOUR HAND FOR KIDS and ERIN BROWER, **Intervenors-Respondents.**	)	

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

BRIEF OF APPELLANTS PUND AND KLEIN

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JURISDICTIONAL STATEMENT

Appellants Robert Pund and Robert Klein appeal from the judgment of the Circuit Court of Cole County denying their request to compel the Secretary of State to reverse his decision to certify an initiative petition for inclusion on the November 2016 ballot. Appellants' appeal involves whether: (1) Chapter 116 of the Revised Statutes of Missouri prohibits counting as valid petition signatures collected under an official ballot title that has been adjudicated unfair and insufficient under § 116.190[1], and (2) the underlying initiative petition is facially unconstitutional.

The Circuit Court of Cole County is within the territorial jurisdiction of the Western District of the Missouri Court of Appeals. § 477.070.

Appellants' appeal is within the jurisdiction of the Missouri Court of Appeals for the Western District because it does not involve the validity of a treaty or statute of the United States, or of a statute or provision of the Constitution of Missouri, the title to any state office, the construction of a revenue law, or the imposition of the death penalty. Mo. Const. Art. V, § 3. *See also Reeves v. Kander*, 462 S.W.3d 853, 856, n.1 (Mo. App. W.D. 2015) (a challenge to the facial constitutionality of a proposed constitutional amendment is within the jurisdiction of the Court of Appeals).

The Court has authority to grant relief requested by Appellants through and including September 27, 2016. § 115.125; Legal File (L.F.) 197.

[1] Unless otherwise indicated, statutory citations refer to the 2000 edition of the Revised Statutes of Missouri, as supplemented.

STATEMENT OF FACTS

A. Parties

Appellants Robert Pund and Robert Klein are Missouri citizens seeking to exercise their rights under § 116.200 to judicial review of a decision by the Respondent Secretary of State (Secretary) to certify an initiative petition for inclusion on the November 2016 ballot. L.F. 190, 915-923. Respondent Raise Your Hand for Kids is a Missouri not-for-profit corporation and a Missouri campaign committee formed under Missouri law to support the initiative petition that is the subject of this litigation. L.F. 190. Respondent Erin Brower is a member of the board of directors of Raise Your Hand for Kids. L.F. 191.

B. Procedures for Initiative Petitions

Article III, §§ 49-53 of the Missouri Constitution reserve a right of initiative to the people of the state.

Chapter 116 of the Revised Statutes of Missouri contains a number of requirements for circulation and submission of initiative petitions and other statewide ballot measures. Among other things, proponents must submit a sample sheet to the Secretary and have an "official ballot title" prepared before a petition may be circulated for signatures that can count toward qualifying the initiative for placement on the next general election ballot. § 116,180; § 116.334; § 116.120. Section 116.010 defines an "official ballot title" as "the summary statement and fiscal note summary prepared for all statewide ballot measures in accordance with the provisions of [chapter 116]…." Section 116.334 in turn requires the Secretary to prepare a summary statement "which shall be a

concise statement not exceeding one hundred words" that is "in the form of a question using language neither intentionally argumentative nor likely to create prejudice either for or against the measure." Section 116.190 requires summary statements to be sufficient and fair. *Brown v. Carnahan*, 370 S.W.3d 637, 653 (Mo. banc 2012). Any citizen may obtain court correction of an unfair or insufficient summary via a § 116.190 suit that must, among other things, be brought within 10 days of the Secretary's certification and placed at the top of the court's docket. § 116.190.

After considering the petition and hearing argument in a § 116.190 challenge, the court is directed to "certify the summary statement portion of the official ballot title to the secretary of state" in its decision. § 116.190.4. Section 116.190.4 requires that "[i]n making the legal notice to election authorities under section 116.240, and for the purposes of section 116.180, the secretary of state shall certify the language which the court certifies to him." Section 116.180 in turn requires the Secretary, within three days of receipt, to "certify the official ballot title" and "deliver a copy of the official ballot title … in the case of initiative or referendum petitions, to the person" designated by the proponent to receive notices. Section 116.180 also mandates that persons circulating initiatives "shall affix the official ballot title to each page of the petition prior to circulation and signatures shall not be counted if the official ballot title is not affixed to the page containing such signatures."

When an initiative petition is submitted to the Secretary for potential inclusion on the ballot, § 116.120.1 directs the Secretary "to determine whether it complies with the Constitution of Missouri and this chapter." § 116.120.1 further provides: "Signatures on

petition pages that do not have the official ballot title affixed to the page shall not be counted as valid."

Under § 116.150, "[a]fter the secretary of state makes a determination on the sufficiency of the petition and if the secretary of state finds it sufficient, the secretary of state shall issue a certificate setting forth that the petition contains a sufficient number of signatures to comply with the Constitution of Missouri and with this chapter." § 116.150.1.

"After the secretary certifies a petition as sufficient or insufficient, any citizen may apply to the circuit court of Cole County to compel him to reverse his decision." § 116.200.1. Such suits must be filed within 10 days and "advanced on the court docket and heard and decided by the court as quickly as possible." *Id.* "If the court decides the petition is insufficient, the court shall enjoin the secretary of state from certifying the measure and all other officers from printing the measure on the ballot." § 116.200.2.

C. IP 2016-152

Raise Your Hand for Kids submitted its initiative petition sample sheet to the Secretary on November 20, 2015. L.F. 192. Raise Your Hand for Kids' submission came nearly a year after the Secretary began receiving proposed initiative sample sheets from other proponents[2]. L.F. 1052. Signed initiative petitions were due for final submission to

[2] The Missouri Constitution "permits submission of sample initiative petitions to the secretary of state from any time after one general election until four months prior to the next general election." *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 517 (Mo. banc 1991).

the Secretary no later than May 8, 2016, for determination of whether they qualified for the November 2016 general election ballot. L.F. 193.

The Secretary identified Raise Your Hand for Kids' initiative petition sample sheet by the number 2016-152 (IP 2016-152). L.F. 192. The initiative petition sample sheet is four pages. L.F. 192, 199-202; Appendix (App.) 29-32. In accordance with § 116.040, the sample sheet's first page included a blank for where the official ballot title is to be inserted. L.F. 199; App. 29. A circulator's affidavit and places for registered voters to sign the petition appear immediately below the location in which the official ballot title is to be inserted. *Id.* The second, third, and fourth pages of the sample sheet contain the full text of the proposed measure in small, singled-spaced type. L.F. 200-202; App. 30-32.

IP 2016-152 proposes to amend Article IV of the Missouri Constitution. *Id.* If adopted, it would transfer the balance of the Coordinating Board for Early Childhood Fund established by § 210.102.4 into a new Early Childhood Health and Education Trust Fund (L.F. 200) and create new fees on tobacco products that must also go into the Early Childhood Health and Education Trust Fund (L.F. 201).

IP 2016-152 specifies that funds in the Early Childhood Health and Education Trust Fund must be used as follows:

- "[a]t least seventy-five percent (75%) of funds shall be disbursed in grants for improving the quality and increasing access to Missouri early childhood education programs";

• "[n]o less than ten percent (10%) and no more than fifteen percent (15%) of funds shall be disbursed in grants to Missouri hospitals or other health care facilities to improve access to quality early childhood health and development programs"; and

• "[n]o less than five percent (5%) and no more than ten percent (10%) of funds shall be disbursed in grants to provide evidence-based smoking cessation and prevention programs for Missouri pregnant mothers and youth." L.F. 200.

Limited expenditures are permitted for additional purposes. L.F. 201. No funds in the Early Childhood Health and Education Trust Fund can be used for, or diverted to, purposes not expressly authorized by IP 2016-152. L.F. 200. The proposal provides that distribution of funds "shall not be limited or prohibited by the provisions of Article IX, section 8" of the Missouri Constitution. L.F. 201. Article IX, § 8 generally prohibits the State and its political subdivisions from distributing State or local funds or property "in aid of any religious creed, church or sectarian purpose," or in support of any educational institution "controlled by any religious creed, church or sectarian denomination."

D. The Boeving § 116.190 Lawsuit and Submission of IP 2016-152 to the Secretary

On January 5, 2016, the Secretary issued a Certification of Official Ballot Title for IP 2016-152 (the January 5, 2016 official ballot title). L.F. 193, 209. On January 15, 2016, Missouri citizen Jim Boeving filed a lawsuit, *Boeving v. Missouri Secretary of State, et al.*, Cole County Circuit Court, Case No. 16AC-CC00016, challenging, *inter*

alia, the sufficiency or fairness of the summary statement and the fiscal note summary in the January 5, 2016 official ballot title (the *Boeving* case). L.F. 193-194.

Raise Your Hand for Kids intervened and spent substantial resources litigating the *Boeving* case. L.F. 194. It opposed any changes to the summary statement.[3] Meanwhile, Raise Your Hand for Kids expended efforts to obtain over 330,000 signatures from persons Raise Your Hand for Kids believed to be Missouri voters. L.F. 194. In so doing, it used petition pages that contained the January 5, 2016 official ballot title and were otherwise in the form of its initiative petition sample sheet submitted on November 20, 2015. L.F. 194-195.

On May 7, 2016, the day before the deadline for submitting initiative petitions for the November 2016 ballot, Raise Your Hand for Kids submitted all petition pages it had collected to the Secretary. L.F. 194. Every petition page contained the January 5, 2016 official ballot title being litigated. *Id.*

On May 19, 2016, after a bench trial, the circuit court entered judgment in the *Boeving* case, which was appealed to this Court. *Id.* On July 8, 2016, this Court issued its decision finding the January 5, 2016 ballot title unfair and insufficient under § 116.190. *Id.*; *Boeving v. Kander*, No. WD 79694, 2016 WL 3676891 (Mo. App. W.D. July 8, 2016). The Court concluded with respect to the summary statement in the January 5, 2016 ballot title that:

[3] *Boeving v. Kander*, No. WD 79694, 2016 WL 3676891, at *8-*10 (Mo. App. W.D. July 8, 2016).

"the second bullet point, as written, is likely to mislead voters, and fails to accurately summarize the equity assessment fee which the initiative petition proposes to establish …. The statement that the initiative will 'create a fee ... of 67 cents' would suggest to a reasonable voter that the fee is established as an unchanging sum-certain. But that is not true. While the initiative petition establishes 67 cents as the benchmark at which the fee will originate, the fee is required to increase annually from there. As the circuit court recognized, nothing in the summary statement would alert a voter to this mandatory, perpetual, annual increase in the equity assessment fee, or would signal that the voter should investigate the issue further before voting.

The misleading nature of the second bullet point is heightened when it is considered in context. … Given the wording of the first bullet point, voters would reasonably expect that the second bullet point would similarly describe any increases in the equity assessment fee. By failing to do so, the second bullet point would mislead voters into believing that the fee is not subject to further increases, but instead represents a definite, fixed 67-cent assessment. As Boeving argues, the two bullet points read together will leave voters 'with the clear impression that the tax increases, but the fee remains constant.' This is clearly not the case."

Boeving, at *6-7.

To correct the misleading summary, the Court certified a modified summary statement to the Secretary. *Id.* at *18; L.F. 194. On July 18, 2016, the Secretary issued a Certification of Official Ballot Title for IP 2016-152 in accordance with the revised summary contained in the Court's *Boeving* decision. L.F. 195; 210. None of the petition pages Raise Your Hand for Kids submitted to the Secretary on May 7, 2016, contained the July 18, 2016 official ballot title language that corrected the misleading summary that Raise Your Hand for Kids had fought to keep in place. L.F. 195.

As of July 18, 2016, the local election authorities had begun the process of verifying signatures, but this process was not yet completed. *Id.*

E. The Secretary's Certification of Sufficiency

On August 9, 2016, the Secretary issued a Certificate of Sufficiency of Petition for IP 2016-152. *Id.* In certifying that there were a sufficient number of valid signatures for IP 2016-152 to appear on the November 2016 ballot as Amendment 3, the Secretary counted signatures on pages that had the January 5, 2016 official ballot title found insufficient, unfair, and likely to mislead voters. *Id.*

F. The Instant Litigation

Appellants Robert Pund and Robert Klein filed the instant suit under § 116.200, requesting the court to compel the Secretary to reverse his decision to certify IP 2016-152 for the ballot. L.F. 915-923. Count I alleged Chapter 116 did not permit signatures collected under a ballot title that had been adjudicated unfair or insufficient to be counted as valid. L.F. 920-921. Count II alleged IP 2016-152 was facially unconstitutional in

violation of Article III, § 51 of the Missouri Constitution because it purported to (1) appropriate money other than new revenues it created and (2) authorize funds to be used for purposes prohibited by Article IX, § 8. L.F. 921-922.

The case was assigned Docket Number 16AC-CC00323. L.F. 909. Raise Your Hand for Kids and Brower were granted leave to intervene. L.F. 1049, 753. They moved to dismiss the suit and filed an answer and purported counterclaims subject to arguments made in their motion to dismiss. L.F. 1061, 1107.

The circuit court scheduled the case for trial at 2 p.m. on Friday, August 19, 2016, along with two other § 116.200 suits brought by Patty Arrowood and Jim Boeving that had been assigned Docket Numbers 16AC-CC00307 and 16AC-CC00310, respectively. L.F. 911, 4, 666.

The cases were submitted on a common record (Tr. 7), which consisted of stipulated facts and exhibits (Tr. 8; L.F. 188-518), a stipulation with regard to the admissibility of two affidavits (Tr. 9; L.F. 519-539), and certain judicially noticed court records from other cases, some of which are included in the Legal File in this case (Tr. 9-12; L.F. 540-602).

The circuit court heard argument (Tr. 13-79) and allowed the parties until 10 a.m. on Monday, August 22, 2016, in which to file proposed judgments (Tr. 79).

On Tuesday, August 23, 2016, the circuit court issued a decision adopting the Secretary's proposed order. L.F. 603-630; App. 1-28.

The circuit court rejected all challenges, concluding that the Secretary "acted in accordance with its obligations in Chapter 116" and dismissing the facial challenges as "not ripe at this time." L.F. 605-606; App. 3-4.

With regard to statutory interpretation, the court stated that legislation requiring ballot titles to be placed on initiative petitions "must be drafted and interpreted … only to address '[m]inor details' that do not 'impair[] the self-executing nature of constitutional provisions.'" L.F. 615-616; App. 13-14. It then reviewed various provisions in Chapter 116 and concluded that the Secretary complied with all his statutory duties as the court construed them. L.F. 616-625; App. 14-23. Although the court recognized that the January 5, 2016 ballot title had been set aside, it reasoned that the January 5, 2016 ballot title was the only certified title until this Court certified a new title to the Secretary on July 8, 2016, after the constitutional deadline for submission had passed. L.F. 618-619; App. 16-17. And since Raise Your Hand for Kids was no longer circulating the initiative petition at that time, the court found "irrelevant" § 116.190's directive that the court-ordered title be certified by the Secretary "for the purposes of section 116.180," insofar as § 116.180 directed that persons circulating the petition "shall affix the official ballot title to each page of the petition prior to circulation and signatures shall not be counted if the official ballot title is not affixed to the page contain such signatures." L.F. 620; App. 18.

The court reasoned that the Secretary did not violate § 116.120's directive not to count signatures on pages not affixed with the official ballot title because at the time Raise Your Hand for Kids submitted the petition to the Secretary on May 7, 2016, the January 5, 2016 ballot title was still the certified title. L.F. 621; App. 19. The court read

§ 116.120 as a directive to the Secretary to check for the proper title as of the date petition pages were submitted, and not as of the date the Secretary actually certified the petition for the ballot. L.F. 621-622; App. 19-20.

The court reasoned that reading Chapter 116 to permit the Secretary to not count signatures submitted before the title had been judicially set aside was consistent with "the general presumption against retrospective operation of statutes," citing case law concerning whether *newly enacted* statutes could be interpreted to apply retrospectively to matters existing before the statute's effective date. L.F. 623-624; App. 21-22 (citing *Dep't of Soc. Services v. Villa Capri Homes, Inc.*, 684 S.W.2d 327, 332 (Mo. 1984)).

Recognizing that facial challenges to the constitutionality of initiative petitions were ripe in § 116.200 suits, the court nonetheless found the question of whether IP 2016-152 violates Article III, § 51 as an "appropriation of money" unripe because it was "simply not possible to know, today, whether at the time Amendment 3 takes effect, if enacted by the voters, it will affect anything other than what the Missouri Constitution calls 'new money.'" L.F. 627, App. 25.

The decision did not analyze whether IP 2016-152 violates Article III, § 51 by authorizing money to be used for purposes prohibited by Article IX, § 8. The judgment stated, however, that any "remaining claims or motion for relief … pending at the time of this Judgment not specifically addressed herein are denied." L.F. 630, App. 28.

These consolidated appeals followed. L.F. 1166, 631, 876.

POINTS RELIED ON

I. The trial court erred in upholding the Secretary's determination that IP 2016-152 is sufficient for inclusion on the November ballot because IP 2016-152 does not meet the plain-language requirements for a sufficient petition in that all signatures were collected under an official ballot title found unfair, insufficient, and misleading to voters rather than the fair and sufficient title certified in *Boeving v. Kander*, § 116.190 and § 116.180 expressly require the Secretary to certify the court-ordered language for circulation purposes and direct that signatures shall not be counted if the official ballot title is not affixed to the pages used to obtain such signatures, § 116.120 similarly expressly prohibits counting signatures to which the official ballot title is not affixed, and the trial court's alternative construction cannot be reconciled with legislative intent and leads to unreasonable and absurd results.

United Labor Comm. of Missouri v. Kirkpatrick, 572 S.W.2d 449 (Mo. banc 1978)

Goerlitz v. City of Maryville, 333 S.W.3d 450 (Mo. banc 2011)

§ 116.190, RSMo

§ 116.180, RSMo

§ 116.120, RSMo

II. The trial court erred in denying the challenge to the constitutionality of IP 2016-152 because the petition is unconstitutional on its face in that this issue is ripe for judicial review because the Secretary has certified the initiative, and in that the initiative constitutes an unconstitutional "appropriation" in violation of Article III, § 51 of the Missouri Constitution because it appropriates funds in the state treasury's Coordinating Board for Early Childhood Fund for purposes specified in the initiative.

Mo. Const. Art. III, § 51

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

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

III. The trial court erred in denying the challenge to the constitutionality of IP 2016-152 because the petition is unconstitutional on its face in that the initiative violates Article III, § 51 of the Missouri Constitution because it purports to use the initiative process to allow a purpose its text identifies as being prohibited by the Constitution.

Mo. Const. Art. III, § 51

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

Wright-Jones v. Nasheed, 368 S.W.3d 157 (Mo. banc 2012)

STANDARD OF REVIEW

This Court reviews *de novo* a case submitted on stipulated facts and determines whether the trial court drew the proper legal conclusions from the facts stipulated. *Kohrs v. Family Support Div., Missouri Dep't of Soc. Servs.*, 407 S.W.3d 85, 87 (Mo. App. W.D. 2013).

"Statutory interpretation is an issue of law that this Court reviews *de novo.*" *Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 930 (Mo. banc 2008).

Constitutional interpretation is likewise a question of law reviewed *de novo*. *Schweich v. Nixon*, 408 S.W.3d 769, 773 (Mo. banc 2013).

Appellate courts review *de novo* whether a litigant has standing to bring a claim and whether such claim is ripe. *See State ex rel. Dep't of Soc. Servs., Family Support Div. v. K.L.D.*, 118 S.W.3d 283, 287 (Mo. App. W.D. 2003).

ARGUMENT

I. The trial court erred in upholding the Secretary's determination that IP 2016-152 is sufficient for inclusion on the November ballot because IP 2016-152 does not meet the plain-language requirements for a sufficient petition in that all signatures were collected under an official ballot title found unfair, insufficient, and misleading to voters rather than the fair and sufficient title certified in *Boeving v. Kander*, § 116.190 and § 116.180 expressly require the Secretary to certify the court-ordered language for circulation purposes and direct that signatures shall not be counted if the official ballot title is not affixed to the pages used to obtain such signatures, § 116.120 similarly expressly prohibits counting signatures to which the official ballot title is not affixed, and the trial court's alternative construction cannot be reconciled with legislative intent and leads to unreasonable and absurd results.

The trial court reached its judgment denying Appellants Pund and Klein's statutory challenge and upholding the Secretary's actions in this case by construing Chapter 116's directives regarding the counting of signatures not to apply in certain time frames or in circumstances that were not exempted by the statutory text. The trial court's approach and ensuing judgment were erroneous and should be reversed. As in other contexts, the plain language of statutory initiative procedures controls, and the doctrine of liberal construction is not a license to ignore or rewrite statutory provisions.

A. Where statutes governing the initiative process provide express consequences for non-compliance, courts apply and enforce the statutes as written.

Of all provisions in the Missouri Constitution, the initiative petition process most "closely models participatory democracy in its pure form." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827(Mo. banc 1990). In recognition of such, courts should "construe liberally constitutional and statutory provisions governing the ballot initiative process to ensure the preservation of the people's power." *Brown*, S.W.3d at 646. With statutory interpretation, however, it is equally true that courts may "resort to rules of liberal or strict construction, … only when a statute is ambiguous." *Peters v. Wady Indus., Inc.*, 489 S.W.3d 784, 792, n.6 (Mo. banc 2016). "Liberal construction does not give courts license to extend a statute beyond its plain terms." *Id.* "If the intent of the legislature is clear and unambiguous," a court is "bound by that intent and cannot resort to any statutory construction in interpreting the statute." *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. banc 2011).

The Missouri Supreme Court has recognized that where there is "express statutory language declaring that petitions which fail to comply with [statutory] requirements shall not be counted," courts should construe the statute to be "enforce[d] to the letter." *See United Labor Comm. of Missouri v. Kirkpatrick*, 572 S.W.2d 449, 456 (Mo. banc 1978) (quoting *Kasten v. Guth*, 395 S.W.2d 433, 435 (Mo. 1965)).[4] So doing is consistent with

[4] A statute that "conflicts with a constitutional provision or provisions" can be set aside as invalid, but such issues are not involved in Appellants' appeal because there is no

the "primary rule of statutory interpretation … to give effect to legislative intent as reflected in the plain language of the statute at issue." *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). But if a statute does not make "a specified irregularity fatal" to the initiative petition, a court should not "make it fatal by judicial construction." *See United Labor Comm. of Missouri*, 572 S.W.2d at 456 (quoting *Kasten*, 395 S.W.2d at 435).

The important distinction is illustrated in *United Labor Commission*. There, an initiative petition had been submitted with an improper notary certification. The notary had attested that circulators (who gathered the actual voter signatures that would qualify the measure for the ballot) signed the petition pages in the notary's presence, when the notary did not in fact witness the circulator attestations in person as required by a statutory provision. 572 S.W.2d at 453. The Court took pains to note that the case did not involve any issue whether the underlying voter signatures in support of the petition were forged, fictitious, or "obtain[ed]" with "dishonest devices." *Id.*

Because a statutory requirement for the form of the initiative petition had not been followed, the Court held that the "irregularities rebut the prima facie validity of the petition." *Id.* At that point, the "burden [was] shifted to the proponents of the signatures of the petition signers to showing the underlying validity of the signatures." *Id.* Before the trial court, the proponents had done so by various forms of evidence demonstrating that the required number of signers were in fact registered voters. *Id.* at 452-453.

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substantial argument that any provision germane to this case contravenes a particular constitutional provision.

The challengers claimed that the proponent's failure to follow the notary requirement should nonetheless invalidate the petition in light of a then-existing statutory provision in § 126.061 stating that the notary form "is mandatory, and if followed in any petition it shall be sufficient, disregarding clerical and merely technical errors." § 126.061, RSMo (1971 ed.). Noting that the circulator provision had the "only statutory purpose" of being a "double check" on the validity of signatures (572 S.W.2d at 454) and was not a constitutional requirement (*id.* at 455), the Court declined to read § 126.061 as requiring invalidation of the petition "in the absence of express statutory language declaring that the petitions which fail to comply with the requirements shall not be counted" (*id.* at 456).

The Court distinguished the case before it from *Barks v. Turbeau*, 573 S.W.2d 677 (Mo. App. 1978), which invalidated votes in which an absentee voter failed to follow a statutory requirement and the statute expressly provided that absentee votes failing to adhere to the statutory form "be rejected." *United Labor Comm.*, 572 S.W.2d at 456. Unlike the statutory provision in *Barks*, the Court explained, § 126.061 had "no provision describing the remedy to be imposed [with respect to the validity of the petition] if the form is not followed completely." 572 S.W.2d at 456. Since nullification was not expressly provided, the Court affirmed the trial court's judgment allowing the measure to proceed to a vote. *Id.* at 457.

B. The circuit court failed to apply the plain language of § 116.190, § 116.180, and § 116.120.

The circuit court in this case misread the analysis in *United Labor Commission* and failed to interpret Chapter 116 in accordance with its plain meaning. With regard to interpretation generally, the court expressed the view that initiative petition statutes must be construed "only to address '[m]inor details' that do not 'impair[] the self-executing nature of constitutional provisions. '" L.F. 615-616; App. 13-14. This approach cannot be reconciled with settled principles that courts must "look at the word's usage in the context of the entire statute to determine its plain meaning," *Union Elec. Co. v. Dir. of Revenue*, 425 S. W. 3d 118, 122 (Mo. banc 2014), "giving reasonable interpretation in light of the legislative objective" (*Reichert v. Bd. of Educ. of City of St. Louis*, 217 S.W. 3d 301, 305 (Mo. banc 2007) (internal quotation omitted)).

The legislative objective of Chapter 116's summary statement provisions is prevention of voter deception through orderly procedural requirements governing what voters see during circulation and on the ballot. As stated in *Brown*, summary statements are among the "procedural safeguards in the initiative process that are designed either, (1) to promote an informed understanding by the people of the probable effects of the proposed amendment, or (2) to prevent a self-serving faction from imposing its will upon the people without their full realization of the effects of the amendment. " *Brown*, 370 S.W. 3d at 654 (quoting *Buchanan v. Kirkpatrick*, 615 S. W. 2d 6, 11-12 (Mo. banc 1981)).

Chapter 116 has been drafted to leave no room for doubt that proponents must submit a sample sheet to the Secretary and have a fair and sufficient "official ballot title" affixed in order to circulate the petition for signatures that can count toward qualifying the initiative for placement on the next general election ballot. § 116.180; § 116.334; § 116.120. Section 116.190 requires summary statements to be sufficient and fair, *Brown v. Carnahan*, 370 S. W. 3d 637, 653 (Mo. banc 2012), and permits any citizen to obtain court correction of an unfair or insufficient summary in an accelerated proceeding. The key issue is whether the summary is so deficient that voters would be misled. *See Brown* 370 S. W. 3d. at 654. The challenge succeeds only if the Secretary's summary is "inadequate; especially lacking adequate power, capacity, or competence" or "marked by injustice, partiality, or deception. " *Id.* at 653.

The statutes expressly set forth the consequences that follow from a court decision certifying a corrected summary to the Secretary. Section 116.190.4 requires that "[i]n making the legal notice to election authorities under section 116.240, *and for the purposes of section 116. 180*, the secretary of state shall certify the language which the court certifies to him. " (Emphasis added)

There are three "purposes" of § 116.180 manifested by the text of that provision for which the court-corrected, non-misleading official ballot title must be used. The first purpose is the requirement that the Secretary within three days of receipt "certify the official ballot title" and "deliver a copy of the official ballot title … in the case of initiative or referendum petitions, to the person" designated by the proponent to receive notices. The second purpose is the mandate that persons circulating initiatives "shall

affix the official ballot title to each page of the petition prior to circulation…." The third purpose is the consequence of non-compliance with the second, which is that "signatures shall not be counted if the official ballot title is not affixed to the page containing such signatures."

The trial court found "irrelevant" § 116.190's directive that the court-ordered title be certified by the Secretary "for the purposes of section 116.180" insofar as § 116.180 directed that persons circulating the petition "shall affix the official ballot title to each page of the petition prior to circulation and signatures shall not be counted if the official ballot title is not affixed to the page containing such signatures. " L.F. 620; App. 18. Its rationale was that since Raise Your Hand for Kids was no longer circulating the initiative by the time this Court issued the *Boeving* decision and had already turned in its petition, Raise Your Hand for Kids no longer had the ability to circulate with the new title. L.F. 620; App. 18.

But pursuant to the plain language of § 116.190.4, the "official ballot title" that must be affixed for circulation is the same title the court certifies in its decision and the same title to be sent as part of the legal notice to election authorities the tenth Tuesday prior to the general election under § 116.240. The clear design of the legislative provisions is to require fair and sufficient descriptions of an initiative petition to appear on the page for signatures *whenever* circulation occurs and as well as in legal notices and on the ballot provided to voters in the voting booth. There is no exception listed for persons who decide to circulate while fighting against court corrections of misleading language and turn in signatures during the pendency of the litigation as Raise Your Hand

for Kids did in this case. The trial court's engrafting of a judicial loophole for Raise Your Hand for Kids is untethered to statutory text, undermines the legislature's evident purpose, and should be reversed.

C. *The circuit court's construction of § 116.120 to require the Secretary to assess whether a petition was circulated with an official ballot title as it existed on the date the petition was submitted is unsupported and leads to unreasonable and absurd results.*

The trial court reasoned that the Secretary did not violate § 116.120's directive not to count signatures on pages not affixed with the official ballot title because at the time Raise Your Hand for Kids submitted the petition to the Secretary on May 7, 2016, the January 5, 2016 ballot title was still the certified title. L.F. 621; App. 19. The court effectively read § 116.120 as a directive for the Secretary to check for the proper title only as of the date petition pages were submitted, notwithstanding subsequent court rulings with respect to that title. L.F. 621-622; App. 19-20.

As discussed above, however, § 116.190 and § 116.180 plainly contemplate that a fair and sufficient summary must be used for circulation, whether such is prepared by the Secretary or as corrected by the courts. It makes no sense within this larger statutory scheme for § 116.120 to be interpreted to have the Secretary conduct a "blip in time" spot check that a certain official ballot title – particularly one being challenged in litigation – was physically attached to the petition pages.

Section 116.120 directs the Secretary, when "an initiative … petition is submitted to the secretary" to "examine the petition to determine whether it complies with the

Constitution of Missouri and with this chapter." It does not direct the Secretary to stop examining the petition the day after petition pages are dropped off. But that, in effect, is how the trial court read § 116.120. It made the date that Raise Your Hand for Kids submitted petition pages the critical point for examination of official ballot title compliance. The Secretary has not in any meaningful sense completed an official "count" of signatures until the Secretary certifies the petition as sufficient or not. Here, the date of sufficiency certification was August 9, 2016, weeks after the non-misleading official ballot title was certified. The Secretary remained subject to § 116.120's directive that "Signatures on petition pages that do not have the official ballot title affixed to the page shall not be counted as valid" through and including August 9, 2016.

The trial court reasoned that reading Chapter 116 to permit the Secretary to not count signatures submitted before the title had been judicially set aside was consistent with "the general presumption against retrospective operation of statutes." L.F. 623-624; App. 21-22. In support, the court cited only to case law concerning whether *newly enacted* statutes could be interpreted to apply retrospectively to matters existing before the statute's effective date. *Id*. (citing *Dep't of Soc. Services v. Villa Capri Homes, Inc.*, 684 S. W. 2d 327, 332 (Mo. 1984))

Retrospective application cases are wholly inapplicable. Sections 116.190, 116.180, and 116.120 have all been in effect since at least 2014, well before Raise Your Hand for Kids even tendered its initiative petition sample sheet, much less turned in signature pages collected under an official ballot title the sufficiency of which was being litigated throughout the entire four-month period that Raise Your Hand for Kids collected

signatures. Raise Your Hand for Kids knew the statutory scheme when it proceeded as it did. It had no vested rights, and no statute applied retrospectively.

Finally, if this Court were to adopt the trial court's construction, unreasonable and absurd results would follow. Proponents could circulate petitions with false and misleading official ballot titles affixed and be privileged to do so as long as litigation of the title stretched past the constitutional deadline for signature submission. And a proponent whose official ballot title was corrected by a court the day before the constitutional deadline would be treated differently than one like Raise Your Hand for Kids in which a final title decision issued soon after the deadline had passed. The Secretary, moreover, would be privileged to act like an automaton examining titles for compliance only on the day of submission.

"Construction of statutes should avoid unreasonable or absurd results. " *Reichert*, 217 S. W. 3d at 305. The plain language of and evident legislative intent behind Chapter 116's official ballot title provisions should be applied as written.

Raise Your Hand for Kids did not follow a statutorily mandated procedure. The express statutory remedy of not counting signatures obtained in violation of the procedure should be enforced and IP 2016-152 enjoined from appearing on the November 2016 ballot.

II. The trial court erred in denying the challenge to the constitutionality of IP 2016-152 because the petition is unconstitutional on its face in that this issue is ripe for judicial review because the Secretary has certified the initiative, and in that the initiative constitutes an unconstitutional "appropriation" in violation of Article III, § 51 of the Missouri Constitution because it appropriates funds in the state treasury's Coordinating Board for Early Childhood Fund for purposes specified in the initiative.

Appellants Pund and Klein alleged that IP 2016-152 is facially unconstitutional in that it violates Article III, § 51 of the Missouri Constitution by requiring the appropriation of money other than new revenues that it creates or for which it provides. The circuit court found that this issue was not ripe. L.F. 627; App. 25. That decision was erroneous. Missouri law allows for a facial constitutional challenge to an initiative petition after the petition is certified but before election, and the unconstitutionality of the proposed initiative is apparent on its face.

A. The challenge pursuant to Article III, § 51 is ripe for judicial review because Missouri law allows pre-election constitutional challenges after the Secretary has certified the initiative.

Missouri courts have long recognized that facial challenges to the constitutionality of proposed initiatives are ripe for determination in a pre-election challenge. *See, e.g.*, *Kansas City v. McGee*, 269 S.W.2d 662, 665 (Mo. 1954) (considering challenge to proposed municipal ordinance for violation of Article III, § 51); *Ketcham v. Blunt*, 847 S.W.2d 824, 833-34 (Mo. App. 1992) (facial constitutional challenges, but not

substantive challenges, are ripe when the Secretary of State makes the determination to submit the issue to the voters); *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 829 (Mo banc. 1990) (considering challenge to initiative petition pursuant to Article III, § 50 requirement of single subject).

A facial constitutional challenge is ripe when the Secretary makes a decision to submit or not submit the initiative issue to the voters. *Missourians to Protect the Initiative Process*, 799 S.W.2d at 828 (Article III, § 50); *Reeves v. Kander*, 462 S.W.3d 853, 857 (Mo. App. W.D. 2015) (same).[5] "At that point, a judicial opinion as to whether the constitutional requirements have been met is no longer hypothetical or advisory." *Missourians to Protect the Initiative Process*, 799 S.W.2d at 828.

Although most of the case law has arisen in the context of claims of facial unconstitutionality under Article III, § 50, the principle applies the same to challenges under Article III, § 51. Challenges under both provisions are brought pursuant to § 116.200, which, at minimum, requires judicial examination of whether the threshold constitutional requirements are met. *Missourians to Protect the Initiative Process*, 799 S.W.2d at 828; *Reeves*, 62 S.W.3d at 857. The language of § 116.200 is not limited to § 50. In fact, it does not mention § 50 or any other section by name. Thus, it applies to all facial challenges of constitutional adequacy.

[5] The court in *Reeves* found that the constitutional challenges were not ripe in the context of a § 116.190 suit challenging the official ballot title. The case was decided before the Secretary had certified the measure for the ballot. 462 S.W.3d at 858. The instant case presents the exact scenario that the *Reeves* court said was ripe for a § 50 challenge: after the Secretary has decided to submit the issue to the voters. *Id.* at 857, 859.

There is no practical or logical reason why this provision would apply differently between §§ 50 and 51. The rationale of allowing constitutional challenges pursuant to § 116.200 includes minimizing the "cost and energy expended related to elections" and avoiding "public confusion[.]" *City of Kansas City, Mo. v. Chastain*, 420 S.W.3d 550, 555 (Mo. banc 2014); *Missourians to Protect the Initiative Process*, 799 S.W.2d at 828. These rationales apply equally to both the single-subject and the prohibition-on-appropriation requirements, which appear in neighboring sections of Article III.

In a recent case confirming the availability of post-certification, pre-election review, the Missouri Supreme Court cited and relied on both a case applying § 50 and a case applying § 51 to a municipal ordinance. *Chastain*, 420 S.W.3d at 554-55 (citing *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d at 828, and *Kansas City v. McGee*, 269 S.W.2d 662, 664 (Mo. 1954)). In *Chastain*, an initiative petition was submitted to the city clerk, pursuant to the constitutional provision allowing citizens of a charter city to propose municipal ordinances via initiative petition. The City sought a declaratory judgment that the initiative violated § 51. *Id*. at 554. Although the Court ultimately found that the initiative was not unconstitutional because it was not an appropriation of funds,[6] it explicitly rejected the argument that the challenge was not ripe: "Missouri law authorizes courts to conduct pre-election review of the facial constitutionality of an initiative petition." *Id.* at 554-55 (citing *Missourians to Protect the Initiative Process* and *McGee*).

[6] *Chastain* differed from the existing case in that it is funded only by the imposition of new taxes. As discussed below, the initiative petition in the instant case *also* appropriates money, by transfer, from an existing fund into a new fund.

After *Chastain*, "[t]here can no longer be any doubt that 'Missouri law authorizes courts to conduct pre-election review of the facial constitutionality of an initiative petition.'" *Reeves v. Kander*, 462 S.W.3d at 857 (quoting *Chastain*, 420 S.W.3d at 554). Such a challenge is appropriate "'where the constitutional violation in a proposed measure if so obvious as to constitute a matter of form.'" *Id*. at 858 (quoting *Knight v. Carnahan*, 282 S.W.3d 9, 21 (Mo. App. W.D. 2009)). Constitutional challenges to initiative petitions are ripe for review in a variety of situations, with the critical factor being that there has been "a final determination by the election authority as to whether to certify the initiative for the ballot." *Id*. at 858. That prerequisite is met in this case.

B. The proposed initiative is unconstitutional on its face because it violates Article III, § 51's prohibition on appropriation by initiative.

As established above, this Court can – and should – consider Appellants Pund and Klein's facial challenge to IP 2016-152 as an unconstitutional appropriation by initiative. Section 51 forbids the use of an initiative petition "for the appropriation of money other than of new revenues created and provided for thereby[.]" Mo. Const. Art. III, § 51; *see also State ex rel. Card v. Kaufman*, 517 S.W.2d 78, 81 (Mo. 1974) (§ 51 applies "to appropriations of money by way of a charter or charter amendment originating by way of the initiative.").

In the instant case, the circuit court acknowledged that "facial and procedural claims are ripe prior to election." L.F. 625; App. 23. But the circuit court found that the § 51 constitutional claim was not ripe because of the "uncertainty surrounding the potential appropriation of funds[.]" L.F. 627; App. 25.

The circuit court's decision was erroneous. Rather than being a case of "uncertainty," this is a case where the constitutional violation is apparent from the face of the initiative petition. The initiative would appropriate money from an existing fund and move it to another fund, to be used for the purposes specified in the petition.

An "appropriation" as used in § 51 "is the legal authorization to expend funds from the treasury[.]" *State ex rel. Sikeston R-VI School Dist. v. Ashcroft*, 828 S.W.2d 372, 375 (Mo. banc 1992). A provision can be an "appropriation" even if it does not specifically appropriate the amount of money necessary to pay for the actions required. *State ex rel. Card v. Kaufman*, 517 S.W.2d 78, 80 (Mo. 1974). It can be an appropriation if it "leaves no discretion" as to the actions to be taken requiring use of funds not created by operation of its provisions. *Id*.

The Missouri Supreme Court discussed the meaning of "appropriation" in detail in *McGee*, 269 S.W.2d 662. In that case, the proposed ordinance would have removed control of the city's pension plan from the city council to new trustees established by the initiative. *Id*. at 665. Along with that control, the existing pension plan fund would have been transferred to the new trustees. *Id*. The *McGee* court found this to violate Article III, § 51:

> Sec. 51 of the Constitution, supra, requires that if such a law is to be enacted through the initiative it can only be done by making provision for *new* revenue to pay the bill. The proposed ordinance is fatally defective in this respect. It is true that the proposed ordinance does not in and of itself appropriate the money to carry out the pension plan but it does not leave any discretion to the City Council. . . . The ordinance has the same effect as if it read that a sum necessary to carry out its provisions as certified by the

> trustees shall stand appropriated and be subject to warrants drawn against the fund by the treasurer of the pension fund.

Id. at 666; *see also State ex. rel. Sessions v. Bartle*, 359 S.W.2d 716 (Mo. 1962) (following *McGee*, finding ordinance that would require certain fixed salaries would violate § 51).

The proposed initiative petition here qualifies as an "appropriation" on its face because it provides legal authorization to expend funds other than those which it creates and mandates how those funds are to be spent. The proposed initiative petition would create an "Early Childhood Health and Education Trust Fund, which would:

> [c]onsist 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 upon the effective date of this section. Interest and moneys earned on the fund shall be deposited in the fund. . . . Any moneys credited to and deposited in the fund shall be used only for purposes which are authorized by this section . . .

The petition details the ways in which the money "shall" be spent – at least 75% in grants for early childhood education, between 10-15% in grants for childhood health programs, and 5-10% for youth smoking prevention programs. L.F. 200; App. 30.

The initiative petition has the same effect as if it read that all funds currently in the Coordinating Board for Early Childhood Fund stand appropriated and subject to warrants drawn against the Coordinating Board for Early Childhood Fund to provide grant funding for the items listed. This makes it an unconstitutional appropriation by initiative of

existing funds. *See Sikeston R-VI School Dist.*, 828 S.W.2d at 375 (defining "appropriation" as "the legal authorization to expend funds from the treasury").

A facial attack is directed at the form of the petition and requires only consideration of its text. While not necessary to a facial attack, it should be noted that if the initiative petition were to be adopted, it would have the real-world effect of appropriating existing money in the treasury. The circuit court's factual findings include that a $100 contribution was made to the Coordinating Board for Early Childhood Fund in April 2016. L.F. 611; App. 9. The Secretary's counsel represented to the court that money was still present when his office checked the week before. Tr. 39. Since initiatives approved by the voters take effect immediately (Mo. Const. Art. III, § 51, § 52(b)), this appropriation would happen automatically, and the money in the existing fund would be subject to the initiative's provisions immediately after the November 2016 election. The General Assembly does not convene again until January 2017 pursuant to Article III, § 20 and thus has no opportunity to consider any other appropriations that could deplete the existing fund before the vote in November.

III. The trial court erred in denying the challenge to the constitutionality of IP 2016-152 because the petition is unconstitutional on its face in that the initiative violates Article III, § 51 of the Missouri Constitution because it purports to use the initiative process to allow a purpose its text identifies as being prohibited by the Constitution.

The initiative petition is unconstitutional on its face in that it violates Article III, § 51's prohibition on using the initiative process to achieve a purpose that would be otherwise prohibited by the Constitution. That provision states:

> 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*. . . .

(Emphasis added).

Section 54(b).2 of the proposed initiative states that "[d]istributions of funds under this amendment shall not be limited or prohibited by the provisions of Article IX, section 8." L.F. 201; App. 31.

As discussed in the preceding sections, this issue is ripe for judicial review as a pre-election, post-certification facial challenge. *See, e.g., City of Kansas City, Mo. v. Chastain*, 420 S.W.3d 550, 554 (Mo. banc 2014); *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 828 (Mo. banc 1990).

That the proposed initiative would violate Article III, § 51 is apparent from the text of the initiative read according to its plain meaning. "Words used in constitutional provisions are interpreted to give effect to their plain, ordinary, and natural meaning."

Wright-Jones v. Nasheed, 368 S.W.3d 157, 159 (Mo. banc 2012). The initiative explicitly states that it would "not be limited or prohibited by the provisions of" another constitutional provision. This is a clear violation of § 51's prohibition on using the initiative process "for any other purpose prohibited by this constitution." If passed, the proposed initiative would allow public funds to be expended for a purpose that is otherwise prohibited by the constitution.

This violation of § 51 is apparent from the face of the proposed initiative petition and provides an additional reason why the initiative should not qualify for the November 2016 ballot.

CONCLUSION

For the foregoing reasons the judgment of the circuit court should be reversed and the Secretary enjoined from certifying the measure and all other officers enjoined from printing it on the November 2016 ballot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Clerk of the Court on this 2nd day of September, 2016, to be served by operation of the Court's electronic filing system on all counsel of record.

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CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 84.06(b) and Rule 55.03, the undersigned hereby certifies the following:

1. This brief includes the information required by Rule 55.03.

2. This brief complies with the limitations contained in Rule 84.06(b) and contains 9,924 words.

3. Microsoft Word 2010 was used to prepare Appellant's Brief.

/s/ Heidi Doerhoff Vollet
SIGNATURE