IN THE SUPREME COURT OF MISSOURI

JIM BOEVING, PATTY ARROWOOD, ROBERT E. PUND and ROBERT A. KLEIN,	)	
Appellants,	)	
	)	
vs.	)	**SC95924**
	)	
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

REPLY BRIEF OF APPELLANTS PUND AND KLEIN

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The undisputed record before the Court provides two independent reasons that IP 2016-152 does not qualify for the November 2016 ballot. First, the signatures do not count toward qualification as a matter of statutory law. This follows from straightforward consideration of the General Assembly's intent with regard to the official ballot title and signature counting provisions of Chapter 116 and applicable rules of statutory construction. The Secretary's and Raise Your Hand for Kids' contrary statutory interpretation arguments are flawed, as is Raise Your Hand for Kids' contention that it was unconstitutional for the General Assembly to have required it to use a fair and sufficient summary during circulation.

Second, IP 2016-152 is facially unconstitutional. It violates Article III, § 51's prohibitions against appropriation of monies not raised by the initiative and against use of funds for purposes otherwise constitutionally prohibited. For reasons explained below, these issues are ripe and in Appellants' favor.

I. IP 2016-152 is invalid because Raise Your Hand for Kids did not follow a valid statutory signature requirement.

A. Respondents' interpretation of Chapter 116's official ballot title and signature counting provisions cannot be reconciled with, and would in fact subvert, the legislature's intent to require fair and sufficient official summaries of measures to be used during circulation.

The trial court construed Chapter 116's directives regarding the requirements of an official ballot title being affixed to signature pages and non-counting of signatures not to

apply in certain time frames or in circumstances not exempted by the statutory text. Indeed, the trial court went so far as to read as "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. 617-618, 620; App. 15-16, 18.

As discussed in Appellants' opening brief, 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. 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, as well as in legal notices and on the ballot provided to voters in the voting booth. There is no exception.

The Secretary and Raise Your Hand for Kids strain to justify their preferred interpretation through reference to liberal rules of construction and various other provisions. The errors of these arguments are well covered by the statutory interpretation sections of the Reply Brief of Appellants Boeving and Arrowood, which are adopted herein by reference in the interest of briefing economy.

It bears emphasis, however, that if the Secretary of State's and Raise Your Hand For Kids' statutory interpretation arguments are accepted by this Court, perverse results will follow which can undermine the State's significant, compelling, and important interests in preserving the integrity of the initiative process. Under Respondents' reading, proponents will have a tremendous incentive to stretch § 116.190 litigation past the constitutional deadline for submission, rather than solidifying or correcting a challenged title as quickly as possible. For if the litigation stretches past the submission date, proponents will be assured the signatures collected under a misleading title will count toward qualification for the ballot, whereas litigation that ends sooner may result in invalidation of signatures gathered before judgment is entered. The more likely the title is deficient (particularly in ways beneficial to the proponent), the harder the proponent may push to delay ultimate decision.

When misleading ballot titles persist in circulation, Missouri citizens will see misleading information as they decide to sign or not sign underneath the official summary on the statutory form when they are approached by circulators. Though circulators will have pages bearing the full text of the measure with them, there is no requirement that circulators show those pages to would-be signers. The text of a measure appears on pages that come after the signature page and are not visible unless the citizen requests to see them. Even if a citizen requests to see the full text, such text can be multiple pages of hard-to-read, single-spaced, small-font text, like IP 2016-152's petition in this case. *See* L.F. 192, 199-202; App. 29-32.

Chapter 116 in effect mandates that citizens be provided, at the time of signature, the ready reference of a 100-word-or-less non-misleading official summary of the proposal. Reading the statutory scheme as the Secretary and Raise Your Hand for Kids suggests will result in voters being deprived of a non-misleading official summary at the circulation stage, when the people of the state desired to have them, as evidenced by the actions of their elected representatives.

B. The non-Missouri cases Raise Your Hand for Kids cites did not permit initiative petitions to qualify for the ballot under like circumstances.

Raise Your Hand for Kids asserts that other state courts have held that "post-submission changes to the official ballot title do not invalidate an initiative." RYH4K Br. 32. But most of the cases cited did not involve titles, and none involved circumstances comparable to those here.

In *Pedersen v. Bennett*, 230 Ariz. 556, 557, 288 P.3d 760, 761 (2012), for example, the Arizona Supreme Court declined to invalidate a petition that had been circulated in proper form but the proponents had inadvertently provided a paper copy to the Secretary of State's office (which was posted on the secretary's website) that included a textual error "on page twelve of fifteen dense, single-spaced pages." *Id.* at 763. Noting the evidence showed only a few visits to the website, the court remarked that the error on the website version was such that it was "unlikely that even the most diligent reader would have found it." *Id.* In *Kromko v. Superior Court In & For County of Maricopa*, 168 Ariz. 51, 811 P.2d 12, 20-21 (1991), the same court declined to invalidate a petition that contained short titles of the measure on the signature page in addition to other

statutorily required material. Although there had been some evidence by a few individuals that they personally had been misled by the short titles, the court reviewed the short titles itself and independently found the titles were not misleading or fraudulent, nor were they prohibited from inclusion by the state constitution or statutes. *Id.* The court further found that the proponents had carried their burden of presenting evidence of an absence of fraud in the circulation process. *Id.* at 20.

In *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 734 (Alaska 2010), the Alaska Supreme Court declined to invalidate a petition that had been circulated with a deficient summary where the "petition summary's omissions did not substantially misrepresent the essential nature of the [proposal]." There do not appear to have been any statutes dictating a different outcome, and the court left open the possibility that a more misleading summary could have led to a different result.

Costa v. Superior Court, 37 Cal.4th 986, 1012, 128 P.3d 675, 689 (2006), involved unusual circumstances in which the proponents inadvertently sent to the attorney general for title preparation a slightly different version of the initiative petition that was circulated with the title prepared by the attorney general. The California Supreme Court declined to invalidate the petition for the discrepancies between the versions inadvertently sent to the attorney general's office and circulated among the electorate. Although the court agreed there was a technical defect, it concluded "the inadvertent differences at issue here did not mislead the public or otherwise defeat or undermine the fundamental purposes underlying the relevant constitutional and statutory provisions." *Id.* at 696.

This case is materially different. The official ballot title used in circulation was voided by the Court of Appeals after being adjudicated likely to mislead voters with regard to a central feature of the proposal. *Boeving v. Kander*, No. WD 79694, 2016 WL 3676891 (Mo. App. W.D. July 8, 2016). Further, Chapter 116's statutory scheme expressly calls for invalidation of any signatures gathered without the official title affixed.

C. This case involves a misleading device used in signature gathering.

Raise Your Hand for Kids seeks to make hay of the statement that opponents "put forward no evidence that any petition signer certified by the Secretary was from a voter who was misled into signing in the petition." RYH4K Br. 7. It is true that Appellants did not proffer evidence that any *specific individual* was *subjectively* misled by the summary into signing the petition. But it has been long established that actual fraud (*i.e.*, fraud involving subjective deception) is not indispensable in voiding election matters. *See Elliott v. Hogan*, 315 S.W.2d 840, 849 (Mo. App. 1958) (defining legal fraud in context of election contest) (citing *Gantt v. Brown*, 238 Mo. 560, 142 S.W. 422 (1911)). An allegation that signatures could not count under applicable statutory law toward qualifying a petition for the ballot is an allegation of legal fraud. *See id.* Either type of fraud—legal or actual—can invalidate a ballot, or in this case, an initiative petition.

Furthermore, it cannot be disputed that the device used by Raise Your Hand for Kids in collecting signatures was in fact misleading. The petition pages circulated prominently displayed the summary that the Court of Appeals held was insufficient and unfair under § 116.190 and likely to mislead voters. *Boeving*, 2016 WL 3676891 at *7-8.

That decision is final. It is not subject to reinterpretation or revision by either the Secretary or Raise Your Hand for Kids, both of whom were parties to the suit. The record is undisputed that the misleading title was used on all petition pages that voters signed. L.F. 194-195. And there is an absence of evidence in the record that voters were *actually* presented with any information about the proposal other than what appeared on the signature page that bore the misleading summary. L.F. 188-539.

D. Chapter 116's official ballot title requirements at the circulation stage and signature invalidation provisions of §§ 116.120, 116.180, and 116.190 are constitutional laws that further the State's compelling interests in the integrity of the initiative process and prevention of deception.

Raise Your Hand for Kids argues that if the statutory provisions mean what Appellants contend, the statutes are unconstitutional burdens on their right of initiative. Br. 28-33. "The state constitution, unlike the federal constitution, is not a grant of power, but as to legislative power, it is only a limitation; and, therefore, except for the restrictions imposed by the state constitution, the power of the state legislature is unlimited and practically absolute." *State ex inf. Danforth ex rel. Farmers' Elec. Co-op., Inc. v. State Envtl. Improvement Auth.*, 518 S.W.2d 68, 72 (Mo. banc 1975). "A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision." *Brown v. Carnahan*, 370 S.W.3d 637, 646 (Mo. banc 2012) (quoting *In re Brasch,* 332 S.W.3d 115, 119 (Mo. banc 2011)). "The person challenging the statute's validity bears the burden of proving the act clearly and undoubtedly violates

the constitution." *Id.* (quoting *Kansas City Premier Apartments, Inc. v. Missouri Real Estate Comm'n*, 344 S.W.3d 160, 167 (Mo. banc 2011)).

"Statutes that place impediments on the initiative power that are inconsistent with the reservation found in the language of the constitution will be declared unconstitutional." *Id.* (quoting *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc. 1990)). However, the General Assembly's "power to enact reasonable implementations of a constitutional directive is generally recognized." *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991).

This Court noted in *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991): "Although the constitution first reserves to the people the initiative power, the constitution by subsequent provisions involves the general assembly in the procedure of submitting initiative petitions." Article III, § 53 of the constitution provides that in submitting initiatives to the people, "the secretary of state and all other officers shall be governed by general laws." Mo. Const. Art. III, § 53. Article XII, § 2(b) provides that any initiative seeking to amend the constitution "shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law…."

The General Assembly is thus not excluded by the Constitution from enacting laws in initiative petition area. And it is certainly a well-known, bedrock principle of democratic government "that there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 187 (1999) (internal quotation omitted). This Court has similarly acknowledged that

the state's "broad interests in preserving the integrity of the election process … are significant, compelling and important." *Geier v. Missouri Ethics Commission*, 474 S.W.3d 560, 566 (Mo. banc 2015).

The official ballot title and accompanying signature provisions clearly further these compelling interests, and they do not clearly contradict any provisions of Article III, §§ 49-53. They require voters and would-be petition signers to be presented a fair and sufficient 100-word-or-less official summary of a measure at the point of signature, rather than a stack of pages of small text, or worse, misleading information. This requirement promotes integrity and understanding of the initiative process and deters fraud. *See Brown*, 370 S.W. 3d at 654 (quoting *Buchanan v. Kirkpatrick*, 615 S. W. 2d 6, 11-12 (Mo. banc 1981)). Not counting signatures where no or a misleading summary is used is a reasonable mechanism to ensure the procedure is followed and voters have not been misled.

Raise Your Hand for Kids seeks to liken this case to *Rekart v. Kirkpatrick*, 639 S.W.2d 606 (Mo. banc 1982), in which this Court held that persons who signed an initiative petition could withdraw any time before the petition had been submitted but could not withdraw after submission "absent fraud, deceit, misrepresentation, duress, etc." *Id.* at 609. The Court was rightly concerned that proponents would have no way to identify which voters might withdraw after the deadline passed, when it would be too late to compensate for withdrawals by gathering additional signatures from among the many other thousands of Missouri voters in the state who would otherwise have still been eligible to sign and may well support the measure. Thus, the Court concluded that

allowing withdrawal after the fact—outside of the limited cases of misrepresentation—would pose too great a burden on the initiative process to be permitted.

This case is not comparable. During the entirety of the circulation period, the proponents used a misleading summary when gathering signatures, bringing it into a category of conduct (misrepresentation) *Rekart* singled out for differing treatment.

Raise Your Hand for Kids also contends the statutory scheme works an unconstitutional limit on the time for circulation. RYH4K Br. 30-32. But Raise Your Hand for Kids has failed to show that any time issues it experienced were not of its own making or *sui generis* to this case. First, the record is undisputed that Raise Your Hand for Kids voluntarily chose not to utilize approximately half of the potential petition circulation period because it chose to submit its sample sheet on November 20, 2015, a year after the first opportunity. L.F. 192. Second, though Raise Your Hand for Kids now complains about the delay of the § 116.190 litigation, it made no showing that it tried to move the § 116.190 litigation more quickly but was unable to do so. Nor has it adduced evidence that § 116.190 litigation is a source of undue burden to proponents generally. When requested to move quickly, the Circuit Court of Cole County, the Court of Appeals, and this Court invariably comply. This case, for example, proceeded to trial and judgment in the trial court within a mere two weeks of the Secretary's certification. The appeal is proceeding quickly to final disposition as well. Raise Your Hand for Kids stipulated that its signature gathering efforts took only four months (L.F. 194), only a small fraction of the time period available, and leaving ample time for resolution of any cloud surrounding a title.

Raise Your Hand for Kids argues unfairness based on a stated reliance on the Secretary's title certification. But citizens do not have any vested right to rely on a government official's erroneous interpretation of a law. *Bartlett & Co. Grain v. Director of Revenue*, 649 S.W.2d 220, 224 (Mo. banc 1983). The Secretary of State's erroneous interpretation of what constituted a fair and sufficient summary statement for IP 2016-152 falls into the same category, especially since that summary was being actively challenged in litigation during the entire pendency of Raise Your Hand for Kids' stated reliance. Raise Your Hand for Kids had full notice that such signatures could be invalidated, and it acknowledged as much in its intervention motion in the *Boeving* § 116.190 suit. Boeving Appendix 37.

As an entity challenging the validity of legislation, the burden falls to Raise Your Hand for Kids to prove unconstitutionality. Raise Your Hand for Kids' remaining evidence of burden (RYH4K Br. 4) was largely that it can be difficult to qualify a petition for the ballot due to Missouri's geographic distribution requirement, the threshold for signatures for constitutional amendments, and the need to gather signatures in public places. All are difficulties inherent to the initiative process generally and have nothing to do with the title and signature count provisions being challenged.

With regard to Raise Your Hand Kids' assertion that ruling against it would sound the death knell for petitions, the Court can take notice that many initiatives have been enacted under the current scheme. This is the first time a claim of unconstitutionality has been presented for decision in this Court. In addition, one can argue that enforcement of the official ballot title requirements crafted by the General Assembly will promote the

wider and more vibrant use of initiative petitions in this state. Citizens have more confidence in a process subject to regulation and cross checks that curb abuse. They may be more likely to sign and participate in that regulated process, rather than becoming jaded by one in which deception is tolerated or its existence difficult to detect. Their confidence may be undermined if they are thrust stacks of paper with small print in parking lots across the state, asked for a signature, with no ready way to ascertain what petition they are being asked to sign does, whether it comports with what the circulator says, or are otherwise given misleading information.

In sum, Raise Your Hand for Kids has fallen far short of carrying its burden of showing that Chapter 116's ballot title and signature count provisions are clearly and undoubtedly unconstitutional.

II. IP 2016-152 is invalid because it is facially unconstitutional.

Independent of the statutory failings, IP 2016-152 does not qualify for the ballot because it is facially unconstitutional in a manner that is cognizable in pre-election judicial review.

A. Appellants' facial challenges to the constitutionality of IP 2016-152 are ripe.

The Secretary recognizes that Article III, §§ 50 and 51 contain "prerequisites or qualifications" that are necessary for placement of a ballot initiative to the voters. Sec. Br. 21. Despite this recognition, however, the Secretary then seems to argue that only the prerequisites in § 50 are appropriate for pre-election review, and that those in

§ 51 are not because they are "substantive." *Id*. at 22-30. This argument is not supported by the law.

The Secretary cites *Ketcham v. Blunt*, 847 S.W.2d 824, 834 (Mo. App. W.D. 1992) for the proposition that proposals "having nothing to do with" § 50 are not ripe for pre-election review. Sec. Br. 24. That is not quite what *Ketcham* says. In *Ketcham*, the court noted that certain issues were not ripe for review—not because they were not found within § 50, but rather because they would require a substantive—not facial—review. 847 S.W.2d at 833. The plaintiffs in *Ketcham* acknowledged that they were requesting a substantive review beyond the face of the petition itself, but argued that such review was proper under *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824 (Mo. banc 1990). 847 S.W.2d at 833. In response, the Court of Appeals noted that the issues in *Ketcham* were different from the issues in *Missourians to Protect the Initiative Process* in that they "had nothing to do with" § 50 and required more than a facial review of the petition.[1] *Id*. at 834. *Ketcham* does not say that only § 50 challenges are reviewable; rather, the language quoted by the Secretary was merely distinguishing the *Missourians to Protect the Initiative Process* case. *Id.* Nothing in *Ketcham* precludes pre-election review of the claims presented here.

[1] The issues which the *Ketcham* court found were substantive were a challenge to the effective date clause (Art. III, § 51), delegation of the power to amend to other states (Art. I, §§ 1 and 3), and vagueness (Art. I, § 10). 847 S.W.2d at 833.

In fact, as the Secretary acknowledges, this Court has considered § 51 claims in pre-election challenges. *E.g.*, *Kansas City v. McGee*, 269 S.W.2d 662 (Mo. 1954); *City of Kansas City, Mo. v. Chastain*, 420 S.W.3d 550 (Mo. banc 2014). In spite of the Secretary's characterization of this case law as "unfortunate," "problematic," "ill-defined," and "vague," the fact remains that Missouri law clearly allows § 51 issues to be reviewed in a pre-election challenge if its unconstitutionality is apparent on the face of the initiative.[2] *Chastain*, 420 S.W.3d at 554-55.

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[2] In his brief, the Secretary states that "[t]his Court may have first used that word [facial] in *Knight*[.]" Sec. Br. 25. In *Knight v. Carnahan*, 282 S.W.3d 9 (Mo. App. 2009), the Court of Appeals was merely applying existing case law, not treading new ground. *Knight* cites *State ex rel. Hazelwood Yellow Ribbon Committee v. Klos*, 35 S.W.3d 457, 468 (Mo. App. 2000), an Eastern District case recognizing pre-election review where the initiative "is clearly facially unconstitutional." *Hazelwood*, in turn, cites this Court's *en banc* cases from 1983 (*State ex rel Dahl v. Lange*, 661 S.W.2d 7), 1997 (*State ex rel. Trotter v. Cirtin*, 941 S.W.2d 498), and 1995 (*Craighead v. City of Jefferson*, 898 S.W.2d 543). *Knight* also cites *Union Elec. v. Kirkpatrick*, 678 S.W.2d 402 (Mo. banc 1984), which recognized that courts may review "the face of the petition" in a pre-election constitutional challenge. Thus, recognizing the viability of "facial" challenges of initiative petitions was not a new invention by the Court of Appeals, but rather was the application of Missouri Supreme Court case law going back decades.

Rather than being a "problematic" erosion of a "bright line rule," the application of facial versus substantive challenges is an issue that courts have been able to handle for decades. This case presents no reason to change course.[3]

Chastain is on point. It was a pre-election challenge to a proposed municipal ordinance based on § 51's prohibition on appropriation by initiative. 420 S.W.3d at 552. The initiative would have created a sales tax to fund a light rail system and other transportation initiatives. *Id*. at 554. The City challenged the proposed ordinance as facially unconstitutional under § 51. *Id*.

Respondents' attempts to distinguish *Chastain* are not persuasive. The Secretary asserts that *Chastain* is "inappropriate to cite" because it is a "pre-election case involving a refusal to place language on the ballot" and that the issue in *Chastain* "was the validity

[3] The Secretary argues that facial challenges are problematic because they would allow for review of issues that ultimately might not arise because the initiative might fail. Sec. Br. 26. The problem with that argument is that, as noted in Appellants Pund and Klein's brief (at p. 33), the appropriation of money from the preexisting Coordinating Board for Early Childhood Fund will happen automatically, as a matter of law, upon passage of the initiative. Mo. Const. Art. III, § 51. The money currently in the fund would be appropriated into the new fund, where the initiative directs how it is to be spent, even before any challenge could be made. Thus, in this case, delaying review means that the unconstitutional appropriation will have already taken place without the opportunity to challenge it.

not of the proposed legislation, but of the City's decision to reject its placement on the ballot." Sec. Br. 29.

Contrary to these assertions, *Chastain* directly addresses the ripeness of pre-election review: "Missouri law authorizes courts to conduct pre-election review of the facial constitutionality of an initiative petition." *Id*. at 554. It is hard to imagine this Court stating it any clearer. Moreover, *Chastain* then goes on to determine whether the provision was unconstitutional—thus, addressing the "validity of the proposed legislation[.]" *Id*. at 555-556.

The Secretary's next argument about the applicability of *Chastain* fares no better. The Secretary asserts that in *Chastain*, a refusal to consider the issue would have meant that the initiative was not on the ballot and there was no opportunity for judicial review. Sec. Br. 29. That argument is not helpful to Respondents in this case because here there is the potential for an unconstitutional appropriation that will happen automatically without any opportunity for judicial review.

The Secretary's final argument for *Chastain's* inapplicability is its assertion in a footnote that the appeal in *Chastain* was filed by the initiative's proponents rather than its opponents. Sec. Br. 29 n.3. This argument is puzzling, as the ripeness of the constitutional issue does not depend on who filed the lawsuit.

Appellants do not, as the Secretary asserts, "ask this Court to rely upon dicta in *Reeves v. Kander* to find ripeness." Sec. Br. 30. *Reeves* is just one of many cases that support Appellants' position. Appellants do not argue, as the Secretary contends, that once the Secretary has certified the language, the "floodgates" are open for any kind of

constitutional challenge. Appellants have never asserted that they are entitled to a substantive constitutional challenge, nor do they assert that now. Appellants are merely seeking review of the constitutionality of the petition on its face—a proposition which has been recognized and available for decades and was recently confirmed in *Chastain*.

B. The initiative is a facially unconstitutional appropriation.

With ripeness established, the issue becomes whether or not an unconstitutional appropriation by initiative is apparent on the face of IP 2016-152. Appellants Pund and Klein explained in Point II of their brief why it is. Summarized, the initiative is an unconstitutional "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.

Without directly addressing Appellants Pund and Klein's arguments, Respondents make a variety of arguments about why the initiative is not an "appropriation."[4] Those arguments are not persuasive for the reasons stated below.

The Secretary argues that there is "no factual verification" that there is money in the account.[5] Sec.'s Br. 33-34. There are two problems with this argument. First, the

[4] The Secretary agrees that appropriation by initiative could—in theory—be a "matter of form" appropriate for a pre-election constitutional challenge. Sec. Br. 32. The Secretary claims to take no position on the merits of the constitutional claim, but then opines that the initiative is not an "appropriation." Sec. Br. 32-34.

circuit court made a factual finding that there was a $100 contribution to the fund in April 2016. App. 9. Second, the existence of money in the account is not necessary to establish the constitutional violation. IP 2016-152 is unconstitutional on its face, whether or not there is money in the existing fund. The fact that there *is* money increases the irreparable harm that would be suffered from the constitutional violation if pre-election judicial review is not granted, but it does not create the violation itself. The constitutional violation arises from the fact that the initiative would take money "other than of new revenues created and provided for thereby" and direct how that money is to be spent. Mo. Const. Art. III, § 51.

Respondents' arguments that the money was not put into the account until after certification are meritless. Similarly, Raise Your Hand for Kids complains at length about how the money got into the account. Respondents provide no explanation why this would make any difference to the constitutional question. The constitutional violation lies on the face of the petition that Raise Your Hand for Kids drafted, not in the

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[5] Raise Your Hand for Kids makes a similar argument, although its argument is addressed to the ripeness question rather than the appropriation question. RYH4K Br. 38-39. That argument fails for the same reason. Appellants Pund and Klein disagree with Raise Your Hand for Kids' assertion that they can prevail only if there is money in the account on the effective date. The unconstitutional appropriation is apparent on the face of the petition whether or not there is money in the account.

mechanics of how or when money was put into the existing account the petition's text references.

Raise Your Hand for Kids' arguments that the initiative does not impose any new duties on the state or change the broad underlying purpose of the existing fund, or that it is just a reorganization, are irrelevant. The initiative is either an appropriation of non-newly created funds or it is not, and these arguments are irrelevant to that determination.

Raise Your Hand for Kids' reliance on *Earth Island Institute v. Union Elec. Co.*, 456 S.W.3d 27 (Mo. banc 2015) for its convoluted argument that the initiative was not "invalidated" until the money was put in the account after it had been certified is misplaced. RYH4K Br. 38-39. *Earth Island Institute* involves the legislative passage of a statute that would invalidate an initiative petition, after the petition had been certified but before the election. Those facts are distinguishable. The proposed initiative here was invalid (unconstitutional) before certification and after. The placement of the money in the account did not make the initiative invalid; the invalidity is on the face of the initiative itself.

Raise Your Hand for Kids engages in significant verbal gymnastics to try to convince this Court that the authorization to spend the money in the fund is not an "appropriation." But calling it a "command . . . to organize the statutory or constitutional structure of the funds that hold revenues" (RYH4K Br. 40) does not change the simple fact that the provision acts as an appropriation. If it walks like an appropriation and talks like an appropriation, it is an appropriation—regardless of what it is called. If it

authorizes the expenditure of money that it does not provide the revenue for, for a stated purpose, it is an appropriation that violates Article III § 51.

Raise Your Hand for Kids also argues that the purpose of § 51 is not served by addressing the kind of issue presented in this case. Rather, Raise Your Hand for Kids argues that courts should only be concerned about the "practical necessity" of initiatives that impose new liabilities and duties without covering the cost. RYH4K Br. 43-44. Appellants Pund and Klein disagree. The issue is the unconstitutional appropriation itself, not the specific amount of money at issue. The fact that certain concerns were identified in one case does not mean that those are the *only* concerns that could potentially be at issue. A clear constitutional violation should not be permitted for any reason.

None of Respondents' appropriation arguments overcomes Appellants' straightforward showing that the petition is an "appropriation" because it authorizes the expenditure of money other than new revenues created and provided for in the initiative. For the reasons stated above and in Appellants' original briefs, it is clear that the proposed initiative is an unconstitutional appropriation by initiative in violation of Article III, § 51.

C. The initiative petition uses the initiative process to achieve a purpose otherwise prohibited by the Constitution.

Appellants' Pund and Klein's brief stated the reasons why violation of this constitutional provision is apparent on the face of the petition. Respondent Secretary does not respond to this issue on the merits. Sec. Br. 32. Raise Your Hand for Kids

dismisses Appellants' argument as "cursory" and waiving "any other claim about how or why Amendment 3 violates Missouri's religion clauses."[6] RYH4K Br. 36-37.

In its substantive response, Raise Your Hand for Kids alleges that Article IX, § 8 (the section that is excluded by the proposed initiative) applies only to the general assembly, and therefore does not apply here anyway. RYH4K Br. 45-46. That, of course, begs the question of why the reference was included in the initiative petition in the first place. Why did the initiative's drafters feel the need to specifically exclude a provision that would not apply anyway? The Court must presume no surplusage was intended. *See State v. Moore*, 303 S.W.3d 515, 520 (Mo. banc 2010) ("When interpreting a statute, this Court must give meaning to every word or phrase of the legislative enactment."). The text of IP 2016-152, as Raise Your Hand for Kids drafted it, is a facial violation of Article III, § 51's prohibition against using the initiative process "for any other purpose prohibited by this constitution."

[6] Appellants do not concede that they have waived any claims.

CONCLUSION

For the foregoing reasons and those stated in Appellants' opening brief, 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 12th day of September, 2016, to be served by operation of the Court's electronic filing system on all counsel of record.

/s/ Heidi Doerhoff Vollet
Heidi Doerhoff Vollet

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 6,366 words.

3. Microsoft Word 2010 was used to prepare Appellants' Reply Brief.

/s/ Heidi Doerhoff Vollet
SIGNATURE