WD80001 (consolidated with cases WD80002 and WD80004)

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JIM BOEVING, *et al.*,
Appellants,

v.

MISSOURI SECRETARY OF STATE JASON KANDER,
Respondent,
and
RAISE YOUR HAND FOR KIDS AND ERIN BROWER,
Intervenors/Respondents.

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

BRIEF OF RESPONDENT MISSOURI SECRETARY OF STATE

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STATEMENT OF FACTS

On January 5, 2016, the Secretary of State ("Secretary") issued a Certification of Official Ballot Title for Initiative Petition 2016-152, comprised of a summary statement prepared by the Secretary and a fiscal note summary prepared by the State Auditor. (LF 607, ¶ 8). By law, the initiative proponent, Raise Your Hand for Kids ("RYH4K"), was required to submit at least 150,000 valid signatures across at least six of Missouri's eight congressional districts by May 8, 2016. (LF 607, ¶ 11). On May 7, 2016, RYH4K submitted over 330,000 signatures to the Secretary on petition pages containing the January 5, 2016, official ballot title certified by the Secretary. (LF 608, ¶¶ 14, 15). During the signature-gathering process, each petition page circulated to voters contained the full text of the proposed measure, in accordance with Section 116.040, RSMo.[1] (LF 199-202).

On July 8, 2016, after the signature submission deadline, the Court of Appeals, Western District, issued its decision in *Boeving v. Kander*, -- S.W.3d --, 2016 WL 3676891 (July 8, 2016), certifying the following modified summary statement for the official ballot title:

> Shall the Missouri Constitution be amended to:

[1] All statutory references are to RSMo (2000) as supplemented unless otherwise noted.

- increase taxes on cigarettes each year through 2020, at which point this additional tax will total 60 cents per pack of 20;

- create a fee paid by cigarette wholesalers of 67 cents per pack of 20 on certain cigarettes, which fee shall increase annually; and

- deposit funds generated by these taxes and fees into a newly established Early Childhood Health and Education Trust Fund?

Boeving, 2016 WL 3676891 at *18. The only difference between the Court of Appeals' July 8, 2016, modified summary statement and the Secretary's January 5, 2016, certified summary statement is the addition of the final clause in the second bullet point: "which fee shall increase annually." (LF 609, ¶ 17). Ten days later, on July 18, 2016, the Secretary delivered the new official ballot title to RYH4K and certified it to local election authorities, as required by Section 116.190.4, RSMo. (LF 210).

The Secretary examined the petition pages submitted and determined that they contained 209,300 valid signatures. (LF 609, ¶ 18). Because RYH4K had surpassed the signature threshold in six of the state's eight congressional districts, on August 9, 2016, the Secretary issued a Certificate of Sufficiency of Petition for IP 2016-152 to appear as Constitutional Amendment 3 on the ballot for the November 8, 2016, election. (LF 609-10, ¶ 21, 22; LF 211).

Collectively, the consolidated cases challenge the Secretary's August 9, 2016, Certificate of Sufficiency of Petition that counted as valid signatures on

petition pages containing the January 5, 2016, ballot title and also challenge the constitutionality of IP 2016-152. The Circuit Court of Cole County found that RYH4K and the Secretary complied with their statutory obligations under Chapter 116, and so the signatures were properly counted as valid, and ordered that IP 2016-152 be submitted to voters in November using the ballot title modified by the Court of Appeals and later certified by the Secretary. (LF 624, 629). The court also found that the majority of the Plaintiffs' constitutional claims were not ripe, except the single-subject claims, as to which the court found IP 2016-152 did not violate Article III, Section 50 of the Missouri Constitution. (LF 627).

ARGUMENT

Standard of Review

The Court's review of the circuit court's decision in this case is *de novo*, because the facts adduced at trial were submitted by stipulation between the parties. *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573, 580 (Mo. App. W.D. 2010). In addition, any statutory or constitutional interpretations made by the circuit court are reviewed *de novo* by this Court. *Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 930 (Mo. banc 2008).

I. A court's change to an initiative petition's official ballot title after the signature submission deadline does not retroactively apply to alter the "official ballot title" utilized for signature-gathering or signature-counting under the Missouri Constitution or Chapter 116, RSMo. (Responding to Appellants' Point Relied On I).

A. The Missouri Constitution broadly grants Missourians the right to engage in participatory democracy through the initiative process and does not require that a certain ballot title be placed on initiative petitions seeking to amend the Constitution.

This case presents an important question that must be addressed within a context that, under Missouri law, requires deference to the efforts of

proponents seeking to place initiatives on the ballot. The Missouri Constitution provides citizens with the broad right to "propose and enact or reject laws *and* amendments to the Constitution." Mo. Const. Art. III, § 49 (emphasis added). Indeed, "[n]othing in our constitution so closely models participatory democracy in its pure form. Through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the people." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990). Due to respect for this power the people have reserved to themselves, and "[t]o avoid encroachment on the people's constitutional authority, courts will not sit in judgment on the wisdom or folly of the initiative proposal presented." *Brown v. Carnahan*, 370 S.W.3d 637, 645 (Mo. banc 2012). Sometimes, though, courts are asked to resolve disputes that arise during the initiative process. In these disputes, courts "must act with restraint, trepidation and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course." *Id.* (quoting *Missourians to Protect the Initiative Process* at 827).

In considering a statutory requirement regarding the initiative process, the Supreme Court of Missouri has stated:

> The initiative power set forth in Art. III, § 50 of the Missouri Constitution is broad and is not laden with procedural detail. The form in question in the present

> case is not mandated by the Constitution, but is instead provided for by statute. . . . Legislation cannot limit or restrict the rights conferred by the constitutional provision. . . . Minor details may be left for the legislature without impairing the self-executing nature of constitutional provisions but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purposes, and must not in any particular attempt to narrow or embarrass it. In a contest between the two if the statute restricts a right conferred by the Constitution, the latter prevails. . . . The initiative process is too akin to our basic democratic ideals to have this process made unduly burdensome.

United Labor Committee of Missouri v. Kirkpatrick, 572 S.W.2d 449, 454-55 (Mo. banc 1978) (citations and editing marks omitted). Indeed, "[c]onstitutional and statutory provisions relative to initiatives are liberally construed to make effective the people's reservation of that power." *Missourians to Protect the Initiative Process* at 827 (citing *State ex rel. Blackwell v. Travers*, 600 S.W.2d 110, 113 (Mo. App. W.D. 1980)). Article III, then, grants and protects the right of the people to legislate by initiative. These rights belong to initiative proponents, not initiative opponents.

The Missouri Constitution provides few requirements for the procedure, form, and content of initiative petitions; just six sections in Art. III relate to initiative petitions. Nothing in this state's Constitution requires that a ballot title be affixed to petition pages for prospective constitutional amendments. For these initiative petitions, what the Missouri Constitution

requires is that "[e]very such petition shall be filed with the secretary of state not less than six months before the election and shall contain an enacting clause and the full text of the measure." Mo. Const. Art. III, § 50. In contrast, there is a requirement that initiative petitions that seek to enact a new *statute* have a ballot title: "Petitions for laws shall contain not more than one subject which shall be expressed clearly in the title." See *Union Elec. Co. v. Kirkpatrick*, 606 S.W.2d at 660 (initiative petition to create an act regulating nuclear reactors). But there is no similar provision for petitions that seek to amend the Missouri Constitution.

There is another reference to official ballot titles in the Missouri Constitution, but that reference does not apply to the signature-gathering phase of the initiative process. Article XII, Section 2(b) of the Missouri Constitution states: "All amendments proposed by the general assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto, at which he may submit any of the amendments." Mo. Const. Art. XII, § 2(b). Notably, this provision refers to the official ballot title that appears on the ballot at a general or special election. It does not require the ballot title to be part of the initiative petition.

There is no constitutional requirement, then, for any sort of ballot title to be placed on initiative petitions during the signature-gathering phase. Such a requirement must be found, instead, in the statutes. It is well-established that all statutes springing from a constitutional right must be drafted and interpreted so as not to "limit or restrict the rights conferred by the constitutional provision," but instead in a way that speaks to "[m]inor details" that do not "impair[]the self-executing nature of constitutional provisions." *United Labor Committee of Missouri*, 572 S.W.2d at 454-55. The ability of Missourians to legislate by initiative is a constitutional right. To the extent that Chapter 116 sets forth procedures for placing a certain ballot title on petition pages, those procedures must be liberally construed to support the rights of initiative proponents to engage in participatory democracy—not to limit or restrict those rights.

B. Prior to the signature submission deadline, the "official ballot title" under Section 116.180 is the ballot title initially certified by the Secretary and delivered to the initiative proponents.

Chapter 116 outlines the procedures that initiative proponents and the Secretary must follow when circulating and certifying initiative petitions. One of the first steps in the initiative process is governed by Section 116.334. When an initiative proponent submits an initiative petition sample sheet to

the Secretary and the Secretary approves it with respect to form, the Secretary "shall prepare and transmit" a summary statement of the measure. § 116.334. The summary statement "shall be a concise statement not exceeding one hundred words," "shall be in the form of a question," and should be "neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure." § 116.334.1. Meanwhile, under Section 116.175.2, the State Auditor "shall prepare a fiscal note and a fiscal note summary" for the initiative petition. § 116.175.2.

The Secretary combines the ballot summary and the fiscal note summary to create the "official ballot title." § 116.010(4). Under Section 116.180, after the Secretary receives the official summary and the fiscal note summary, "[he] shall certify the official ballot title in separate paragraphs with the fiscal note summary immediately following the summary statement of the measure[.]" § 116.180. For initiative petitions, the Secretary "shall deliver a copy of the official ballot title and the fiscal note" to the designated person on behalf of the proponents of the initiative. *Id*.

At this point—post-certification by the Secretary and pre-signature submission—there is one "official ballot title": the one "certified" by the Secretary and "delivered" to the proponents. On January 5, 2016, the Secretary certified an official ballot title comprised of a summary statement

and fiscal note summary and delivered that ballot title to RYH4K. On that date, the Secretary followed his obligations set forth in Section 116.180.

Section 116.180 then directs initiative proponents what to do next. "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." *Id*. During the signature-gathering process, the "official ballot title" can only refer to the official ballot title certified by the Secretary and delivered to the proponents. Unless and until a court certifies a new title to the Secretary and the Secretary in turn delivers it to the proponents, there is no other choice. Just as the Secretary complied with his obligations under Section 116.180 before the signature submission deadline, so too did RYH4K by circulating petition pages with the January 5, 2016 ballot title certified by the Secretary.

C. After the signature submission deadline, Section 116.120 directs the Secretary to count signatures on petition pages bearing the "official ballot title" certified by the Secretary under Section 116.180.

Appellants do not dispute that in the timeframe after certification by the Secretary but before the signature submission deadline, the "official ballot title" under Section 116.180 is the one "certified" by the Secretary and "delivered" to the proponents. In other words, there is no dispute that

between January 5, 2016, and May 8, 2016, the only "official ballot title" that could have been placed on petition pages was the one certified by the Secretary on January 5, 2016; there wasn't any other ballot title. What Appellants ask this Court to do is to imbue "official ballot title" with new *meaning* based on events that occurred in litigation after the signature submission deadline. The words that comprise the "official ballot title" may change later, as happened here with the Court of Appeals' July 8, 2016 decision, but if they do change, the "official ballot title" must still mean only one thing for signature-gathering and signature-counting in order to uphold the constitutional right of proponents to place their initiatives on the ballot. Neither the Missouri Constitution nor Chapter 116 support making the phrase "official ballot title" mean one thing for signature-gathering and something entirely different for signature-counting when the opportunity to gather additional signatures has come and gone.

Section 116.190 authorizes litigation over the "official ballot title." While initiative proponents are able to gather signatures once the Secretary delivers to them "the official ballot title," Chapter 116 provides that courts may simultaneously review that title, so long as the challenge is brought within ten days after the Secretary certifies the "official ballot title." § 116.190.1. The action is "placed at the top of the civil docket" and ultimately leads to a court certifying "the official ballot title." § 116.190.4.

In addition to providing a statute of limitations for bringing a ballot title challenge—within ten days after certification by the Secretary—Chapter 116 also places an outside limit on when the litigation must be completed. That limit is imposed with an eye towards resolution before the election: the action is "extinguished" if "not fully and finally adjudicated within one hundred eighty days of filing, and more than fifty-six days prior to election in which the measure is to appear." § 116.190.5. Appellants Boeving and Arrowood contend in their brief that "The purpose of these expedited challenges is to root out the misleading and insufficient ballot titles as quickly as possible, and before they can be used and relied upon in the initiative process. A misleading ballot title must not be used to gather signatures." (Boeving Br. at 19-20). These Appellants provide no legal citation for their contention, and with good reason: the accelerated timetable merely ensures that the decision is made before the matter is certified for the ballot and ballots are printed. Section 116.190.5's deadlines are marked by the election date. The inference that the legislature also wanted to ensure litigation was finished in time for placement on petitions being circulated is unjustified and appears nowhere in the statute or in case law.

Section 116.190 explains what happens at the end of a case. First, the court must "in its decision certify the summary statement portion of the official ballot title to the secretary of state." § 116.190.4. Then, it is the

Secretary's turn to act: "In making the legal notice to election authorities . . . **and for the purposes of section 116.180**, the secretary of state shall certify the language which the court certifies to him." § 116.190.4 (emphasis added).

In essence, Section 116.190.4 sets forth a two-step process for the Secretary: the Secretary (1) makes the required legal notice to local election authorities containing the language the court certifies and (2) adheres to his obligations under Section 116.180. The first part of the instruction is simple enough: the Secretary certifies the title certified by the court when the Secretary gives notice to election authorities. Then, the Secretary returns to Section 116.180 and does what that statute requires.

Either at the point that the Secretary certifies a new title certified to him by a court, or when the court itself certified the title to the Secretary of State, the new, certified title becomes "the official ballot title." The impact of the replacement is felt prospectively, not retrospectively, in a situation where, as here, the replacement came after the signature submission deadline. This is because Section 116.180 tells the Secretary and the initiative proponents what to do after an official ballot title has been certified.

And we already know what the parties must do. The Secretary must "certify the official ballot title," then "deliver a copy of [that] official ballot title" to the initiative proponents. § 116.180. After the Court of Appeals

certified the new "official ballot title," the Secretary did exactly that; there is no challenge to that here. The initiative proponents must then "affix the official ballot title to each page of the petition prior to circulation." *Id.* But RYH4K had already complied with Section 116.180 by the time the Court of Appeals certified the new "official ballot title" two months after the signature submission deadline. Reading Section 116.180 in the way advocated by Appellants creates a strict impossibility when the signature submission deadline had already passed. There was no way for RYH4K to circulate new petition pages.

Appellants contend in their First Point Relied On that Sections 116.120 and .180 provide consequences for failing to affix the *new* "official ballot title" to the petition pages: the signatures "shall not be counted." §§ 116.120, 116.180. But Section 116.120 is irrelevant here, because Section 116.190.4 does not instruct the Secretary to use the newly certified "official ballot title" "for the purposes of" Section 116.120. As for Section 116.180, that provision relates the "official ballot title" for signature-counting directly to the "official ballot title" affixed for signature-gathering:

> 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.

§ 116.180 (emphasis added). So, the Secretary's instruction to not count certain signatures is based on the "official ballot title" that the proponents are statutorily, not constitutionally, required to affix to petition pages. RYH4K completed that requirement when they circulated the petition pages, and they had no opportunity to do otherwise after May 8, 2016.

Appellant Pund, for one, misreads Section 116.190.4's directive. (See Pund Br. at 22-23). Note that Section 116.190.4's "for the purposes of section 116.180" language refers only to what the Secretary must do—fulfill his obligations under Section 116.180 and "certify the language which the court certifies to him." § 116.190.4. It does not require initiative proponents to take any additional action. Appellants essentially entreat the court to interpret Section 116.190.4 to impose a new obligation upon initiative proponents; this is not found in the plain text of that statute.

Where the initiative proponents have already complied with their circulation obligations and the signature submission deadline has passed, neither Section 116.190.4 nor Section 116.180 require them to do anything else. In fact, they cannot do anything else, because the deadline has come and gone. Certainly, the no-counting penalty of Section 116.180 applies in some cases, but it cannot extend to situations of strict impossibility. *See Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816, 835 (Mo. banc 2013); *Egenreither ex rel. Egenreither v. Carter*, 23 S.W.3d 641, 646 (Mo. App. E.D. 2000)

(impossibility of compliance supports noncompliance with a statute); *George v. Quincy, Omaha & K.C.R. Co.*, 167 S.W. 153, 156 (K.C. Ct. App. 1914) (same). Statutes must be construed in a way as to "avoid unreasonable or absurd results." *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012). Appellants' construction of Chapter 116 produces the type of results unwarranted by this canon of statutory construction.[2]

Here, "the official ballot title" on each petition page submitted to the Secretary bore the only "official ballot title" that was available to RYH4K: the one that the Secretary had certified and delivered to the proponents at the time the petitions were circulated and signed, and at the time the petitions were delivered to him. The circuit court correctly held that the proponents did precisely what the statute required. And it correctly held that the Secretary complied with his obligations under Sections 116.120, .180, and

[2] Along the same lines, Appellants contend that the circuit court's decision, if affirmed, would result in "terrible public policy which will generate incentives for creation of and reliance upon misleading ballot titles without consequence." (Boeving Br. at 26). But the alternative policy—telling proponents to use one official ballot title, then, after the fact, saying, "never mind; that one doesn't work"—is not just terrible public policy, it would raise a more-than-colorable question about the constitutionality of at least two sections of Chapter 116. If a constitutional claim is more than colorable, this Court may not have jurisdiction to consider the case. *Thompson v. ICI Am. Holding*, 347 S.W.3d 624, 634 (Mo. App. W.D. 2011).

.190.4 by counting the signatures on petitions submitted with the only "official ballot title" available at the time of submission.

D. Chapter 116 can, and should, be construed uniformly to promote the right of initiative proponents to have their causes placed on the ballot when a court certifies a new official ballot title after the signature submission deadline.

Appellants' reading of Chapter 116 cannot be reconciled with the deference constitutionally mandated be given to the ability of the people to use the initiative process. Appellants' construction places the success of an initiative outside the proponents' control, thus partially defeating Missourians' constitutional rights. It would depend on the outcome of litigation brought by opponents to the initiative.

Chapter 116 does not have to be read in such a way to create a situation of impossibility when a court certifies a new official ballot title after the signature submission deadline. There is a reading that applies an internal, consistent logic to Chapter 116, while vindicating the rights of initiative proponents in a case such as this one, where the certification of new language comes after the deadline for filing petitions: to read "the official ballot language" required to be placed on petition pages by Section 116.180 as

"the official ballot language" certified by the Secretary and delivered to the proponents at the time the petition is circulated to the voter and signed.

Where, as here, proponents of an initiative petition followed all the requirements of Section 116.180 by circulating petitions with official ballot titles certified to them by the Secretary, the requirement that the statute imposes on the proponents has already been fulfilled. That is, Section 116.190.4 only requires the Secretary to certify the court's language to those gathering signatures "for the purposes" of Section 116.180 and where those "purposes" were completed at the time the Court of Appeals ruled, there are no further "purposes of Section 116.180" outstanding. Section 116.190.4 does not require voiding of all initiative petition pages that have already been signed. It operates prospectively to require that the new language be on the ballot, but not retrospectively to invalidate actions (*i.e.*, circulating, signing, and submitting petitions) that occurred before a new "official ballot title" was certified. On that day, there was only one "official ballot title," and its use is sufficient for counting signatures.

This reading is consistent with the general presumption against retrospective operation of statutes: "Statutes are generally presumed to operate prospectively, 'unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication.'" *Dep't of Soc. Servs. v. Villa Capri*

Homes, Inc., 684 S.W.2d 327, 332 (Mo. banc 1985) (quoting *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34 (Mo. banc 1982)). To the extent Appellants argue that the plain language of Sections 116.120, 116.180, and 116.190.4 mean that both the initiative proponents and the Secretary must use a different "official ballot title" when a court certifies a new one after the signature submission deadline—a reading that is not supported or warranted by the plain language of the statutes, in any event—it produces the type of illogical result that requires courts to look beyond the statutes' ordinary meaning. See *Farmers' & Laborers' Co-op Ins. Ass'n v. Dir. of Revenue, State of Mo.*, 742 S.W.2d 141, 145 (Mo. banc 1987). That meaning to look to is the one found in the Missouri Constitution, which protects the rights of initiative proponents to access the ballot. Mo. Const. Art. III, § 49.

Appellants contend (Boeving Br. at 24) that a previous secretary of state had adopted a position in opposition to the Secretary's position in these consolidated cases, citing a circuit court case from over ten years ago, *Tuohey, et al. v. Markenson, et al.*, Case No. 06AC-CC00424 (Cole County Cir. Ct. July 24, 2016) (LF 554). However, *Tuohey*, and the then-secretary's position in *Touhey*, is not on all fours with the instant matter. In *Tuohey*, the change to the official ballot title came before the signatures were submitted, a critical distinction between that case and the legal issue presented for this Court to review. And, in any event, to the extent the two secretaries' positions are at

odds, any position the Secretary has taken is based on the facts presented. *Tuohey* is not binding on *this* Court, and the facts in that case are distinguishable from these cases.

Promoting the right of initiative proponents to access the ballot, as is their right under the Missouri Constitution, does not require overruling any precedent, nor is it inconsistent with precedent. For example, Appellants cite *Dotson v. Kander*, 464 S.W.3d 190 (Mo. banc 2015), as support for their argument that signatures collected under a "misleading" ballot title cannot be counted as valid. (Boeving Br. at 25). But *Dotson* did not interpret Sections 116.120, .180, or .190.4. In *Dotson* the Court addressed only what should appear on the ballot for an election; *Dotson* does not suggest, let alone hold, that a post-election decision could reach back to invalidate petitions, or that placement of the proposition (as opposed to the language used to describe it) on the ballot could have been, retroactively, improper. It makes sense to give greater scrutiny to what voters will actually see in the privacy of the voting booth than to what they see when talking with the circulator. Here, Amendment 3 will appear on the ballot in November using the same full text of the measure presented to petition signers, and the new "official ballot title" certified by this Court on July 8, 2016. This Court should uphold the decision of the circuit court, as doing so would apply an internal and consistent logic to Chapter 116 and uphold the rights of initiative proponents.

II. The substantive constitutional challenges to Amendment 3 are not ripe for judicial determination. (Responding to the remainder of the Appellants' Points Relied On).

A. Claims based on form and procedure—those that go to whether a proposal meets the minimum constitutional requirements to appear on the ballot—are ripe for decision before the election.

The Missouri Constitution includes a few—very few—prerequisites or qualifications for proposals to be placed on the ballot by initiative. They are contained in Art. III, §§ 50 and 51.

In Section 50, the constitution sets the number of signatures required and the deadline for filing them with the Secretary. It also imposes some requirements for form:

> Petitions for constitutional amendments shall not contain more than one amended and revised article of this constitution, or one new article which shall not contain more than one subject and matters properly connected therewith, and the enacting clause thereof shall be "Be it resolved by the people of the state of Missouri that the Constitution be amended:". Petitions for laws shall contain not more than one subject which shall be expressed clearly in the title, and the enacting clause thereof shall be "Be it enacted by the people of the state of Missouri:".

Mo. Const. Art. III, § 50.

Section 51 then excludes from the initiative, and thus from the ballot, proposals that "appropriate[e] money other than of new revenues created and provided for thereby," or that accomplish "any other purpose prohibited by this constitution." Mo. Const. Art. III, § 51.

Questions regarding the procedural prerequisites in Section 50 have long been subject to pre-election judicial review. At this stage, said the Missouri Supreme Court, the judiciary's "single function is to ask whether the constitutional requirements and limits of power, as expressed in the provisions relating to the *procedure and form* of initiative petitions, have been regarded." *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827 (emphasis added).

Use of the word "form" to define the rule makes sense. After all, both the constitution and various statutes regarding the review, circulation, and receipt of initiative petitions address "form." The form requirements for the proposal, found in Art. III, § 50 are described above. Sections 116.030 and .040 further define the "form" of petitions. Under Section 116.332.1, a sample sheet for each petition "must be submitted to the secretary of state in the form in which it will be circulated." The sample sheet is reviewed, in turn, by the Attorney General "as to form." § 116.332.3. The Secretary then "make[s] a final decision as to the approval or rejection of the form of the petition." § 116.332.4. The "form" required in Sections 116.030 and .040 is within the

scope of the secretary's (and the Attorney General's) review under Section 116.332. And it is appropriately considered by courts before the election because it is a prerequisite to ballot placement.

B. Other constitutional claims—those that go to what the proposal would do if enacted—are ripe only if it is not even debatable that the substantive problems they address are apparent on the face of the proposal.

By contrast, the longstanding rule in Missouri is that "substantive issues" of constitutionality of an initiative proposal are not ripe for adjudication unless and until the proposal is enacted by public vote. *Knight v. Carnahan*, 282 S.W.3d 9, 22 (Mo. App. W.D. 2009) (citing *Ketcham v. Blunt*, 847 S.W.2d 824, 833 (Mo. App. W.D. 1992)).

The Missouri Supreme Court explained more than 25 years ago that "it is generally improper for courts to adjudicate pre-election challenges to a measure's substantive validity, because: '[s]uch pre-election review involves issuing an advisory opinion, violates ripeness requirements, undermines the policy of avoiding unnecessary constitutional questions, and constitutes unwarranted judicial interference with a legislative process.'" *Missourians to Protect the Initiative Process* at 833-34 (citing Pre-Election Judicial Review of Initiatives and Referendums, 64 Notre Dame L. Rev. 298, 298 (1989)).

Thus, this Court has declared that constitutional challenges that "have nothing to do with the prerequisites of Art. III, § 50 of the constitution" are not ripe for judicial review prior to election. *Ketcham*, 847 S.W.3d at 834.

Once, that seemed like a bright line—one that explained why courts will hear single-subject claims (see *Knight*, 282 S.W.3d at 9; *United Gamefowl Breeders Ass'n of Missouri v. Nixon*, 19 S.W.3d 137 (Mo. banc 2000); *Kuehner v. Kander*, 442 S.W.3d 224 (Mo. App. W.D. 2014)), because the single-subject requirement is found in Art. III, § 50 (petition "shall not contain more than one subject"). It also explained why courts will consider challenges related to the signature requirement, also found in Art. III, § 50. *See, e.g.*, *Ketcham*, 847 S.W.2d at 828-34.

Unfortunately, the line between claims that must or can be litigated before the election and those that are litigated afterward has moved toward pre-election consideration of a an ill-defined, broader range of questions—ones that go beyond the scope of the statutory requirements in Chapter 116 and the constitutional requirements in Art. III, § 50.

Courts—including this Court—moving in that direction have defined the scope of available pre-election review with language that might be consistent with the previous bright line, but is vague enough to permit an expansion of the scope of pre-election review: "Before a vote is held on a measure, the judiciary may review only 'those threshold issues that affect the

integrity of the election itself, and that are so clear as to constitute a matter of form.'" *Knight*, 282 S.W.3d 9 at 22 (quoting *United Gamefowl Breeders Ass'n of Missouri*, 19 S.W.3d at 139). "Threshold issues" and "so clear as to constitute a matter of form" are undefined phrases; they are words of the courts, and not words of the constitution.

Now, courts seem free to address alleged non-form, non-procedural errors which are so significant that they, if "clear," constitute fatal errors that warrant excluding a proposal on the ballot. And they are free to do so without considering the doctrine that once drew a closer boundary on issues subject to pre-election review: courts' refusal to engage in advisory opinions.

Perhaps most problematic of the words chosen by the courts to describe this expanded vision of what claims are subject to pre-enactment review is the word, "facial." This Court may have first used that word in *Knight*, 282 S.W.3d at 22, describing "a claim so facially apparent that it comprised a matter of form." This Court most recently used it in *Reeves v. Kander*, 462 S.W.3d 853, 857 (Mo. App. W.D. 2015)—this time quoting it from the Missouri Supreme Court: "There can no longer be any doubt that 'Missouri law authorizes courts to conduct pre-election review of the *facial* constitutionality of an initiative petition.'" (quoting *City of Kansas City v. Chastain*, 420 S.W.3d 550, 554 (Mo. banc 2014) (emphasis added)).

This Court has recognized that allowing such challenges erases part of the bright line constraining pre-election review: "Pre-election review for facial unconstitutionality has been referred to as an 'exception[ ] to the general rule' that pre-election disputes are not ripe." *Reeves*, 462 S.W.3d at 858 (quoting *State ex rel. Hazelwood Yellow Ribbon Comm. v. Klos*, 35 S.W.3d 457, 468 (Mo. App. E.D. 2000)).

Accepting for review challenges of "facial constitutionality" is problematic not just because it expands the availability of pre-election review to cover questions that might never arise—thus conflicting with past precedent rejecting review of speculative questions—but because "facial" can have two very different meanings.

The first is that the question can be answered simply by looking at the face of the document—here, on the face of the petition—without further analysis, research, or cross-reference. That meaning, though it does not give the resulting line much definition, does make some sense. There may be an initiative petition that obviously violates the Missouri Constitution. And it may be possible for the Secretary of State or the Attorney General to immediately and indisputable see that problem. The problem is apparent in the "form" of the proposal—not in its "form" in terms of the particular form requirements in the Constitution, but in terms of a broader use of "form" that still refers solely to the proposal and not to its subsequent application to any

or all circumstances. In the Secretary's view, that is what the courts refer to when they speak of "facial unconstitutionality."

But "facial" is commonly used in another way—in constitutional law, to differentiate between a law that is unconstitutional as applied to everyone everywhere, and one that is unconstitutional only "as applied" in particular circumstances. Judge Fischer used that meaning recently when he addressed a constitutional question: "After *Heller* was decided but while *McDonald* was pending in the Supreme Court of the United States, this Court held that a statute prohibiting an intoxicated person from possessing a firearm was not *facially* unconstitutional or unconstitutional *as applied* under article I, section 23 of the Missouri Constitution." *Dotson v. Kander*, 464 S.W.3d 190, 201 (Mo. 2015) (Fischer, J. concurring).

The Secretary cannot endorse that broad use of "facial" in a pre-election review of initiative petitions. After all, it is possible for something to ultimately be determined to be "facially unconstitutional" only upon considerable, complex analysis, and perhaps based on unknown (or future, unknowable) precedent. And adding the possibility of "facial" versus "as applied" imposes an undue predictive burden on the public officials—the Secretary of State and the Attorney General—who must review and defend petitions, and on the courts that must adjudicate constitutionality in an accelerated pre-election review of matters that might well never be enacted.

On the other hand, the "facial" and "as applied" categories as used in constitutional analysis do make sense in one respect: if a proposal might ultimately be constitutional in some applications but not others, it cannot, in the Secretary's view, be so deficient in form as to be excluded from the ballot. To determine in what applications a proposal law or constitutional amendment could or would be constitutionally invalid requires detailed and careful analysis. And it often necessarily leads to complex questions of severance that should not be addressed at any pre-election stage—not by the Secretary upon initial review, nor by the courts after certification but before ballot notification.

So again, a question of "facial unconstitutionality" should refer to whether a proposal is obviously and solely on its face unconstitutional. And even in applying that version of "facial," deference is owed to the proponents and the proposition. *See Missourians to Protect the Initiative Process* at 827 ("[c]onstitutional and statutory provisions relative to initiative are liberally construed to make effective the people's reservation of that power."); *see also* Part I.A. *supra*. The test may fairly be stated, then, using another term this Court recently quoted in *Reeves*: if the ultimate, substantive constitutionality of a proposal is even "debatable," a pre-election challenge to its constitutionality is not ripe. *Knight*, 282 S.W.3d at 22.

It is inappropriate to cite, as Appellants do, pre-election cases involving a refusal to place language on a ballot to argue for a broader reading of "facial unconstitutionality." That is true even of the most recent Missouri Supreme Court decision, *City of Kansas City v. Chastain*, 420 S.W.3d 550 (Mo. banc 2014). In *Chastain*, the Kansas City City Council refused to place an initiative on the ballot. *Id.* at 554. So the question before the court was the validity not of the proposed legislation, but of the City's decision to reject its placement on the ballot. *Id.* The Court affirmed the City's decision, reasoning that the City was correct in concluding that the proposal, as written, would necessarily violate Art. III, § 51 of the Missouri Constitution. *Id.*

It is important that in *Chastain*, failing to fully address the constitutional question in advance would have barred the initiative from the ballot *without any opportunity for judicial review*. The substantive constitutional issues were ripe—or more accurately, the City's conclusion regarding the substantive constitutional issues was ripe—because if the City's decision stood, the initiative died. The proponents needed relief before the election or they could never obtain relief.[3]

That is not true of substantive constitutional issues where, as here, the official responsible for accepting and acting on the petition has not barred the

[3] And, as distinguished from the consolidated cases here, in *Chastain* it was the initiative proponents who filed suit to place the petition on the ballot after the City Council had refused to do so.

proposal from the ballot. The substantive constitutional questions live on to be answered later. And, again, the questions will not ever need to be answered if the measure fails at the general election in November.

Not surprisingly, Appellants ask this Court to rely upon dicta in *Reeves v. Kander* to find ripeness. The question in *Reeves* was not whether review of substantive constitutional issues was permissible at the point in time relevant in these consolidated cases (*i.e.*, after the Secretary has certified Amendment 3 for the ballot), but merely whether the review was permissible before signatures had been submitted. This Court held it was not. In doing so, the Court pointed, in part, to the nature of the remedy sought:

> The remedy that Reeves seeks is not available until "the Secretary of State makes a decision to submit, or refuse to submit, an initiative issue to the voters." "At that point, a judicial opinion as to whether the constitutional requirements have been met is no longer hypothetical or advisory." *Id.*

Id. at 859 (quoting *Missourians to Protect the Initiative Process* at 828).

Appellants argue that, because the Secretary has made a decision to submit the initiative issue to the voters, it must now be ripe for review. But such a reading, though kept afloat by language used by this Court in *Reeves*, flies in the face of developed case law spanning decades. As discussed above, case law remains clear that pre-election review of constitutional challenges is only appropriate on procedural and facial grounds. The holding in *Reeves*

should not be read to require the result that Appellants propose.

Moreover, even if the court's observation in *Reeves* that the "remedy" could be ripe now were correct, that does not lead to an inescapable conclusion that each and every "issue" whose resolution might support that remedy is ripe for determination. The remedy sought in *Reeves*, presumably, was an order barring the Secretary from accepting the filing of the initiative petition. The *Reeves* court was correct that such a *remedy* would be ripe after the Secretary has presented the issue to the voters, but only so far as it could be justified by resolving form, procedural, or truly facial issues. *Reeves* does not mean that once the Secretary makes a decision to submit, or not submit, an issue to the voters, the ripeness floodgates open for every conceivable constitutional challenge.

C. The appropriation by initiative question presented is not ripe not just because it goes to what the proposal would do if enacted, but because assuming that earmarking is "appropriation" for purposes of the constitutional ban, it is not possible to determine, on the face of the proposal, whether it "appropriates" anything but new funds.

Though the Secretary agrees that the "single subject" question presented in Appellant Boeving's Point VI to be decided under Art. III, § 50 is a question as to form that can be adjudicated now, the Secretary takes no

position on the merits of that question. The Secretary also declines to take a position on the merits of the other constitutional claims presented in Points II through V of Appellant Boeving's brief and Points II and III of Appellant Pund's brief.[4] But it is important to address one aspect of the "appropriation by initiative" argument made by Appellants in Point II of their respective briefs.

The Constitution contemplates that there could be an "appropriation by initiative" question involving a matter of form. An example—inapposite because the constitutional provision was not enacted by initiative—is the language found in Art. IV, § 30(b), under which certain funds entirely bypass the requirement in Art. IV, § 28 that "[n]o money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law." Mo. Const. Art. IV, § 28. Regarding road tax

[4] Point III of Appellant Boeving's brief, in which he makes the unsupported contention that "[d]irect prohibitions in the Missouri Constitution are relatively scarce, but where the Constitution establishes prohibited conduct, the initiative cannot be used to circumvent the prohibition" (Boeving Br. at 37), deserves special mention. The Secretary takes no position on this issue, as it is not yet ripe for judicial review, but it is important to state the foundational question of law cleanly: Does Art. III, § 51 bar the use of the initiative to eliminate any prohibition contained in the constitution? Or does it merely reiterate that the initiative can't be used to do something that the constitution says can't be done by initiative (*e.g.*, appropriate old money)? If it does the former, at least one constitutional provision enacted by initiative would be invalid: 1998's Amendment 9, which authorized riverboat gambling in its present form as an exception to the general ban on state lotteries, and which is just as much a removal of a prohibition as Appellants contend Amendment 3 is here.

funds, Art. IV, § 30(b) says:

> [A]ll state revenue derived from highway users as an incident to their use or right to use the highways of the state … shall be deposited in the state road fund which is hereby created within the state treasury and *stand appropriated without legislative action* to be used and expended by the highways and transportation commission for the following purposes.

Mo. Const. Art. IV, § 30(b)(1).

If Amendment 3 applied similar language to existing revenue, it would be unconstitutional on its face (*see* Part II.A. *supra*) and could be barred from the ballot. But Amendment 3 does not. Indeed, it appears on its face to be make subject to appropriation all funds it affects, existing or new.

Appellants nonetheless assert that Amendment 3 is "facially" unconstitutional because it transfers an existing fund—one not tied to any state tax or other ongoing source of revenue—into a new fund, which it then earmarks for particular purposes. Assuming that would be sufficient to violate the constitutional restriction if there were funds in the expiring account, it was not possible for the Secretary, when asked to approve the petition or when the petition was presented, nor for the courts, even today, to determine whether that is, factually, true. The record shows that only recently, at least, there was $100 in the expiring account, contributed by an individual in April 2016—after the Secretary's January 5, 2016 certification. (LF 611). But there is no way to know whether that amount or any amount

will be in the expiring account the day that the account transfer will be made if Amendment 3 is enacted.

Appellant Boeving asserts in his brief that "the appropriation of the Coordinating Board for Early Childhood Fund into the Early Childhood Health and Education Trust Fund will happen automatically if the initiative is passed." (Boeving Br. at 35). However, this is not an accurate statement of what Amendment 3 does. Appellant uses the word "appropriation" as if that language appears in Amendment 3, but it does not. What Amendment 3 does is create a new account, the Coordinating Board for Early Childhood Fund, which "shall **include the balance** of the Coordinating Board for Early Childhood Fund." (LF 200 at Section 54(a).1) (emphasis added). On its face, the proposal seems to contemplate that the balance (if there is a balance) remains subject to appropriation—they do not stand "appropriated." The face of Amendment 3 does not allow one to conclude, today, whether it in fact it constitutes an "appropriation."

In this circumstance—again, assuming that the movement of funds is enough to trigger the no-appropriation-by-initiative restriction—the question cannot be ripe. It cannot be answered based on speculation. It remains well within the scope of nonjusticiable "advisory opinions." *See Missourians to Protect the Initiative Process*, 799 S.W.2d at 833-34. This Court should uphold the circuit court's decision and decline to review the appropriation by

initiative challenge under Art. III, § 50 because it is simply not ripe.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Circuit Court of Cole County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed electronically pursuant to Rule 103 through Missouri Case Net, on September 7, 2016, and served to all counsel of record for Appellants and Respondents/Intervenors.

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and Western District Special Rule XLI, in that excluding the cover, certificates of service and compliance, signature blocks, table of contents, and table of authorities, the brief contains 8,005 words.

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