

SC100132

IN THE SUPREME COURT OF MISSOURI

ANNA FITZ-JAMES et al.,

Respondents,

vs.

ANDREW BAILEY, in his official capacity as Attorney General for the State of
Missouri,

Appellant.

**BRIEF OF *AMICUS CURIAE* THOMAS MORE SOCIETY ADDRESSING THE
FISCAL NOTE AND FISCAL NOTE SUMMARY STATEMENTS PROVIDED
BY THE AUDITOR FOR THE STATE OF MISSOURI**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. Stating that “[l]ocal government entities estimate” the cost of the initiative petitions to be “at least \$51,000” involved no “assessment,” or “estimation,” by the Auditor and is a false representation of the submissions to the Auditor. It therefore does not satisfy the Auditor’s duty to advise voters.	4
II. The Auditor wrongly disregarded or discredited significant, concrete, and even certain losses to Missouri that were raised by contributors of fiscal impact statements.	8
A. The Auditor should have warned Missourians that the initiative petitions imperil billions of dollars in federal Medicaid funding to Missouri.	8
B. The Auditor should have warned voters of the certain and significant financial losses to Missouri that will attend the destruction of large numbers of future Missouri citizens, workers, creators, taxpayers, and heads of families.	10
C. The Auditor should have warned voters of the certain and significant budgetary demands the initiative petitions would place on the Missouri Department of Health and Senior Services.	12
D. The Auditor should have warned voters of the certain and significant burdens the initiative petitions will place on the Missouri healthcare system.	13
CONCLUSION	14
CERTIFICATE OF COMPLIANCE	16
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Brown v. Carnahan</i> , 370 S.W.3d 637 (2012)	Passim
Statutes:	
116.175 RSMo.....	2, 3, 6, 7
Other Authorities:	
HB No. 126.....	9

INTEREST OF *AMICUS CURIAE*¹

Amicus Thomas More Society (TMS) is a national public interest law firm dedicated to restoring respect in the law for the right to life, freedom of speech and religious liberty. A 501(c)(3) nonprofit incorporated in Illinois with offices in Chicago, Illinois and Omaha, Nebraska, TMS pursues its purposes through civic education, litigation, and related activities. In this effort, TMS has represented many individuals and organizations in federal and state courts and filed numerous *amicus curiae* briefs with the aim of protecting the right to life and the rights of individuals and organizations to communicate their political and social views, as well as to faithfully practice their religion, as guaranteed by the Constitution.

SUMMARY OF ARGUMENT

Petitioner seeks to propose to Missouri voters 11 similar constitutional amendments. Each proposal would amend Missouri's constitution to make abortion and other wide-ranging, ill-defined "reproductive health care" widely available in Missouri and immunize all who provide such "care" or assist others in obtaining it. *See, e.g.*, Initiative Petition 2024-077. Each amendment would overturn current Missouri law that largely prohibits

¹ All parties have consented to the filing of this brief. The undersigned counsel represents that no party or party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparation or submission of this brief; and that no person other than the *amicus* and counsel identified herein contributed money that was intended to fund preparation or submission of this brief.

abortion and create a new, largely unregulated, abortion and “reproductive freedom” industry in Missouri.

The proposed amendments will allow the destruction of thousands of pre-born Missouri citizens a year, with profound consequences to Missourians that far eclipse financial concerns. As part of the initiative petition process, however, the State Auditor is legally tasked with the grim calculation of the financial costs to Missouri from this enormous human loss.

Specifically, Missouri statutes require the Missouri State Auditor to “assess” the fiscal impact of proposed legal measures, including initiative petitions. 116.175 RSMo. He does so by soliciting fiscal impact submissions from representative State and local entities and receiving fiscal impact submissions from the public, evaluating the reasonableness of the submissions, and then generating a “fiscal note summary” that “state[s] the measure’s estimated cost or savings, if any, to state or local governmental entities.” 116.175 RSMo. “The fiscal note summary . . . is intended to advise the voters about the potential cost or savings, if any, from the adoption of the initiative.” *Brown v. Carnahan*, 370 S.W.3d 637, 649-50 (2012).

The State Auditor has utterly failed to fulfill his legal obligations to “assess,” “estimate,” and “evaluate” with respect to the proposed initiative petitions. In assessing the information received from solicited sources, the Auditor abused the reasonable calculations he received from a single county and misrepresented them as applying to all local government entities throughout the State. He then disregarded credible submissions from

several sources identifying profound and certain costs to Missouri from making abortion and related “care” freely available.

As a result of these failures, the Auditor’s fiscal note summary is legally deficient and utterly inadequate to “advise the voters about the potential cost or savings” to Missouri’s governments. *Brown*, 370 S.W.3d at 649-50. Indeed, it actively misleads voters. As such, the fiscal note summary cannot form part of a valid legal process aimed at eliciting the will of Missouri voters.

ARGUMENT

For each initiative petition, Missouri law provides that “the auditor shall assess the fiscal impact of the proposed measure” and generate a “fiscal note and fiscal note summary” that “state the measure’s estimated cost or savings, if any, to state or local governmental entities.” 116.175 RSMo. The Missouri Supreme Court has elaborated that “[t]he fiscal note summary . . . is intended to advise the voters about the potential cost or savings, if any, from the adoption of the initiative.” *Brown v. Carnahan*, 370 S.W.3d 637, 649-50 (2012). In preparing a fiscal note summary that will advise voters, the Auditor is charged with evaluating the “reasonableness” of solicited and unsolicited fiscal impact submissions he receives, whether from state and local government entities or from proponents or opponents of the particular initiative. *Id.*

Missouri’s State Auditor failed to discharge his duties to “assess” the fiscal impact of the proposed initiative petitions, to “estimate” the cost or savings of the initiative petitions to state or local governmental entities, and to evaluate the reasonableness of the

fiscal impact submissions he received. As such, his fiscal note summary is legally deficient and inadequate to advise voters of the potential cost or savings to Missouri's state and local governments of these initiative petitions.

I. Stating that “[l]ocal government entities estimate” the cost of the initiative petitions to be “at least \$51,000” involved no “assessment,” or “estimation,” by the Auditor and is a false representation of the submissions to the Auditor. It therefore does not satisfy the Auditor’s duty to advise voters.

In order to generate a fiscal note and fiscal note summary, the auditor must evaluate the reasonableness of the fiscal impact submissions he receives. *See Brown*, 370 S.W.3d at 649. “The auditor’s determination of reasonableness is based on the auditor’s experience in state government and overall knowledge and understanding of business and economic issues.” *Id.*

The fiscal note summary for Initiative Petition 2024-077 states that “Local government entities estimate costs of at least \$51,000 annually in reduced tax revenues.” Missouri State Auditor’s Office, Fiscal Note Summary, Fiscal Note (24-077) at 39. This statement is false in a way that is both misleading to voters and obvious to and curable by the Auditor. Using this number as if it represents a possible total cost to local governments throughout the state represents an abdication of the Auditor’s responsibility to “assess the fiscal impact” of the initiative petitions and “state the[ir] estimated cost” to voters. It certainly does not reflect an assessment of the fiscal impact submissions to the Auditor that is based on “experience in state government and overall knowledge and understanding of business and economic issues.” *Brown*, 370 S.W.3d at 649. The Auditor has therefore

failed to discharge his duty to generate a fiscal note summary that will advise Missouri voters.

The Auditor's process, both in this case and as elaborated by the Missouri Supreme Court in *Brown v. Carnahan*, includes soliciting "fiscal impact submissions" from a representative selection of local government entities. *Brown*, 370 S.W.3d at 649; Fiscal Note (24-077) at 1 (listing entities from whom the State Auditor solicited input). "The auditor chooses local governmental entities based on geography, population, and form of government to ensure a good cross-section of local governments that might be affected by the proposal are represented." *Brown*, 370 S.W.3d at 649.

In this case, Greene County submitted a fiscal impact statement pursuant to the Auditor's request, in which it estimated that it would lose \$50,886.90 of tax revenue in the coming year if abortion were made freely available under the constitutional amendment proposed by Initiative Petition 2024-077. Greene County's submission laid out the calculation that yielded this estimate, which was based on DHSS statistics recording yearly "resident abortions" in Greene County, United States census population statistics for Greene County, and 2022 sales and property taxes received by Greene County. Fiscal Note (24-077) at 6-7. Greene County further pointed out that, since a loss of population would occur each year, the actual loss to the county could be "extrapolated to illustrate less tax collections and revenues over the years of potential working lifetimes." *Id.* at 6.

Apparently crediting Greene County's estimate as reasonable, the Auditor included its \$51,000 loss in the Fiscal Note Summary. Fiscal Note (24-077) at 39. However, the Auditor's summary states: "Local government entities estimate costs of at least \$51,000

annually in reduced tax revenues.” *Id.* While Greene County’s estimate was reasonable and based on valid data and legitimate forecasting, the Auditor’s statement that that \$51,000 was the estimate of “Local government entities” misuses Greene County’s data and misrepresents its significance, with the end result of misleading voters.

In short, either all counties in Missouri will lose tax revenues as a result of freely available abortions or none will. It is 100% certainly NOT true that ONLY Greene County will. Moreover, as Greene County itself pointed out to the Auditor, after it experiences a \$51,000 loss in the first year, its losses will be compounded each year by additional lost citizens. So, that figure is deficient even to represent losses to Greene County alone. Therefore, it is misleading to state that “Local government entities” estimate a total loss of \$51,000, as if \$51,000 could possibly represent the entire loss to all of Missouri’s local governments. In facilely relying on that number from one county and sticking an “at least” in front of it, the Auditor has completely abdicated his responsibility to “assess” and “estimate” the economic impact of the initiative petition on the state.

Presumably, the purpose of soliciting input from “a good cross-section of local governments that might be affected by the proposal,” *Brown*, 370 S.W.3d at 649, rather than ALL local governments, must be to allow the Auditor to perform some analysis that is more sophisticated than simply adding the total amount of estimated losses from those selected taxing authorities. Even if every one of a selection of representative authorities responded to the Auditor’s request for information, a sum total of those few impacts could not be justly included in a fiscal note summary that “state[s] the measure’s estimated cost or savings, if any, to state or local governmental entities.” 116.175 RSMo. The Auditor’s

“sample group” methodology therefore anticipates that the Auditor will use his “experience in state government and overall knowledge and understanding of business and economic issues,” *Brown*, 370 S.W.3d at 649, to extrapolate from the representative submissions to a figure that may actually represent the loss to local government entities throughout the state. This is necessary for the Auditor to use sample group numbers to form an “assessment” and “estimate” of the impact on the entire State, as required by Section 116.175.

In this case, an extrapolation from the data before the Auditor would have been simple, following Greene County’s pattern of using the freely available abortion, population, and taxation statistics for other local jurisdictions in Missouri and for the State. And, if the Auditor found Greene County’s submission sufficiently reasonable to be included in his fiscal note summary, there is no legitimate reason why he did not use that single county estimate to “assess” and “estimate” the costs to local governments throughout the whole state. Nor why he did not extrapolate compounding losses into the future, as Greene County explicitly suggested. Similar methodology could also have yielded an estimated loss of tax revenue to the State government.

Although the Auditor is not required by Missouri law to use a particular methodology to “assess” and “estimate” the cost or savings that will attend a certain proposition, he is obliged to do some assessment and estimation. At the very least, the Auditor’s responsibility to generate a fiscal note summary that can advise Missouri voters by “stat[ing] the measure’s estimated cost or savings, if any, to state or local governmental entities,” 116.175 RSMo., must include a positive duty not to mislead voters.

Characterizing Greene County’s estimate of its own loss in a single year as an “at least” estimate of the total future losses to “[l]ocal government entities” throughout the State is false in such a way that voters are certain to be misled.

II. The Auditor wrongly disregarded or discredited significant, concrete, and even certain losses to Missouri that were raised by contributors of fiscal impact statements.

The Auditor’s Fiscal Note Summary states that “[o]pponents estimate a potentially significant loss to state revenue.” Fiscal Note (24-077) at 39. This statement is inadequate to “advise the voters about the potential cost or savings, if any, from the adoption of the initiative.” *Brown v. Carnahan*, 370 S.W.3d 637, 649-50 (2012). In the statement “potentially significant loss to state revenue,” the Auditor glosses over enormous potential and certain costs to Missouri that were squarely raised in multiple, credible submissions to the Auditor and therefore should have been included in the Fiscal Note Summary.

A. The Auditor should have warned Missourians that the initiative petitions imperil billions of dollars in federal Medicaid funding to Missouri.

Most prominently, several submissions raised the threat the initiative petitions pose to receipt of federal Medicaid funds, which are budgeted at \$12.5 billion in 2024 alone. This threat is real and not speculative. As several fiscal impact submissions pointed out, the federal government has a recent history of withholding or threatening to withhold Medicaid funding where a state’s laws required medical care providers or employers to fund or participate in abortion. *See* Fiscal Note (24-077) at 10 (submission of Susan Klein, Executive Director of Missouri Right to Life); 15-16 (submission of Samuel Lee, Director of Campaign Life Missouri, citing instances in California and Vermont). The initiative

petitions' broad language permits interpretations that would require Missourians to provide and participate in abortions in ways that violate federal law.

The State Auditor's Office is not unfamiliar with the potential adverse funding consequences of state laws that conflict with federal standards. In a 2019 Fiscal Note Summary, former State Auditor Nicole Galloway concluded that a proposed Missouri statute threatened all of Missouri's Medicaid funding by *not funding enough abortions* to satisfy the Hyde Amendment.² Missouri State Auditor's Office, Fiscal Note Summary (20-R001), June 17, 2019 ("[F]ederal Medicaid revenues may decrease by an unknown amount, up to \$7.2 billion annually."). The General Assembly's Oversight Division and a submission by three members of the Fiscal Review Committee of the House of Representatives were preeminently concerned with the risk to Medicaid funding posed by that bill. Fiscal Note (20-R001).

The Former Auditor also based her conclusion on a submission from the City of St. Louis reporting a history of lost federal funding: "In the past, [St. Louis] has been penalized by federal agencies for maintaining state legislation that does not conform to minimum standards established by the federal government." Fiscal Note (20-R001) at 5. The City of

² The authors recognize that the Hyde Amendment is in fact concerned with limiting federal funding for abortion. Those opposing the 2019 bill that would limit abortions in Missouri, HB No. 126, nevertheless argued that Missouri would risk all of its then-\$7.2 billion of federal Medicaid funding if Missouri did not provide funding for the small subset of abortions that the Hyde Amendment "required." Fiscal Note (20-R001) at 8. That concern made it into the Auditor's fiscal note summary. Fiscal Note Summary, Fiscal Note (20-R001). Obviously, since the Hyde Amendment in fact prohibits funding for abortions, Missouri is at much greater risk of becoming discontinuous with federal law in the instant case, by making abortions and related "care" widely available with no regulations.

St. Louis found the prospect of lost Medicaid funding to be “calamitous”: “Medicaid funding continues to be the glue that holds together the foundational structure for access to care. The impact of losing Medicaid funding will be calamitous to the St. Louis region’s local public health system, and the lives of St. Louis residents and visitors.” *Id.* Another submission stated that the “complete loss of federal funds for the state Medicaid program” was the “largest possible impact on the Missouri economy” posed by that bill, and “[a]ny legitimate, responsible fiscal note must properly reflect the full cost of the legislation up to the amount possible under current state and federal laws.” Fiscal Note (20-R001) at 29.

Especially given the sensitivity to risk to Medicaid funding displayed by the Auditor’s Office in 2019, it is hard to understand the current Auditor’s failure to advise Missouri voters of the much greater risk to Medicaid funding posed by the present initiative petitions. As stated in multiple fiscal impact submissions, the risk to Missouri Medicaid funding of adopting a state abortion law that conflicts with federal law is substantial, and the amounts of funding in question are enormous and potentially crippling to Missouri’s healthcare system and economy. It was not consistent with his responsibility to advise Missouri voters for the Auditor to fail to inform them of this risk.

B. The Auditor should have warned voters of the certain and significant financial losses to Missouri that will attend the destruction of large numbers of future Missouri citizens, workers, creators, taxpayers, and heads of families.

Several fiscal impact submissions pointed the Auditor to the certain and significant losses to Missouri caused by the destruction of thousands of its future citizens each year. Samuel Lee of Campaign Life directed the Auditor to the June 15, 2022, report of the Joint

Economic Committee Republicans, “The Economic Cost of Abortion,” which estimates that the loss to an economy of losing a single future citizen to abortion is 425 times greater than the economic loss to a mother from having the child. JEC Republicans, “The Economic Cost of Abortion,” at 1. That study further points out that “abortion shrinks the labor force, stunts innovation, and limits economic growth. It also weakens the solvency of social insurance programs like Social Security and Medicare that rely on workers to support a growing elderly population.” *Id.*

Greene County’s submission directed the Auditor to a Pew Trusts Issue Brief on the grim effects of low fertility rates on state budgets. Fiscal Note (24-077) at 6-7 (referring the Auditor to Pew, “The Long-Term Decline in Fertility—and What It Means for State Budgets,” Dec. 5, 2022, available at <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/12/the-long-term-decline-in-fertility-and-what-it-means-for-state-budgets>). That report predicts significant, long-term adverse impacts on state revenue streams from loss of income, sales, and property taxes as well as federal funding, which is often granted on a population basis, as a result of historically low fertility rates. Reducing Missouri’s fertility even further through freely available abortion will compound all of these impacts.

Rachel U. Greszler of the Heritage Foundation offered a fiscal impact submission directly addressing the high projected costs to Missouri of population loss from abortion. Fiscal Note (24-077) at 35-38. She points to the same lost labor force contributions of aborted citizens that is noted by the JEC Republicans—*i.e.*, that the loss to the economy of destroying future citizens, workers, and taxpayers is much greater and longer in duration

than any positive impact on women's earnings as a result of abortion. She also points to the loss of tax revenue and the loss of contributors to pension and other post-employment benefits.

These future losses to Missouri from loss of population due to abortion are both absolutely certain (fewer citizens definitely means fewer future taxpayers and laborers) and potentially generational and infinite. The Auditor's responsibility to assess and estimate the costs to Missouri of the initiative petitions required, at a minimum, an acknowledgment of these certain future costs of making abortion freely available, which were raised by multiple submissions, as well as some representation of them in the Fiscal Note Summary.

C. The Auditor should have warned voters of the certain and significant budgetary demands the initiative petitions would place on the Missouri Department of Health and Senior Services.

As the submission of Samuel Lee of Campaign Life laid out, the Missouri code tasks the Missouri Department of Health and Senior Services with annual inspections and licensing of abortion facilities. Fiscal Note (24-077) at 17. Under the constitutional amendment proposed by the initiative petitions, every one of Missouri's 7,000 pharmacies would become a purveyor of chemical abortions and therefore subject to this licensing regime. Hundreds of new facilities for providing abortions and other reproductive procedures would also spring up in Missouri if it became an abortion and reproductive cure-all destination state, as contemplated by the proposed amendments.

The prospective costs to the Department of Health and Senior Services of providing tens of thousands of new inspections and licenses annually are a certain and substantial cost of the initiative petitions, and they were highlighted by fiscal impact submissions. The

Auditor's duty to "assess" and "estimate" the cost to voters of the initiative petitions extended to reporting these certain and estimable costs. The fact that DHSS did not itself predict these impacts did not discharge the Auditor's task of himself assessing and estimating the actual future costs to Missouri's departments, bringing to bear his "experience in state government and overall knowledge and understanding of business and economic issues." *Brown*, 370 S.W.3d at 649.

D. The Auditor should have warned voters of the certain and significant burdens the initiative petitions will place on the Missouri healthcare system.

Allowing for widely available abortions and other unspecified reproductive procedures, especially to be performed with impunity by non-professionals and unlicensed providers, on all patients regardless of age, health or condition, will without doubt generate a substantially increased need for health care in Missouri. To guarantee Missourians and others free access to abortions and undefined "reproductive freedom" in Missouri necessarily implies a guarantee to provide follow up health care for individuals (citizens and abortion visitors) who need support after surgical and chemical abortions, who suffer abortion-related complications and injuries, who need follow-up for complications or consequences of other "reproductive" procedures, and who need mental health support related to these traumatic procedures.

The increased burden on Missouri's health care system will therefore be profound. Samuel Lee of Campaign Life reported to the Auditor the high costs of emergency department care and admissions for post-abortive women and for pre-term infants born

after attempted abortions. Fiscal Note (24-077) at 16-17. Such cases will proliferate in a Missouri that makes abortion widely available, and taxpayers will bear the costs.

Simultaneously, as pointed out to the Auditor by Susan Klein of Missouri Right to Life, requiring state health care providers to participate in abortions and other reproductive procedures will cause an exodus from state medical institutions of those who cannot in conscience participate. Fiscal Note (24-077) at 11. This exodus will compound the strain generated by the increased demand for care following abortions and other broad-ranging reproductive procedures.

The Auditor's responsibility to assess and estimate the costs to Missouri of the proposed constitutional amendments included the responsibility to acknowledge and convey to voters the certain and significant burdens that freely available, unregulated abortions and other procedures will impose on Missouri's healthcare system.

CONCLUSION

In short, the State Auditor has failed to fulfill his legal obligation under Missouri law to "assess" the costs to Missouri of the constitutional amendment proposed by Initiative Petition 2024-077. He has failed to provide an "estimate" of those costs. He has ignored reasonable submissions from credible sources relying on data that has been credited by Auditors in the past. What costs he did report in the fiscal note summary, he misrepresented. As a result, the fiscal note summary for Initiative Petition 2024-077 utterly fails to "advise the voters about the potential cost or savings, if any, from the adoption of

the initiative.” *Brown v. Carnahan*, 370 S.W.3d 637, 649-50 (2012). It must be excluded from any legitimate legal process.

Respectfully submitted this 5th day of July, 2023.

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing Amicus Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains approximately 3,841 words as determined by Microsoft Word. The foregoing Brief also complies with Supreme Court Rule 55.03. The font is Times New Roman, 13-point type.

s/ Timothy Belz

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Amicus Brief was filed electronically and served by operation of the Court's electronic filing system this 5th day of July, 2023 on all registered parties.

s/ Timothy Belz