

Summary of SC92582, *Ralph Brown v. Missouri Secretary of State Robin Carnahan, Missouri State Auditor Thomas Schweich, and Missourians for Health and Education and Dudley McCarter, and Peggy Taylor*;
consolidated with SC92564, *Victor Allred v. Robin Carnahan, Thomas A. Schweich, and Missouri Jobs with Justice*;
consolidated with SC 92500, *Peggy Northcott, et al. v. Robin Carnahan, et al.*;
consolidated with SC92571, *Tiffany Francis, et al. v. Robin Carnahan, et al., Missourians for Responsible Lending, et al.*;
consolidated with SC92573, *John Prentzler v. Robin Carnahan, et al and Missourians for Responsible Lending, et al.*;
consolidated with SC92574, *Stephen J. Reuter v. Robin Carnahan, et al. and Missourians for Responsible Lending, et al.*
Appeals from the Cole County circuit court, Judges Jon E. Beetem and Daniel R. Green
Argued and submitted June 25, 2012; opinion issued July 31, 2012

Attorneys: In all six cases: Carnahan was represented by Deputy Solicitor Jeremiah J. Morgan and Patricia J. Churchill of the attorney general's office in Jefferson City, (573) 751-3321; and Schweich was represented by General Counsel Ronald R. Holliger of the attorney general's office in Jefferson City, (573) 751-3321, and Darrell L. Moore and Whitney S. Miller of the auditor's office in Jefferson City, (573) 751-5032.

In SC92500, *Northcott*; SC92571, *Francis*; SC92573, *Prentzler*; and SC92574, *Reuter*: Shull and Stockman were represented by John E. Campbell of The Simon Law Firm in St. Louis, (314) 241-2029, Dale K. Irwin of Slough Connealy Irwin & Madden LLC in Kansas City, (816) 531-2224, and Vanessa Carroll of the Southern Poverty Law Center in Jackson, Miss., (601) 948-8882; and Bryan and Missourians for Responsible Lending were represented by Heidi Doerhoff Vollet, Dale C. Doerhoff and William E. Peterson of Cook, Vetter, Doerhoff & Landwehr PC in Jefferson City, (573) 635-7977.

In SC92500, *Northcott*; SC92574, *Reuter*; and SC92583, *Brown*: Northcott, Reuter and Brown were represented by Charles W. Hatfield and Khristine A. Heisinger of Stinson Morrison Hecker LLP in Jefferson City, (573) 636-6263.

In SC92571, *Francis*: Francis and Hoover were represented by Marc H. Ellinger and Stephanie S. Bell of Blitz, Bardgett & Deutsch LC in Jefferson City, (573) 634-2500.

In SC92564, *Allred*, and SC92573, *Prentzler*: Allred and Prentzler were represented by Edward D. Greim, Todd P. Graves and Clayton J. Callen of Graves Bartle Marcus & Garrett LLC in Kansas City, (816) 256-4144.

In SC92564, *Allred*: Missouri Jobs with Justice was represented by Christopher N. Grant and Loretta K. Haggard of Schuchat Cook & Werner in St. Louis, (314) 621-2626.

In SC92583, *Brown*: Missourians for Health and Education, McCarter and Taylor were represented by Lowell D. Pearson and R. Ryan Harding of Husch Blackwell LLP in Jefferson City, (573) 635-0118.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: Several individuals and organizations challenge the constitutional validity of section 116.175, RSMo, authorizing the state auditor to prepare fiscal notes and fiscal note summaries of ballot initiatives. They also challenge the fairness and sufficiency of the secretary of state's summary statements and the auditor's fiscal notes and fiscal note summaries written for three initiative petitions proposed for the November 2012 ballot. In a per curiam decision that cannot be attributed to any particular judge and that is joined by six judges, the Supreme Court of Missouri holds that section 116.175 is constitutional and that the secretary of state's summary statements and the auditor's fiscal notes and fiscal note summaries are fair and sufficient. There is no bar to including the summary statements, fiscal notes and fiscal note summaries on the ballot.

Judge Zel M. Fischer concurs in the result and wrote a concurring opinion, noting he agrees the initiatives should be placed on the ballot. The secretary of state's summary and the auditor's fiscal note and fiscal note summaries are fair and sufficient as defined by prior case decisions. He would find that section 116.175, authorizing the auditor to write fiscal note summaries, however, is an unconstitutional expansion of the auditor's duties. His opinion is based on the plain language of article IV, section 13 of the Missouri Constitution and the historical context in which it was adopted. As such, he would not include these fiscal note summaries in the official ballot titles but would allow the initiatives to be placed on the ballot without the fiscal note summaries.

Facts: This opinion consolidates six cases involving challenges to three initiative petitions proposed for the November 2012 ballot. *Brown* regards a tobacco tax initiative, *Allred* regards a minimum wage initiative, and *Northcott, Francis, Prentzler* and *Reuter* regard a payday loan initiative. The tobacco tax initiative proposes additional taxes on certain tobacco products to fund a health and education trust fund to educate about prevention and quitting tobacco use. The minimum wage initiative would increase the state's minimum to \$8.25 per hour, tipped employees would get 60 percent of the minimum wage and if the federal minimum wage is increased above state minimum wage, the federal rate would apply. The payday loan initiative would limit the annual percentage rate for payday, title, installment, other high cost consumer credit and small loans to 36 percent per year. Before an initiative appears on the ballot, the secretary of state is to examine it and prepare a concise summary of the proposal. The secretary then sends the initiative to the state auditor who reviews it and prepares a fiscal note and fiscal note summary. The attorney general reviews the summary statement, fiscal note and fiscal note summary. If they are approved, the secretary of state includes them in her certification of the official ballot title.

Brown sought a declaratory judgment that section 116.175 is unconstitutional because it provides the auditor greater authority than that authorized by article IV, section 13 of the Missouri Constitution. The trial court found that the auditor's duty to prepare fiscal notes was consistent with his constitutional authority. It determined the auditor is the proper elected official to advise the public of the initiative's expected fiscal impact, the initiative directly will impact state

revenue and the initiative's fund disbursement directives are related to the auditor's duties of supervising the receipt and expenditure of public funds. Brown also challenged the fairness and sufficiency of the secretary of state's summary statement and the auditor's fiscal note and fiscal note summary. The trial court denied the sufficiency and fairness claims.

Allred alleged section 116.175 provided the auditor greater authority than that authorized by the Missouri Constitution. The trial court found section 116.175 did violate the Missouri Constitution because it expanded the auditor's authority beyond that provided by the constitution. The court determined that estimating the fiscal impact of the initiative was not related to the auditor's duties to supervise and audit the receipt and expenditure of public funds. Accordingly it vacated the fiscal note and fiscal note summary. Allred also alleged the secretary of state's summary statement and auditor's fiscal note and fiscal note summary are insufficient, misleading, biased and unfair. The trial court found the summary statement, fiscal note and fiscal note summary were fair and sufficient.

Northcott, Francis, Prentzler and Reuter alleged section 116.175 was unconstitutional because the auditor did not have the authority to carry out the fiscal note duties. The trial court declined to declare section 116.175 unconstitutional in all cases. Northcott and Francis also alleged the secretary of state's summary statement is unfair and insufficient for failure to list the specific interest rate requested by the minimum wage initiative. The trial court found the summary statement was not specific enough and should have stated that the interest rate would be 36 percent. Northcott, Francis, Prentzler and Reuter also allege the secretary of state's summary statement and auditor's fiscal note and fiscal note summary are insufficient and unfair. The trial court found the summary statement; fiscal note and fiscal note summary were unfair, insufficient and likely would deceive petition signers and voters.

These appeals and cross-appeals follow.

SC92582, *Brown*: AFFIRMED.

SC92654, *Allred*: AFFIRMED IN PART AND REVERSED IN PART.

**SC92500, *Northcott*; SC92571, *Francis*; SC92573, *Prentzler*; and SC92574, *Reuter*:
AFFIRMED IN PART AND REVERSED IN PART.**

Court en banc holds: (1) Section 116.175, authorizing the auditor to prepare the fiscal note and fiscal note summary as part of an investigation relating to the supervision of the receipt and expenditure of public funds, is constitutional and does not delegate duties impermissibly to the auditor beyond those authorized by the constitution. This Court's primary duty is to determine whether the constitutional requirements and limits of power relating to the procedure and form of initiative petitions have been regarded. Section 116.175 sets forth the procedure for the auditor to prepare the fiscal notes and fiscal note summaries for petition sample sheets (including initiative petitions), joint resolutions or bills. Preparing fiscal notes is an "investigation" as defined in the auditor's duties authorized by article IV, section 13. Further, section 116.170.2 expressly grants the auditor the authority to conduct investigations as required by law. No other official has the express power to draft a fiscal note or fiscal note summary. The auditor is not seeking to expand his power, but is expressing a power he expressly possesses. In preparing the fiscal note and fiscal note summary, the auditor performs an official inquiry. The auditor compiles information

from the submissions of various government agencies and individuals, which falls under the plain meaning of “investigate” and “investigation.” There is no qualitative difference between investigating and assessing the fiscal impact of a proposed measure. Further, the auditor’s investigation for the preparation of the fiscal note and fiscal note summary is related to the receipt and expenditure of public funds. The extent and intensity of an investigation and fiscal note is a question of statutory compliance but is irrelevant to whether the statute delegated authority to the auditor. It is not the auditor’s role to choose a winner among the opposing viewpoints through independent research, double-checking and adopting one view over another in the fiscal note. Section 116.175 is constitutional and does not extend the auditor’s duties beyond those authorized by the Missouri constitution.

(2) The summary statements, fiscal notes and fiscal note summaries for each of the three initiative petitions comply with section 116.190.3, RSMo, which requires summary statements, fiscal notes and fiscal note summaries to be sufficient and fair. “Insufficient” means “inadequate,” especially lacking adequate power, capacity or incompetence. “Unfair” means marked by injustice, partiality or deception. The summary statement must be adequate and state the consequences of the initiative without bias, prejudice, deception or favoritism. The fiscal note and fiscal note summary must be adequate and without bias, prejudice or favoritism.

(a) As to the tobacco tax initiative, the trial court correctly rejected Brown’s arguments challenging the sufficiency and fairness of the summary statement. Given the 100- word limit for the summary statement, the degree of specificity Brown requests is not required. The test, rather, is whether the language fairly and impartially summarizes the purposes of the initiative and the summary statement complied with this requirement. Additionally, the trial court correctly found that the fiscal note summary language at issue reflected a fiscal impact assessment of the proposed measure and is in line with the auditor’s duties. Further, Brown’s argument that the trial court was limited by a prior decision (*res judicata*, or the law of the case) fails. The claim Brown ultimately raised was not a *res judicata* claim but an offensive collateral estoppel claim (collateral estoppel prevents relitigation of an issue). To invoke offensive collateral estoppel, which is disfavored, the plaintiff must plead the claim in the petition in a timely manner. Brown did not raise *res judicata*, collateral estoppel or any other issue preclusion in any of his pleadings, motion for judgment on the pleadings or the hearing prior to the ruling. His claim was raised untimely.

(b) As to the minimum wage initiative, the trial court correctly found the summary statement to be fair and sufficient. The mere fact that a proposal references a current law in the constitution does not make it automatically unfair or prejudicial. Allred fails to persuade this Court that the trial court erred. Given the 100-word limit for the summary statement, the degree of specificity Allred requests is not required. The test, rather, is whether the language used was fair and impartial, and this Court finds it is. Further, the trial court correctly found the fiscal note and fiscal note summary for the minimum wage initiative to be fair and sufficient. The fiscal note summary meets its purpose of informing the public about the proposed initiative’s potential fiscal consequences without using language likely to cause bias, prejudice, deception or favoritism for or against the proposal.

(c) As to the payday loan initiative, the trial court erred in finding that the summary statement was unfair and insufficient. The summary statement was fair and sufficient as written and was accurate to the purpose of the initiative. The summary statement language was fair and impartial and was not written in a way that would mislead voters; the trial court erred in rejecting it. Further, the trial court erred in rejecting the auditor's fiscal note and fiscal note summary for the payday loan initiative. The fiscal note and fiscal note summary complied with the auditor's obligations to create a fair and sufficient summary and to inform the public of the fiscal consequences of the proposed measure without bias, prejudice, deception or favoritism. Nothing required the auditor to look beyond the information provided in assessing the fiscal impact on the so-called section 510 lenders. Given the 100-word limit for the fiscal note summary, certain specific financial impact details are excluded that might improve the summary but are not required for it to be sufficient and fair.

(3) The trial court correctly found that Francis' claims were not ripe. Any opinion by this Court as to this matter would not have precedential value. Rule 84.16(b).

(4) The claims of the intervenors are moot because they already have received their desired relief of supporting the ballot initiative.

Concurring opinion by Judge Fischer: The author would allow the initiatives to be placed on the ballot, although he would not include the fiscal note summaries in the official ballot titles. The secretary of state's summary and the auditor's fiscal note and fiscal note summaries are fair and sufficient as defined by prior case decisions. Article IV, section 13 of the Missouri Constitution provides that no duty should be imposed on the auditor that is not related to the supervising and auditing of the receipt and expenditure of public funds. This Court held in *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392, 395 (Mo. banc 1996), that the legislature had no power to adopt a statute increasing the duties of a committee to prepare fiscal notes and fiscal note summaries for initiatives because the statute increased the duties beyond those expressly authorized by the Missouri Constitution. The author would apply the same analysis to the auditor and would hold that the legislature has no power to enact a statute increasing the auditor's duties beyond those authorized in the Missouri Constitution. His interpretation of the auditor's constitutional authority is based on the plain language of article IV, section 13 and the historical context in which it was adopted. In his view, the preparation of a fiscal note summary is not related to the supervision of the receipt and expenditure of public funds. Further, nothing in the constitutional provisions providing for initiative measures require a fiscal note or the inclusion of a fiscal note summary to be on the ballot.