IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

Hannah Sue Kelly, Kathleen Anne Forck, and Mary Elizabeth Anne Coleman, Petitioners, v. Scott Fitzpatrick, Missouri State Auditor, in his official capacity, and John R. Ashcroft, Missouri Secretary of State, in his official capacity Respondents.	)))))))))))))))))))	Case No. 23AC-CC04802

JUDGMENT

FACTS

On August 7, 2023, Petitioners Hannah Kelly, Kathleen Forck, and Mary Elizabeth Coleman ("Petitioners") filed a petition under Section 116.190, RSMo, arguing the fiscal note summaries for initiative petitions numbered 2024-077 to 2024-087 were insufficient and unfair and requested the Court to certify Petitioners' proposed fiscal note summary language for inclusion on the official ballot titles, to be used in lieu of the Auditor's. The Auditor asserts the fiscal note summaries for the eleven initiative petitions are fair and sufficient, the alternative language

proposed by the Petitioners is false and misleading, the Petition must be denied and that his Fiscal Note Summaries should be certified for the ballots.

On September 11, 2023, the matter was called for argument. Petitioners appeared through their attorneys, Timothy Belz and Mary Catherine Hodes. Respondent Secretary of State John Ashcroft appeared through his attorney, Jason Lewis. Respondent State Auditor Scott Fitzpatrick appeared through his attorneys, LeslieAnn Korte and Robert Tillman. Intervenor Dr. Anna Fitz-James appeared through her attorneys Anthony Rothert and Tori Schafer. The parties announced ready and argument was heard.

The matter was submitted on stipulated facts. After hearing arguments from the Petitioners, Respondents, and Intervenor, the court took the matter under advisement. The matter is now fully submitted and ready for the court's review. After consideration of the evidence, the arguments of counsel, and the authorities cited to the Court, the Court enters its findings.

DISCUSSION

"The party challenging the official ballot title has the burden of showing why the fiscal note or fiscal note summary is insufficient or unfair." *Sinquefield v. Jones*, 435 S.W.3d 674, 677 (Mo. App. 2014); *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573, 582 (Mo. App. 2010) (challengers bear the burden of demonstrating the Auditor's fiscal note and fiscal note summary are insufficient or

unfair) (citing *Cures Without Cloning v. Pund,* 259 S.W.3d 76, 81 (Mo. App. 2008)); *Cole v. Carnahan*, 272 S.W.3d 392, 394 (Mo. App. 2008).

I. State governmental entities estimate no costs or savings, but unknown impact.

Petitioners argue the first sentence of the fiscal note summaries are problematic because multiple fiscal submissions stated a substantial risk to the state's federal Medicaid funding if voters approved a state abortion law that conflicted with federal law, and those reported costs are not reflected in the costs relevant to state governmental entities. The Auditor analyzed federal Medicaid funding requirements, state and federal laws pertaining to government funding of abortion, the provisions of the proposed initiatives, and other relevant law, and concluded the proposed initiatives do not threaten the state's federal Medicaid funding.

The Auditor's determination that the provisions of the eleven petitions would not jeopardize the state's federal Medicaid funding was supported by DSS indicating through its fiscal submission that it does not anticipate a fiscal impact as a result of the provisions. MO HealthNet, as the entity charged with managing the state's Medicaid Program, is a de facto expert regarding the state's federal Medicaid funding with intimate knowledge of federal Medicaid law. When presented with the opportunity to weigh in on the fiscal impact of the eleven initiatives through its parent department DSS, MO HealthNet, possessing the aforementioned expertise and knowledge, determined they would have no impact. They then reinforced this

determination after consideration of the Attorney General's concerns. If MO HealthNet and DSS believed the state's federal Medicaid funding was in jeopardy, they had at least two opportunities to say so.

Petitioners' argument that a four year old fiscal note summary for referendum petition 2020-R001 is controlling precedent for the fiscal note summaries for these eleven initiatives is not persuasive. 2020-R001 was a referendum petition that asked voters to accept or reject HB 126, a bill that created an abortion ban, while the eleven initiatives at issue in this case seek to overturn that ban via an amendment to the state's constitution.

Petitioners' argument is interesting, because in essence they are saying the fiscal note summary for 2020-R001 correctly advised voters that *banning* abortion places federal Medicaid dollars at risk. Petitioners simultaneously argue the provisions of the eleven initiatives, which seek to *legalize* abortion, places federal Medicaid dollars at risk. Petitioners have thus argued that both banning *and* legalizing abortion would each result in a 100% disallowance of the state's federal Medicaid funding. That argument is untenable, and the record tends to show neither scenario has resulted in a disallowance of federal Medicaid funding, in any amount. Prior to HB 126 becoming law (when abortion was legal in Missouri) the state was not being penalized by HHS, nor has it been penalized after 2022 when HB 126 became effective (and now abortion is only legal in a medical emergency).

"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." *Brown v. Carnahan*, 370 S.W.3d 637, 649 (Mo. banc. 2012). If the Auditor finds a suggested fiscal impact unreasonable, he gives it less weight in preparing the fiscal note summary and may exclude it. *Id.* at 685; *Missouri Municipal League v. Carnahan*, 364 S.W.3d 548, 554, 557 (Mo. App. 2011); *Mo. Mun. League I,* 303 S.W.3d at 582. The Auditor did not find claims that federal Medicaid dollars, in an amount up to the entire amount received from the federal government for the program each year, would be at risk to be reasonable and therefore excluded that fiscal impact from the fiscal note summaries.

"The fiscal note summary is required to be sufficient and fair pursuant to section 116.190.3. Insufficient in this context means inadequate; especially lacking adequate power, capacity, or competence[,] and unfair means marked by injustice, partiality, or deception." *Sinquefield*, 435 S.W.3d at 683 (quoting *Brown*, 370 S.W.3d at 653) (internal quotations omitted). It is fair and sufficient for the Auditor to have relied on the submissions from state agencies and his own expertise in summarizing the fiscal impact to state governmental entities by stating state governmental entities estimated no costs or savings, and to have excluded from the summary what the Auditor concluded were erroneous references to potential losses

of Medicaid funding from third parties. Petitioners have failed to set forth any facts or credible legal assessment to establish otherwise.

Petitioners next argue DHSS submitted a potential fiscal impact to the Auditor that the Auditor then failed to include in the fiscal note summaries. The submissions received from DHSS discussed the various components of the initiatives and the potential the provisions could void all or most of the current statues outlined in Chapter 188, RSMo (pertaining to the regulation of abortion), remove DHSS's authority to license or regulate abortion facilities, negate promulgated rules, and expand the practice of abortion and the number of abortion facilities in the state. Based on all of these factors, DHSS then reported the following fiscal impact: "Due to the various factors stated above, the proposed constitutional amendment has an unknown impact on the Department." The fiscal note summaries specify that state governmental entities estimate an unknown impact. DHSS (a state entity) reported an "unknown impact", and the fiscal note summary for each initiative uses the phrase "unknown impact" when describing the potential impact to state entities. The word "unknown" as used to inform the public of an initiative's potential fiscal consequences is not language that is likely to cause bias, prejudice, deception, or favoritism for or against a proposal. *See Brown*, 370 S.W.3d at 662. "Use of the word 'unknown' in the fiscal note summary to characterize potential impact to revenues for state and local governments is sufficient and fair." *Sinquefield*, 435 S.W.3d at

685; *see also Boeving v. Kander*, 493 S.W.3d 865, 887 (Mo. App. 2016). The fiscal note summary for each initiative includes all of the fiscal impact reported by DHSS, and fairly and sufficiently characterizes the potential costs or savings of the measures as reported by state governmental entities.

Petitioners also argue the fiscal note summaries do not include long-term adverse impact on state revenue streams. DOR is the central collection agency for taxes and fees payable to the state. Mo. Const. Art. IV, Section 22. As such it is reasonable to conclude DOR is the best source for information regarding the state's tax laws and state revenue streams. And much like DSS and MO HealthNet, when presented with the opportunity to weigh in on the fiscal impact of the eleven initiatives not once, but twice, DOR reported no fiscal impact.

To conclude that the Auditor "should have second-guessed, and rejected, the Department of Revenue's revenue estimate impose[s] on the Auditor a duty it does not have." *Boeving*, 493 S.W.3d at 885 (quoting *Brown*, at 674) (internal quotations omitted). The Auditor has no obligation to develop an independent estimate of the impacts of an initiative on state tax revenues. *Id.* "Nothing in the record indicates that the submission of the Department of Revenue diverged from or did not address the particular issue of the Initiative. Because the Department's submission addressed and did not diverge from the particular issue of the Initiative, it was reasonable." *Sinquefield*, 435 S.W.3d at 681–82.

The fiscal note summaries for the eleven initiative petitions included all fiscal impacts reported by state governmental entities, excluded information the Auditor concluded was unreasonable, and expressed the potential impact to state governmental entities in language that was adequate and without bias, prejudice, or favoritism.

II. Local governmental entities estimate costs of at least $51,000 annually in reduced tax revenues.

Petitioners argue the second sentence of each fiscal note summary is flawed because the Auditor didn't both ignore the fiscal impact submissions of all other local governments and apply the methodology of Greene County to the entire population of every county in the state. The Auditor included the assessment of Greene County based on that county's estimation that it would immediately suffer a $51,000 fiscal loss due to the anticipated abortion of approximately 135 future citizens. The Auditor was provided with conflicting submissions from all other counties and local governmental entities that responded, each of which reported no fiscal impact.

The statutory timeline for the Auditor to review submissions and draft fiscal notes and fiscal note summaries is not sufficient to independently analyze every economic theory contained in submissions received, much less extrapolate the assumptions of a single entity across the thousands of different political subdivisions in the state, all of which have different levels of taxation, fertility rates, and numbers of citizens who might seek an abortion. It was reasonable for the Auditor to not apply

Greene County's economic theory to other governmental entities, given that no other governmental entity supplied a similar analysis. *Brown*, 370 S.W.3d at 650 ("It is not the auditor's role to choose a winner among these opposing viewpoints by independently researching the issue himself, double-checking economic theories and assumptions, and adopting one side's view over another's in the resulting fiscal note."). Furthermore, the Court finds this entire future citizen analysis to embody so many assumptions as to damage its credibility.

Petitioners' argument that the Auditor should have either applied Greene County's fiscal assessment to the entire state, or excluded it entirely, is another misunderstanding of how the Auditor examines fiscal impact submissions. "The role of the Auditor is not to judge the merits of a fiscal impact submission, but only to examine to determine whether the submission is complete, is relevant, has an identifiable source, and is reasonable." *Protect Consumers' Access To Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665, 674 (Mo. App. 2015). "The auditor is not required to compel and second-guess reasonable submissions from entities but is able to rely on the responses submitted." *Brown,* 370 S.W.3d at 650. For completeness, the Auditor included the fiscal impact reported by Greene County, and indicated the amount of their response was the lowest indicated cost to local governments. Specifically, the fiscal note summary says: "Local governmental entities estimate costs of *at least* $51,000 annually in reduced tax revenues."

Petitioners claim it is misleading to say "local governmental entities" estimate a total loss of $51,000, as if $51,000 represents the entire loss to all of Missouri's local governments. The use of a collective term such as "local governmental entities" to describe all responsive information received by the Auditor from such entities is not considered unfair or insufficient, even where only one entity responded, which is not the case here. *Protect Consumers' Access To Quality Home*, 488 S.W.3d at 674 ("We agree with the Auditor that the use of the collective term "state universities and governmental entities" is not unfair or insufficient, even if only one entity did in fact respond.").

> It would be unnecessarily cumbersome to require the Auditor's office to more specifically categorize each response received in a summary. The Auditor is tasked with soliciting information from state and local governmental entities to determine what probable affect the initiative would have on state and local finances. Framing the response as one collectively from the . . . governmental entities as a whole is not misleading or unfair.

Id. There is no authority to conclude the Auditor should simply ignore all other fiscal submissions from local governments in favor of an outlier.

Petitioners argue the Auditor misrepresented the financial significance of the impact reported by Greene County. The "$51,000" estimate included in each fiscal note summary is modified by the phrase "at least", which in conventional grammar means "minimum." The fiscal note summaries use language that conveys $51,000 is

the floor of the potential impact reported by local government entities, not the ceiling. The fiscal note summary for each initiative petition fairly and sufficiently characterizes the potential costs of the measures as reported by local governmental entities, and Petitioners have failed to demonstrate otherwise.

III. Opponents estimate a potentially significant loss to state revenue.

Finally, Petitioners argue the third sentence of the fiscal note summaries is flawed because they claim it does not account for all of the potential losses reported by opponents of the measures. To be sure, the third sentence of the fiscal note summaries state: "Opponents estimate a potentially significant loss to state revenues." While the Auditor concluded there was a lack of evidence the state would lose federal Medicaid funding, opponents cited a multitude of other consequences of the initiatives that could result in potential significant losses in revenue, which is acknowledged in the language of the fiscal note summaries.

Opponents provided fiscal impact submissions that estimated the initiative petitions would pose a potentially significant loss to state revenues. It is accurate for the fiscal note summaries to label these individuals as "opponents" of the measure, due to their public opposition to the initiatives and the content of their submissions. Petitioners cannot credibly argue the fiscal note summaries do not include this potential impact when they very clearly *specifically* address it. Instead, Petitioners are unsatisfied with how this impact is described because it does not set forth a

specific dollar figure. But the law on this is well settled. The Auditor's fiscal note summaries do not have to express an exact dollar figure, especially when one cannot be calculated with any degree of certainty. "The fiscal note is required to be sufficient and fair, and it can be considered meaningful, sufficient, and fair even if it does not . . . *inform voters of an express amount* of potential costs of the initiative." *Brown,* 370 S.W.3d at 662 (emphasis added); *see also Sinquefield*, 435 S.W.3d at 683.

Reasonable individuals would agree that potential losses of up to $12.5 billion dollars or $6.9 trillion dollars (the various dollar amounts of potential losses submitted by some opponents), or even infinity (as proposed by Petitioners), are all "potentially significant losses," and it is difficult to understand why Petitioners would think otherwise. As previously noted, the Auditor is not required to express an exact dollar amount, only to fairly and sufficiently summarize the fiscal impact of the measures, which he has done. Petitioners have failed to cite to any authority that says in order to be meaningful, a fiscal note summary must include amounts of estimated costs.

Describing estimated costs as "significant" in a fiscal note summary is a fair and "accurate statement that is unlikely to cause bias, prejudice, deception and/or favoritism for or against the proposal." *Mo. Mun. League II*, 364 S.W.3d at 557 (citing *Hancock v. Secretary of State,* 885 S.W.2d 42, 49 (Mo. App. 1994)).

> The purpose of the fiscal note is to inform the public of the fiscal consequences of the proposed measure. If the note conveys the fiscal consequences to the public adequately in "language neither argumentative nor likely to create prejudice either for or against the proposed measure," then the Auditor has met [his] burden under the statute.

Mo. Mun. League I, 303 S.W.3d at 582. The fiscal note summary for each initiative fairly and sufficiently characterizes the potential costs of the measures as reported by opponents.

CONCLUSIONS OF LAW

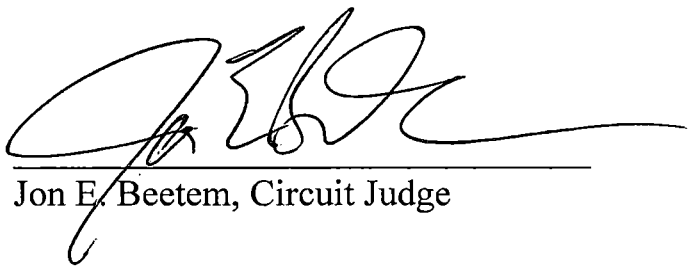
The Auditor's fiscal note summary for each of the eleven initiatives is fair and sufficient and accurately represents the potential costs of each measure. The Auditor has a solemn duty to provide voters with unbiased fiscal note summaries that are as accurate as possible, and when those fiscal note summaries are fair and sufficient, his methodology for creating those summaries will not be disturbed.

ORDER AND JUDGMENT

WHEREFORE, based on the foregoing, the Petition is denied and the Auditor's Fiscal Notes and Summaries are hereby certified for inclusion with each respective official ballot title.

IT IS SO ORDERED.

9/25/24
Date



Jon E. Beetem, Circuit Judge