IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

State of Missouri, ex rel., Dr. Anna Fitz-James,	)	
	)	
Relator/Petitioner,	)	
	)	
v.	)	CaseNo. 23AC-CC02800
	)	
Andrew Bailey, in his official capacity, et al.,	)	
	)	
Respondents.	)	

JUDGMENT

FACTS

On March 8, 2023, Relator Dr. Anna Fitz-James ("Relator")[1] submitted to Secretary of State John Ashcroft ("Secretary of State") eleven initiative petitions, each of which, if approved by the voters, would amend the Missouri Constitution to confer a constitutional right to have an abortion. Each of the eleven petitions contain clauses that specified that either no government funding was required[2], no government funding was required other than as required by federal law[3], or remained silent as to government funding altogether[4].

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[1] Dr. Fitz-James seeks a writ of mandamus or, in the alternative, declaratory judgment. Because this Court concludes that this case lies in mandamus, she will be referred to as Relator.

[2] Initiatives 2024-079, 2024-081, 2024-084, 2024-085, 2024-087 specified that no government funding was required.

[3] Initiative 2024-077 specified no government funding was required, other than as required by federal law.

[4] Initiatives 2024-078, 2024-080, 2024-082, 2042-083, and 2024-086 contained no provisions pertaining to government funding.

The Secretary of State assigned these eleven initiatives numbers 2024-077, 2024-078, 2024-079, 2024-080, 2024-081, 2024-082, 2024-083, 2024-084, 2024-085, 2024-086, and 2024-087. On March 9, 2023, the Secretary of State sent a copy of each initiative's sample sheet to Attorney General Andrew Bailey ("Attorney General") and State Auditor Scott Fitzpatrick ("Auditor") and posted the text of each initiative conspicuously on his website. On March 20, 2023, the Attorney General approved each initiative as to form, and the Secretary of State thereafter approved each initiative as to form.

In preparing the fiscal note and fiscal note summary, the Auditor followed the procedure which has remained substantially the same and has been used in drafting all fiscal notes and fiscal note summaries for at least the last decade. The Auditor availed himself of the option set forth in Section 116.175.1, RSMo, to consult with state and local government entities that might be affected by the proposal, in addition to accepting submissions from any proponent or opponent of the proposed measure who wished to provide one, to determine the estimated costs or savings, if any, created by the initiatives. The Auditor sent copies of the proposed ballot initiative to sixty state and local governmental entities, requesting the entities review the same and provide information regarding the estimated costs or savings, if any, of the proposed initiative.

The Auditor requested submissions from the Attorney General's Office[5], the Department of Agriculture, the Department of Economic Development, the Department of Elementary and Secondary Education, the Department of Higher Education and Workforce Development, the Department of Health and Senior Services, the Department of Commerce and Insurance, the Department of Mental Health, the Department of Natural Resources, the Department of Corrections, the Department of Labor and Industrial Relations, the Department of Revenue, the Department of Public Safety, the Missouri Department of the National Guard, the Department of Social Services, the Governor's Office, the Missouri House of Representatives, the Department of Conservation, the Department of Transportation, the Office of Administration, the Office of State Courts Administrator, the Missouri Senate, the Secretary of State's Office, the Office of the State Public Defender, the State Treasurer's Office, Adair County, Boone County, Callaway County, Cass County, Clay County, Cole County, Greene County, Jackson County, Jasper County, St. Charles County, St. Louis County, Taney County, the City of Cape Girardeau, the City of Columbia, the City of Jefferson, the City of Joplin, the City of Kansas City, the City of Kirksville, the City of Mexico, the City of Raymore, the City of St.

[5] On March 16, 2023, officials from the Attorney General's Office provided a separate fiscal response for each of the eleven initiatives that indicated they expect to the extent the enactment of the proposed measures would result in increased litigation, their office could absorb the costs associated with that increased litigation using existing resources, however, if the enactment were to result in substantial additional litigation, they may be required to request additional appropriations.

Joseph, the City of St. Louis, the City of Springfield, the City of Union, the City of Wentzville, the City of West Plains, Cape Girardeau 63 School District, Hannibal 60 School District, Malta Bend R-V School District, Mehlville School District, Wellsville-Middletown R-1 School District, State Technical College of Missouri, Metropolitan Community College, University of Missouri, and St. Louis Community College. In addition to the solicited submissions, the Auditor also accepts any and all submissions provided by any other governmental entity, proponents, opponents, and members of the public. The Auditor then recorded the responses received in the fiscal note and determined from these responses the estimated costs or savings, if any, of the proposed ballot measures.

The entity tasked with managing the state's Medicaid program, the Department of Social Services ("DSS"), as well as the Department of Mental Health ("DMH"), and the Department of Health and Senior Services ("DHSS"), the two other state agencies with exposure to the Medicaid program, indicated they did not anticipate a fiscal impact, other than an unknown impact related to regulating abortion facilities submitted by DHSS. No other state department, nor the Attorney General, provided a response that indicated any of the initiatives would jeopardize the state's federal Medicaid funding.

One local government, Greene County, submitted a potential impact of $51,000, 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. All other responsive counties reported they anticipated no fiscal impact, a response that conflicted with the assessment of Greene County. The State Auditor's Office included the fiscal impact reported by Greene County and indicated the amount of their response was the lowest expected cost to local governments.

Opponents of the initiative provided submissions indicating they believed some or all of the state's Medicaid funding could be withheld by the federal government if the initiatives became law. Opponents also argued the initiatives could result in reduced tax revenues to the state, although no analysis was provided indicating the amount of tax revenue opponents believed would be lost. Based on his experience in state government, his overall knowledge and understanding of the state budget and Medicaid funding, and a review of pertinent case law, the Auditor concluded the funding provisions of each initiative petition did not run afoul of federal Medicaid funding requirements, the state's federal Medicaid funding was not at risk, and that it would not be reasonable to say it was in the fiscal note summary. The Auditor received no submissions of estimated fiscal impact from any proponents of the proposed initiatives.

On March 29, 2023, the Auditor forwarded to the Attorney General a fiscal note and fiscal note summary for each initiative. While each fiscal note contained slight differences due to the initiatives not being completely identical, the fiscal note

summary produced for each of the eleven initiatives was identical. The fiscal note summary produced by the Auditor for each of the eleven initiatives stated: "State governmental entities estimate no costs or savings, but unknown impact. Local governmental entities estimate costs of ***at least*** $51,000 annually in reduced tax revenues. Opponents estimate a potentially significant loss to state revenue." (emphasis added).

On April 7, 2023, the Attorney General sent identical letters to the Secretary of State, expressing his belief that each of the eleven initiatives were facially unconstitutional and would create a substantial economic cost to the state, asserting his belief that the state stood to lose up to $12.5 billion in federal Medicaid funding.

On April 10, 2023, the Attorney General sent eleven identical Attorney General opinions to the Auditor stating his disagreement with all eleven of the Auditor's fiscal note summaries. The Attorney General disputed the Auditor's assessment of each of the proposed initiatives and opined that the fiscal note summary should include a cost estimate much higher than that reached by the Auditor. The Attorney General claimed the fiscal note summaries were legally deficient because they contained inadequate and divergent submissions from local governmental entities and that two state agencies had provided inadequate submissions concerning impact to state governmental operations. The Attorney General objected to the Auditor not extrapolating the economic analysis of Greene

County to every county in the state, and further claimed DSS and the Department of Revenue ("DOR"), both of whom reported to the Auditor that the measures would have no fiscal impact, failed to adequately assess the impact of the initiatives to their operations. The Attorney General believed the initiatives put the state's federal Medicaid funding at risk, and the Auditor should have included verbatim the responses submitted by opponents, some of which alleged estimated economic costs as high as $6.9 trillion dollars.

Upon receipt of the Attorney General's April 10, 2023, opinions returning the fiscal note summaries for revision, based on the Attorney General's representations regarding the massive potential costs of the measures, the Auditor conducted additional consultations with the governmental entities referenced by the Attorney General in his opinions. Specifically, the Auditor consulted with the Director of DSS[6], the Director of MO Healthnet, and the Director of DOR. After consideration of the contents of the Attorney General's opinions relevant to their agencies, each entity reiterated they did not anticipate a fiscal impact. No state agency submitted any response that indicated any of the initiatives would jeopardize the state's federal Medicaid funding, and no state agency changed its original response after reviewing and considering the allegations of unstated fiscal impact asserted by the Attorney General. After this further review, the Auditor determined the Attorney General was

[6] The then Acting Director of DSS has since been elevated to full status Director of DSS.

mistaken and there was no basis for altering the cost estimates contained in any of the eleven fiscal note summaries.

On April 21, 2023, the Auditor sent the Attorney General a written analysis, supported by legal citations, explaining in detail why the Attorney General's fiscal assumptions pertaining to the state's Medicaid funding were legally unsound. This written analysis with legal support further explained that the Attorney General's understanding of the process for drafting fiscal note summaries was erroneous and based on a misunderstanding of the Attorney General's role in the fiscal note summary process. The Auditor resubmitted his original fiscal notes and fiscal note summaries to the Attorney General for approval of their legal content and form.

On April 24, 2023, the Attorney General approved the eleven summary statements prepared by the Secretary of State for each of the initiatives and forwarded his approval to the Secretary of State. In these Attorney General opinions, the Attorney General approved the legal content and form of the proposed summary statements, stating that they were each a concise statement, not exceeding one hundred words, in the form of a question using language that was neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.

On May 1, 2023, the Attorney General again refused to approve the fiscal note summary as to each initiative. The Attorney General did not respond to or otherwise

dispute the Auditor's legal analysis and explanation regarding how federal Medicaid funding requirements, the Hyde Amendment[7], the Weldon Amendment[8], state laws prohibiting government funding of abortion, and the provisions of the proposed initiatives would intertwine and co-exist and not result in additional risk to the state's Medicaid funding. Nor did the Attorney General respond to or dispute the Auditor's legal analysis and explanation regarding the process of drafting a fiscal note summary and the Auditor's discretion in determining what should be included in a fiscal note summary. The Attorney General simply stated that his April 10, 2023, opinions explained his reasons for his rejection, and he refused to forward his approval for any of the eleven initiatives.

While the Secretary of State has been in possession of the official summary statement for each of the eleven initiatives since April 24, 2023, without a fiscal note or an approved fiscal note summary, the Secretary of State is unable to certify the official ballot title for any of the proposed measures as required by Section 116.180, RSMo.

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[7] The Hyde Amendment is a funding restriction included by Congress in their annual appropriations. In its current form, the amendment provides that no covered funds "shall be expended for any abortion" or "for health benefits coverage that includes coverage of abortion," except "if the pregnancy is the result of an act of rape or incest; or . . . in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed." CONSOLIDATED APPROPRIATIONS ACT, 2023, PL 117-328, December 29, 2022, 136 Stat. 4459, 4908.

[8] The Weldon Amendment stands for the proposition that health care providers cannot be required to provide coverage for abortion services and bars federal funding by the United States Department of Health and Human Services to any federal agencies or programs, or state or local governments, that discriminate against health care plans that do not include coverage for abortion procedures.

On May 4, 2023, Relator filed a Petition for Writ of Mandamus and Declaratory Judgment. Relator asserts that with no certified official ballot title, she is unable to begin collecting signatures, and without the requisite amount of signatures, her measures cannot appear on the ballot. Relator also contends that without a certified official ballot title, she is unable to challenge the Secretary of State's summary statement for each initiative as insufficient and unfair, and that she must ask the court for different summary statements before she may begin collecting signatures on the initiatives to which the ultimate ballot title is affixed. Relator asserts time is of the essence because each day certification of the official ballot title is delayed, the time within which to collect signatures shortens, increasing the resources required to obtain enough signatures to qualify for an appearance on the 2024 ballot.

Relator asks this court to issue a writ of mandamus directing the Attorney General to approve the fiscal note summary produced by the Auditor for each of the eleven initiative petitions at issue. Alternatively, Relator asked the court to issue a writ of mandamus directing the Auditor to deliver to the Secretary of State the fiscal note summaries for the initiatives as written and requiring the Secretary of State to certify a ballot title for each of the proposed measures. In the absence of relief via either of the requested writs, Relator asked the court to enter a declaratory judgment

that any or all of Sections 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334, RSMo, are unconstitutional on their face or as applied.

On May 17, 2023, this court entered preliminary writs as to Respondents, requiring each of them to file their pleading to Relator's petition on or before May 31, 2023. Each Respondent timely responded and in addition, the Secretary of State filed a Motion to Quash the Preliminary Writ and Dismiss Relator's claims against him, asserting that because he had not yet received a fiscal note with an approved fiscal note summary for inclusion in the ballot title, his duty under Section 116.180, RSMo, to certify the official ballot title had not yet been triggered.

On June 7, 2023, the matter was called for argument on pending motions. Petitioner, Dr. Anna Fitz-James, appeared through her attorneys, Anthony Rothert and Tori Schafer. Respondents Attorney General Andrew Bailey and Secretary of State John Ashcroft appeared through their attorneys, Jason Lewis and Samuel Freedlund.[9] Respondent State Auditor Scott Fitzpatrick appeared through his attorneys, Robert Tillman and Leslie Korte. The parties announced ready and argument was heard.

After consideration of the arguments of Relator and the Secretary of State, the court sustained the Secretary of State's Motion to Quash and dismissed the Secretary of State from this action. The matter was submitted on stipulated facts. After hearing

[9] Attorney Ray Wagner also appeared for the Attorney General, but he presented no arguments and he has not formally entered his appearance in this case.

arguments from Relator, the Attorney General, and the Auditor on the substance of Relator's petition, the court took the matter under advisement. The matter is now fully submitted and ready for the court's review. After considerations of the evidence, the arguments of counsel and the authorities cited to the Court, the Court enters its findings.

DISCUSSION

Count I

The crux of this legal dispute hinges on the meaning of the phrase "legal content", as used in Section 116.175.4, RSMo. Relator and the Auditor assert that "legal content", as used in Section 116.175.4, RSMo, means the measure's estimated cost or savings, if any, to state or local governmental entities. The Attorney General asserts "legal content" means the exclusion of argumentative and prejudicial language in the fiscal note summary, and that if cost information received from opponents is not included verbatim by the Auditor, regardless of whether those estimates are reasonable, the legal content is inherently argumentative and prejudicial to voters. The Attorney General further argues the fiscal note summary is defective because the Auditor has not extrapolated the fiscal impact assumptions of a single county (Greene County) across all the counties in the state, nor discarded the fiscal assessments of DSS and DOR. The Attorney General has not raised any

specific challenges to the language used in the Auditor's summaries, only a general disagreement as to the estimated cost of the measures.

The only requirements for a fiscal note or fiscal note summary are located in Section 116.175.3, RSMo. That section states:

> The fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities. The fiscal note summary shall contain no more than fifty words, excluding articles, which shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure.

Section 116.175.3, RSMo. "The primary rule of statutory interpretation is to ascertain the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute." *Kelly v. Marvin's Midtown Chiropractic, LLC*, 351 S.W.3d 833, 836 (Mo. App. W.D. 2011). The only content required to be included in a fiscal note summary is a measure's estimated cost or savings, if any, to state or local government entities. It is therefore reasonable to conclude that the "legal content" referenced in Section 116.175.4, RSMo, is the statement of the estimated cost or savings, if any, to state or local governmental entities required by Section 116.175.3, RSMo.

The Attorney General asserts the fiscal note summaries include argumentative and prejudicial language, however the prohibition on the use of such language goes to the required form of a fiscal note summary, not it's legal content. This finding is

bolstered by the fact that Section 116.175.3 breaks the requirements of the fiscal note summaries drafted by the auditor into two sentences. The first sentence discusses the content required to be included in a fiscal note summary. The second sentence of Section 116.175.3 includes the prohibition on the use of argumentative or prejudicial language, and also specifies the fifty-word limit imposed on a fiscal note summary, which is clearly an issue of form. Regardless, the Attorney General's argument still fails, as the language of the fiscal note summaries are neither argumentative nor prejudicial.

Argumentative or prejudicial language is approbatory or pejorative language used purposefully to incite either a preference or disdain for the estimated costs or savings of a proposed measure. Other than the disputed actual amount of the cost of the proposed measures, the Attorney General does not set forth any other language included in the fiscal note summaries that he alleges is argumentative or prejudicial. He does not like the fiscal conclusion reached by the Auditor, and believes that because the Auditor's fiscal conclusions are not identical to his own, the Auditor's language is necessarily argumentative and prejudicial.

Yet the law makes clear, the Attorney General is only authorized to review a fiscal note summary to ensure it states the estimated cost or savings, if any, to state and local governments, that it is no more than fifty words (excluding articles), and that it does not contain argumentative or prejudicial language. While the Attorney

General may make a submission regarding the estimated costs or savings he anticipates a measure to have to the Auditor for his consideration in drafting the fiscal note and fiscal note summary, he has no authority under Section 116.175, RSMo, or anywhere else, to conduct an investigation into the underlying fiscal impact of a proposed measure for the purposes of drafting a fiscal note or fiscal note summary. As is the case here, the Attorney General also has no authority to substitute his own judgment for that of the Auditor regarding the estimated cost of a proposed measure as part of his review and approval of its legal content and form. The Attorney General relied on the same opponent submissions that had already been considered by the Auditor to justify returning the fiscal note summaries to the Auditor for revision. He also attempted to substitute his judgment for that of DSS and DOR, both of which submitted fiscal impact responses after evaluating the proposed measures.

Using "his experience in state government and overall knowledge and understanding of business and economic issues," ***the Auditor*** determines the reasonableness of a submission of potential fiscal impact by examining whether it addresses the pertinent issue or diverges from it. *Sinquefield v. Jones*, 435 S.W.3d 674, 679 (Mo. App. W.D. 2014). "***The auditor*** reviews the submissions for completeness, relevance, source identity, and reasonableness." *Id.* (citing *Brown v. Carnahan*, 370 S.W.3d 637, 649 (Mo. banc. 2012) (per curiam)) (emphasis added).

While the Attorney General contends that pursuant to Section 116.175, RSMo, the Auditor must make his demanded revisions to a fiscal note summary, this contention is clearly a misreading of the section. If the Attorney General's demanded revisions would render a fiscal note summary unfair and insufficient in the Auditor's opinion, then the Auditor will be placed into an untenable and absurd positon regarding a challenge to a fiscal note summary pursuant to Section 116.190, RSMo. "When the action challenges the fiscal note or the fiscal note summary prepared by the auditor, the state auditor shall also be named as a party defendant." Section 116.190.2, RSMo. As the party required to be sued in a challenge to a fiscal note summary under Section 116.190, RSMo, the Auditor would be unable to defend the fiscal note summary, because he would be in agreement with the challenger that it was unfair and insufficient. If the Auditor desired to have the fiscal note summary reverted back to his original draft, then under the Attorney General's reading of Section 116.175, RSMo, (which would require the Auditor to write a fiscal note summary that the Auditor believes is inaccurate and misleading), the Auditor would be placed in the peculiar position of having to sue himself to challenge his own fiscal note summary.

This situation is made more preposterous by the fact that if, during such a challenge, the court agreed the fiscal note summary was unfair and insufficient and exercised its discretion to remand it back to the Auditor for revision pursuant to

Section 116.175, RSMo, the Attorney General would once again be in a position to demand revisions to the fiscal note summary, which could result in a potentially never-ending cycle of demanded revisions, challenges, and remands of the fiscal note summary. Likewise, if the Auditor chose to revise a fiscal note summary upon return from the Attorney General for revision, there is no guarantee the revision would be acceptable to the Attorney General, again leading to perpetual requests for revision and delaying Relator the opportunity to exercise her constitutional right to initiative petition in perpetuity.

Over forty years ago, the General Assembly eliminated the Attorney General's statutory authority to draft the fiscal note summary for a proposed initiative, by repealing Section 126.081, RSMo, 1978. Senate Substitute for Senate Bill No. 658, Second Regular Session, 80th General Assembly, 1980.[10] "When the General Assembly amends a statute, the amendment is presumed to effect some change in the existing law." *Marvin's Midtown Chiropractic, LLC*, 351 S.W.3d at 836; *see also Hill v. Ashcroft*, 526 S.W.3d 299, 309 (Mo. App. W.D. 2017) ("When interpreting statutes, courts do not presume that the legislature has enacted a meaningless provision.") (citing *Edwards v. Gerstein*, 237 S.W.3d 580, 581 (Mo. banc 2007)). It is illogical to conclude the General Assembly repealed the Attorney General's

[10] SS SB 658 (1980) gave the committee on state fiscal affairs statutory authority to draft the fiscal note and fiscal note summary. In 1997, the statutory authority to draft the fiscal note and fiscal note summary was given to the Auditor. House Committee Substitute for Senate Bill No. 132, 89th General Assembly, 1997.

authority to draft fiscal note summaries, but silently intended for the Attorney General to be able to substitute his judgment as to the estimated cost or savings of a measure for that of the Auditor's.

To conclude the Attorney General has authority to substitute his judgment for that of the Auditor's as it pertains to the fiscal impact of an initiative petition would render meaningless both the Auditor's role in the fiscal note and fiscal note summary process and the General Assembly's actions in repealing the Attorney General's authority to draft fiscal notes and fiscal note summaries. "[T]he legislature will not be charged with having done a meaningless act." *State v. Swoboda*, 658 S.W.2d 24, 26 (Mo. 1983). There is an absolute absence of authority to conclude the Attorney General is permitted to send the Auditor's fiscal note summary back for revision simply because he disagrees with the Auditor's estimated cost or savings of a proposed measure.

The process for providing Attorney General approval of the legal content and form of a fiscal note summary has worked consistently for over twenty-five years. It is almost a certainty that during that time an Auditor has submitted a fiscal note summary with which an Attorney General disagreed, yet no Attorney General has ever attempted to interpret his role under Section 116.175, RSMo, as one that allows him to reject a fiscal note summary because he disagreed with the substance of the

Auditor's conclusions regarding a proposed measure's estimated cost or savings to state or local governments.

The Auditor is the proper elected official to perform the responsibility of advising the people of Missouri on the anticipated fiscal impact of an initiative petition, as it is the Auditor who has constitutional authority to supervise the receipt and expenditure of public funds. *See* MO. CONST. art. IV, Section 13; *see also Brown*, 370 S.W.3d at 652 (holding Section 116.175, RSMo, was a constitutional delegation of authority to the Auditor and concluding "it is appropriate for the auditor to advise Missouri citizens about the expected fiscal impact of a proposed initiative measure as part of his power 'related to . . . supervising the receipt and expenditure of public funds.'"). The Supreme Court has already noted that besides the Auditor, "no other official has the express power to draft a fiscal note or fiscal note summary." *Brown,* 370 S.W.3d at 652.

Section 116.175, RSMo, sets forth when the Attorney General is required to approve a fiscal note summary. "The attorney general ***shall***, within ten days of receipt of the fiscal note and the fiscal note summary, approve the legal content and form of the fiscal note summary prepared by the state auditor and ***shall*** forward notice of such approval to the state auditor." Section 116.175.4, RSMo, (emphasis added). In this case, the Attorney General returned the fiscal notes and fiscal note summaries to the Auditor for revision, despite the fact that the fiscal note and fiscal

note summaries contained an estimate of cost or savings to state or local governmental entities, were less than fifty words, and did not use argumentative or prejudicial language. After receiving the returned fiscal notes, the Auditor considered the Attorney General's comments, reviewed them in consultation with the applicable state agencies and determined no revision was necessary. This is wholly within the discretion of the Auditor. The Attorney General has no authority to return a fiscal note and fiscal note summary to the Auditor if it complies with Section 116.175, RSMo, much less to do so repeatedly after the Auditor has considered and responded to the Attorney General's concerns and resubmitted the fiscal note and fiscal note summary. *See Am. C.L. Union of Missouri v. Ashcroft*, 577 S.W.3d 881, 900 n. 21 (Mo. App. W.D. 2019) (noting that the predicament of officials taking all of the time allowed by section 116.334.1—thereby leaving little time for signature gathering—underscored why it was beyond the authority of the Secretary of State to derail the referendum process by reviewing a sample sheet for anything beyond its requisite form). It is noteworthy that as of the date of trial, sixty days have elapsed since the Auditor submitted the fiscal note and fiscal note summary for each initiative, depriving the initiative process of fifty days in which to proceed which cannot be recovered.

In his trial brief, the Attorney General asserts the court "is left with nothing other than a simple disagreement between two government officials about whether

50 words correctly summarize an initiative petition and whether a fiscal note is ***sufficient***." *Trial Brief of Attorney General Bailey*, pages 1-2 (emphasis added). The Attorney General labels this dispute as a "disagreement between the Attorney General and the Auditor about whether a proposed fiscal note and fiscal note summary are ***sufficient and fair***." *Id.* at 6 (emphasis added). The Attorney General also asserts that he has expertise to determine whether "the Auditor's submission is legally ***sufficient***" and that he has authority to direct the Auditor to revise a submission "when the Attorney General determines that the submission is legally ***insufficient.***" *Id.* at 14 (emphasis added). The Attorney General claims the language in Section 116.175 directs "that the Attorney General shall 'determine[]' whether or not a fiscal note or fiscal note summary is ***sufficient***." *Id.* at 23 (emphasis added). The Attorney General states he "has returned every fiscal note and fiscal note summary he determined was ***insufficient*** to the Auditor." *Id.* at 24 (emphasis added).

For the Attorney General's argument to succeed, Section 116.175, RSMo, must be read to imply the General Assembly gave him unwritten authority to direct the Auditor to revise a submission when he determines the submission is insufficient or unfair. It is clear this is not what the General Assembly intended because the Attorney General's review of a fiscal note and fiscal note summary is limited to reviewing "legal content and form," as set forth in section 116.175.4, RSMo. The terms "insufficient", "sufficient", "fair" and "unfair" do not appear anywhere in

Section 116.175, RSMo. "[C]ourts 'do not engraft language onto a statute that the legislature did not provide.'" *Hill*, 526 S.W.3d at 309 (quoting *Page v. Scavuzzo*, 412 S.W.3d 263, 267 (Mo. App. W.D. 2013)). Further, where different terms are used in different sections of a chapter, it is reasonable to conclude the legislature intended the terms to have different meaning and effect. *See Am. C.L. Union of Missouri*, 577 S.W.3d at 892 (comparing the plain and unambiguous language of Section 116.332, RSMo, with Section 116.120.1, RSMo, and concluding the Secretary of State's authority to review a referendum petition sample sheet for sufficiency as to form is limited to determining if it is in the form required in Section 116.030, RSMo); *see also City of Cape Girardeau v. Elmwood Farms, L.P.,* 575 S.W.3d 280, 284 (Mo. App. S.D. 2019)("[I]f different terms are used in different subsections of the statute, then the legislature intended the terms to have a different meaning and effect.").

Challenges to the fiscal note summary for sufficiency and fairness take place within the context of a challenge to the language of an official ballot title under Section 116.190, RSMo. "In section 116.190, the legislature provided a specific means and a specific remedy for challenges to the fiscal note summary." *Knight v. Carnahan,* 282 S.W.3d 9, 20 (Mo. App. W.D. 2009). The Attorney General, like every other citizen, has the right to contest the Auditor's determination regarding the estimated cost of the proposed measure. He must use the proper avenue to do so by bringing an action against the Auditor pursuant to Section 116.190, RSMo,

challenging the fiscal notes and fiscal note summaries as being insufficient or unfair. There is no prohibition precluding him from doing so.

The Attorney General argues that because Section 116.175.5, RSMo, specifies he must "determine" whether the fiscal note or the fiscal note summary satisfies the requirements of Section 116.175, RSMo, his obligations under that section are discretionary, not mandatory. "The word 'shall' generally prescribes a mandatory duty." *State v. Teer,* 275 S.W.3d 258, 261 (Mo. banc. 2009). The Attorney General's duty to approve a fiscal note summary that satisfies the requirements of Section 116.175, RSMo, is mandatory, not discretionary, as the statute makes clear what he "shall" do.

> For more than a century, this Court has held that a ministerial or clerical duty is one in which a certain act is to be performed "upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to [the public official's] judgment or opinion concerning the propriety or impropriety of the act to be performed." *State ex rel. Forgrave v. Hill*, 272 Mo. 206, 198 S.W. 844, 846 (Mo. Banc 1917) (quotation marks omitted).

State ex rel. Alsup v. Kanatzar, 588 S.W.3d 187, 191 (Mo. 2019); *State ex rel. Thomas v. Neeley*, 128 S.W.3d 920, 924 (Mo. App. S.D. 2004) (citing *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. App. W.D. 1998)) ("A ministerial act is one that law directs the public official to perform upon a given set of facts, independent of how the official may regard the propriety or impropriety of performing the act in any particular case."). Section 116.175.4, RSMo, directs the Attorney General to,

within ten days of receipt of the fiscal note and the fiscal note summary, approve the legal content and form of the fiscal note summary and forward notice of such approval to the Auditor.

The role of the Attorney General in this process is not meaningless; as the Attorney General has himself noted, "[t]he legislature has expressly acknowledged that executive branch officials may occasionally make mistakes." *Trial Brief of Attorney General Bailey,* page 37. The Attorney General's review of a fiscal note and fiscal note summary for legal content and form can rightly be interpreted as a safeguard created by the legislature to ensure the fiscal note and fiscal note summary received by the Secretary of State contains the proper legal content and is in the form required by law.

The Attorney General has failed to show the fiscal note summaries do not state estimated costs or savings, if any, to state or local governmental entities, are more than fifty words, excluding articles, or contain argumentative or prejudicial language. Because the fiscal note summary for each of the eleven initiative petitions satisfied the requirements of Section 116.175, RSMo, the Attorney General lacked any statutory authority or discretion to return the fiscal note summaries to the Auditor for revision, and he was required by law to forward his approval of them to the Auditor.

Count II

Relator has not identified any legal duty imposed upon the Auditor that the Auditor has failed to complete. Relator urges the court to construe the statutory scheme to require the Auditor to forward the unapproved fiscal note summaries to the Secretary of State for inclusion in the official ballot title. Yet mandamus is not appropriate to establish a public official's legal obligation to perform a ministerial duty, but only to compel a public official's performance of a ministerial duty that already exists. *See State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo. banc. 1994) (citing *State ex rel. Brentwood School Dist. v. State Tax Comm'n*, 589 S.W.2d 613, 614 (Mo. banc 1979)). "[T]he purpose of the writ is to execute, not adjudicate." *State ex rel. Commissioners of the State Tax Comm'n v. Schneider*, 609 S.W.2d 149, 151 (Mo. banc. 1980). Because the Relator has failed to establish the Auditor had a legal obligation to forward to the Secretary of State unapproved fiscal note summaries, mandamus as to the Auditor to compel such action cannot be had.

Count III

Finally, Relator seeks a declaration that certain sections within Chapter 116, RSMo, are unconstitutional on their face. "When courts are called upon to intervene in the initiative process, they 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." *Missourians to Protect the Initiative Process v. Blunt*, 799

S.W.2d 824, 827 (Mo. 1990). "Statutes that place impediments on the initiative power that are inconsistent with the reservation found in the language of the constitution will be declared unconstitutional." *Id.*

The Attorney General's failure to comply with his duty under Section 116.175.4, RSMo, and not the statutory scheme set forth in Chapter 116, RSMo, has created the current impediment to the certification of an official ballot title for each of the eleven initiatives. Because of the court's findings as to Counts I and II, the court declines to disrupt the statutory scheme set forth in Chapter 116, RSMo, which has served the citizens of Missouri well by providing fiscal estimates for every ballot measure for over twenty-five years. The court finds a discussion of the constitutionality of those statutes is unnecessary.

CONCLUSIONS OF LAW

The Court concludes the Auditor's fiscal note summary for each of the eleven initiative petitions state the measure's estimated costs or savings, if any, to state and local governmental entities, and as such they contain the legal content required by Section 116.175, RSMo. Further, the Auditor's fiscal note summary for each of the eleven initiative petitions contain no more than fifty words, excluding articles, which summarize the fiscal notes in language neither argumentative nor likely to create prejudice either for or against the proposed measures, and as such are in the proper form. Because the fiscal note summaries have the required legal content and are in

the proper form, the Attorney General is required to forward his approval of the summaries to the Auditor. The Attorney General's refusal to approve the Auditor's fiscal note summaries for these eleven initiatives constitutes a failure to perform the ministerial duty imposed on him by Section 116.175.4, RSMo, and mandamus must issue as to Count I in order to afford Relator relief and safeguard the right of initiative which is explicitly reserved by the people of Missouri and enshrined in our Constitution[11].

Relator has failed to establish a legal duty imposed on the Auditor that the Auditor has failed to perform, therefore mandamus against the Auditor as requested in Count II is not appropriate. Because of the Court's conclusions as to Counts I and II, there is no reason to reach the issue of the constitutionality of Sections 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334, RSMo.

ORDER AND JUDGMENT

WHEREFORE, based on the forgoing, it is hereby Ordered, Adjudged and Decreed that Relator's Petition for Writ of Mandamus as to Count I is granted. Relator's Petition for Writ of Mandamus as to Count II is denied. It is unnecessary

[11] [11] If mandamus were not available, this Court would direct the same relief by declaratory judgment. *See ACLU of Mo.*, 577 S.W.3d at 898 (holding declaratory judgment is available to determine the parameters of an official's statutory authority and, when such a claim "is meritorious, . . . a permanent (mandatory) injunction, can be invoked to compel the undoing of something wrongfully done" (quotation and citation omitted)).

to rule on Relator's Petition for Declaratory Judgment as to Count III, and said count is therefore dismissed.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I. A writ of mandamus should issue requiring the Attorney General to, within twenty-four (24) hours of the entry of this order, to approve forthwith the legal content and form of the fiscal note summaries submitted to the Attorney General on March 29, 2023 by the Auditor for initiatives numbered 2024-077, 2024-078, 2024-079, 2024-080, 2024-081, 2024-082, 2024-083, 2024-084, 2024-085, 2024-086, and 2024-087 and to then immediately forward such approval to the Auditor.

II. The relief requested in Count II is denied, and therefore Count II is dismissed.

III. The Court denies Count III and therefore Count III is dismissed.

IT IS SO ORDERED.

6/20/23
Date

Jon E. Beetem, Circuit Judge