

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

Dr. Anna Fitz-James,)	
)	
Petitioner,)	
)	Case No.
v.)	
)	Division:
Andrew Bailey, in his official)	
capacity as Attorney General)	
for the State of Missouri, 207)	
West High Street, Jefferson)	
City, Missouri;)	
)	
John R. Ashcroft, in his official)	
capacity Secretary of State)	
for the State of Missouri,)	
600 West Main Street,)	
Jefferson City, Missouri; and)	
)	
Scott Fitzpatrick, in his official)	
capacity as Auditor for the)	
State of Missouri, 301 West)	
High Street, Room 880)	
Jefferson City, Missouri,)	
)	
Respondent.)	

Verified Petition for Writ of Mandamus and Declaratory Judgment

1. For more than a century, the People of Missouri have reserved to themselves the right to amend the constitution independently of the legislature by initiative. *See Marsh v. Barlett*, 343 S.W.2d 737, 742. The right to initiative is now enshrined as Article III, Sections 49 and 50.

2. “The courts of this state must zealously guard the power of the initiative petition process that the people expressly reserved to themselves.” *Boeving v. Kander*, 496 S.W.3d 498, 506 (Mo. banc 2016).

3. The legislature enacted procedures that must be satisfied before the People may exercise their share of the legislative power. These procedures include directing the Secretary of State, the Auditor, and the Attorney General (“the executive officers”) to undertake responsibility for crafting a ballot title, which includes a summary statement, fiscal note, and fiscal note summary for a proposed initiative before petition signatures may be gathered. *See* RSMo. § 116.010, et seq.

4. Officers have faithfully carried out their duties so that interference with the right to initiative is minimal. *But see ACLU of Missouri v. Ashcroft*, 577 S.W.3d 881 (Mo. App. W.D. 2019) (right to referendum).

5. Until now.

6. The Secretary of State has failed to certify a ballot title for eleven initiatives that would establish an explicit right to reproductive freedom in our state constitution.

7. As interpreted by the Secretary of State, the statutes permit any one of the executive officers to prevent certification of a ballot title by

simply not carrying out his statutory responsibility. With no ballot title, citizens can neither begin to collect signatures nor challenge an insufficient or unfair title. With no signatures, an initiative cannot appear on the ballot. In other words, the statutory scheme enables each of the executive officers to prevent a vote on any initiative by doing nothing—passively neglecting his duties permits him to destroy the direct democracy reserved by the People.

8. Properly interpreted, the statutory scheme imposes ministerial duties on the executive officers for which they lack discretion and that will result in a certified ballot title that any citizen can challenge in court.

9. On the other hand, if the statutory scheme truly permits the executive officers, alone or in concert, to interfere with the ability of any citizen to exercise the right of initiative, then it is unconstitutional on its face and as applied here.

Jurisdiction and Venue

10. This Court maintains original subject-matter jurisdiction over this action under Missouri Supreme Court Rule 87.01 and RSMo. § 527.010.

11. Venue is proper in this Court because the Secretary of State, Auditor, and Attorney General each maintain an office in Cole County.

Parties

12. Petitioner, Dr. Anna Fitz-James, is a Missouri citizen.
13. Respondent Andrew Bailey serves as the appointed Attorney General for the State of Missouri. He is sued in his official capacity.
14. Respondent John Ashcroft is the elected Secretary of State for the State of Missouri. He is sued in his official capacity.
15. Respondent Scott Fitzpatrick is the elected Auditor for the State of Missouri. He is sued in his official capacity.

Additional Factual Allegations

16. On March 8, 2023, Dr. Fitz-James submitted to Respondent Ashcroft, pursuant to RSMo. § 116.040, § 116.050, and § 116.332.1, eleven initiative petitions, each of which would amend the Missouri Constitution to establish the right to reproductive freedom.
17. Respondent Ashcroft assigned the initiatives numbers 2024-077, 2024-078, 2024-079, 2024-80, 2024-81, 2024-82, 2024-83, 2024-84, 2024-85, 2024-86, and 2024-87.
18. Respondent Ashcroft was required to forward a copy of each initiative to Respondents Bailey and Fitzpatrick. He did so.
19. Respondent Ashcroft must within two days from submission post the text of each initiative conspicuously on his website.

RSMo. § 116.332.2. He did so.

20. Respondent Bailey is allowed ten days to review each initiative and forward approval as to form or comments to Respondent Ashcroft.

RSMo. § 116.332.3. He did so.

21. Respondent Ashcroft had until within fifteen days from submission to approve or reject each initiative as to form.

RSMo. 116.332.4. He did so, approving each initiative as to form.

22. Respondent Fitzpatrick had until twenty days after he received the initiatives from Respondent Ashcroft to forward to Respondent Bailey the fiscal note and a fifty-word fiscal note summary for each initiative. RSMo. § 116.175.2. In doing so, he must state the “fiscal impact estimating the cost of the proposal in a manner consistent with the standards of the governmental accounting standards board and section 23.140.” RSMo. § 116.175.1. He did so, providing an identical fiscal note and fiscal note summary for each of the initiatives. A copy of the fiscal note summary for Initiative No. 2024-077 is attached hereto as Exhibit A.

23. The fiscal note summary for each initiative contained all content required and was in the form described by law.

24. Respondent Bailey then has ten days “to send notice of [] approval of the legal content and form of the fiscal note summary to the state auditor.” RSMo. § 116.175.4. He did not.

25. Should Respondent Bailey decided to reject the fiscal note summary for each initiative based on its legal content and form of the fiscal note summary, he may return the fiscal note and fiscal note summary to the auditor. RSMo. § 116.175.5. There is no statutory deadline for rejecting the legal content and form of an initiative.

26. As to each initiative Respondent Bailey on April 10, 2023, sending identical letters as to the Auditor stating his disagreement with the Auditor's estimate of the fiscal impact of the cost of the initiatives; however, recognizing doing so is outside of his statutory and constitutional authority, he characterized his rejection as one of the legal content and form of the fiscal note. A copy of Attorney General's letter for Initiative No. 2024-077 is attached hereto as Exhibit B.

27. Once Respondent Bailey rejected the fiscal note summary—purportedly as to legal content and form, there was no statutory for any further action by any of the executive officers.

28. There is no statutory provision for the fiscal note summary to be resubmitted to or approved by anyone after remand from the Attorney General and the Auditor's consideration of the Attorney General's comments.

29. Nonetheless, Respondent Fitzpatrick conducted further consultations with government entities, determined there is no basis

for altering the fiscal note summary, and, on April 21, 2023, resubmitted the fiscal note summary to the Respondent Bailey along with an explanation for why it was not revised. The correspondence for each of the initiatives was identical. A copy of the letter from the Auditor regarding Bailey's comments related to Initiative No. 2024-077 is attached hereto as Exhibit C. A copy of the fiscal note summary for Initiative No. 2024-077 is attached hereto as Exhibit D.

30. From April 21 to May 1 (the date by which a ballot title was due to be certified), Respondent Bailey did nothing.

31. On May 1, 2023, without further analysis or explanation, Respondent Bailey again rejected the fiscal note summary in identical letters as to each initiative. A copy of each Bailey's May 1 correspondence as to Initiative No. 2024-77 is attached hereto as Exhibit E.

32. During this process, the Secretary of State submitted proposed summary statement language for each initiative to the Attorney General. RSMo. § 116.334. He did so.

33. The Attorney General is supposed to review the summary statement for each initiative as to legal content and form. RSMo. § 116.334. He did.

34. Because the summary statement for each initiative is insufficient and unfair, Petitioner will be required to ask the court for different summary statements before she may begin collecting signatures on petitions to which the ultimate official ballot title is affixed.

35. Upon receipt of the official summary statement, the approved fiscal note summary, and the fiscal note, the Secretary of State has three days to certify the official ballot title for each initiative.

RSMo. §116.180.

36. Respondent Ashcroft contends he cannot certify the ballot title for any of the initiatives because he has not received a fiscal note summary that has been approved by Respondent Bailey.

37. Respondent Bailey continues to withhold his approval of the fiscal note summary.

38. Upon information and belief, Respondent Bailey does not intend to approve the fiscal note summary and Respondent Ashcroft does not intend to certify a ballot title for any of the initiatives absent a fiscal note summary approved by Respondent Bailey.

39. In ordinary course, assuming each executive official used the maximum time proscribed by statute to complete his tasks, the ballot title for each of the initiatives would have been certified on or before May 1, 2023.

40. No citizen can challenge the official ballot title before it has been certified by the Secretary of State. RSMo. § 116.190.

41. Signatures may not be counted if the official ballot title is not affixed to the page containing the signature. RSMo. § 116.180.

42. Respondent Bailey, like any Missouri citizen, may challenge the sufficiency of the fiscal note summary after the ballot title is certified.

43. Absent intervention by the court, a ballot title will never be certified for any of the initiatives and the People's right to initiative will be thwarted by hubris.

44. Even if a ballot title is eventually certified, each day certification of the ballot title is delayed, the ability to collect signatures is delayed, increasing the resources required to obtain enough signatures to qualify for the ballot.

45. Petitioner has no alternative method to vindicate the fundamental constitutional right to amend the constitution by initiative.

COUNT I
Mandamus or Declaratory Judgment
Against Respondent Bailey

46. By reference, Petition incorporates here all previous allegations and exhibits.

47. Respondent Bailey has a ministerial, non-discretionary duty pursuant to RSMo. § 116.175.4 to approve a fiscal note summary that is in the correct form and contains the information required by law.

48. The legal content of the fiscal note summary is prescribed by statute:

The . . . 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.

RSMo. § 116.175.

49. Respondent Bailey does not have discretion to do anything other than approve the fiscal note summaries prepared by the Auditor for the initiatives because it is in the correct form and has the required legal content in that the fiscal note summary: (a) states the initiatives' estimated cost of savings to government entities, (b) contains no more than fifty words, excluding articles, and (c) uses language that is neither argumentative nor likely to create prejudice for or against the initiatives.

50. Respondent Bailey has withheld his approval because Respondent Fitzpatrick has refused to include assertions as to the cost of the initiatives advanced by opponents that he has determined to be inaccurate.

51. Respondent Fitzpatrick is the elected Auditor and, thus, vested with the Constitutional duty to “make all . . . audits and investigations required by law.” Mo. Const. Art. 4, § 13.

52. Respondent Bailey is not the Auditor, has no expertise in matters of accounting or auditing, and lacks any authority to conduct audits and investigations that may be required by law.

53. Respondent Bailey’s rejection of the fiscal note summary is inconsistent with the standard of the government accounting standards board, which is understandable because government accounting is not a part of Respondent Bailey’s job.

54. Assuming, *arguendo*, Respondent Bailey had discretion to reject the fiscal note summary and remand it to the Auditor, he has no statutory authority to continue to withhold approval after the Auditor responded to his concerns.

55. Interpreting RSMo. § 116.175.4 and .5 to permit Respondent Bailey to indefinitely withhold approval of the fiscal note summary—as

he has as to these initiatives—interferes with the right of initiative by delaying and, eventually, defeating the right.

56. The statutory scheme provides Petitioner no recourse.

57. If required to perform his ministerial duty and approve the legal content and form of the fiscal note summary, Respondent Bailey is not without recourse to challenge a fiscal note summary with which he disagrees. Like any citizen, Respondent Bailey remains at liberty to challenge the substantive content of the summary by initiating an action pursuant to RSMo. § 116.190.

WHEREFORE Petitioner prays this Court:

A. Issue a writ of mandamus directing Respondent Bailey to approve the fiscal note summary for the initiatives as to legal content and form within twenty-four hours and immediately deliver notice of said approval to Respondent Ashcroft;

B. In the alternative, enter declaratory judgment that Respondent Bailey has a ministerial duty to approve the fiscal note summary for the initiative as to legal content and form and corresponding injunctive relief requiring him to do so within twenty-four hours and immediately deliver notice of said approval to Respondent Ashcroft; or

C. Afford Petitioner such other or further relief to which she is entitled.

COUNT II
Mandamus or Declaratory Judgment
Against Respondents Ashcroft and Fitzpatrick

58. By reference, Petition incorporates here all previous allegations and exhibits.

59. The statutory scheme provides the Attorney General no further role in the ballot title certification process after he remands a fiscal note summary to the Auditor.

60. After consideration of the Attorney General's comments in remanding a fiscal note summary, the statutory scheme as a whole and construed in a manner that allows it to operate constitutionality requires that the Auditor should send his newly approved fiscal note summary to the Secretary of State, who in turn has a ministerial duty to include the fiscal note summary as part of the certified ballot title.

WHEREFORE Petitioner prays this Court:

A. Issue a writ of mandamus directing Respondent Fitzpatrick to within twenty-four hours deliver to Respondent Ashcroft the fiscal note summary for the initiatives as written after consideration of Attorney General's comments and requiring Respondent Ashcroft to certify a ballot title for each of the

initiatives that includes the fiscal note summary approved by the Auditor upon remand from the Attorney General within twenty-four hours of receipt of the fiscal note summary;

B. In the alternative, enter declaratory judgment that

Respondent Fitzpatrick has a ministerial duty to deliver to the Secretary of State the fiscal note summary for each initiative that he has approved on remand after consideration of the Attorney General's comments and Respondent Ashcroft has a ministerial duty to certify a ballot title for each initiative that includes the fiscal note summary for the initiative and corresponding injunctive relief directing Respondent Fitzpatrick to deliver to Respondent Ashcroft within twenty-four hours the fiscal note summary for the initiatives as written after consideration of Attorney General's comments and requiring Respondent Ashcroft to certify a ballot title for each of the initiatives that includes the fiscal note summary approved by the Auditor upon remand from the Attorney General within twenty-four hours of receipt of the fiscal note summary.

C. Afford Petitioner such other or further relief to which she is entitled.

COUNT III
Declaratory Judgment Against All Respondents

61. By reference, Petition incorporates here all previous allegations and exhibits.

62. The constitutional right to initiative does not contemplate a ballot title.

63. “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.” *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990).

64. The statutory scheme described herein providing for the creation of a ballot title to appear on the ballot in the place of the text of the initiative places an impediment of the initiative power that is inconsistent with the power reserved in that it permits partisans to delay indefinitely the gathering of signatures that would permit an initiative to qualify for consideration.

WHEREFORE Petitioner prays this Court:

- A. Enter declaratory judgment that any or all of the following statutes, in whole or in part, are unconstitutional on their face or as applied to Petitioner: RSMo. §§ 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334.

- B. Enter corresponding injunctive requiring Respondent Ashcroft to count as valid signatures on initiative petitions that do not contain all or any portion of a ballot title so long as the full text of the initiative is attached to the signature page and to cause the full text of any initiative for which sufficient signatures are submitted to be printed on ballots in place of the ballot title; and
- C. Afford Petitioner such other or further relief to which she is entitled.

Respectfully submitted,

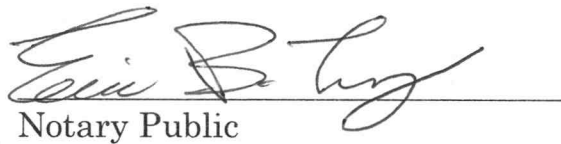
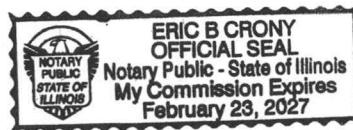
/s/ Anthony E. Rothert
Anthony E. Rothert, #44827
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American Civil Liberties Union
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906 Olive Street
Suite 1130
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tschafer@aclu-mo.org

Verification

I have reviewed each of the allegations in the foregoing verified petition and attest that based on my personal knowledge the allegations are true and correct to the best of my knowledge and belief.

A handwritten signature in black ink, appearing to read "Anthony E. Rothert", written over a horizontal line.

Sworn and subscribed to me on May 4, 2023, by Anthony E. Rothert.

A handwritten signature in black ink, appearing to read "Eric B. Crony", written over a horizontal line.
Notary Public



SCOTT FITZPATRICK
MISSOURI STATE AUDITOR

RECEIVED

MAR 29 2023

MISSOURI
ATTORNEY GENERAL

March 29, 2023

The Honorable Andrew Bailey
Attorney General
Supreme Court Building
Jefferson City, MO 65101

Dear Attorney General Bailey:

Our office received initiative petition 24-077 on March 9, 2023. Pursuant to §116.175, RSMo, we are forwarding the following fiscal note summary for your review and approval as to legal content and form:

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.

A copy of the fiscal note for the initiative petition is also attached. Thank you for your immediate attention to this matter. Your office should return the approved fiscal note summary to our office within 10 days, pursuant to §116.175.4, RSMo. If you have any questions or comments, please contact me at (573) 751-4213.

Sincerely,

Ted Fugitt, CPA, CGAP
Assistant Director of Audits

Enclosures

Ex. A



RECEIVED

APR 11 2023

STATE AUDITORS OFFICE

ATTORNEY GENERAL OF MISSOURI

ANDREW BAILEY
April 10, 2023

OPINION LETTER NO. 206-2023

The Honorable Scott Fitzpatrick
Missouri State Auditor
State Capitol, Room 229
Jefferson City, MO 65101

Dear Auditor Fitzpatrick:

This office received your letter of March 29, 2023, submitting a fiscal note and fiscal note summary prepared under § 116.175, RSMo, for an initiative petition submitted by Anna Fitz-James, 2024-077. The fiscal note summary that you submitted reads in its entirety as follows:

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.

This office has independently reviewed the submission your office received which was attached to the proposed fiscal note summary. Under § 116.175.4, RSMo, the Attorney General is tasked to review the "legal content and form of the fiscal note summary prepared by the state auditor[.]" Section 116.175.3 requires that the fiscal note and fiscal note summary "state the measure's estimated cost or savings, if any, to state and local governmental entities." If the Attorney General determines that "the fiscal note or the fiscal note summary does not satisfy the requirements of [§ 116.175, RSMo], the fiscal note and the fiscal note summary shall be returned to the auditor for revision." § 116.175.5, RSMo.

The Attorney General's Office is returning the fiscal note and fiscal note summary because the fiscal note summary does not contain the legal content required for Missourians to know the enormous financial impact this measure will have on the State of Missouri and its state and local governmental operations. If added to the Missouri Constitution, the measure would create a constitutional right abortion in Missouri, overturning dozens of existing state laws. The actual potential fiscal impact

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Ex B

likely is upward of \$12 billion—and potentially much higher based upon a study and report noted in conjunction with the Greene County submission discussed below. That impact is reflected in submissions from organizations and individuals who provided information to your office, yet it was not transposed into your fiscal note summary. In addition, because the impact to the State of Missouri is likely to be so drastic but is not reflected in the submissions you received from state and local entities, the fiscal note on which your summary relied is legally deficient.

A. The fiscal note is legally deficient.

- i. *The fiscal note contains inadequate and divergent submissions from local governmental entities.*

This ballot measure will affect the present and future population of Missouri. Yet while Missouri has 114 counties and one independent city, in addition to over 1,000 other cities and villages, your fiscal note requested submissions from just 12 counties and 14 cities. Only three counties and two cities responded. That is a statistically insignificant sample to be representative of the true fiscal impact.

One of those entities, Greene County, understood that the measure would have the obvious effect of reducing the population of their citizens. Greene County estimated that 135 future citizens would be lost in that county annually due to legalizing abortion in Missouri. Greene County's estimates were supported by fertility rates and the number of abortions in 2020 recorded by the Missouri Department of Health and Senior Services. Undoubtedly, this ballot measure will result in population loss. Greene County was the only entity to recognize what is facially apparent from this measure. It estimated nearly \$51,000 in lost revenue *annually* to that county based on the reduced population base. Moreover, this annual dollar amount will necessarily increase cumulatively in successive years.

Your office recognized that this was a reasonable assumption, as your fiscal note summary reflects the financial impact to Greene County. Your office, however, did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded to your request for a fiscal note submission, nor did your office apply this obvious assumption to highly populous areas in the state.

—Greene County's assumption is supported by a nationwide study published by the United States Senate Joint Economic Committee. See <https://www.jec.senate.gov/public/index.cfm/republicans/2022/6/the-economic-cost-of-abortion>. It reports an estimate economic cost of abortion in 2019 alone, due to nearly 630,000 unborn lives – was at least \$6.9 trillion, or 32 percent of the GDP. Based on this study and 4,660 abortions in Missouri in 2019,¹ the

¹ <https://health.mo.gov/data/vitalstatistics/mvs19/Table12ab.pdf>.

total economic loss to Missouri from these measures could be as high as \$51 billion. As Greene County appropriately presents, the substantial economic fiscal reality of abortion relating to unborn lives cannot be denied or omitted from a fiscal note to inform voters of the consequences.

In *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010) the Court of Appeals reviewed the State Auditor's Office's process in preparing a fiscal note and fiscal note summary for a ballot measure. The Court noted that it is your office's practice to "evaluate the responses and to obtain clarification from the entity if the information was unclear. If [the office] found a response to be unreasonable, that affected how much weight was given to the statement in preparing the summary." *Id.* at 582.

The fiscal note and fiscal note summary submitted to the Attorney General's Office does not comply with this process. Greene County's submission is the only reasonable submission by the few entities that responded to your request for submission. The responses from the other counties and cities were unreasonable as they employed an entirely different—and patently incorrect—methodology. It is unreasonable for those entities to conclude that the measure will have no estimated fiscal impact on their operations. Greene County's methodology, or a similar methodology that recognizes the assumptions Greene County recognizes, should be applied to the population base in all Missouri counties and take into account the number of reported abortions in Missouri from the Department of Health and Senior Services, a source referenced in Greene County's submission to your office.

- ii. *The fiscal note contains inadequate submissions concerning the impact to state governmental operations.*

The fiscal note indicates that responses were received from the Department of Revenue and the Department of Social Services, among others. Neither of those entities estimated a fiscal impact despite the plain impact this ballot measure will have to their agencies.

As Greene County recognized, aborting unborn Missourians will have a deleterious impact on the future tax base. The Department of Revenue did not employ a similar methodology for the state tax base. As one submission to your office noted, there were about 2,000 abortions reported in Missouri to the Department of Health and Senior Services between 2020-2021.

The Department of Revenue's submission should be rejected under *Carnahan*, which should affect "how much weight [should be] given to the statement in preparing the summary," *Missouri Mun. League*, 303 S.W.3d at 582. In the alternative, another submission should be requested from the Department of Revenue that more accurately estimates the fiscal impact to its operations.

The Department of Social Services similarly estimated that the measure will have no impact on their department. This submission also fails under *Carnahan*.

Your office received submissions that correctly indicate that this measure will affect the Department of Social Services. One submission noted that under federal law, “state are barred from using Federal funds to pay for abortions except in limited cases (the Hyde Amendment). Federal funding could be in jeopardy and Missouri could be subject to the risk of litigation and sanctions, including the possibility of deferral or disallowance of federal financial participation in Missouri’s Medicaid program.” As that submission noted, in 2019, Missouri’s Medicaid program received more than \$7.2 billion in federal funds.

Another submission noted the amendment might result in a loss of federal Medicaid revenues by an unknown amount, up to \$12.5 billion annually—the amount that Missouri is estimated to receive in fiscal year 2024 in federal Medicaid dollars. Other states have recently lost Medicaid revenue because of changes in abortion policy. As two submissions to your office noted, the State of California did not receive \$200 million in federal Medicaid matching dollars due to its unlawful abortion insurance mandate.

Those numbers are reflected nowhere in the submission from the Department of Social Services. The submission should thus be afforded no weight, or another submission should be requested from the Department of Social Services that more accurately estimates the fiscal impact to its operations.

B. The fiscal note summary is legally deficient

Under § 116.175.3, a fiscal note summary must contain “language neither argumentative nor likely to create prejudice either for or against the proposed measure.” It is subject to challenge in the courts if the language is “insufficient or unfair.” § 116.190.

The fiscal note summary likely does not comply with § 116.175 for at least two primary reasons. First, the fiscal note summary conveys the misleading message that it is an accurate representation of the true cost to local and state governmental operations. The only numerical figure mentioned in the fiscal note summary is \$51,000—a sliver of the maximum (or even likely) potential financial impact to local and state governmental operations. The average, reasonable voter reading this summary will not know the small sample of entities your office solicited for submissions or the small response rate. The fiscal note summary hides an elephant in a mouse hole. Upon revision, if your office does not receive a greater response rate or solicit new submissions, the revised fiscal note should explain that the true,

statewide cost of this measure is nowhere close to the amount reported by just one Missouri county.


Second, the fiscal note summary is legally deficient for failing to adequately summarize the submissions your office received. In *Protect Consumers' Access To Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665 (Mo. App. W.D. 2015), the Court of Appeals held that “[t]he Auditor must include submissions in the fiscal note regarding the *potential* cost or savings to state or local government entities as a result of the initiative.” *Id.* at 674. The fiscal note summary merely states that “opponents estimate a potentially significant loss to state revenue.” Your office received submissions indicating that the “potentially significant loss” could be nearly \$12.5 billion dollars in Medicaid losses alone, and potentially much higher.

The fiscal note summary should reflect that number. To the extent that the fiscal note summary must have the “responses submitted [] listed verbatim in the fiscal note with only minor editing,” *Brown v. Carnahan*, 370 S.W.3d 637, 649 (Mo. banc 2012), the fiscal note summary does not meet that standard by failing to note the potential \$12.5 billion impact to the State from the potential loss of Medicaid dollars or the much higher impact from the decrease in population.

Voters reading the fiscal note summary are likely to be misled into thinking that this ballot measure will have little fiscal impact on state and local governmental entities. If it ultimately appears as part of the official ballot title, the fiscal note summary is likely to be met with a well-founded legal challenge to its fairness and sufficiency.

For these reasons, I conclude that the fiscal note and fiscal note summary do not satisfy the requirements of § 116.175 and therefore I am returning them to you for revision.

Very truly yours,



ANDREW BAILEY
Attorney General

OP-2023-205

State Capitol
201 W. Capitol Avenue
Jefferson City, MO 65101



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SCOTT FITZPATRICK
MISSOURI STATE AUDITOR

April 21, 2023

RECEIVED

APR 21 2023

The Honorable Andrew Bailey
Attorney General of Missouri
Supreme Court Building
Jefferson City, MO 65101

MISSOURI
ATTORNEY GENERAL

Re: Attorney General Opinion No. 206-2023

Dear Attorney General Bailey,

The State Auditor's Office is in receipt of Opinion Letter No. 206-2023 in which you allege the fiscal note and fiscal note summary for IP 2024-077 did not satisfy the requirements of section 116.175, RSMo, and were therefore returned for revision.

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 fiscal note and fiscal note summary for IP 2024-077 contain estimated costs to state and local governmental entities and the fiscal note summary further states potential significant costs are anticipated by opponents. The fiscal note summary contains 33 words (excluding one article) and summarizes the fiscal note in language neither argumentative nor likely to create prejudice either for or against the ballot initiative. The fiscal note therefore does contain language that advises Missourians of the estimated financial impact IP 2024-077 would have on the State of Missouri and its state and local governmental operations, and it complies with all statutory requirements contained in chapter 116.

In preparing the fiscal note and fiscal note summary, the State Auditor's Office followed the procedure which has remained substantially the same and been used in drafting all fiscal notes and fiscal note summaries for at least the last decade, during which Auditors of both major political

parties have held office. This process has been upheld by the courts repeatedly, as you are aware from reviewing the various decisions cited in your opinion, and includes ensuring representation from an appropriate cross-section of entities that might be affected by the proposal. To achieve this representation, the State Auditor's Office sent copies of the proposed ballot initiative to various 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. While the State Auditor's Office is not required to solicit responses from any entities at all, we inquired of a range of state agencies and other political subdivisions, a list of which has been curated over many years based on a variety of considerations.¹

Specifically, the State Auditor's Office requested submissions from the Attorney General's Office², 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. 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,

¹ This list also includes entities that have specifically asked to be added to the comprehensive list of entities that receive from the State Auditor's Office a copy of every ballot initiative for review for impact. It also excludes any entity that has specifically asked to be excluded from this list.

² On March 16, 2023, officials from the Attorney General's Office provided a fiscal response that indicated they expect to the extent the enactment of IP 2024-077 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.

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 State Auditor's Office also accepts any and all submissions provided by any other governmental entity, proponents, opponents, and members of the public.

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 other agencies with exposure to the Medicaid program) indicated they do not anticipate a fiscal impact, other than an unknown impact related to regulating abortion facilities submitted by DHSS, as a result of IP 2024-077 and no other state agency, nor the Attorney General's Office, provided a response that indicated IP 2024-077 would jeopardize the state's federal Medicaid funding. Your opinion states that you disagree with the fiscal response of DSS and the Department of Revenue³ (DOR), stating their submissions are missing the inclusion of the potential loss of Medicaid funding and tax revenue respectively, and assert another submission should be requested.

Although the auditor *may* conduct a follow-up inquiry with an entity whose submission raises additional questions or appears incomplete, *Brown*, 370 S.W.3d at 649, there is no authority *requiring* that the auditor send any entity the submission of another entity for review nor *requiring* any entity to respond to the auditor's request for submissions at all, much less to comply with a request to review the submission of another entity and comment on such submission.

Sinquefield v. Jones, 435 S.W.3d 674, 681 (Mo. App. W.D. 2014) (emphasis in original). The responses received from DSS and DOR were clear and did not raise additional questions or appear incomplete. Even so, since receiving your opinion, I have spoken with the Director of the Department of Social Services and the Director of MO Healthnet, as well as the Director of the Department of Revenue regarding IP 2024-077 and have been informed that after consideration of the contents of your opinion relevant to their agencies, neither DSS nor DOR will be modifying their response.

The State Auditor's Office examines submissions to determine whether they appear complete, are relevant, have an identifiable source and are reasonable. *Protect Consumers' Access*

³ DOR indicated IP 2024-077 would have no fiscal impact on the department.

to *Quality Home Care Coalition, LLC v. Kander*, 488 S.W.3d 665, 674 (Mo. App. W.D. 2015) ("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."). "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). Based on my experience in state government as a legislator, State Treasurer, and State Auditor and my overall knowledge and understanding of the state budget and Medicaid funding, I see no argument to be made that the state's \$12.5 billion in annual Medicaid funding is at risk. Additionally, no legal opinion presented to me, including yours, provides analysis supporting the claim that Missouri's Medicaid funding could be lost due to mandated violations of federal law, and stating such in the fiscal note summary would be inaccurate. While I personally find the content of the IP extremely morally objectionable, that is not a sufficient reason for me to claim the state could lose \$12.5 billion of federal funds annually. Even setting aside the lack of evidence or any legal analysis explaining how the IP would place Missouri in violation of the Hyde⁴ amendment, our research has failed to identify any state that has ever been subjected to a penalty that amounted to the withholding of 100% of annual federal Medicaid funding. To the extent the U.S. Department of Health and Human Services (HHS) has penalized a state for a violation of what the Hyde or Weldon⁵ Amendments require, the penalty imposed has been less than 5% (typically 1-2%) of that state's total annual Medicaid funding. The citation to the \$200 million penalty imposed upon California is unfortunately not comparable to the provisions included in IP 2024-077. The State of California was penalized by HHS because California illegally imposed universal abortion coverage mandates on all health care plans in the state—a mandate that is clearly in violation of the Weldon

⁴ 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.

⁵ The Weldon Amendment stands for the proposition that mandatory abortion coverage cannot be foisted upon health care providers and bars federal funding by HHS 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.

Amendment, and a mandate that if included in the IP would have almost certainly resulted in a different response from DSS and a different fiscal note summary.

While there is a lack of evidence the State of Missouri would lose federal funding, opponents cited a multitude of other consequences of IP 2024-077 that could result in potential significant losses in revenue, which is acknowledged in the fiscal note summary. Specifically, the fiscal note summary states: "Opponents estimate a potentially significant loss to state revenues."

The State Auditor's Office 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. We were provided with conflicting submissions from all other counties that responded, each of which reported no fiscal impact, yet your opinion concludes the fiscal note summary should have disregarded the other responses that were received from local governments and applied the Greene County methodology to all other political subdivisions in the state. The statutory timeline for the State Auditor's Office 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 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 would not be appropriate to 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."). For completeness, I included the fiscal impact reported by Greene County, and indicated that the amount of their response was the lowest indicated cost to local governments. Specifically, the fiscal note summary states: "Local governmental entities estimate costs of *at least* \$51,000 annually in reduced tax revenues".

The State Auditor's Office is not required to parrot the fiscal responses provided by proponents or opponents in the face of knowledge that such responses are unreasonable or otherwise include questionable methodology or an unidentifiable source for its fiscal assessment, nor should it be. More succinctly stated, the Auditor is *not* required to include "responses

submitted [] listed verbatim in the fiscal note with only minor editing" or in the fiscal note summary. In determining that the Auditor's actions throughout the process of preparing fiscal notes and fiscal note summaries fall under the plain meaning of the terms "investigate" and "investigation", the *Brown* court summarized the testimony of a member of the staff of then Auditor Thomas Schweich.

The auditor then drafts the fiscal note and fiscal note summary based solely on the responses he or she receives. The responses submitted are listed verbatim in the fiscal note with only minor editing. The fiscal note summary is a compilation of the various proposals and is intended to advise the voters about the potential cost or savings, if any, from the adoption of the initiative. Hence, the auditor's actions throughout the process of preparing the fiscal notes and fiscal note summaries fall under the plain meaning of "investigate" and "investigation."

Your opinion mischaracterizes this summarization of the testimony of a State Auditor's Office employee as a directive of the court. The court very clearly did not hold or in any fashion create a standard that required the Auditor to include responses verbatim (with minor editing) in the fiscal note or in the fiscal note summary. *Brown*, 370 S.W.3d at 649. "All of the details of a fiscal note need not be set out in a summary consisting of a mere fifty words." *Missouri Muni League v. Carnahan*, 303 S.W.3d 573, 583 (Mo. App. W.D. 2010). If that requirement existed, or it were the practice of the State Auditor's Office to blindly include all submissions, regardless of content, in the fiscal note summary, the office would be forced to include any submission regardless of how preposterous it was or how likely it was to create prejudice for or against the proposed measure, something I'm sure we would both find problematic.

In 1997, the legislature definitively delegated to the State Auditor, not the Attorney General, the duty to prepare the fiscal notes and fiscal note summaries.

Except as provided in section 116.155, upon receipt from the secretary of state's office of any petition sample sheet, joint resolution or bill, the auditor shall assess the fiscal impact of the proposed measure. The state auditor may consult with the state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal. Proponents or opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact estimating the cost of the proposal in a manner consistent with the standards of the governmental accounting standards board and section 23.140, provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state.

Section 116.175.3, RSMo (emphasis added). The State 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 State Auditor that has constitutional authority to supervise the receipt and expenditure of public funds. *See* MO. CONST. art. IV, §13; see also *Brown*, 370 S.W.3d at 652 (holding section 116.175, RSMo, was a constitutional delegation of authority to the State 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 State Auditor's Office availed itself of its option set forth in chapter 116 to gather responses from various state and local government entities, as well as proponents and opponents, to determine the estimated costs or savings, if any, IP 2024-077 would have on their entity. The office then recorded their responses in the fiscal note and determined from their responses the estimated costs or savings, if any, of the proposed ballot measure.

My personal pro-life stance and history of advancing pro-life legislation, including eliminating taxpayer funding for abortion providers during my time as the budget chairman in the House of Representatives, is very public and I have consistently been endorsed by pro-life organizations based on my legislative record and recorded positions. As much as I would prefer to be able to say this IP would result in a loss to the state of Missouri of \$12.5 billion in federal funds, it wouldn't. To submit a fiscal note summary that I know contains inaccurate information would violate my duty as State Auditor to produce an accurate fiscal note summary. Because the long-established process for producing fiscal notes and fiscal note summaries was followed and no new information has been presented that warrants inclusion in the fiscal note or fiscal note summary, I will not revise them.

Pursuant to section 116.175.2, RSMo, I have enclosed the fiscal note and fiscal note summary for IP 2024-077.

Sincerely,



Scott Fitzpatrick
Missouri State Auditor



SCOTT FITZPATRICK
MISSOURI STATE AUDITOR

April 21, 2023

The Honorable Andrew Bailey
Attorney General
Supreme Court Building
Jefferson City, MO 65101

Dear Attorney General Bailey:

Our office received initiative petition 24-077 on March 9, 2023. Pursuant to §116.175, RSMo, we forwarded the following fiscal note summary for your review and approval as to legal content and form. On April 10, 2023, you returned the fiscal note and fiscal note summary to our office for revision. Our office declines to revise the fiscal note and fiscal note summary. Accordingly, we are resubmitting the unaltered fiscal note summary for your review and approval as to legal content and form:

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.

A copy of the unaltered fiscal note for the initiative petition is also attached. Thank you for your immediate attention to this matter. Your office should return the approved fiscal note summary to our office within 10 days, pursuant to §116.175.4, RSMo. If you have any questions or comments, please contact me at (573) 751-4213.

Sincerely,

Ted Fugitt, CPA, CGAP
Assistant Director of Audits

Enclosures

Ex. D



ATTORNEY GENERAL OF MISSOURI
ANDREW BAILEY

May 1, 2023

RECEIVED

MAY 02 2023

STATE AUDITORS OFFICE

The Honorable Scott Fitzpatrick
Missouri State Auditor
State Capitol, Room 229
Jefferson City, MO 65101


Dear Auditor Fitzpatrick:

This office received your letters of April 21, 2023 resubmitting fiscal notes and fiscal note summaries prepared under § 116.175, RSMo, for initiative petitions submitted by Anna Fitz-James, 2024-077 through 2024-087. The fiscal note summary that you submitted for all eleven initiative petitions reads in its entirety as follows:

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.

On April 10, 2023, this office previously rejected these fiscal notes and fiscal note summaries that you submitted for this measure, which we "returned to the auditor for revision." § 116.175.5, RSMo. Our previous letter explained the reasons for our rejection. Your resubmitted fiscal notes and fiscal note summaries have not changed. Our office thus concludes that we have fulfilled our response obligations under § 116.175, RSMo for initiative petitions 2024-077 through 2024-087.

Very truly yours,



ANDREW BAILEY
Attorney General