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SC100132

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel. Dr. Anna Fitz-James,

Plaintiff-Respondent,

v.

Andrew Bailey, Missouri Attorney General, *et al.*,

Defendants-Appellants.

From the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

BRIEF OF APPELLANT ATTORNEY GENERAL ANDREW BAILEY

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JURISDICTIONAL STATEMENT

On May 4, 2023, Respondent Dr. Anna Fitz-James (Relator below) filed her Verified Petition for Writ of Mandamus and Declaratory Judgment. Counts I and II of the Petition prayed for a writ of mandamus or declaratory judgment against the Attorney General, the State Auditor, and the Secretary of State.[1] Count III of the Petition asserted a direct challenge to the constitutionality of seven different elections statutes related to the ballot initiative process under Article III, §§ 49 and 50 of the Missouri Constitution: §§ 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. Specifically, Respondent prayed for the Court to conclude that "any or all" of the aforementioned statutes are unconstitutional "in whole or in part . . . on their face or as applied" to Respondent.

This Court has exclusive appellate jurisdiction over this case because, under Article V, § 3 of the Missouri Constitution, this Court has "exclusive appellate jurisdiction in all cases involving the validity . . . of a statute . . . of this state." *See Alderson v. State*, 273 S.W.3d 533, 535 (Mo. banc 2009). That appellate jurisdiction also extends to situations where "any party properly raises and preserves in the trial court a real and substantial (as opposed to merely colorable) claim that a statute is unconstitutional[.]"*Boeving v. Kander*, 496 S.W.3d 498, 503 (Mo. banc 2016)

[1] The Circuit Court dismissed the Secretary of State from this lawsuit at the beginning of trial.

(further noting that "this Court has exclusive appellate jurisdiction over any appeal in which that claim may need to be resolved.").

On June 20, 2023, the Circuit Court issued a Judgment against the Attorney General on Count I, and denied Respondent's claims in Counts II and III. The Attorney General has appealed the portion of the Circuit Court's June 20, 2023 judgment adverse to the Attorney General that issued a writ of mandamus or declaratory relief, against the Attorney General. As represented in Respondent's Petition and the Circuit Court's Judgment, the Attorney General's appeal inherently involves questions surrounding the obligations imposed on executive branch officials by various elections statutes and the relationship between those obligations and different provisions of the Missouri Constitution.

Respondent's Petition also directly challenged the validity of seven different duly enacted statutes under Article III, §§ 49 and 50 (both on the face of each statute and as applied), and this issue was repeatedly addressed by both parties throughout the litigation and ruled on by the Circuit Court. *See Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens Serial Numbers 1-047 and 1-048, et al.*, 517 S.W.2d 49, 55 (Mo. banc 1974) (stating that the Supreme Court "reviews only questions presented to the trial court."). The Attorney General's appeal of the Circuit Court's Judgment on Respondent's Petition may implicate the scope of Article III, § 49 and Article III, § 50 of the Missouri

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Constitution, as each relates to the validity of the Missouri election system under the statutes that Respondent sought to declare as unconstitutional in Count III of the Petition: §§ 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. And Respondent has cross-appeal rights over Count III.

Accordingly, appellate jurisdiction is proper in this Court because this case involves "the validity . . . of a statute . . . of this state," Mo. Const. art. V, § 3, or at the very least it involves a properly-preserved and colorable constitutional claim that may need to be resolved on appeal, *see Boeving*, 496 S.W.3d at 503.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the question of when the Attorney General can properly exercise the authority given to his office under Section 116.175 to "return to the [State Auditor] for revision" a fiscal note and fiscal note summary prepared for an initiative petition that does not contain the "legal content" required for those materials. § 116.175.4, .5, RSMo. The answer to that question is clear, and it comes from the very statute granting the Attorney General the authority to review the State Auditor's submissions: he can return to the Auditor for revision a fiscal note and summary that is "argumentative" or is "likely to create prejudice for or against the proposed measure." § 116.175.3, RSMo. That is exactly what the Attorney General did here. For several reasons, the Circuit Court erred in slashing the Attorney General's authority and relegating his office to merely rubber stamping the State Auditor's submissions.

First, the plain meaning of the Attorney General's and State Auditor's roles under Section 116.175 are clear. The Attorney General has the responsibility to review the Auditor's proposed fiscal note and fiscal note summary[2] and determine

[2] As discussed in the Statement of Facts, Respondent proposed 11 initiative petitions. For purposes of the issues raised in this appeal, there is no material difference between those ballot measures or between the fiscal notes and fiscal note summaries prepared for them. For that reason and in order to simplify the language in this brief, Appellant will refer to Respondent's initiative petitions and the State Auditor's fiscal note and fiscal note summaries in the singular. Appellant will differentiate between the measures when necessary.

whether the fiscal note and fiscal note summary each satisfy the requirements of the statute. The statute commands that State Auditor shall revise his submissions if the Attorney General returns them to him. § 116.175.5, RSMo. Here, the State Auditor refused to do so. He could, and should, have done more, as Section 116.175 commands. In fact, the evidence demonstrates that for many of Respondent's proposed ballot measures, the State Auditor *did* receive additional comments from government officials that should have been incorporated into a revised fiscal note and fiscal note summary.

Second, the Attorney General correctly rejected the State Auditor's fiscal note and fiscal note summary. The only plausible interpretation of "legal content," based on that phrase's plain meaning and surrounding context in Section 116.175, is that a fiscal note or fiscal note summary that is obviously deficient on its face does *not* contain the required legal content. This is a narrow reading of "legal content" that does not justify the Circuit Court's holding that the Attorney General engaged in an unwarranted exercise of authority.

In his Opinion Letters to the State Auditor, the Attorney General described the many reasons why the State Auditor's materials lacked the required legal content. The State Auditor's fiscal note contained wildly inadequate responses based on divergent and nonsensical methodologies from local governmental entities that, on their face, cannot survive even the most forgiving review. The fiscal note

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summary, too, lacks the required legal content because it conveys the misleading—and therefore facially argumentative and prejudicial—message that it is a reliable estimate of the cost of the measure. The fiscal note summary also fails to adequately summarize all submissions the State Auditor received from "others with knowledge pertinent to the cost of the proposal." § 116.175.1, RSMo. Voters will be misled when reviewing the fiscal note and fiscal note summary, and the information contained in them will create prejudice in favor of the measure.

Third, the Circuit Court erred in entering either mandamus or declaratory relief against the Attorney General. Mandamus relief ordering the Attorney General to approve the State Auditor's materials was inappropriate because mandamus is a last-resort remedy, and there were other steps that needed to take place before a writ of mandamus could be sought. Section 116.175 allows the Attorney General's review of a fiscal note and fiscal note summary to be more than a rubber-stamp review confined to the number of words in the materials; for that reason, the Attorney General's duty is not ministerial and not one that can be enforced through mandamus. And Respondent did not demonstrate that she had a *right* to inject herself at this early stage in the ballot measure review process, which should be an exchange of materials between two statewide elected officials. Her challenge is premature.

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For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary.

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STATEMENT OF FACTS

I. The Proposed Initiative Petitions.

On March 8, 2023, Respondent Dr. Anna Fitz-James submitted eleven initiative petitions that would amend the Missouri Constitution to the Secretary of State. (D28, at ¶2; D29 (Jt. Stip. Ex. A)). The Secretary of State assigned the following initiative numbers to the petitions: 2024-077, 2024-078, 2024-079, 2024-080, 2024-081, 2024-082, 2024-083, 2024-084, 2024-085, 2024-086, and 2024-087. (D28, ¶4). The Secretary of State sent a copy of each initiative petition's sample sheet to the Attorney General and the State Auditor. (D28, ¶6). Additionally, the text of each initiative petition was posted to the Secretary of State's website. (D28, ¶5).

The Attorney General reviewed and approved the sample sheets for each of the eleven initiative petitions as to form under Section 116.050. (D28, ¶7). Following that approval, the Secretary of State also approved each of the initiative petitions as to form. (D29, ¶8).

On March 29, 2023, the Auditor sent a proposed fiscal note and fiscal note summary for each of the eleven initiative petitions to the Attorney General. (D28, ¶9). On April 10, 2023, the Attorney General responded to each of the fiscal notes and fiscal note summaries from the Auditor with an opinion letter, stating the reasons that the proposed fiscal notes and fiscal note summaries were legally deficient under Section 116.175. (D28, ¶11; D34-D35 (Jt. Stip. Ex. C)).

II. The Attorney General's Opinion Letters Sent to the Auditor in Response to the Fiscal Note and Fiscal Note Summaries.

In the April 10, 2023 Opinion Letters from the Attorney General to the State Auditor, the Attorney General stated that he was rejecting the State Auditor's fiscal note and fiscal note summary for lacking the required legal content and returning them to the State Auditor for revision. (D34-D35 (Jt. Stip. Ex. C)). The Attorney General's Opinion Letters detailed the reasons for his rejection, as follows. (*Id.*).

First, the Attorney General wrote that the fiscal note contains inadequate and divergent submissions from local government entities. (D34 at p.2). The Attorney General stressed the statistically insignificant small sample size of responses solicited by the State Auditor, noting "this ballot measure will affect the present and future population of Missouri. (*Id.*) Yet, while Missouri has 114 counties and one independent city, in addition to over 1,000 other cities and villages . . . only three counties and two cities responded." (*Id.*).

The Opinion Letter noted that only one local governmental entity, Greene County, made an effort to submit a reliable methodology for calculating the fiscal impact. (*Id.*) "Greene County[] understood that the measure would have the obvious effect of reducing the population of [its] citizens," and estimated that 135 future citizens would be lost in that county annually due to legalizing abortion to Missouri. It estimated nearly $51,000 in lost county revenue annually. (*Id.*). The Attorney

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General emphasized again that Greene County "was the only entity to recognize what is facially apparent from this measure." (*Id.*).

The Greene County response stated that 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." (*Id.* at p.3). The Attorney General reviewed the submission and informed the State Auditor that it must have "recognized that this was a reasonable assumption" and that the "fiscal note summary reflects the financial impact to Greene County." (*Id.*). The Attorney General continued by noting that, however, that the State Auditor "did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded." (*Id.*). Additionally, the Attorney General wrote that the Greene County methodology should be applied to the remainder of the populous of Missouri, because it is "unreasonable for those entities to conclude that the measure will have no estimated fiscal impact[.]" (*Id.*).

Second, the Attorney General also stated the fiscal note contained inadequate submissions concerning the impact to state government operations. (*Id.*). Citing submissions submitted to the State Auditor's office by a few entities, the Attorney General wrote that the proposed initiative petitions could jeopardize federal funding for Missouri Medicaid. (*Id.* at pp.3-4). He compared Missouri's situation to another other state who recently suffered similar losses when changes were made to its

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abortion policies. (*Id.* at p.4). The Attorney General stated those submissions should not be accepted, because the potential value of the loss was not reflected in the submissions from the varying state government entities. (*Id.*).

Third, the Attorney General stated that the fiscal note summary was also legally deficient for two principal reasons. (*Id.* at pp.4-5). The first reason was that the fiscal note summary "conveys the misleading message that it is an accurate representation of the true cost to local and state governmental operations." (*Id.* at p.4). The Attorney General wrote that this was because the "only numerical figure mentioned in the fiscal note summary is . . . a sliver of the maximum (or even likely) potential financial impact" and that the "average, reasonable voter reading this summary will not know the small sample of entities" that the State Auditor had solicited for a submission. (*Id.*).

The second reason was that the fiscal note summary fails "to adequately summarize the submissions [the State Auditor's] office received." (*Id.* at p.5). The Attorney General wrote that "the fiscal note summary merely states that 'opponents estimate a potentially significant loss to state revenues.'" (*Id.*). He stated that the State Auditor "received submissions indicating that the 'potentially significant loss' could be nearly $12.5 billion dollars" and because of that potential loss, "the fiscal note summary should reflect that number." (*Id.*).

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One submission by an interested party noted "the loss of federal Medicaid dollars, which in the proposed fiscal year 2024 budget would be a loss of nearly $12.5 billion." (*Id.*; *see also* D30 at p. 15 (Jt. Stip. Ex. B)). The submission explained several examples of how this might occur. (D30 at p.15 (Jt. Stip. Ex. B)). For example, under the initiative petitions, the entity noted that hospitals might be required to perform certain procedures that are disallowed by the federal government. (*Id.*). That same submission noted that under the initiative petitions, the cost of inpatient medical procedures and emergency department services for treating "issues before childbirth with complications" has a median charge per person of $11,997 with a maximum charge of $35,345. (*Id.* at p.16). The submission noted that these procedures may ultimately be paid by taxpayers. (*Id.*). Another submission by an interested party echoed many of those same concerns and potential loss of $12.5 billion in federal Medicaid money. (D30 at p.22 (Jt. Stip. Ex. B)).

For these reasons, the Attorney General concluded that "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." (D34 at p.5). Therefore, the Attorney General's Opinion Letters continued, "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." (D34 at p.5).

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III. The State Auditor Receives Additional Fiscal Impact Estimates.

Three days before the Attorney General responded with his rejection of the State Auditor's fiscal note and fiscal note summary, on April 7, 2023, the State Auditor received additional information from the Governor's Office. (D41 (Jt. Stip. Ex. I)). The Governor's Office provided a fiscal estimate for each of the 11 initiative petitions based on "additional costs identified by other agencies in regards to regulation and enforcement." (*Id.*) In addition, the Governor's Office stated that each initiative petition appears "to conflict with federal law, which may have bearing on the fiscal responsibilities of [the Governor's Office]." (*Id.*).

Each submission from the Governor's Office noted that "there will likely be litigation leading to a fiscal impact on the Legal Expense Fund (LEF) ranging from $1,500 to unknown" due to potential conflicts with the U.S. Supreme Court's decision in "*Dobbs v. Jackson Women's Health Organization* and requirements of parental consent." (*Id.*) (Italics to case citation added). In addition, for several of the initiative petitions, the Governor's Office estimated that "failing to be in compliance with federal requirements related to Medicaid and MO HealthNet could lead to a fiscal impact of up to $600M" due to an apparent conflict "with the federal policy related to the Hyde Amendment and expending public funds on abortions." (*Id.*).

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IV. The State Auditor's Response to the Attorney General's Decision to Return the Fiscal Note and Fiscal Note Summary.

On April 21, 2023, the State Auditor sent the Attorney General a letter refusing to revise the fiscal note and fiscal note summary. The State Auditor did not revise its original materials to incorporate the new information it had received from the Governor's Office. (D28, ¶13; D38 (Jt. Stip. Ex. F)). The State Auditor stated that his office is "resubmitting the unaltered fiscal note and fiscal note summary for [the Attorney General's] review and approval as to legal content and form." (D38 (Jt. Stip. Ex. F)). The State Auditor's response letter stated that the Attorney General should "return the approved fiscal note summaries within 10 days, pursuant to § 116.175.4, RSMo." (*Id.*)

Additionally, on April 21, 2023, the State Auditor sent a separate letter stating that the fiscal note and fiscal note summary contained "estimated costs to state and local government entities and the fiscal note summary further states potential significant costs are anticipated by opponents." (D37 (Jt. Stip. Ex. E)). The State Auditor did not revise the fiscal note or the fiscal note summaries because "no new information [had] been presented that warrant[ed] inclusion in the fiscal note or fiscal note summary." (*Id.*). The State Auditor's letter made no mention of the new information it received from the Governor's Office. (*See id.*).

On May 1, 2023, the Attorney General stated that because the proposed fiscal notes and fiscal note summaries remained unchanged after the previous rejection,

they were not approved. (D28, ¶ 14; D40 (Jt. Stip. Ex. H)). The Attorney General's Office "thus concluded that we have fulfilled our response obligations under § 116.175, RSMo for initiative petitions 2024-077 through 2024-087." (*Id.*).

V. Respondent Files Litigation.

On May 4, 2023, Respondent filed a Petition against the Attorney General, State Auditor, and Secretary of State. (D2). The Petition raised three Counts. Count I was asserted only against the Attorney General and sought mandamus or declaratory relief that ultimately sought to order the Attorney General to approve the State Auditor's initial fiscal note and fiscal note summary. Count II was asserted against the State Auditor and the Secretary of State and sought mandamus or declaratory relief requiring the State Auditor to deliver to the Secretary of State the initial fiscal note and fiscal note summary for inclusion in an official ballot title. Count III was a request for declaratory relief against all three statewide officials and sought to strike as unconstitutional "any or all" of seven statutes governing the ballot initiative process in Chapter 116: Sections 116.040, 116.050, 116.175, 116.180, 116.190, 116.332, and 116.334. (*Id.*).

The case was briefed and tried on an expedited basis, and limited discovery took place also on an expedited basis. (*See generally* D1). It was ultimately tried on a joint stipulation of facts and exhibits. (D28). At the trial on June 14, 2023, the Circuit Court granted a motion to dismiss filed by the Secretary of State, leaving

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only the Attorney General and State Auditor as remaining parties. (Tr. 17:14-20). Ultimately, no witnesses testified, and counsel for Respondent, the State Auditor, and the Attorney General presented argument. (*See generally* Tr.).

On June 20, 2023, the Circuit Court issued a Judgment against the Attorney General on Count I, and denied Respondent's claims in Counts II and III. (D44). The Circuit Court entered a writ of mandamus ordering the Attorney General to "approve the legal content and form of the fiscal note summaries submitted to the Attorney General on March 29, 2023, by the Auditor" for the eleven initiative petitions. (D44, p.28; D45). Later that same day, the Attorney General filed this notice of appeal. (D47).

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POINTS RELIED ON

I. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the Attorney General properly returned the State Auditor's fiscal note and fiscal note summary to the State Auditor for revision, in that the State Auditor's submissions lacked the required legal content under Section 116.175, RSMo.

- Section 116.175, RSMo
- *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582 (Mo. banc 2018)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)

II. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the State Auditor was required to revise his fiscal note and fiscal note summary after the Attorney General rejected them, in that the Attorney General's rejection was proper, Section 116.175 contains a clear command to revise the materials upon rejection, and the State Auditor received additional information that should have been incorporated.

- Section 116.175, RSMo
- *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582 (Mo. banc 2018)
- *Protect Consumers' Access to Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665 (Mo. App. W.D. 2015)

- *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010)
- *Pippens v. Ashcroft*, 606 S.W.3d 689 (Mo. App. W.D. 2020)

III. The circuit court erred in granting mandamus relief against the Attorney General, because Respondent had other remedies available and the Attorney General's duty under Section 116.175 is not ministerial, in that the Auditor had not yet revised his materials before Respondent filed suit, the Attorney General has not refused to perform a ministerial duty, and the Attorney General has discretionary authority to review and determine a fiscal note and fiscal note summary's compliance under Section 116.175.

- Section 116.175, RSMo
- *State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800 (Mo. banc 2022)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)
- *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261 (Mo. banc 1980)
- *Barnes v. Uhlich*, 592 S.W.3d 67 (Mo. App. W.D. 2019)

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IV. The circuit court erred in granting declaratory relief against the Attorney General, because the case was not yet ripe and therefore not justiciable, in that the fiscal note and fiscal note summary review and resubmission process had not yet concluded.

- Section 116.175, RSMo
- *State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts.*, 651 S.W.3d 800 (Mo. banc 2022)
- *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009)
- *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261 (Mo. banc 1980)
- *Barnes v. Uhlich*, 592 S.W.3d 67 (Mo. App. W.D. 2019)

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ARGUMENT

I. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the Attorney General properly returned the State Auditor's fiscal note and fiscal note summary to the State Auditor for revision, in that the State Auditor's submissions lacked the required legal content under Section 116.175, RSMo.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

A. Background to Section 116.175.

Section 116.175 clearly establishes the role of the Attorney General in reviewing, and either approving or rejecting the Auditor's fiscal note and fiscal note summary prepared for an initiative petition. The process of crafting the fiscal note and fiscal note summary for an initiative petition begins with the Auditor, who prepares a proposed fiscal note and fiscal note summary for each initiative petition received from the Secretary of State's office. RSMo. § 116.175.1. The adequacy of a fiscal note and fiscal note summary are governed by Section 116.175, which

provides, among other things, mechanisms for proponents or opponents of a measure to submit statements related to the measure and which requires that any fiscal note or fiscal note summary "state the measure's estimated cost or savings, if any, to state or local governmental entities." § 116.175.3. The fiscal note summary shall additionally "summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure." *Id*.

After the Auditor has "prepare[d] a fiscal note and a fiscal note summary" for a proposed initiative, the Auditor "forwards both to the attorney general" for the Attorney General's review. § 116.175.2. At that point, the plain language of Section 116.175 is clear: a review of the proposed fiscal note and fiscal note summary shifts to the Attorney General. "[W]ithin ten days of receipt of the fiscal note and the fiscal note summary," the Attorney General must either "approve the legal content and form" of the fiscal note and fiscal note summary or "determine[] that the fiscal note or fiscal note summary does not satisfy the requirements" of § 116.175.4, .5.

If the Attorney General determines that the fiscal note and fiscal note summary satisfies the requirements of Section 116.175, he "forward[s] notice of such approval to the state auditor." 116.175.4. If, on the other hand, the Attorney General "determines that the fiscal note or the fiscal note summary does not satisfy the requirements of [§ 116.175]," the Attorney General "return[s]" the fiscal note and fiscal note summary "to the auditor for revision." § 116.175.5. At that point, the

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statute commands that the Auditor must revise the proposed fiscal note and fiscal note summary and again forwards both to the Attorney General. *Id*. The statute uses the strongest language: "the fiscal note and the fiscal note summary shall be returned to the auditor for revision." *Id.*

It is only after the fiscal note and fiscal note summary are ultimately approved by the Attorney General that the Secretary of State may use the "approved fiscal note summary and fiscal note," along with the official summary statement, to certify the official ballot title. § 116.180. Section 116.180 mandates that the official ballot title contain "separate paragraphs with the fiscal note summary immediately following the summary statement of the measure[.]" Section 116.175.5 is clear that a fiscal note or fiscal note summary that the Attorney General determines does not satisfy the requirements of the statute "also shall not satisfy the requirements of section 116.180." § 116.175.5.

In summary, the Auditor first prepares fiscal notes and fiscal note summaries and forwards them to the Attorney General. The Attorney General then reviews the fiscal note and fiscal note summary to determine whether each complies with the requirements of Section 116.175, which includes a review for legal content that plainly incorporates a review for argumentative language or information that is likely to create prejudice for or against a measure. § 116.175.3. If the Attorney General determines that a proposed fiscal note or fiscal note summary does not

comply with § 116.175, he is required by the statute to send the deficient fiscal note or fiscal note summary back for further revision. The State Auditor then revises the deficient fiscal note or summary and re-submits it to the Attorney General for review and, if the updates satisfy § 116.175, ultimately approval by the Attorney General. Once the Attorney General determines that a revised fiscal note or fiscal note summary complies with § 116.175, the Attorney General exercises his statutory authority to approve the fiscal note and fiscal note summary for the Secretary of State's use in a certified official ballot title.

B. "Legal content" is different than "form," and the Attorney General's review of the "legal content" of a fiscal note and fiscal note summary is more than just counting words and checking boxes.

A plain-text reading of Section 116.175 and surrounding context make clear that the Attorney General's review for "legal content" plainly incorporates a review for argumentative language or information that is likely to create prejudice for or against a measure. § 116.175.3. The statute does not include a definition of "legal content," but "legal content" must be distinct from "form." The statute requires the Attorney General to review a fiscal note and fiscal note summary for "legal content and form." § 116.175.4. The statute is mandatory, as it uses "shall" to describe the Attorney General's role. Courts have consistently held in statutory interpretation that "[t]he word 'shall' generally prescribes a mandatory duty." *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).

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Because form and legal content are two separate phrases in the statute, they must have two separate meanings. The legislature "is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect" and "[t]he plain and ordinary meaning of the words in a statute is determined from the words' usage in the context of the entire statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018) (citing *Mantia v. Mo. Dep't of Transp.*, 529 S.W.3d 804, 809 (Mo. banc 2017)).

There does not appear to be a dispute in this case about "form," as Section 116.175.3 makes clear what the "form" of a fiscal note and fiscal note summary are: "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[.]" § 116.175.3. This reading of "form" is consistent with how Missouri's appellate courts construe "form" in other initiative petition contexts. For example, in *Bradshaw v. Ashcroft*, the Court of Appeals reasoned that the "form" of the initiative petition is limited to whether the measure contains the designated items that must be contained in the measure, such as certain notices, a signature sheet, specification of the county the signature page will be circulated, and space for notarization:

> Section 116.040 specifies the form of an initiative petition, and directs that the form must be "substantially" followed. The form of an initiative petition is required to include notice that it is a crime to "sign any initiative petition with

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> any name other than [one's] own, or knowingly to sign [one's] name more than once for the same measure for the same election, or to sign a petition when such person knows he or she is not a registered voter." *Id.* Section 116.040 requires the form of an initiative petition to afford a place for each person signing the petition to provide a signature, the date of signature, the signer's address including zip code, the signer's congressional district, and the signer's printed name. Section 116.040 requires the form of an initiative petition to include a circulator's affidavit swearing and affirming under penalty of perjury that persons identified on the petition "signed this page of the foregoing petition ... in my presence," and that the circulator believes each signer to be "a registered voter in the State of Missouri" in the county specified on the signature page. Section 116.040 requires the form of an initiative petition to afford a place for the circulator's affidavit to be signed by the circulator in the presence of a notary.

559 S.W.3d 79, 83 (Mo. App. W.D. 2018). Here, in the context of a fiscal note and fiscal note summary, "form" can mean only whether the fiscal note summary contains 50 or fewer words and a statement of estimated costs or savings. § 116.175.3.

In contrast, "legal content" demands more. The relevant dictionary definitions of "content" are "the topics, ideas, facts, or statements in a book, document, or letter." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 492 (3d ed. 1993). And "legal" means "of or relating to law," "conforming to or permitted by law or established rules : conforming to the procedures and methods prescribed by law." *Id.* 1290. The plain dictionary of "legal content," then, must refer to what *else* is

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required *by law* to be done when preparing, and ultimately contained in, a fiscal note and fiscal note summary. Surrounding context in Section 116.175 makes clear what the legal content of a fiscal note and fiscal note summary must include, at minimum: it must not be "argumentative," and it must not "create prejudice either for or against the proposed measure." *See Richter v. Union Pac. R. Co.*, 265 S.W.3d 294, 297 (Mo. App. E.D. 2008) ("In absence of statutory definitions, we may derive the plain and ordinary meaning from a dictionary and by considering the context of the entire statute in which it appears.") (citing *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 224 (Mo. banc 2007)). "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018). The Attorney General's construction of Section 116.175 achieves these fundamental canons of construction.

At first, all parties followed the process for crafting a fiscal note and fiscal note summary laid out in § 116.175. The State Auditor submitted to the Attorney General an identical proposed fiscal note and fiscal note summary for each of Respondent's eleven initiative petitions. The Attorney General reviewed each of these submissions and determined that each of the fiscal notes and fiscal note summaries "does not satisfy the requirements of [§ 116.175]." In part, the Attorney General determined that the STate Auditor's proposed fiscal note "contain[ed]

inadequate and divergent submissions from local government entities" and "contain[ed] inadequate submissions concerning the impact to state governmental operations." The Attorney General additionally determined that the Auditor's proposed fiscal note summary is legally deficient because in part it "conveys [a] misleading message" and "fail[s] to adequately summarize" the submissions in the fiscal note. Consequently, the Attorney General determined that the fiscal note and fiscal note summary for each of Respondent's initiative petitions was inadequate and returned each to the Auditor for revision. *Id*.

The plain and reasonable intent of the legislature for each of these clauses in the statutory scheme is that the Attorney General's determination actually has meaning and acts as a review on the State Auditor. The Circuit Court's judgment relegates the Attorney General's authority to little more than a word-counter and rubber stamp. As the Circuit Court and Respondent view the statute, the Auditor could prepare a fiscal note or fiscal note summary plainly in contravention of § 116.175 and, without any effective check on his determination, could disregard the Attorney General's concerns and require the Secretary of State to certify an official ballot title with a clearly deficient fiscal note and fiscal note summary. Adoption of Respondent's interpretation would require the Court to conclude that the legislature meant to render significant portions of § 116.175 superfluous and intended that any review of the Auditor's submissions by the Attorney General is completely toothless.

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Section 116.175 reinforces the Attorney General's interpretation of § 116.180, making explicitly clear that "[a] fiscal note or fiscal note summary that does not satisfy the requirements of [§ 116.175] also shall not satisfy the requirements of section 116.180"—the official ballot title requirement statute. Respondent's and the Circuit Court's view would additionally require the Court to exercise its judicial authority to create, out of thin air and without any legislative consent, authority for another executive branch official to approve a proposed fiscal note and fiscal note summary—the State Auditor himself. But the statutory scheme is clear that the State Auditor cannot approve his own fiscal note and fiscal note summary. That role belongs only to the Attorney General. And for reasons further discussed in Point III below, the Attorney General's role *must* be more than simply ministerial when reviewing for legal content.

C. The State Auditor's fiscal note and fiscal note summary are deficient as to legal content.

The Attorney General's Opinion Letters detailed across several pages why the State Auditor's fiscal note and fiscal note summary lack the required legal content under Section 116.165. Ultimately, if voters were to see the fiscal note summary at the ballot box, they would be more likely driven to vote for the measure due to misleading language that is apparent from the face of the fiscal note. Of course, the full fiscal note is not present on the ballot itself, and so voters are left only to look at the 50-word fiscal note summary. This is more than just a dispute over whether the

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Attorney General "does not like the fiscal conclusion reached by the Auditor," as the Circuit Court held. Rather, it is apparent from the face of the fiscal note and fiscal note summary that they lack the required legal content and will create undue prejudice in favor of the measure.

First, the fiscal note contains inadequate and divergent submissions from local government entities. This goes to the heart of the "legal content" required of a fiscal note, because a fiscal note must contain adequate submissions from governmental entities. In his Opinion Letter, the Attorney General stressed the statistically insignificant small sample size of responses solicited by the State Auditor, noting "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 . . . only three counties and two cities responded." Not many more were even solicited for submissions: only 12 and 14 cities.

Only one local governmental entity, Greene County, made an effort to submit a reliable methodology for calculating the fiscal impact. Greene County understood that the abortion-legalization measure would have the obvious effect of reducing population. No other entity engaged in this common-sense analysis that should be present on the face of any submission. As Greene County correctly stated, 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."

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However, the State Auditor did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded. Instead, the fiscal note and fiscal note summary took Greene County's calculated estimated fiscal impact and purported to represent that fiscal impact as the fiscal impact for the *entire state*. Never once did Greene County purport to calculate the fiscal impact of the effects of the initiative petition on the entire state. To represent otherwise is misleading and prejudicial in favor of the initiative petitions. As the Attorney General informed the State Auditor in his Opinion Letter, the Greene County methodology should be applied to the remainder of the populous of Missouri, because it is "unreasonable for those entities to conclude that the measure will have no estimated fiscal impact[.]" (D34, p.3). In other words, it was misleading and prejudicial to represent the financial impact of the measures on Greene County as representative of all 114 counties in Missouri.

To properly apply the methodology would not raise the State Auditor's minimum responsibilities outlined by this Court in *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012). Rather, doing so would underscore *why* the State Auditor even plays a role in the process in the first place while giving proper meaning to "legal content." This Court in *Brown* noted the State Auditor "is not required to compel and second-guess reasonable submissions from entities but is able to rely on the responses submitted. Nor should the auditor wade into the policy debates

surrounding initiative petitions, which an independent investigation would entail. . . . 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." *Id.* at 650. *Brown* did not preclude the State Auditor from selecting *an* assumption or methodology. Any reasonable construction of "legal content" and the duties of the State Auditor require some sort of methodology, and *Brown* does not stand for the proposition that the State Auditor *must only* add and subtract numbers that entities submit.

But, in fact, the State Auditor did not even do that properly. Non-governmental entities estimated a massive possible loss to state revenues, up to a possible loss of $12.5 billion. But that figure is nowhere in the fiscal note summary. Instead, all the State Auditor did was note that "opponents estimate a potentially significant loss to state revenues." This vague language does not comply with the State Auditor's role under Section 116.175 or under *Brown*.

Section 116.175 expressly allows for consideration of figures submitted by governmental and non-governmental entities. Subsection (1) of that statute states that "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***." § 116.175.1 (emphasis added). Furthermore, "[p]roponents or

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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." There is no dispute that the State Auditor received estimates from "others with knowledge pertinent to the cost of the proposal," who may be opponents to the measure, that those estimates were out of compliance with the appropriate fiscal standards, or that the submission were timely received. The record contains no such fact-finding or evidence to the contrary. Instead, the record contains submissions that were not expressly incorporated into the fiscal note summary. The Auditor should have done so, just as it did when it included a specific dollar figure based on Greene County's estimate.

Thus, as the Attorney General wrote in his Opinion Letter, 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 a sliver of the maximum (or even likely) potential financial impact. The average, reasonable voter reading this summary will not know the small sample of entities that the State Auditor had solicited for a submission. That same voter is also much more likely to vote in favor of a measure

that is estimated to cost approximately $50,000 than one that estimates a fiscal impact closer to what the submissions *actually received by the State Auditor* estimated the measure will cost.

To be clear: the Attorney General is advancing a narrow and appropriate reading of his authority to review a fiscal note and fiscal note summary under Section 116.175. That review must be more than a rubber stamp. And at minimum that review allows a rejection of the State Auditor's submissions if it is evident from their face that they are inaccurate, misleading, and likely to create bias for or against a measure. This Court should reverse the Circuit Court's decision, and remand the case to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

II. The circuit court erred in granting mandamus or declaratory relief against the Attorney General, because the State Auditor was required to revise his fiscal note and fiscal note summary after the Attorney General rejected them, in that the Attorney General's rejection was proper, Section 116.175 contains a clear command to revise the materials upon rejection, and the State Auditor received additional information that should have been incorporated.

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Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

As noted above, "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy*, 543 S.W.3d at 585. The legislature "is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect" and "[t]he plain and ordinary meaning of the words in a statute is determined from the words' usage in the context of the entire statute." *Id*. (citing *Mantia v. Mo. Dep't of Transp*., 529 S.W.3d 804, 809 (Mo. banc 2017)). "Where a statute's language is clear, courts must give effect to its plain meaning and refrain from applying the rules of construction unless there is some ambiguity." *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. banc 2010).

Section 116.175 could not be more clear: if the Attorney General "determines" that the Auditor's proposed fiscal note or fiscal note summary for an initiative petition does not satisfy the requirements of Section 116.175, the Attorney General "shall" return the deficient fiscal note or fiscal note summary to the Auditor "for

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revision." § 116.175.5. The Attorney General complied with his duty. The State Auditor has yet to do so.

Instead of revising each fiscal note and fiscal note summary to comply with Section 116.175, the State Auditor "decline[d] to revise the fiscal note and fiscal note summary" for each of the initiative petitions. Because the State Auditor failed to revise the fiscal notes and fiscal note summaries, and because the Attorney General determined that the proposed fiscal notes and fiscal note summaries submitted by the Auditor continue to fail to satisfy the requirements of Section 116.175, the Attorney General again returned the fiscal notes and fiscal note summaries to the Auditor for revision. *See, e.g.* Ex. D. The Auditor has, to date, failed to revise the fiscal note or fiscal note summary for any of Respondent's initiative petitions.

In crafting the text of Section 116.175, the legislature plainly laid out the scope of responsibilities for both the Auditor and the Attorney General. It is the *Attorney General's* responsibility to "determine" whether the fiscal note or fiscal note summary "does not satisfy the requirements of [§ 116.175]" and, if the Attorney General determines that a fiscal note or fiscal note summary does not satisfy those requirements, "the fiscal note and the fiscal note summary shall be returned to the auditor for revision." § 116.175.5. In the context of Section 116.175, the meaning of the requirement that the fiscal note and fiscal note summary be "returned to the

auditor for revision" is clear. The phrase "return . . . for revision" imposes on the State Auditor a statutory duty to provide an updated or altered fiscal note and fiscal note summary for the Attorney General's review under Section 116.175. Any other meaning of the word would render the responsibility for the Attorney General to determine whether a proposed fiscal note and proposed fiscal note summary complies with § 116.175, and, consequently, whether to approve it or send it back to the Auditor for revision, superfluous. Any alternative reading of the requirement that the fiscal note and fiscal note summary shall be "returned for revision" upon a determination by the Attorney General would be contrary to this pronouncement.

This understanding of the legislature's use of the word "revision" is consistent with how the word "revision" is used by courts addressing challenges under Chapter 116. *See, e.g. Pippens v. Ashcroft*, 606 S.W.3d 689, 693 (Mo. App. W.D. 2020) (using the term "revision" to refer to the process of making changes to the official summary statement for an initiative petition); *Sedey v. Ashcroft*, 594 S.W.3d 256, 265 n. 6 (Mo. App. W.D. 2020) (using the terms "revised" and "revisions" to describe changes to the summary language of citizen initiatives). It is also consistent with how Missouri courts have traditionally used the words "revise" and "revisions." *See, e.g. Care & Treatment of Morgan v. State*, 176 S.W.3d 200, 205–06 (Mo. App. W.D. 2005) (considering the "revised" version of a statute as being a change to the legal definition of a term compared to the past definition); *McCarty v. City of Kansas*

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City, 671 S.W.2d 790, 795 (Mo. App. W.D. 1984) (using the term "revisions" to refer to "a change in existing regulations and restrictions" at issue). "[I]n construing a statute to determine legislative intent, a court must presume that the legislature acted with a full awareness and complete knowledge of the present state of the law" and Missouri court cases. *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. banc 1984). Even if the plain meaning of the term "revision" was uncertain (which it is not), Missouri courts' past use and definition of the term strongly supports the Attorney General.

Both the plain meaning of the term "revision" as used in the statute and the regular use of the term by courts in analyzing both ballot title cases and other general cases makes clear: the State Auditor had a statutory duty to send to the Attorney General an *updated and modified* fiscal note or fiscal note summary for each of Respondent's initiative petitions. The Attorney General would then review the resubmitted fiscal note and fiscal note summary to determine whether the documents complied with the requirements of Section 116.175, just as he would upon receiving a first submission. Despite this clear statutory instruction, the State Auditor refused to revise the statute to address the Attorney General's concerns.[3] In fact, the State

[3] Notably, in her Petition below, the one claim Respondent did *not* bring is a request for this Court to enter a judgment declaring that the Auditor must comply with his statutory obligation under § 116.175 to "revise" the proposed fiscal notes and fiscal note summaries. As discussed in the Attorney General's other points on appeal, the Circuit Court erred in blessing Respondent's failure to ask for the relief she did

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Auditor explicitly stated instead that he "*declines to revise* the fiscal note and fiscal note summary." (D38, cleaned up, emphasis added). As the Auditor "decline[d]" to perform his statutory duties under Section 116.175, the Attorney General again returned the fiscal notes and fiscal note summaries for revision. (*See, e.g. id.*; D40).

Neither Section 116.175 nor any other statute requires the Attorney General to approve a fiscal note or fiscal note summary that he determines does not satisfy the requirements of Section 116.175 and is therefore deficient. On the contrary, Section 116.175.5 entrusts in the Attorney General *only one* nondiscretionary duty: that any fiscal note or fiscal note summary which he "determines . . . does not satisfy the requirements of [§ 116.175] . . . ***shall be*** returned to the Auditor for revision." § 116.175.5 RSMo. Courts have consistently held in statutory interpretation that "[t]he word 'shall' generally prescribes a mandatory duty." *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).

Here, the Attorney General determined that the State Auditor failed to make any revisions to the deficient proposed fiscal note and proposed fiscal note summary

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request in her lawsuit and then complain that she does not have relief available to her to resolve her claimed injury. *See State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980) (finding it "undisputed that the relators had an alternative remedy [to a writ of mandamus] available to them" when the relators also "filed an action seeking a declaratory judgment" related to the same dispute.). The proper relief here is for completion of the Attorney General and Auditor's submission, review, and resubmission process. And then if Respondent found the *final* fiscal note or fiscal note summary unfair or insufficient, she could file her own lawsuit under Section 116.190 challenging those materials.

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for each of the initiative petitions, and, consequently, complied with his statutory duty to return the drafts to the State Auditor for further revision. The Attorney General would be running afoul of the requirements of § 116.175.5 if he *did not* return fiscal notes and fiscal note summaries for further revision after a determination that they did not comply Section 116.175.5.

Section 116.175 is clear on the continuing responsibilities of both the Attorney General and the Auditor in reaching an approved fiscal note and fiscal note summary that complies with § 116.175. The General Assembly's use of the term "revision" and the requirements that a fiscal note and fiscal note summary satisfy Section 116.175 and be "approved" by the Attorney General for the purpose of Section 116.180 before the Secretary of State may certify a ballot title demonstrates that the preparation of a fiscal note is an ongoing process. The dual requirements of revision and approval create an ongoing review process that continues until an adequate fiscal note and fiscal note summary is approved. The clear text of the statute renders any additional construction unnecessary. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012) ("When the words are clear, there is nothing to construe beyond applying the plain meaning of the law.").

Even to the extent this Court concludes that it is necessary to look beyond the plain meaning of the statute, the plain and straightforward construction of Section 116.175 is that the use of the terms "revision," "determine," and "approve" create

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continuing, time-constrained obligations on the Auditor and Attorney General to engage in the processes of Section 116.175 until the fiscal note and fiscal note summary for an initiative petition are approved. The rules of statutory construction "require this court to determine the intent of the legislature" by considering the plain and ordinary meaning and application of the text of the statute. *Owsley v. Brittain*, 186 S.W.3d 810, 815 (Mo. App. W.D. 2006).

Here, the plain and ordinary application of the text utilizes the time limit imposed on the executive branch officials—ten days—to govern any deadlines for revisions to proposed fiscal notes or fiscal note summaries. The Attorney General has ten days after receiving an iteration of a proposed fiscal note and fiscal note summary to determine whether to approve or send back for revision the fiscal note and fiscal note summary. § 116.175.4, .5. Under the most permissive interpretation of these provisions controlling executive branch officials drafting and reviewing proposed fiscal notes and fiscal note summaries, "returning" a draft "for revision" *at minimum* implies (and, in the Attorney General's view, expressly requires) that the draft will be edited and then re-submitted for potential approval under a similar statutory timeline as the initial production. Indeed, both the State Auditor and Attorney General acted under this construction of the statute—each provided communications on the proposed fiscal note and fiscal note summary within ten days of receipt. The Circuit Court's judgment effectively discards portions of the statute

mandating a determination of when a fiscal note or fiscal note summary is insufficient—an outcome which is unlikely to be "the intent of the legislature" drafting the provision. *Owsley*, 186 S.W.3d at 815.

Second, the Circuit Court's judgment creates unnecessary statutory conflicts that ultimately render meaningless critical portions of Section 116.175. The judgment expresses concern that there could be a a parade of horribles occurs that then invites intervention from outside the relationship between statewide elected officials carefully crafted by the legislature. Not only is this legal conclusion not supported by the statute, there is no evidence that this fear is happening here. The only event that has occurred is *one* rejection of the State Auditor's initial submissions based on several grounds clearly explained in the Attorney General's Opinion Letters. At most, the present challenge is unripe, especially given that the statute specifically addresses the Attorney General's authority to review and then approve or reject a fiscal note and fiscal note summary. It cannot be the case that every time the Attorney General were to take an action expressly allowed by statute, a parade of horribles occurs that then invites intervention from outside the statewide elected officials. What is more, the solution to this problem is clear: an order requiring the State Auditor to complete his duty under the statute and revise the fiscal note and fiscal note summary. The solution is not to slash the Attorney General's authority that Section 116.175 plainly gives him.

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Finally, the record below demonstrates that the State Auditor still had more work to do. Three days before the Attorney General responded with his rejection of the State Auditor's fiscal note and fiscal note summary, on April 7, 2023, the State Auditor received additional information from the Governor's Office. The Governor's Office provided a fiscal estimate for each of the 11 initiative petitions based on "additional costs identified by other agencies in regards to regulation and enforcement." In addition, the Governor's Office stated that each initiative petition appears "to conflict with federal law, which may have bearing on the fiscal responsibilities of [the Governor's Office]."

Each submission from the Governor's Office noted that "there will likely be litigation leading to a fiscal impact on the Legal Expense Fund (LEF) ranging from $1,500 to unknown" due to potential conflicts with the U.S. Supreme Court's decision in "*Dobbs v. Jackson Women's Health Organization* and requirements of parental consent." (Italics to case citation added). In addition, for several of the measures, the Governor's Office estimated that "failing to be in compliance with federal requirements related to Medicaid and MO HealthNet could lead to a fiscal impact of up to $600M" due to a conflict between the content of the initiative petitions and "the federal policy related to the Hyde Amendment and expending public funds on abortions."

The State Auditor has failed to incorporate these new figures, even though the State Auditor acknowledged receiving these responses and could have incorporated the responses from the Governor's office when revising his fiscal note and fiscal note summary.

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5

III. The circuit court erred in granting mandamus relief against the Attorney General, because Respondent had other remedies available and the Attorney General's duty under Section 116.175 is not ministerial, in that the Auditor had not yet revised his materials before Respondent filed suit, the Attorney General has not refused to perform a ministerial duty, and the Attorney General has discretionary authority to review and determine a fiscal note and fiscal note summary's compliance under Section 116.175.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

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Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

A writ of mandamus may only be issued in instances where the litigant: (1) proves that "no alternative remedy exists"; (2) "proves that he has a clear, unequivocal, specific right to a thing claimed"; and (3) proves the writ relates to "a ministerial duty that one charged with the duty has refused to perform." *Barnes v. Uhlich*, 592 S.w.3d 67, 70–71 (Mo. App. W.D. 2019). Here, Respondent's Petition failed on every count. This Court should reverse the Circuit Court's finding otherwise.

A. Respondent failed to establish that a writ of mandamus is the exclusive remedy available to her.

"There is no remedy that a court can provide that is more drastic, no exercise of raw judicial power that is more awesome, than that available through the extraordinary writ of mandamus." *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980). As it is the most significant exercise of judicial power a court can perform, a "writ of mandamus issues only in a case of necessity," and if "there is any doubt of its necessity or propriety, it will not be issued." *State ex rel. University Park Building Corp. v. Henry*, 376 S.W.2d 614, 617 (Mo. App. 1964); *see also State ex rel. Kelley*, 595 S.W.2d at 266 ("Recognizing the extreme nature of the order to act in accordance with a peremptory writ of mandamus, we believe

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that the remedial writ ought to be reserved for those cases in which no alternative measure will be effective.").

Recognizing these limitations, courts have held that "[i]t is a long-established principle of law that mandamus does not issue where there is another adequate remedy available to relator." *State ex rel. Kelley*, 595 S.W.2d at 265. "In other words, 'the writ of mandamus is to be used only as a last resort on the failure of any adequate alternative remedy.'" *Beauchamp v. Monarch Fire Protection District*, 471 S.W.3d 805, 810 (Mo. App. E.D. 2015) (quoting *State ex rel. Kelley*, 595, S.W.2d at 265); *see also State ex rel. KelCor., Inc. v. Nooney Realty Tr., Inc.*, 966 S.W.2d 399, 402 (Mo. App. E.D. 1998) ("A required element of proving a right to mandamus is that there is no alternative, adequate remedy other than the issuance of the writ.").

A review the Petition below reveals that Respondent likely acknowledges that a writ of mandamus is the exclusive possible remedy. Count I of the Petition acknowledges the existence of other possible remedies and therefore, on the face of Respondent's own pleadings, bars any right to a writ of mandamus. *See Barnes*, 592 S.W.3d at 71–72 (dismissing a petition for writ of mandamus where the relator "did not allege in his petition in mandamus that he was without an adequate alternative remedy."). In briefing before the Circuit Court, Respondent even took one step past *Barnes*, acknowledging with frankness that Respondent believes "mandamus . . . is not the exclusive remedy" against the Attorney General available to her in her

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Petition. (D8 at p.5). Respondent's own admission should have been fatal to Count I of her Petition.

This Court has held that an attempt to take two bites of the same apple by requesting both a declaratory judgment and writ of mandamus per se demonstrates that mandamus is not the exclusive remedy available and, consequently, bars a court from issuing the writ in her favor. In *State ex rel. Kelley*, this Court found it "undisputed that the relators had an alternative remedy [to a writ of mandamus] available to them" when the relators also "filed an action seeking a declaratory judgment" related to the same dispute. *State ex rel. Kelley*, 595 S.W.2d at 267. The Court noted that, "[b]y filing the action for declaratory judgment seeking a judicial declaration" on the same underlying facts of the lawsuit, the relator "demonstrated his willingness to submit the controversy . . . to the judgment of the court" and was consequently barred from seeking mandamus. *Id*. Likewise here, Respondent's "alternative" request for declaratory judgment on the same facts demonstrates mandamus is not the exclusive remedy available to her. Mandamus is not a "short cut for the speedy resolution of disputes that adequately may be resolved by other means." *Id.* at 268. A writ of mandamus is an extraordinary remedy of last resort. Even now, this case is not at a last resort stage.

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B. Respondent failed to establish any clear, unequivocal, and specific right she seeks to vindicate with a writ of mandamus.

Respondent also failed to demonstrate any clearly established and presently existing right she could vindicate through mandamus. "Mandamus is a discretionary writ, not a writ of right," and it "is not appropriate to establish a legal right, but only to compel performance of a right that already exists." *State ex rel. Petti v. Goodwin-Raftery*, 190 S.W.3d 501, 506 (Mo. App. E.D. 2006). A petitioner seeking mandamus bears the burden of establishing that he or she has a "clear, unequivocal, specific right to have the act performed as well as a corresponding present, imperative, and unconditional duty on the part of the respondent to perform the action sought." *State ex rel. Lee v. City of Grain Valley*, 293 S.W.3d 104, 109 (Mo. App. W.D. 2009) (emphasis omitted). This is because "the purpose of mandamus is to execute and not to adjudicate; it coerces performance of a duty already defined by law." *State ex rel. City of Crestwood v. Lohman*, 895 S.W.2d 22, 27 (Mo. App. W.D. 1994).

Respondent did not meet her burden of establishing a clear, unequivocal, specific right to have the act performed. It is important to break down the precise "clear and unequivocal right" Respondent asserted warrants the granting of extraordinary mandamus relief. Section 116.175 relates exclusively to the interactions between the Auditor and the Attorney General in the process of drafting and reviewing proposed fiscal notes and fiscal note summaries. § 116.175. Nowhere

in the statute is any provision that even *implies* that a member of the public has a "clear and unequivocal" right to interject themselves into the process of the Attorney General reviewing fiscal notes and fiscal note summaries. The absence of any case establishing Respondent's right to file a lawsuit while there is still more work for one state official to do is telling.

In fact, Respondent already has an alternative avenue here – to challenge an official ballot title under Section 116.190. If Respondent disagrees with the ultimately approved fiscal note or approved fiscal note summary, she is free to challenge the ballot title once the Secretary of State certifies the official ballot title. Her statutory rights under Section 116.190 does not, however, support any suggestion that she has a "clear and unequivocal" right to intervene before that time. The Circuit Court erred in holding otherwise.

To allow a party to obtain mandamus relief from generalized statements that they have a right to bring issues they deem significant under a constitutional provision, such as Article III, Section 50, would render entirely meaningless the requirement to demonstrate a clear and specific right to relief. This Court has conclusively held that one must demonstrate a "specific" right to relief before a court may rule on a request for mandamus. *See State ex rel. Swoboda v. Missouri Comm'n on Hum. Rts*., 651 S.W.3d 800, 805 (Mo. banc 2022). A generalized pronouncement

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of a litigant's "right to bring issues they deem significant to the voters" (D8 at p.4) as Respondent argued below plainly does not satisfy this standard.

Mandamus is an extraordinary and consequential tool. It is "a hard and fast writ, and an unreasoning writ, a cast-iron writ, the right arm of the court." *State ex rel. Kelley*, 595 S.W.2d at 266 (quoting *State ex rel. Kansas City v. Kansas City Gas Co.*, 163 S.W. 854, 857 (Mo. banc 1914)). To protect against overreach of this power, courts may only exercise mandamus when a litigant has identified a "clear, unequivocal, and specific right" to the action a party seeks performed. Respondent failed to establish any such right, and the Circuit Court erred in concluding otherwise.

C. The Attorney General's statutory authority under Section 116.175 to approve or reject the State Auditor's proposed fiscal note and fiscal note summary is not ministerial and therefore not subject to a writ of mandamus.

Respondent's request for mandamus should also have failed below because she asked the Circuit Court to exercise judicial power to compel an executive branch official to reach a *particular* outcome on a *discretionary* decision. Courts have long held that a writ of "'[m]andamus will not lie to compel an act when its performance is discretionary.'" *McDonald v. City of Brentwood*, 66 S.W.3d 46, 51 (Mo. App. E.D. 2001) (quoting *State ex rel. University Park Building*, 376 S.W.2d at 617). This is because the purpose of a writ of mandamus is to "compel the performance of a ministerial duty that one charged with the duty has refused to perform." *Lemay Fire*

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Prot. Dist. v. St. Louis County, 340 S.W.3d 292, 294 (Mo. App. E.D. 2011) (quoting *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 236 S.W.3d 632, 635 (Mo. banc 2007)); *see also State ex rel. Thomas v. Neeley*, 128 S.W.3d 920, 924 ("[A] writ of mandamus cannot compel the performance of a discretionary act.") (Mo. App. S.D. 2004).

Even if Respondent were able to establish all of the other requirements for a writ of mandamus—which she failed to do—mandamus relief should have been unavailable because the Attorney General's duties to *review* ***and*** *approve or deny* a fiscal note and fiscal note summary Section 116.175 are not "ministerial." When analyzing whether a writ of mandamus may issue, courts have juxtaposed "ministerial" government actions with discretionary actions of government officials "that require[] the exercise of reason in determining how or whether the act should be performed." *State ex rel. Thomas*, 128 S.W.3d at 924. A writ of mandamus "will only issue when there is an *unequivocal showing* that the public office failed to perform a ministerial duty imposed by law." *Id*. (emphasis added).

Section 116.175 directs the Attorney General to "determine[]" whether the fiscal note and fiscal note summary satisfy the requirements of the statute, which, in turn, affects whether the Attorney General approves the proposed fiscal note and fiscal note summary or returns each to the auditor for revision. The fact that the Attorney General's determinations under the statute are more than simply

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"ministerial" is demonstrated by the explicit contemplation under the statute that the Attorney General *may* determine that the fiscal note and fiscal note summary cannot approved until further revision—all depending on his review of the proposed fiscal note and fiscal note summary. *State ex rel. Thomas*, 128 S.W.3d at 924. In the face of the plain text of the statute, Respondent did not carry her burden to make an "unequivocal showing" that the Attorney General failed to perform a ministerial duty. *Id*.

A discretionary action does not become ministerial simply because a party challenging a decision strongly believes the outcome should have been different. *State ex rel. Thomas*, 128 S.W.3d at 924. After all, it is often the case that actions by government officials can elicit strong reactions on both sides of the question. Respondent asked the Circuit Court to utilize the writ of mandamus to direct the Attorney General to exercise his discretion in a particular manner on the question of whether or not a proposed fiscal note and fiscal note summary comply with requirements of § 116.175. The Circuit Court agreed, and that decision risks creating a dangerous and unprecedented result of the exercise of judicial power over Missouri elections officials performing discretionary elections responsibilities. The very fact that the Attorney General must "determine[]" whether the "content" of a proposed fiscal note and fiscal note summary complies with a list of requirements, and then either approve the draft or return it to the State Auditor for revision, demonstrates

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that Section 116.175 entrusts in the Attorney General fundamental discretionary powers. Missouri courts have held time and again that mandamus may not be used to compel the Attorney General—or indeed, any other government official—to exercise his discretion in a particular way favored by a litigant. *E.g.*, *McDonald*, 66 S.W.3d at 51.

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

IV. The circuit court erred in granting declaratory relief against the Attorney General, because the case was not yet ripe and therefore not justiciable, in that the fiscal note and fiscal note summary review and resubmission process had not yet concluded.

Standard of Review. This point on appeal raises a question of statutory interpretation, which is reviewed de novo on appeal. *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020).

Preservation. The Attorney General preserved this issue for appeal in his answer to Respondent's Petition (D19), in his pre-trial brief (D23), and during trial (*See* Tr.).

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For similar reasons as the Attorney General argued above why the Circuit Court erred in granting mandamus relief and why the State Auditor failed to comply with his duty under Section 116.175 to revise his fiscal note and fiscal note summary, the Circuit Court erred in granting Respondent's alternative request for declaratory relief against the Attorney General. The Circuit Court held in footnote 11 to its judgment that it would "direct the same relief by declaratory judgment" if it did not grant Respondent's request for mandamus relief. Because the Circuit Court appears to have rested an alternative declaratory judgment ruling on the same grounds as the ruling granting mandamus relief, the Attorney General incorporates his same arguments above here. The Attorney General will also elaborate on some of those points.

There was no presently existing controversy over which a court can grant relief of a conclusive character. "Ripeness, like standing, is an element of justiciability." *Calzone v. Ashcroft*, 559 S.W.3d 32, 35 (Mo. App. W.D. 2018). Ripeness is determined by whether "the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." *Mo. Health Care Ass'n v. Attorney Gen. of Mo.,* 953 S.W.2d 617, 620 (Mo. banc 1997); *see also Seay v. Jones*, 439 S.W.3d 881, 888 (Mo. App. W.D. 2014) ("citizens are authorized to seek judicial review of the official ballot title… [i]n such an action, the

challenger must 'state the reason or reasons why the summary statement portion of the official ballot title is insufficient or unfair.'").

Here, Respondent's suit is not ripe because the exchange—and review and resubmission—of materials between the Attorney General and the State Auditor had not yet concluded. There was more work left for the State Auditor to do, as the State Auditor received new submissions from the Governor's Office on a fiscal impact for the initiative petitions. Even if the State Auditor did not receive those submissions, the State Auditor still has not complied with his duty to revise the fiscal note and fiscal note summary. § 116.175.5. But his receipt of new information shows even more that there was more work to do.

Respondent's alternative request for declaratory relief—and the Circuit Court's granting of that alternative request—came too early. Of course, as discussed above, Respondent should wait until the entire process had concluded and challenge an official ballot title under Section 116.190. But at the time she filed her lawsuit and up until the time of trial, there was no real presently existing controversy between the Attorney General and Respondent. Simply because Respondent disagreed with the Attorney General's decision does not entitle her to a request for declaratory relief. Rather, the dispute must be ripe. Furthermore, in bringing her lawsuit Respondent may not attempt to challenge the Attorney General's underlying exercise of discretion in determining that the Auditor's identical proposed fiscal note

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and fiscal note summaries for Respondent's initiative petitions failed to comply with Section 116.175. And ultimately, her request for declaratory relief seems to challenge the discretion the Attorney General exercised at a pre-final dispositional stage. There is no right for Respondent to file any lawsuit and interfere in the State Auditor and Attorney General's process before it has been completed.

For these reasons, this Court should reverse the Circuit Court's judgment because it was not yet ripe and therefore non-justiciable, and remand it to the Circuit Court with instructions to dismiss the case.

CONCLUSION

For these reasons, this Court should reverse the Circuit Court's judgment, and remand it to the Circuit Court with instructions to dismiss the case and order the State Auditor to revise his the fiscal note and fiscal note summary under Section 116.175.5.

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July 5, 2023

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 3rd day of July, 2023, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 13,432 words.

/s/ *Jason K. Lewis*