SC100132

IN THE SUPREME COURT OF MISSOURI

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

Respondents,

vs.

Andrew Bailey, Missouri Attorney General,

Appellant.

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

BRIEF OF RESPONDENT STATE AUDITOR SCOTT FITZPATRICK

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STATEMENT OF FACTS

On March 14, 2023, the Governor's Office provided to the Auditor timely estimates of the fiscal impact on its office for each of the eleven initiatives, stating, "this proposal relating to reproductive issues does not financially impact the Office of the Governor." (D42 (Jt. Stip. Ex. J)). On March 16, 2023, the Attorney General provided to the Auditor timely estimates of the fiscal impact on his office for each of the eleven initiatives, stating to the extent the enactment of the proposed measures would result in increased litigation, the Attorney General's Office could absorb the costs associated with that increased litigation using existing resources and if the proposed measures resulted in substantial litigation, then he may be required to request additional appropriations. (D43 (Jt. Stip. Ex. K)). In that response, the Attorney General made no mention of any other fiscal impact of the measures to either his office or to any other state or local governmental entities. *Id*.

On April 7, 2023, after the fiscal notes and fiscal note summaries had been sent to the Attorney General for approval, the Governor's Office sent the Auditor a new statement of fiscal impact for each of the eleven initiatives. (D41 (Jt. Stip. Ex. I)). The Governor's Office's new fiscal estimate for each of the eleven initiative petitions was not based on additional costs actually identified by other state agencies, but instead stated, "[w]hile there appears to be no immediate fiscal impact to the Office of the Governor, there *may* [sic] additional costs identified by other state agencies in regards to regulation and enforcement." (D41 (Jt. Stip. Ex. I)) (emphasis added). In addition, the Governor's Office stated that each

of the initiative petitions "appear to conflict with federal law, which may have bearing on the fiscal responsibilities of this office." *Id*. For five of the initiative petitions, the Governor's Office asserted the initiative petitions appeared to conflict with federal policy related to the Hyde Amendment and expending public funds on abortions, but did not identify with any specificity exactly how.[1] *Id*. For the remaining six initiative petitions, the Governor's Office did not list any fiscal impact related to a potential loss of federal Medicaid funds.[2] *Id*.

On April 21, 2023, the Auditor sent a letter explaining to the Attorney General why his fiscal assumptions pertaining to the state's Medicaid funding were legally unsound. (D38 (Jt. Stip. Ex. E)). The Auditor explained the fiscal note summary for each initiative contained 33 words (excluding one article) and summarized the fiscal note in language neither argumentative nor likely to create prejudice either for or against the ballot initiative. *Id*. The Auditor explained to the Attorney General the fiscal notes therefore did contain language that advised Missourians of the estimated financial impact the measures would have on the State of Missouri's state and local governmental operations, and that each of the fiscal notes and fiscal note summaries complied with all statutory requirements contained in Chapter 116, RSMo. *Id*.

[1] Initiatives 2024-078, 2024-080, 2024-082, 2042-083, and 2024-086.
[2] Initiatives 2024-077, 2024-079, 2024-081, 2024-084, 2024-085, and 2024-087.

The Auditor explained to the Attorney General the process of preparing fiscal notes and fiscal note summaries that repeatedly has been upheld by the courts. *Id*. The Auditor set forth for the Attorney General the multitude of entities from which the Auditor solicited submissions. *Id*.

The Auditor explained to the Attorney General that the Department of Social Services ("DSS"), the agency tasked with managing the state's Medicaid program, 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 did not anticipate a fiscal impact other than an unknown impact related to regulating abortion facilities submitted by DHSS, and that no other governmental entity, including the Attorney General's Office, provided a timely response indicating the measures would jeopardize the state's federal Medicaid funding. *Id*.

The Auditor explained to the Attorney General that the responses received from DSS and the Department of Revenue ("DOR") were very clear and did not raise any additional questions nor did they appear incomplete, but given the Attorney General's concerns, the Auditor spoke with the Director of DSS and the Director of MO HealthNet, as well as the Director of DOR, regarding the measures. *Id*. The Auditor advised the Attorney General he was informed that after consideration of the contents of the Attorney General's opinion relevant to their agencies, neither DSS nor DOR would be modifying their responses, and

as a result, the original fiscal responses received from DSS and DOR remained their responses. *Id*.

The Auditor then explained to the Attorney General that even setting aside the lack of evidence or legal analysis explaining exactly how the measures would place Missouri in violation of the Hyde amendment, the Auditor's research failed to identify any state that had ever been subjected to a penalty that amounted to the withholding of 100% of its annual federal Medicaid funding. *Id*. The Auditor advised the Attorney General that to the extent the U.S. Department of Health and Human Services ("HHS") has penalized a state for a violation of the requirements of the Hyde or Weldon Amendments, the penalty imposed has been less than 5% (typically 1-2%) of that state's total annual Medicaid funding. *Id*. The Auditor distinguished the Attorney General's citation to the $200 million penalty imposed upon the State of California as not comparable to the provisions included in the measures because California was penalized by HHS for illegally imposing universal abortion coverage mandates on all health care plans in the state—a mandate that clearly was in violation of the Weldon Amendment. *Id*. The Auditor further explained that if such a mandate had been included in the measures, it would have almost certainly resulted in a different response from DSS and a different fiscal note summary. *Id*.

The Auditor explained to the Attorney General it would not be appropriate to apply Greene County's economic theory to other governmental entities given no other governmental entity supplied a similar analysis, but for completeness, the fiscal impact

reported by Greene County was included in the fiscal note summary. *Id*. The Auditor further explained that to knowingly submit a fiscal note summary that contained inaccurate information would violate his duty as State Auditor to produce an accurate fiscal note summary and because the long-established process for producing fiscal notes and fiscal note summaries was followed and no new information had been presented to warrant inclusion in the fiscal notes or fiscal note summaries, he would not revise them. *Id*. The Auditor's letter made no mention of the April 7, 2023, letters received from the Governor's Office because they did not contain any new information that had not already been considered by the Auditor's Office, they were submitted after the deadline established by law for the Auditor to have submitted his fiscal note and fiscal note summary to the Attorney General, and they contradicted submissions from the state agencies tasked with managing the Medicaid program. (D41 (Jt. Stip. Ex. I); D 30-32 (Jt. Stip. Ex. B)).

ARGUMENT

I. The circuit court did not err in granting mandamus against the Attorney General, because the Attorney General improperly refused to approve the Auditor's fiscal note summaries when the fiscal note summaries satisfied the requirements of Section 116.175, RSMo. (Response to Appellant's Point I).

A. Attorney General's Background to Section 116.175, RSMo.

Contrary to the argument of the Attorney General, Section 116.175.5, RSMo, does not "command" that the Auditor must revise the proposed fiscal note and fiscal note summary when it is returned by the Attorney General. Section 116.175.5, RSMo, specifically directs when it is determined by the Attorney General that the fiscal note or fiscal note summary do not satisfy the requirements of that section, they "shall be returned to the auditor for revision." Section 116.175.5, RSMo, does not contemplate what action is required of the Auditor when an Attorney General exceeds his authority under the statute and attempts to usurp the discretion of the Auditor.

The Auditor agrees he is required to revise a fiscal note summary that does not satisfy the requirements of Section 116.175, RSMo, and is therefore deficient, but when no such deficiency exists, there is nothing that requires revision. As an example, had the fiscal note summaries exceeded the fifty word limitation, excluding articles, and the Auditor refused to revise them to comply with that requirement, then the Auditor would have been in violation of his duty to produce a fiscal note summary that complies with the requirements found in Section 116.175.3, RSMo. However, that is not the case here.

The Attorney General further argues Section 116.175, RSMo, 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." (Appellant's Brief, p. 29-30) (emphasis added). That is simply not what Section 116.175.3, RSMo, requires.

> 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 (emphasis added). In terms of proper grammar, the phrases "neither argumentative" and "nor likely to create prejudice" both modify the term "language." The phrase "*information that is likely to create prejudice*" as set forth by the Attorney General appears nowhere in the text of Chapter 116, RSMo.

B. Attorney General's argument pertaining to "legal content" and "form."

The circuit court identified the crux of this legal dispute as hinging on the meaning of the phrase "legal content" as used in Section 116.175.4, RSMo. (D44). The Auditor asserted, and the circuit court agreed, that "legal content," as used in Section 116.175.4, RSMo, means a measure's estimated cost or savings, if any, to state or local governmental entities. The Attorney General asserted to the circuit court "legal content" meant the exclusion of argumentative and prejudicial language in the fiscal note summary, and if cost information received from opponents is not included verbatim by the Auditor, regardless of whether those estimates are reasonable, the legal content is inherently argumentative and

prejudicial to voters. (Tr.,[3] pp. 38-41). The Attorney General now claims "legal content" includes a review for "argumentative language or information that is likely to create prejudice for or against a measure." (Appellant's Brief, p. 31).

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

Contrary to the assertion of the Attorney General, there *is* a dispute in this case about the meaning of the term "form." The Attorney General claims "form," as used in Section 116.175.4, RSMo, refers to "the measure's costs or savings, if any, to state or local governmental entities. The fiscal note summary shall contain no more than fifty words, excluding articles." (Appellant's Brief, p. 31). The Auditor, on the other hand, agrees with the circuit court, which found that "form" as used in that section pertains to the word

[3] Tr. shall be an abbreviation for Transcript.

limitation and prohibition on argumentative or prejudicial language. (D44). The court noted that its findings pertaining to the meaning of the terms "legal content" and "form" as used Section 116.175.4, RSMo, was bolstered by the fact that Section 116.175.3, RSMo, breaks the requirements of the fiscal note summaries drafted by the Auditor into two sentences, with the first sentence discussing the content required to be included in a fiscal note summary and the second sentence including the prohibition on the use of argumentative or prejudicial language and also specifying the fifty word limit imposed on a fiscal note summary, clearly an issue of form. *Id.*

The Attorney General's reliance on *Bradshaw v. Ashcroft* is misplaced. That case pertained to the form of an initiative petition, which is set forth in the pro forma found in Section 116.040, RSMo. *Bradshaw v. Ashcroft,* 559 S.W.3d 79 (Mo. App. W.D. 2018). Quite literally, Section 116.040, RSMo, states the example (the form) set forth in that section "shall be substantially the form of each page of each petition for any law or amendment . . . proposed by the initiative." Section 116.040, RSMo.

For the first time on appeal, the Attorney General reads words into Section 116.175, RSMo, that simply are not there, specifically, he argues he is required to review for "argumentative language *or information* that is likely to create prejudice for or against a measure." (Appellant's Brief, p. 29, 30) (emphasis added). This new reading of the statute has likely arisen because the circuit court decisively concluded the fiscal note summaries did not use argumentative or prejudicial language, and other than the disputed actual

amount of the cost of the proposed measures, the Attorney General failed to identify any language included in the fiscal note summaries that he alleges was argumentative or prejudicial. (D44).

The plain and reasonable intent of the legislature regarding the Attorney General's role in the review of a fiscal note and fiscal note summary is that of a safeguard to ensure when received by the Secretary of State, they both contain the estimated cost or savings of the measure, and that the fiscal note summary is fifty words or less and does not contain argumentative or prejudicial language and thus, contains the required legal content and is in the form required by law. This interpretation does not render the Attorney General's role meaningless, because as noted by both the Attorney General and the circuit court, the legislature has acknowledged that executive branch officials may occasionally make mistakes. (D44). It makes sense for some official to perform a perfunctory review of the Auditor's work to avoid a petitioner from needing to file a court challenge over minor flaws that could have been corrected prior to the certification of the official ballot title; the Attorney General is an effective check on the Auditor to ensure the fiscal note and fiscal note summary comply with the requirements of Section 116.175.3, RSMo. As previously stated, if the Auditor disregarded *legitimate* concerns from an Attorney General, the Auditor would be in violation of his own duty pertaining to what he is required to include in a fiscal note or fiscal note summary.

Contrary to the Attorney General's assertions, and as proven in this case, the Auditor has no mechanism or authority to compel the Secretary of State to certify an official ballot title that would include a fiscal note summary that has not been approved by the Attorney General.

The Attorney General argues Section 116.175, RSMo, reinforces his interpretation of Section 116.180, RSMo, because it specifically states a "fiscal note or fiscal note summary that does not satisfy the requirements of this section also shall not satisfy the requirements of section 116.180." (Appellant's Brief, p. 35). But this language in Section 116.175, RSMo, actually supports the circuit court's determination that the Attorney General's role is not meaningless, as he can prevent a deficient fiscal note or fiscal note summary from being forwarded to the Secretary of State for inclusion in the official ballot title when such deficiencies would necessarily render them inadequate under Section 116.180, RSMo.

The Attorney General argues the circuit court's view would require the Court to exercise its judicial authority to create, out of thin air and without any legislative consent, authority for the Auditor to approve a proposed fiscal note and fiscal note summary. *Id*. This argument is wholly without merit, because the circuit court never found the Auditor can approve his own fiscal note summary, nor has the Auditor ever argued he has such authority. The Attorney General is confusing his failure to comply with his own statutory

duty, and the circuit court's remedy for that failure, with an imaginary creation of authority for the Auditor to approve his own fiscal note summaries.

C. Attorney General's argument that the fiscal notes and fiscal note summaries are deficient as to legal content.

While the Attorney General's April 10, 2023, Opinion Letters set forth over several pages why the Attorney General believes the fiscal note summaries should be inflated, they completely lack any legal analysis, citation, or any other supporting documentation or discussion to establish why the Attorney General's understanding of how federal Medicaid funding interacted with the provisions of the initiatives had any merit. (D34-35 (Jt. Stip. Ex. C)). The Attorney General also repeatedly acts as if the fiscal note summaries are completely silent as to the cost estimated by opponents, when in fact the summaries each state, "[O]pponents estimate *a potentially significant loss* to state revenue." (D30-33) (emphasis added). It is unclear why the Attorney General believes if voters were to see this language at the ballot box, they would be more likely driven to vote for the measure, given that it decisively states a considerable negative fiscal impact is estimated by opponents. Nor is it clear why a specific dollar amount would necessarily persuade a voter to vote against a measure, given that the two manners of expressing the information convey an almost identical message, albeit in differing terms.

The Attorney General complains the fiscal note contains inadequate and divergent submissions from local governmental entities, however the Auditor cannot control what submissions he receives from what entities, nor can he control the information contained

within those submissions he does receive. Although the Attorney General is dissatisfied with the sample size of responses solicited by the Auditor, the fact remains the Auditor is not required to solicit submissions at all. "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." Section 116.175.1, RSMo. (emphasis added). The State Auditor's Office availed itself of its option set forth in Chapter 116, RSMo, to gather responses from various state and local governmental entities, as well as proponents and opponents, to determine the estimated costs or savings, if any, the measure would have on their respective entities. The office then recorded those responses in the fiscal note and determined from the responses the estimated costs or savings, if any, of the proposed ballot measures.

The Attorney General asserts that other than Greene County, no other entity engaged in the "common-sense analysis" that should have been included on the face of any submission. (Appellant's Brief, p. 36). This argument shows the Attorney General's bias, as countless other entities submitted estimated fiscal impact responses to the Auditor, and they all indicated no costs or savings were anticipated.

The Attorney General contends the fiscal note summary took Greene County's calculated estimated fiscal impact and purported to represent that fiscal impact as the fiscal impact of the entire state, however local governmental entities estimated either no costs or savings, or a cost of $51,000 annually in reduced tax revenues (Greene County). The

Auditor was provided with conflicting submissions from all other responsive counties, each of which reported no costs or savings, yet the Attorney General argues the fiscal note summary should have disregarded all other responses 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 different political subdivisions in the state, all of which have different levels of taxation, fertility rates, and numbers of citizens who might seek an abortion. It 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. "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." *Brown v. Carnahan*, 370 S.W.3d 637, 650 (Mo. banc. 2012) (per curiam). For completeness, the Auditor included the fiscal impact reported by Greene County, and indicated the amount of their response was the lowest indicated cost to local governments. Specifically, the fiscal note summary states: "Local governmental entities estimate costs of *at least* $51,000 annually in reduced tax revenues." (D30-33) (emphasis added).

Neither the Attorney General, nor any of the opponents of the initiatives who provided fiscal submissions to the Auditor, have provided any legal analysis to support the assertion that state revenues will suffer a loss of up to $12.5 billion due to a possible loss of all federal Medicaid funding. If the initiatives truly jeopardized the state's federal Medicaid funding, surely by now the Attorney General would have provided to the Auditor the sound legal analysis to demonstrate such. While there is a lack of evidence the State of Missouri would lose federal funding, opponents cited a multitude of other consequences of the measures that could result in potential significant losses in revenue, which is acknowledged in the fiscal note summary.

The Attorney General claims the fiscal note summary does not contain submissions that were submitted by others with knowledge pertinent to the cost of the proposal, but those submissions were included verbatim in the fiscal notes, and due to the word limitation on a fiscal note summary, no party can credibly argue the Auditor is required to expressly incorporate every submission into the fiscal note summary.

To be clear, the Attorney General is advancing a broad and over-reaching reading of his authority to review a fiscal note and fiscal note summary under Section 116.175, RSMo. As noted by the circuit court, the Attorney General is only authorized to review a fiscal note summary to ensure it states the estimated cost or savings, if any, to state and local governments, that it is no more than fifty words (excluding articles), and that it does not contain argumentative or prejudicial language.

For these reasons, this court should affirm the circuit court's decision.

II. The circuit court did not err in granting mandamus against the Attorney General because when a fiscal note summary satisfies the requirements of Section 116.175, RSMo, the Auditor is not required to revise his fiscal estimates to the fiscal estimates improperly calculated and improperly demanded by the Attorney General. (Response to Appellant's Point II).

As the circuit court noted, over forty years ago the General Assembly eliminated the Attorney General's statutory authority to draft the fiscal note summary for a proposed initiative, by repealing Section 126.081, RSMo (1978). Senate Substitute for Senate Bill No. 658, Second Regular Session, 80th General Assembly, 1980. "When the General Assembly amends a statute, the amendment is presumed to effect some change in the existing law." *Marvin's Midtown Chiropractic, LLC*, 351 S.W.3d at 836; *see also Hill v. Ashcroft*, 526 S.W.3d 299, 309 (Mo. App. W.D. 2017) ("When interpreting statutes, courts do not presume that the legislature has enacted a meaningless provision.") (citing *Edwards v. Gerstein*, 237 S.W.3d 580, 581 (Mo. banc 2007)). In 1997, the legislature definitively delegated to the State Auditor, not the Attorney General, the duty to prepare fiscal notes and fiscal note summaries.

> 1. 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.
>
> 2. Within twenty days of receipt of a petition sample sheet, joint resolution or bill from the secretary of state, ***the state auditor shall prepare a fiscal note and a fiscal note summary for the proposed measure*** and forward both to the attorney general.

Section 116.175.1 and .2, RSMo. (emphasis added). The circuit court found it was illogical to conclude the General Assembly repealed the Attorney General's authority to draft fiscal note summaries, but silently intended for the Attorney General to be able to substitute his judgment as to the estimated cost or savings of a measure for that of the Auditor's. (D44). This Court has already noted that besides the Auditor, "no other official has the express power to draft a fiscal note or fiscal note summary." *Brown,* 370 S.W.3d at 652.

To find the Attorney General has authority to substitute his judgment as it pertains to the fiscal impact of a proposed measure for that of the Auditor's would render meaningless both the Auditor's role in the fiscal note and fiscal note summary process, and the General Assembly's repeal of the Attorney General's authority to draft fiscal notes and fiscal note summaries. "[T]he legislature will not be charged with having done a meaningless act." *State v. Swoboda*, 658 S.W.2d 24, 26 (Mo. 1983).

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 who has constitutional authority to supervise the receipt and expenditure of public funds. *See* Mo. Const. Art. IV, Section 13; see also *Brown,* 370

S.W.3d at 652 (holding Section 116.175, RSMo, was a constitutional delegation of authority to the 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 Attorney General is tasked with determining whether a fiscal note or fiscal note summary satisfies the requirements of Section 116.175, RSMo, but a problem arises when an Attorney General is mistaken as to what those requirements are and lacks understanding as to what the terms used in that section mean. The Attorney General is required to return to the Auditor for revision a fiscal note and fiscal note summary that do not satisfy the requirements of Section 116.175, RSMo, however, the Attorney General *only* has authority to return for revision where those requirements are not satisfied. Section 116.175.5, RSMo. Where the fiscal note and fiscal note summary contain the legal content and form required by the statute, the Attorney General has no authority to return the fiscal note or fiscal note summary to the Auditor for revision, and the Auditor is therefore not obliged to make any revisions unlawfully demanded by the Attorney General. There is no dispute over what the term "revision" means in this context, the dispute is only if the Auditor is bound by duty to engage in revision when it is illicitly demanded by the Attorney General. The Attorney General is running afoul of the authority granted to him under Section 116.175, RSMo, as he can only return a fiscal note summary that does not satisfy the requirements of that section. While the Attorney General is authorized to "determine" whether or not the

requirements are satisfied, this does not transform his review into a discretionary exercise of authority allowing him to "determine" that an otherwise satisfactory fiscal note or fiscal note summary are unsatisfactory under the statute simply because he does not like the fiscal estimate contained within.

The Attorney General asserts the requirements of Section 116.175, RSMo, create an ongoing review process that continues until an adequate fiscal note and fiscal note summary are approved and therefore any additional construction is unnecessary. (Appellant's Brief, p. 46). This reading of the statute would interfere with or impede the right to initiative, and therefore such a reading would conflict with Article III, Sections 49 and 50 of the Missouri Constitution. But such a reading of the statute is unnecessary; here the circuit court found the Attorney General had an absolute absence of authority to send the Auditor's fiscal note summary back for revision simply because he disagreed with the Auditor's estimated cost or savings of a proposed measure. (D44). Because the Attorney General has exceeded his authority and violated his statutory duty under Section 116.175, RSMo, there is no need to engage in any further construction of that statute.

The Attorney General argues 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, but as so eloquently noted by the circuit court, for the Attorney General's argument to succeed, Section 116.175, RSMo, must be read to imply the General

Assembly gave him unwritten authority to direct the Auditor to revise a submission when he determines the submission is insufficient or unfair.

> It is clear this is not what the General Assembly intended because the Attorney General's review of a fiscal note and fiscal note summary is limited to reviewing "legal content and form," as set forth in section 116.175.4, RSMo. The terms "insufficient", "sufficient", "fair" and "unfair" do not appear anywhere in Section 116.175, RSMo.

(D44). "[C]ourts 'do not engraft language onto a statute that the legislature did not provide.'" *Hill*, 526 S.W.3d at 309 (quoting *Page v. Scavuzzo*, 412 S.W.3d 263, 267 (Mo. App. W.D. 2013)).

Finally, the Attorney General claims the Auditor still has more work to do, because the Governor's Office provided untimely submissions pertaining to estimated fiscal impact, after having already provided timely submissions on March 14, 2023. The Attorney General attempts to quote these letters as saying that the Governor was providing a fiscal estimate for each of the eleven initiatives "based on 'additional costs identified by other agencies in regards to regulation and enforcement.'" (Appellant's Brief, p. 49). However as the Court can read for itself, this is not what those letters state. Specifically, they state: "While there appears to be no immediate fiscal impact to the Office of the Governor, there *may* [sic] additional costs identified by other state agencies in regards to regulation and enforcement." (D41 (Jt. Stip. Ex. I)) (emphasis added). The Governor's Office stated each of the initiative petitions "appear to conflict with federal law, which may have bearing on the fiscal responsibilities of this office." *Id*. As previously noted, for five of the initiative petitions,

the Governor's Office asserted the initiative petitions appeared to conflict with federal policy related to the Hyde Amendment and expending public funds on abortions, but did not identify with any specificity exactly how, and for the remaining six initiative petitions, the Governor's Office did not list any fiscal impact related to a potential loss of federal Medicaid funds. *Id*.

In addition to being untimely, the information included in the Governor's Office's letters was not new as opponents of the measures had already asserted to the Auditor that federal Medicaid funding could be jeopardized by the measures, and the Auditor had already concluded that position was legally unsupported and unsound. Thus, there were no "new figures" for the Auditor to incorporate. The new submissions by the Governor's Office also conflicted with several other submissions received by the Auditor. When the Auditor receives conflicting submissions as to impact to the same program or entity, he has to make a decision. In this case, on the subject of Medicaid losses, after completing his own legal analysis and review of pertinent case law on the matter, the Auditor deferred to the submissions and follow-up conversations from the actual Medicaid experts—the Director of MoHealthNet and the Director of DSS. On the legal expense fund expense of $1,500 cited by the Governor's Office, due to the conflict between the Governor's Office and the Attorney General, the Auditor deferred to the submissions from the Attorney General, whose approval under Section 105.711.5, RSMo, is required for all expenses paid from that fund, and who did not list any fiscal impact to the legal expense fund.

For these reasons, this Court should affirm the circuit court's judgment.

III. The circuit court did not err in granting mandamus relief against the Attorney General because the Attorney General's duty under Section 116.175, RSMo, is purely ministerial, he refused to perform that duty, he has no discretion to assess the fiscal impact of a proposed initiative, and Respondent had no other remedy available to resolve the impasse. (Response to Appellant's Point III).

A. Respondent has not failed to establish that a writ of mandamus is the exclusive remedy available to her.

While the Attorney General asserts Respondent had some other possible remedy, and therefore a writ of mandamus is not available, he has failed to set forth any plausible scenario under which the unaltered fiscal note summaries of the Auditor would receive his approval absent court intervention. The lack of any other credible remedies offered by the Attorney General suggests the writ was the exclusive remedy available.

B. Respondent has not failed to establish any clear, unequivocal, and specific right she seeks to vindicate with a writ of mandamus.

Like all Missouri citizens, Respondent has a clear, unequivocal right to the initiative process that is enshrined in Missouri's Constitution. Mo. Const. Art. III, Sections 49 and 50. Without an approved fiscal note summary, the Secretary of State is unable to certify the official ballot title for any of the proposed measures as required by Section 116.180, RSMo. Without a certified official ballot title, Respondent cannot begin to collect signatures, and without the requisite amount of signatures, Respondent's initiatives cannot qualify to appear on the ballot.

The Attorney General argues that Respondent has an alternative avenue here, which is to challenge an official ballot title under Section 116.190, RSMo. (Appellant's Brief, p. 55). Ironically, that is also the avenue the Attorney General should have waited to pursue to challenge the fairness and sufficiency of the fiscal note summary, which is clearly what he is attempting to do now. However, that argument fails to recognize that a Section 116.190 challenge can only be brought *after* the official ballot title has been certified. "The action must be brought within ten days ***after the official ballot title is certified*** by the Secretary of State in accordance with the provisions of this chapter." Section 116.190.1, RSMo. (emphasis added). The Attorney General does not explain how the Respondent could bring a Section 116.190 challenge in the absence of a certified, official ballot title.

As such, the circuit court's decision to issue a writ of mandamus to the Attorney General to approve the fiscal note summary for each of the eleven initiative petitions should be affirmed.

C. The Attorney General's statutory authority under Section 116.175, RSMo is ministerial and therefore the proper subject of a writ of mandamus.

The Attorney General argues that his duties to review and approve or deny a fiscal note summary are not ministerial. "The word 'shall' generally prescribes a mandatory duty." *State v. Teer,* 275 S.W.3d 258, 261 (Mo. banc. 2009). As noted by the circuit court, the Attorney General's duty to approve a fiscal note summary that satisfies the requirements of

Section 116.175, RSMo, is mandatory, not discretionary, as the statute makes clear what he "shall" do. (D44).

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

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

For these reasons, this Court should affirm the circuit court's judgment.

IV. The circuit court did not err in granting declaratory relief against the Attorney General, as the case was ripe because without court intervention there is no plausible scenario in which the Secretary of State would receive an approved fiscal note summary for any of the eleven petitions for inclusion in the official ballot title. (Response to Appellant's Point IV).

The Attorney General argues Respondent's suit is not ripe because the exchange of materials between the Attorney General and the Auditor had not yet concluded. (Appellant's Brief, p. 61). Yet, it very clearly had concluded. On April 21, 2023, the Auditor set forth to the Attorney General a legal analysis and explanation regarding why the Attorney General's concerns were invalid and advised he would therefore not revise his fiscal note summaries.

The Attorney General claims that he "again returned the fiscal note and fiscal note summaries to the Auditor for revision", but this claim is also false. On May 1, 2023, without disputing the Auditor's legal analysis or engaging in any discussion of his concerns, the Attorney General advised that his office "concludes that we have fulfilled our response obligations under Section 116.175, RSMo for initiative petitions 2024-077 through 2024-087." (D40 (Jt. Stip. Ex. H)). The May 1, 2023 letter(s), unlike the April 10, 2023 letter(s), makes no mention of revision whatsoever. It seems abundantly clear the exchange of materials between the Attorney General and the Auditor was complete; in the absence of a compelling and legally sound justification to alter the fiscal notes or fiscal note summaries, the Auditor was not going to alter them, and the Attorney General was not going to approve the fiscal note summaries unaltered. Indeed, the Attorney General does not disclose what the next step in his perceived ongoing "exchange of materials" would have been.

The Attorney General again attempts to rely on the Governor's Office's untimely April 7, 2023, letters disclosing a "new" estimated fiscal impact, but the information contained within those letters, that federal Medicaid dollars may be at risk, was not new information; that information had already been provided to the Auditor in March by opponents of the measures.

For these reasons, this Court should affirm the Circuit Court's judgment.

CONCLUSION

For the foregoing reasons, the circuit court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the above and foregoing document was served via the Court's electronic filing system on the 13th day of July, 2023, to all counsel of record.

The undersigned further certifies that the foregoing brief complies with the limitations contained in rule No. 84.06(b) and that the brief contains 7,000 words.

/s/ LeslieAnn Korte