IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

Dr. Anna Fitz-James,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 23AC-CC02800
	)	
Andrew Bailey, et al.	)	
	)	
Respondent.	)	

Suggestions in Support of
Writ of Mandamus and Injunctive Relief

This Court should issue a writ of mandamus, injunctive relief, or both to vindicate the right of initiative in the face of Respondents' obstruction.[1]

On March 8, 2023, Petitioner submitted eleven initiative petitions to the Secretary of State. In ordinary course—a.k.a. for every initiative petition ever except these eleven—a ballot title consisting of a summary statement and a fiscal note summary is certified within no more that fifty-four days. Petitioner's wait should have gone no later than May 1, 2023. Yet May 1 and more than two additional weeks have passed with no ballot title.

In a bungled effort reminiscent of Abbott and Costello's "Who's on First?" Respondents have stalled certification of a ballot title with no foreseeable resumption of their responsibility to render one for each of the

[1] The preliminary evidence in this matter is found within the verified petition, including its exhibits.

petitions. The Auditor produced a summary statement, which the Attorney General rejected and returned to the Auditor. The Auditor then addressed the Attorney General's relevant concerns (explaining why the Attorney General's notions of what should be in a fiscal note summary are mistaken) and returned the fiscal note and fiscal note summary to the Attorney General, who still refuses to approve the fiscal note summary. In the meantime, the hapless Secretary of State believes he is impotent to do anything other than wait for the Auditor or Attorney General to change his respective mind.

Under Respondents' interpretation of the statutory scheme, proponents of Petitioner's initiatives cannot begin the arduous task of collecting petition signatures until Respondents take statutorily specified actions that result in a certified ballot title. Moreover, even though the summary statement portion of the ballot title is already written by Respondent Secretary of State and approved by Respondent Attorney General, Petitioner and other citizens might not even be able to commence a challenge to its insufficiency or unfairness—another time suck—because the title is not certified.

In any case, the entire ballot title procedure imagined by the legislature substantially interferes with the right of initiative. Indeed, as applied here, the process enacted by the general assembly, as interpreted by Respondents, is on track to defeat direct democracy.

This not likely what the legislature intended. In 2019, Respondent Secretary of State illegally purported to reject a referendum petition as to form based on a grandiose statutory misinterpretation that would—and in that case in effect did—give him veto power over the People's exercise of the right of referendum. In this case as well, Respondents interpret their ministerial duties in a manner that invites them to prevent voters from exercising the right of initiative. That is not the law.

In the unlikely event that this whole statutory scheme is permitted to run indefinitely, it violates Missourians' most cherished right to direct democracy. The impediments the ballot title scheme places on the People originate in the legislature, not the Constitution.

Once again, Missourians find themselves in need of the courts' protection from the courts. The right of initiative is one of the People's reserved checks on the legislature. The legislature cannot defeat that right through statutory shenanigans—nor can the executive. This Court should vindicate the right of the People to exercise the right to direct democracy that they reserved onto themselves without interference from the political branches.

Mandamus is Available to Require Respondents to Perform Established Ministerial Duties

The purpose of mandamus is to execute established rights. *State ex rel. Comm'rs of State Tax Comm'n v. Schneider*, 609 S.W.2d 149, 151 (Mo. banc 1980). Mandamus will lie only when there is a clear, unequivocal, and specific right. *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 911 (Mo. banc 1982). Moreover, the right sought to be enforced against a government official must be clearly established and presently existing. *State ex rel. Commissioners of the State Tax Comm'n v. Schneider*, 609 S.W.2d 149, 151 (Mo. banc 1980). The purpose of writs is to execute established rights.

The People have an unmistakable right to bring issues they deem significant to the voters. As a matter of law, it was established in *American Civil Liberties Union of Missouri v. Ashcroft*, 577 S.W.3d 881 (Mo. App. W.D. 2019), that the duties that culminate in a certified ballot tile are non-discretionary. This makes sense when considering the statutory scheme as a whole. After certification, citizens are permitted to challenge the substance of the ballot title—its summary statement or fiscal note summary components or both—in a cause of action authorized by Missouri Revised Statutes § 116.190. The legislature did not contemplate that any of the state officials would fail to perform their ministerial duties and, thus, did not create a cause of action to challenge their decisions. That leaves mandamus.

At bottom, mandamus is the proper tool to enforce an established right, *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo. banc 1994),

but it is not the exclusive remedy. In addition to a writ of mandamus, or if it is not appropriate, declaratory judgment is an available avenue for establishing statutory and constitutional rights. *ACLU of Mo.*, 577 S.W.3d at 898–99.

Declaratory Judgment and Corresponding Injunctive Relief are Available to Discern Respondents' Statutory Obligations and Mandate That They be Carried Out

To state a claim for declaratory judgment, a Petitioner need only allege facts showing "'a justiciable controversy that presents a real, substantial, presently-existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation; . . . a [petitioner] with a legally protectable interest at stake, . . . a controversy ripe for judicial determination; and . . . an inadequate remedy at law." *Mo. State Conf. of Nat'l Ass'n for Advancement of Colored People v. State*, 601 S.W.3d 241, 246 (Mo. banc 2020) (quoting *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 25 (Mo. banc 2003)). Petitioner has satisfied this standard with factual allegations supported by Respondents' own records. None of the pertinent facts are in reasonable dispute, presenting this court with clear legal questions that are ripe for resolution.

Declaratory judgment is available to determine the parameters of Respondents' statutory authority. *ACLU of Mo.*, 577 S.W.3d at 898. When such a claim "is meritorious, . . . a permanent (mandatory) injunction, can be

'invoked to compel the undoing of something wrongfully done.'" *Id.* (quoting *State ex rel. Shartel v. Humphreys*, 93 S.W.2d 924, 926 (Mo. 1936)).

Declaratory judgment is also the appropriate vehicle for challenging the constitutional validity of a statute. *Hicklin v. Schmitt*, 613 S.W.3d 780, 786 (Mo. banc 2020). Remedies for a successful declaratory judgment action may include an "injunction against the illicit action." *Missourians for Separation of Church & State v. Robertson*, 592 S.W.2d 825, 837–38 (Mo. App. W.D. 1979) (*Berghorn v. Reorganized School District No. 8*, 260 S.W.2d 573, 581 (Mo. 1953)).

There is no remedy at law.

Regardless of whether a writ of mandamus is warranted, declaratory judgment with an injunction is.

The Attorney General has a Ministerial Duty to Approve a Fiscal Note Summary that Contains the Content Required by Law and is in the Proper Form, as the Fiscal Note Summary Produced by the Auditor Does and Is.

The Attorney General's statutory role in reviewing a fiscal note summary is neither substantial nor indefinite. All previous Attorneys General have understood this, as has the current Attorney General when it comes to other initiatives.

The Attorney General misconstrues §116.175 as allowing him to determine the substance of the fiscal note summary. Considering the plain

language of the statute, the absurdity of his interpretation, and the obligation of courts to avoid constructions that violate the Constitution, his duty here is to send notice of approval of the fiscal note summary to the Auditor. Thus, he should be directed to carry out his statutory responsibility.

An Attorney General's limited role in approving a fiscal note summary emerges only after a fiscal note and fiscal note summary have been prepared by the Auditor and forwarded to the Attorney General. § 116.175.2, RSMo.

The Attorney General does not approve the fiscal note, just the summary. § 116.175.4, RSMo. While lacking authority to approve a fiscal note, the Attorney General may reject it and return it to the Auditor. § 116.175.4, RSMo. Under the statute, however, rejection of the fiscal note does not stop certification.

The Attorney General's duty with respect to the fiscal note summary is minimal:

> The attorney general shall, within ten days of receipt of the fiscal note and the fiscal note summary, approve the legal content and form of the fiscal note summary prepared by the state auditor and shall forward notice of such approval to the state auditor.

§ 116.175.4, RSMo. Approving the legal content and form of the Auditor's fiscal note summary is not complicated for a reasonable attorney because the statute dictates the fiscal note summary's legal content and form. The statute commands that the "fiscal note summary shall state the measure's estimated

cost or savings, if any, to state or local governmental entities" and "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." § 116.175.3, RSMo.

The plain language of the statute describes the Attorney General's ministerial duty, which he has refused to fulfill.

"The cardinal rule of statutory construction is that the intention of the legislature in enacting the statute must be determined and the statute as a whole should be looked to in construing any part of it." *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. banc 2000). Moreover, in determining the meaning of a provision, its "[w]ords are to be given their plain and ordinary meaning wherever possible."

The pertinent statutory language is not difficult to decipher. The Attorney General need only check whether there is a summarization of costs, its language is argumentative or prejudicial, and the fiscal note summary is fifty or fewer words, excluding articles. That is the legal content and form of the fiscal note summary. The Auditor's summary meets all these requirements, so it should have been approved by the Attorney General and the Attorney General should be directed to perform his duty *instanter*.

Alas, the Attorney General is confused. True, he has authority to reject a fiscal note summary if an auditor were to fail to include the requisite

nonargumentative summarization or exceeded fifty words after excluding articles. § 116.175.5, RSMo. But the statute does not contemplate an Attorney General airing his personal political predilections about a fiscal note and summary or imposing his desires upon the Auditor. Indeed, neither does the Auditor himself concoct a fiscal note summary based on his policy preferences, as the Attorney General wishes he would, but rather through a statutorily prescribed process of reviewing wide-ranging input.

Even so, the statutes provide no further function for the Attorney General. Here he appears to believe that he can forever fail to forward approval of the Auditor's fiscal note summary. That is not permitted under the plain language of the statute; however, if there are any doubts about that proposition, the Attorney General's statutory analysis should be rejected for the additional reasons that it would result in absurdity and conflict with the constitutional right of initiative.

The Attorney General's view that his disagreement with the substance of a fiscal note or fiscal note summary enables him to forever prevent efforts to place an initiative before voters would produce an absurd, unreasonable, unjust result.

It is an elementary concept of statutory construction that "[s]tatutes cannot be interpreted in ways that yield unreasonable or absurd results." *State v. Nash*, 339 S.W.3d 500, 508 (Mo. banc 2011). "Statutory construction is favored that avoids unjust or unreasonable results." *Am. Fed'n of Tchrs. v.*

Ledbetter, 387 S.W.3d 360, 363 (Mo. banc 2012). "Procedures designed to effectuate [the rights of initiative and referendum] should be liberally construed to avail the voters with every opportunity to exercise these rights." *No Bans on Choice*, 638 S.W.3d at 490 (quotation and citation omitted).

Empowering the Attorney General to by idleness defeat the right of initiative is the type of authority characterizing a despot, not a Missouri official. In our system of government—with its three branches—no executive official can undermine the legislative authority the People have reserved for themselves for eleven score and five years. *Marsh v. Bartlett*, 121 S.W.2d 737, 742 (Mo. 1938) (recalling voters of Missouri first adopted a constitutional amendment reserving for themselves the right to amend the Constitution by way of initiative in 1908). It is absurd, unreasonable, and unjust to construe the relevant statutes in any manner that authorizes bureaucrats to undermine the right of initiative. The legislature could not have intended the Attorney General be authorized to use a devise a dispute about the substance of the Auditor's work and rely on as an excuse for robbing citizens of the opportunity to an up or down vote on an initiative.

Moreover, the Attorney General's proposition is especially absurd, unreasonable, and unjust because the legislature has provided the Attorney General a *different* route to protest the substance of a fiscal note summary. "'When determining the legislative intent of a statute, no portion of the

statute is read in isolation, but rather the portions are read in context to harmonize all of the statute's provisions.'" *ACLU of Mo.*, 577 S.W.3d at 891 (quoting *BASF Corp. v. Dir. of Revenue*, 392 S.W.3d 438, 444 (Mo. banc 2012) (per curiam)). Any citizen—including Andrew Bailey—may initiate a court challenge to the fiscal note summary portion of the ballot title or the fiscal note itself. § 116.190.1, RSMo.[2]

To allow the Attorney General to do as a professed review of "legal content and form" what he can do later in the process grows the absurd, unreasonable, unjust nature of his position. The idea he can unilaterally force the Auditor to change the substance of a fiscal note or fiscal note summary when he would have to mount a successful case to do so in court adds to absurdity, unreasonableness, and unjustness of his position. His apparent belief that he can by inertia forever prevent any consideration of a proposed initiative is unimaginable.

The doctrine of constitutional avoidance counsels against any statutory construction that permits Attorney General to withhold approval of a fiscal note summary that purports to summarize the fiscal note and satisfies the word limitation.

[2] Unfortunately for the Attorney General, however, in court he would be required to prove a case—a scenario in which he does not fare well. Moreover, in contrast to the consequence-free character of his dereliction of duty to date, in court he could be sanctioned for filing a frivolous suit.

"The courts of this state must zealously guard the power of the initiative petition process that the people expressly reserved to themselves." *Boeving v. Kander*, 496 S.W.3d 498, 506 (Mo. banc 2016). "[A] court should avoid a construction which would bring a statute into conflict with constitutional limitations." *Cascio v. Beam*, 594 S.W.2d 942, 946 (Mo. banc 1980).

As explained, *infra.*, if the statutory scheme can be construed in way that permits what is happening now, the ballot title requirements, its procedures, or portions thereof are invalid because they run afoul of the constitutional right of initiative. Hence, the scope of the Attorney General's review of the fiscal note summary should be construed to avoid requiring this Court to strike down statutes.

The Auditor has a Ministerial Duty to Forward the Fiscal Note and Summary to the Secretary of State, and the Secretary of State has a Ministerial Duty to Certify a Ballot Title that Includes That Fiscal Note Summary.

The Secretary of State certifies a ballot title upon receipt of, inter alia., the approved fiscal note summary and the fiscal note. § 116.180, RSMo. The statutes do not specify how the note or summary gets to the Secretary of State. Somehow it always has until the ordinary customs failed here.

The statutes should be interpreted as requiring the Auditor to forward to the Secretary of State the note and summary he has approved upon

remand from the Attorney General and the Secretary of State to treat the summary as he would any other approved one.

The statutory scheme does not articulate any additional activity for the Attorney General if he rejects a fiscal note or fiscal note summary and returns both to the Auditor. After considering the Attorney General's comments and conducting further investigation to ensure the accuracy of the fiscal note summary, the Auditor returned the fiscal note and its summary to the Attorney General, who, after stalling until after a certified ballot title was due, rejected it without any acknowledgment of the Auditor's response to his concerns.

Assuming, *arguendo*, the Attorney General acted within his authority in the first instance of rejecting the fiscal note summary, the best interpretation of the statutory scheme is that, after considering the Attorney General's thoughts, the Auditor should forward the fiscal note and summary to the Secretary of State who should then certify a ballot title that includes the fiscal note summary.

While § 116.175.5, RSMo., permits the Attorney General to return the fiscal note and summary to the Auditor if the summary is deficient in legal content or form, the statute is silent about happens afterwards. There are no instructions for anyone. In contrast to the responsibilities assigned to officials elsewhere, the scheme does not require anyone do anything. Unlike the strict

time limits for actions throughout the process, there are no deadlines. The best reading of the statutory process as a whole, as required, *see ACLU of Mo.*, 577 S.W.3d at 891 (quoting *BASF Corp.*, 392 S.W.3d at 444), is that upon consideration by the Auditor after remand, the fiscal note summary should be send to the Secretary of State for inclusion as part of the certified ballot title. This interpretation would also allow any citizen who remains critical of the fiscal note summary to challenge it in court—the only way the legislature offers to resolve a fiscal-note-related dispute.

This interpretation also avoids absurd, unreasonable, or unjust results. As discussed described, *supra.*, doing so is at the heart of the canons of construction.

It also avoids a finding that one or more statutes is unconstitutional, *see infra*. Constitutional avoidance allows this Court to overcome the most plausible argument in support of the proposition that the Secretary of State must wait in perpetuity for the Attorney General to cease his mulishness: the Secretary of State might note that the statute provides that he must certify a ballot title after receiving, *inter alia.*, "the approved fiscal note summary." § 116.180, RSMo. "If an enactment 'is fairly susceptible of two or more constructions, that interpretation will be adopted which will avoid the effect of unconstitutionality, even though it may be necessary, for this purpose, to disregard the more usual or apparent import of the language employed.'"

State ex rel. Columbia Tel. Co. v. Atkinson, 195 S.W. 741, 745–46 (1917) (per curium)(quotation and citation omitted). In the present context, the approved fiscal note should be interpreted as referring to a fiscal note summary approved by either the Attorney General, in the first instance, or the Auditor, after remand.

The Ballot Title Requirement and Its Procedures Impermissibly Infringes Upon the People's Reserved Right of Initiative and, Thus, are Invalid in Whole or in Part

If the statutes governing the ballot title for an initiative cannot be construed in a manner that compel the prompt production of a ballot title, then those provisions are unconstitutional on their face and as applied.

Article III, § 49 of the Missouri Constitution describes the contours of the right of initiative: "**The people reserve power to propose and enact** or reject laws and **amendments to the constitution by the initiative, independent of the general assembly**, and also reserve power to approve or reject by referendum any act of the general assembly, except as hereinafter provided." (emphasis supplied).

Article III, § 50 establishes the constitutional requirements to invoke the right of initiative:

> **Initiative petitions proposing amendments to the constitution shall be signed by eight percent of the legal voters in each of two-thirds of the congressional districts in the state**, and petitions

> proposing laws shall be signed by five percent of such voters. **Every such petition shall be filed with the secretary of state not less than six months before the election and shall contain an enacting clause and the full text of the measure. Petitions for constitutional amendments shall not contain more than one amended and revised article of this constitution, or one new article which shall not contain more than one subject and matters properly connected therewith, and the enacting clause thereof shall be "Be it resolved by the people of the state of Missouri that the Constitution be amended:".** Petitions for laws shall contain not more than one subject which shall be expressed clearly in the title, and the enacting clause thereof shall be "Be it enacted by the people of the state of Missouri:".

(emphasis supplied). In sum, this section prescribes the quantity of signatures that must be collected, from whence in Missouri signatures must emanate, the deadline for submitting signatures, what must be included on each petition, and that each initiative be confined to a single subject and article. There is no mention of a title for a constitutional amendment by initiative.

The Constitution does not require a ballot title. Article XII, § 2(b) allows on, but only on the ballot, as its name applies, stating:

> **All amendments proposed** by the general assembly or **by the initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law**, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto, at which he may submit

> any of the amendments. No such proposed amendment shall contain more than one amended and revised article of this constitution, or one new article which shall not contain more than one subject and matters properly connected therewith.

(emphasis added).

No other constitutional provisions are implicated in this case.[3]

Absent from the Constitution is any contemplation of the notion that the People must present a petition for pre-circulation approval. If such a requirement had been intended, it would have been included in the text of the Constitution, as evidenced by the inclusion of a presentment requirement after signature collection. Moreover, because a ballot title is merely permitted, it is not mandated at any time in the constitutional-amendment-by-initiative process. Had anything other than an enacting clause and the full text of a measure been envisioned as part of a petition, no doubt it would have been included in Article III, § 50.

Nor does the Constitution foresee the drawn-out procedure to produce a ballot summary that the general assembly has concocted. A "title" in the

[3] Article III, § 51 limits when an initiative might be used to appropriate monies, determines when a measure takes effect, and addresses a conflicting-measure scenario. Article III, §53 details how the number of signatures required is figured.

.

initiative context is properly interpreted to coincide with the meaning of "title" when it is used in the Constitution as a requirement for statutory enactments. This definition neither necessitates a fiscal note summary nor requires months to draft and additional months to litigate. Like the title requirement for bills, the requirement of a title for constitutional amendments by initiative appears in the Constitution alongside a single-subject clause, which suggests a "title" has the same purpose in both contexts. That is, as when a title is required for legislation, a ballot title generally describes the purpose of the proposal. A title does not have to "give specific details" but rather should "indicate only generally" the contents of a proposed constitutional amendment. *St. Louis Health Care Network v. State*, 968 S.W.2d 145, 147 (Mo. banc 1998); *see Giudice v. Mercy Hosps. E. Communities*, 645 S.W.3d 492, 499 (Mo. banc 2022) ("bill's title indicates generally what constitutes the act"); *Jackson Cnty. Sports Complex Auth. v. State*, 226 S.W.3d 156, 161 (Mo. banc 2007) (title's umbrella term generalizes the topics of the bill); *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 328 (Mo. banc 2000) ("overarching subject" of bill is identified by "is the broad umbrella category expressed in the title").

While a ballot title *may* be required by law, the Constitution contemplates a general description that using umbrella terms to describe the subject of the proposal, not a lengthy process that marked by partisan

mischief and perpetual litigation. The most natural reading of the Constitution is that responsibility for drafting a title falls to the measure's proponent; after all, the option for title appears alongside a single-subject clause and it is the proponent who loses if a proposal contains more than one subject.

As this case demonstrates, the ballot title scheme is a trap that can kill the right of initiative. The procedures are extensive and afford politicians numerous opportunities to interfere with and even defeat direct democracy. The legislature has imposed the following obligations, none of which are mentioned in our Constitution, before proponents can collect signatures in advance of the constitutional deadline:

- A proponent is required to present a sample sheet of any proposed initiative to the Secretary of State for pre-circulation approval and creation of a ballot title. RSMo. § 116.040, § 116.050, and § 116.332.1;
- The Secretary of State is required to forward a copy of each initiative petition to the Attorney General and the Auditor.
- He is also supposed to post the text of each initiative conspicuously on his website. RSMo. § 116.332.2;

- The Attorney General must review each initiative and forward approval as to form or comments to the Secretary of State. RSMo. § 116.332.3;
- The Secretary of State then approves or rejects each initiative as to form. RSMo. 116.332.4;
- Meanwhile, the Auditor must create a fiscal note and fiscal note summary. RSMo. § 116.175.1;
- The Auditor then forwards them to the Attorney General. RSMo. § 116.175.2;
- After receiving the fiscal note and summary from the Auditor, the Attorney General reviews the fiscal note summary to ensure it is in the form and has the content require by statute.
    - If the Attorney General approves the fiscal note summary,[4] he is required to send notice to the Auditor. RSMo. § 116.175.4.
    - If the Attorney General does not approve, he returns the fiscal note and summary to the Auditor. RSMo. § 116.175.5. The statute does not oblige the Auditor or the Attorney General to do anything further;

[4] Although the Attorney General can reject the fiscal note, no provision permits him to approve it.

- While the fiscal note and summary are prepared, the Secretary of State must craft a summary statement and forward it to the Attorney General. RSMo. § 116.334;
- The Attorney General is supposed to review the summary statement as to legal content and form. *Id*.
    - If the Attorney General approves, he sends notice to the Secretary of State.
    - If the Attorney General does not approve, he returns the summary statement to the Secretary of State. Xxx. The statute does not oblige the Secretary of State or the Attorney General to do anything further;
- Eventually, the Secretary of State is directed to certify a ballot title; however, as interpreted by the incumbent, the statute does not allow him to do so without an Attorney-General-approval fiscal note summary (and presumably summary statement). RSMo. §116.180. No statute considers how the right to initiative can be vindicated without a certified ballot title;
- Certification is not the end because every citizen has a statutory right to challenge the summary statement, fiscal note, or fiscal note summary. RSMo. § 116.190.

    - If a court finds a summary statement insufficient or unfair, it will provide a different one.
    - If a court finds a fiscal note or summary deficient, then they are remanded to the Auditor. The statutes are silent to what happens after remand.
- Any party who receives an adverse ruling in the circuit court may appeal. Although the legislature purports to provide for a direct appeal to the Supreme Court, the Court's jurisdiction is governed by the Constitution, not the legislature. *Boeving v. Kander*, 493 S.W.3d 865, 872–73 (Mo. App. W.D. 2016). Thus, appeal is permitted to the Court of Appeals and, thereafter, appeal to the Supreme Court is available at the Court's discretion.

Even on occasions when state officials carry out their duties in good faith, this entire scheme interferes with every attempt to exercise the right of initiative and defeats many. Every day the time for signature collection is delayed, the cost of gathering enough signatures to get a measure before voters increases and the feasibility decreases. *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 491 (Mo. banc 2022). For one thing, according to statute, signatures cannot be counted if the official ballot title is not affixed to the

page containing the signature. RSMo. § 116.180.[5] Moreover, even if they could be, *but see No Bans on Choice*, 638 S.W.3d at 492, it would be unreasonable to require proponents to decide whether to undertake the onerous and expensive task of gathering signatures without knowing how a proposed initiative will be presented to voters on the ballot.

In practice, the ballot title scheme is an even greater burden on the right of initiative than the statutes suggest, however, because it affords ample opportunities for enough shenanigans to defeat—with no consideration by voters—any proposal personally opposed by the Secretary of State, the Auditor, or the Attorney General. A rogue official—like Ashcroft in 2019 or Bailey here—can pretend to "follow the law" and shut the process down by sheer obstinance. But even when supplying a ballot title, evenhandedness is not frequent. Our state's court records are littered with instances where state officials approved a ballot title that a was insufficient or unfair even after affording deference to the officials who authority them.

---

[5] Although the requirement that the ballot title be affixed to a petition for signatures to count has yet to be declared unconstitutional, there is no serious disputing that it is. *See Boeving v. Kander*, 496 S.W.3d 498, 507 (Mo. banc 2016); *see also No Bans on Choice*, 638 S.W.3d at 490 ("an official ballot title is not necessary to prevent individuals from being deceived at the petition-signing stage and that the ability to exercise the constitutional right of referendum should not be 'interfered with or impeded' by a pre-circulation ballot title requirement").

As applied here, but also in every instance, the ballot title statutory scheme interferes with and impedes the right of initiative. "The ability of the voters to get before their fellow voters issues they deem significant should not be thwarted in preference for technical formalities." *United Lab. Comm. of Missouri v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. banc 1978). "Constitutional and statutory provisions relative to initiative are liberally construed to make effective the people's reservation of that power." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990). "Statutes that place impediments on the initiative power that are inconsistent with the reservation found in the language of the constitution will be declared unconstitutional." *Id*. Restrictions on the direct democracy rights represent the legislature limiting the People's check on the legislature. "The legislature must not be permitted to use procedural formalities to interfere with or impede this constitutional right that is so integral to Missouri's democratic system of government." *No Bans on Choice*, 638 S.W.3d at 492.

For these reasons, the statutory requirements for a ballot title, which is not required by the Constitution, interferes with and infringes on the right to initiative and is unconstitutional. This Court should enter declaratory judgment so stating. Moreover, Respondent Ashcroft should be ordered to count the signatures on any petition that includes the constitutionally required enactment clause and to which the text of the proposed initiative is

attached. Furthermore, he should be required, upon a determination that the requisite number of signatures have been presented, to cause the full text of the proposed measure to be printed on ballots for the election at which the initiative will be presented to voters.

CONCLUSION

This case separates those who cherish direct democracy and the right of initiative from those who would let their personal political passions trump the power of the People to express their will. It falls to this Court to set things straight.

Respectfully submitted,

/s/ Anthony E. Rothert
Anthony E. Rothert, #44827
Tori Schafer, #74359
American Civil Liberties Union
of Missouri
906 Olive Street
Suite 1130
St. Louis, Missouri 63103
(618) 531-4184
arothert@aclu-mo.org
tschafer@aclu-mo.org

Certificate of Service

By operation of casenet, a copy of the foregoing will be delivered to all counsel of record upon filing.

/s/ Anthony E. Rothert