IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

Dr. Anna Fitz-James	)	
Petitioner,	)	
	)	
v.	)	No. 23AC-CC02800
	)	
ANDREW BAILEY, et al.,	)	
Respondents.	)	

[PROPOSED] BRIEF OF PUBLIC RIGHTS PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S REQUEST FOR MANDAMUS AND DECLARATORY JUDGMENT

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INTERESTS OF *AMICUS CURIAE*

Public Rights Project ("PRP") is a not-for-profit civil rights advocacy organization committed to equitable enforcement of law.[1] PRP seeks to catalyze greater rights protection by our network of nearly 200 state, local, and tribal government partners. PRP provides technical assistance, training, and legal support to drive public administration that improves the daily lives of historically underserved groups and marginalized people, and promotes voting rights and other democratic norms.

There is an accelerating trend of state actors attempting to block ballot initiatives where citizens of their states wish to restore or advance reproductive rights. These undemocratic actions by state officials undermine the rule of law and the values of the communities who elected them to office. These attacks have included unilateral executive action or inaction—exemplified here by the Attorney General's failure to fulfill his ministerial duties. Likewise, officials have usurped the powers of other officials and undermined democratic processes to reach policy ends they prefer. PRP files this brief in support of Petitioner's request for mandamus relief not only because her rights clearly were violated by the Attorney General's unlawful actions and inaction, but because this broader trend interferes with and erodes our democracy.

[1] All parties have consented to the filing of this brief or have stated they have no objection. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than Amicus or Amicus's counsel made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

Attorney General Bailey disregarded Missouri law and failed to fulfill his ministerial duties by indefinitely delaying the production of a ballot title. He did so because he disagreed with the State Auditor's reported estimate of the fiscal impact of the cost of the ballot initiatives. But the Attorney General's disagreement is irrelevant because Missouri law en14trusts the Auditor, not the Attorney General, to solicit and report relevant and reasonable information pertinent to the cost of a proposal. Second-guessing the Auditor's report and demanding a different result is outside the Attorney General's authority. The delay the Attorney General has created through his actions and inaction is unlawful and undemocratic. This Court should compel the Attorney General's prompt action in this area. His duties are ministerial and the law provides him no discretion or power to interfere with the State Auditor's duties and Petitioner's rights.

I. Attorney General Bailey's Duty to Approve the Fiscal Note and Fiscal Note Summary is Ministerial and Therefore the Proper Subject of Mandamus.

Missouri law imposes clear duties on the Secretary of State, the Auditor, and the Attorney General (collectively, the "executive officers") that they must fulfill before signatures may be collected for a ballot initiative. *See* RSMo. § 116.010, *et seq.* As relevant here, RSMo. § 116.175 directs Respondent Fitzpatrick, as Auditor for the State of Missouri, to prepare a fiscal note and fiscal note summary for the measure, and Respondent Bailey, as Attorney General for the State of Missouri, to "approve the legal content and form" of the note summary. *See* RSMo. § 116.175.4. If the note summary includes all required parts and meets the form requirements of the statute, the statute requires the Attorney General to approve it. Rather than follow Missouri law, however, Attorney General Bailey is blocking the initiative process based on his own unauthorized review of the fiscal impact of the initiatives. Attorney General Bailey does not have

the authority to second guess the Auditor's report and indefinitely delay a ballot initiative based on his own view of the fiscal impact to the State.

It is blackletter law across federal and state jurisdictions that public officials' work consists of discretionary acts and ministerial acts, and that ministerial acts must be executed. Ministerial duties are outlined in governing law and are "of a clerical nature, upon which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act performed." *See, e.g.*, *Schulz Through Schulz v. City of Brentwood*, 725 S.W.2d 157, 161 (Mo. Ct. App. 1987) (citing *Kanagawa v. State ex rel. Freeman*, 685 S.W.2d 831, 836 (Mo. banc 1985), overruled on other grounds by *Alexander v. State*, 756 S.W.2d 539 (Mo. banc 1988)). *See also Knutson v. State ex rel. Seberger*, 157 N.E.2d 469, 471 (Ind. 1959) (noting that it is "well established by a long line of decisions that public officials, boards and commissions may be mandated to perform ministerial acts where there is a clear legal duty to perform such acts"). Ministerial acts involve "conduct requiring adherence to a governing rule, with a compulsory result." *Lauer v. City of New York*, 95 N.Y.2d 95, 99 (2000).

Likewise, to determine whether an act or task is ministerial, federal judges "ask whether any federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Cope v. Scott*, 45 F.3d 445, 448 (D.C. Cir. 1995) (cleaned up). "If a specific directive exists, then the employee had no choice. The only issue is whether the employee followed the directive." *Id.* Even a "high officer" who maintains discretion in some areas, may have "duties assigned him by law, in the execution of which he is independent of all control, but that of the laws." *See e.g*., *Marbury v. Madison*, 5 U.S. 137, 149–50, 2 L. Ed. 60 (1803) (holding

that the secretary of state may be compelled to perform ministerial duties assigned to him by law). When directed to perform ministerial actions, these officers are "not above the law." *Id.*

Laws conferring ministerial duties on officers may require some discretion in how one follows the statutory directive, but an officer must still act "by direction of legal authority upon a given state of facts, independent of what he may think of the propriety or impropriety of doing the act in the particular case." *State ex rel. Jones v. Cook*, 73 S.W. 489, 493 (Mo. banc 1903). A public official's duty to correct an autopsy record to include a previously overlooked aneurysm and deliver it to investigators is ministerial; once the alternative cause of death is discovered, the official has no discretion to withhold the information. *Lauer,* 95 N.Y.2d at 99. Deciding where and when to put up warning signs on public roadways, even though requiring fact-gathering, analysis, and some discretion, is ministerial. *Cope*, 45 F.3d at 452. Public school teachers may have a ministerial duty to report bullying according to known rules or codes of conduct even if there is discretion "with respect to the means or method to be employed in performing this duty." *Patton v. Bickford*, 529 S.W.3d 717, 727-28 (Ky. 2016) (citing *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959)). Similarly, officers tasked with a ministerial duty to approve a land development must determine whether standards are met but they may not substitute their own judgment and depart from the established standards. *Knutson v. State ex rel. Seberger*, 239 Ind. 656, 659 (1959) (describing the approval of plots of land based on existing standards as "a ministerial act"). Courts have applied the same considerations to the ballot initiative process, finding officers' duties to review petitions for statutory requirements to be "ministerial in nature." *See e.g.*, *Duggan v. Beermann*, 544 N.W.2d 68, 82 (Neb. 1996).

Here, Attorney General Bailey has a ministerial, mandatory duty to approve the fiscal impact statement prepared by State Auditor Fitzpatrick. RSMo. § 116.175.4 ("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."); *see also* Respondent Scott Fitzpatrick's Answer to Petition for Writ of Mandamus and Declaratory Judgment at 14 ("The Attorney General's duty to approve a fiscal note summary that satisfies the requirements of Section 116.175 is mandatory, not discretionary. Sections 116.175.4 and 116.175.5, RSMo."). Notably, the Attorney General attempts to rewrite the statute in his brief, citing to the statute but replacing "shall approve," RSMo. § 116.175.4, with "may 'approve.'" *See* AG Br. at 4, 22. Although this is the Attorney General's preferred reading, it is not what the text of the statute says. And as the Attorney General himself acknowledges, "the word 'shall' generally prescribes a mandatory duty." AG Br. at 26 (quoting *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009). Such is the nature of a ministerial duty.

The Attorney General may not decline to approve the fiscal note summary once it is presented to him in its proper form. He must, in a clerical manner, identify whether the summary contains fewer than fifty words and does not contain language that is argumentative or likely to create prejudice for or against the proposed measure, RSMo. § 116.175.3, and then he "**shall** forward notice of [] approval to the state auditor." RSMo. § 116.175.4. This is not a borderline case that required some fact-gathering (*Cope*, in identifying places on a road to erect warning signs), analysis, expertise (*Lauer*, in conducting and analyzing autopsies), or discretion in means or method (*Patton,* in determining the proper methods to enforce a school's codes of conduct). The fiscal note summary had fewer than fifty words, and did not contain argumentative or prejudicial language.[2] On those facts, the Attorney General has no discretion and "shall approve"

[2] In its entirety, it reads "State governmental entities estimate no costs or savings, but unknown impact. Local government entities estimate costs of $51,000 annually in reduced tax revenues. Opponents estimate a potentially significant loss to state revenue."

the fiscal note and note summary. RSMo. § 116.175.4. He failed to fulfill that duty and continues to refuse to do it. And his demand that the Auditor elevate and generalize one set of inputs from one (Greene) county, despite the fact that no other county provided the same, and disregard the input from the Department of Revenue and the Department of Social Services is the kind of substitution of judgment courts do not permit in the execution of ministerial tasks. *See, e.g., Knutson*, 239 Ind. at 659.

The Missouri Supreme Court has previously rejected attempts by executive officers who fail to execute their ministerial duties to block initiatives that complied with legal requirements from reaching voters. *See State ex rel. Stokes v. Roach*, 190 S.W. 277, 278 (Mo. 1916). In *Roach*, the Secretary of State was required by law to furnish a ballot title to county clerks, but refused to do so based on alleged legal deficiencies that the Secretary of State did not have authority to raise. *Id.* at 278-79. The court compelled the Secretary of State to act, noting that the "court has repeatedly declared that he is purely a ministerial officer and as such may be compelled by mandamus to do what he ought to do." *Id.* at 178 (citing *State ex rel. Railroad v. Johnston*, 137 S. W. 595 (Mo. banc 1911)). "Any other construction of the law would present the anomaly of clothing a merely ministerial officer…with power to thwart the will of the people." *Id.*

Other state courts have also rejected attempts to interfere with ballot initiatives that comply with statutory requirements, finding that executive officers act in a ministerial capacity in the initiative process.[3] The Nebraska Supreme Court, for instance, describes the Secretary of State's duty to determine whether a petition satisfies statutory prescriptions regarding the form of initiative as "ministerial in nature," preventing the Secretary from passing on the substantive

[3] Attorney General Bailey is, therefore, wrong in implying a lack of case law supporting the proposition that his statutorily assigned duties are ministerial. AG Br. at 24. Rather, it is the Attorney General who is unable to point to a single authority granting an executive officer the discretion to indefinitely block a ballot initiative based on a disagreement with how a separate officer performed duties assigned to them by law.

merits of a proposal. *Duggan v. Beermann*, 544 N.W.2d 68, 82 (Neb. 1996). The court noted that the officer must approve the initiative if requirements are "substantially complied with" and that this "general leniency is carried through the entire initiative process in order to preserve the full spirit of the precious right of the people to revise their Constitution." *Id.*

The Michigan Supreme Court has similarly prevented officials from restricting access to the initiative process, holding that the Board of Canvassers "acts in a ministerial capacity and lacks discretionary authority to adjudicate legal disputes" when approving ballot petitions. *Reprod. Freedom for All v. Bd. of State Canvassers,* 978 N.W.2d 854, 855 (Mich. 2022) (McCormack, C.J., concurring) (citing *Stand Up for Democracy v Secretary of State*, 822 N.W.2d 159 (Mich. 2012); *McQuade v Furgason*, 51 N.W. 1073 (Mich. 1892)). Accordingly, the Michigan Supreme Court ordered the Board of State Canvassers to certify the ballot petition when it complied with statutory requirements. *Id.* at 854-55. In California, an appellate court considered a statutory scheme similar to Missouri's which required the Attorney General to "prepare a summary of the chief purposes and points of the proposed measure." *Planning & Conservation League, Inc. v. Lungren*, 38 Cal. App. 4th 497, (3d Dist. 1995). The court found this was a "ministerial duty and must be performed if the petition is in the proper form and submitted in accordance with the appropriate procedures." *Id.* at 501 (citing *Warner v. Kenny*, 27 Cal. 2d 627, 630-31 (Cal. 1946)). The court upheld the lower court's writ of mandate to compel the Attorney General to perform their statutory duty. *Id.*

Here, as in *Roach* and the other state court ballot cases, Attorney General Bailey has prevented Petitioner from exercising her right to initiative by refusing to execute his ministerial duties. Attorney General Bailey refuses to follow statutory directions to approve a legally compliant initiative by claiming authority that Missouri law does not grant to him. *See* RSMo. §

116.175.3 (granting the authority to assess the fiscal impact to the state auditor). So this court, as other courts have, must order him, despite his high office, to do his duty: set aside his own policy preferences, approve the Auditor's preparation of the fiscal note and summary because it complies with all statutory requirements, and send along his approval to the Secretary of State.

II. Attorney General Bailey's Advocacy of Flawed Statistical Analyses Illustrates the Dangers of His Intrusion Into the Auditor's Role.

Attorney General Bailey's proffered reasons for rejecting the fiscal impact statement and summary prepared by Auditor Fitzpatrick illustrate why the law imposes only ministerial duties on the attorney general in the ballot initiative process. The statutory scheme authorizes the Auditor, and the Auditor alone, to prepare the fiscal impact statement. RSMo. § 116.175.1–2. Here, the Auditor ably carried out his duties, arriving at a fiscal impact statement and fiscal note summary that satisfies statutory requirements and, contrary to Attorney General Bailey's purported rationale for rejecting the note summary, gives more credence than required by law to opponents of the initiative. To the extent the Attorney General disagrees, he has the same right as anyone else to challenge the fiscal impact statement once published. RSMo. § 116.190.1, RSMo. The Attorney General's attempt to short-circuit the fiscal-analysis process lacks merit on both the facts and the law. He has no "power to thwart the will of the people," *Roach*, 190 S.W. at 278, by blocking an initiative from reaching Missourians on his mere say-so.

Missouri state law directs the Auditor, not the Attorney General, to "assess the fiscal impact of the proposed measure," RSMo. § 116.175.1–2, and prepare a fiscal note summary with the "purpose of informing the public about the proposed initiative's potential fiscal consequences." *Brown v. Carnahan*, 370 S.W.3d 637, 649 (Mo. banc 2012) (citing RSMo. § 116.175). In preparing the fiscal note summary, the Auditor "**may** [but is not required to] consult with the state departments, local government entities, the general assembly and others with

knowledge pertinent to the cost of the proposal." RSMo. § 116.175.1 (emphasis added). In doing so, the Auditor, not the Attorney General, determines whether the submissions "appear complete, are relevant, have an identifiable source, and are reasonable." *Brown*, 370 S.W.3d at 649.

Notably, the Auditor is not authorized to "analyze or evaluate the correctness of the returned fiscal impact submissions" or "wade into the policy debates surrounding initiative petitions." *Id.* Nor is any other executive officer. Instead, the fiscal note must "state the consequences of the initiative without bias, prejudice, deception, or favoritism." *Id.* Therefore, RSMo. § 116.175 carefully cabins the role of officers in preparing the summary and does not authorize the power to block an initiative based on any officer's personal judgments.[4]

Here, Auditor Fitzpatrick fulfilled his statutory duty when he submitted the fiscal impact notes and fiscal impact summary to Attorney General Bailey. Auditor Fitzpatrick acted according to a "procedure which has remained substantially the same and been used in drafting all fiscal notes and fiscal note summaries for at least the last decade during which Auditors of both major political parties have held office." Memo from Auditor re: Opinion Letter, at 1-2. Auditor Fitzpatrick requested submissions from state agencies, including the Attorney General's office, and counties across the state. *Id.* at 2-3. Auditor Fitzpatrick then, per Missouri law, considered these submissions for their relevance and reasonableness, *id.* at 3-4, and prepared the fiscal impact statement according to his legal duties, *id.* at 7 (citing Mo. CONST. art. IV, §13; *Brown*, 370 S.W.3d at 652).

Reaching beyond his ministerial review of the content and form of the summary, Attorney General Bailey cited flawed and cherry-picked analyses to support a conclusion that

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[4] Even in states where the Attorney General has a more substantial role to play in the initiative process, the Attorney General must act in that role neutrally. *See, e.g. In re Initiative Petition No. 397, State Question No. 767*, 326 P.3d 496, 508 (2014) ("[a]n Attorney General does not use the People's initiative process as a vehicle to champion his or her political positions.").

aligns with his own views to stall the initiative. *See*, Petition at Ex. B. ("Attorney General Opinion Letter No. 206-2023"). Attorney General Bailey argued that federal Medicaid funds would be jeopardized. *Id.*, at 4. But not one of the agencies contacted by the Auditor indicated that the proposal would jeopardize Medicaid funding, including the Department of Social Services which is tasked with administering Medicaid.[5] Memo from Auditor re: Opinion Letter, at 3-4. Attorney General Bailey also cited a submission from a single county (Greene) that used a flawed statistical method to support his favored viewpoint and argue that the Auditor should apply this analysis to the entire state. Memo from Auditor re: Opinion Letter, at 5-6. But the Missouri Revised Statutes provide no authority for any executive officer, let alone Attorney General Bailey, to adopt a single county's economic theory and apply it to the state. *Id.* (citing Mo. CONST. art. IV, §13; *Brown*, 370 S.W.3d at 652).

Apart from their legal defects, Attorney General Bailey's purported "revisions" to the fiscal analysis are factually unmoored. If anything, Auditor Fitzpatrick's original summary was overly deferential to opponents of the proposal. Auditor Fitzpatrick included a cost figure that reported Greene County's $51,000 figure despite the county's use of a highly questionable economic theory and the fact that all other counties that responded to the Auditor reported no fiscal impact. Memo from Auditor re: Opinion Letter, at 5. The Auditor could have rejected Greene County's submission as part of his review for whether the fiscal information is "reasonable," *Brown*, 370 S.W.3d at 649, but he instead gave more weight to opponents' considerations of cost than required by law. *Id.* at 5-6. In addition, the fiscal impact statement does not include the expected *positive* fiscal impacts of a ballot measure that restores access to reproductive healthcare and rights. Studies indicate that abortion bans are costly and an initiative

[5] The Auditor even followed up to contact these agencies in response to the AG's rejection and they did not change their response, further refuting the idea that these funds would not be jeopardized. Memo from Auditor re: Opinion Letter, at 3-4.

restoring reproductive rights would lead to an expected overall *reduction* in costs to Missouri state and local governments. *See, e.g., The High Cost of House Bill 126 on the Economic Health of St. Louis*, The Office of the Treasurer of St. Louis City & NARAL Pro-Choice Missouri Foundation 6-8 (Mar. 2021) (finding that the potential public and private sector impacts from the loss of reproductive rights could approach tens of millions of dollars in a single Missouri city), https://prochoicemissouri.org/research/.[6]

Attorney General Bailey's advocacy of flawed statistical analyses, attempt to inaccurately inflate the initiatives' estimated cost, and his demand that the Auditor disregard the input of state agencies with specific relevant expertise, highlights why Missouri law carefully cabins the role of executive officers in preparing fiscal note summaries. The legislature drafted a statute to protect the right to initiative from an executive officer's personal judgments or policy preferences. Attorney General Bailey has disregarded these statutory limits to advance his own position on the proposals. This sets an unlawful and dangerous precedent, and undermines a

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[6] *See also* Foster DG, Ralph LJ, Biggs MA, Gerdts C, Roberts SCM, Glymour MA, *Socioeconomic outcomes of women who receive and women who are denied wanted abortions*, American Journal of Public Health, 108(3):407-413 (March 2018) (concluding that laws restricting abortion may result in worsened economic outcomes for women and specifically finding that relative to those who received an abortion, those study participants forced to give birth: experienced had higher odds of poverty 6 months after abortion denial, were more likely to receive public assistance and unable to cover basic living expenses like food, housing and transportation); Miller S, Wherry LR, Foster DG, *The Economic consequences of being denied an abortion* The National Bureau of Economic Research, NBER Working Paper No. 26662 (January 2020) (finding that women denied an abortion experience a large increase in financial distress that is sustained for several years; being denied an abortion lowered a woman's credit score, increased a woman's amount of debt and increased the number of their negative public financial records, such as bankruptcies and evictions); Foster DG, Biggs MA, Raifman S, Gipson JD, Kimport K, Rocca CH, *Comparison of health, development, maternal bonding, and poverty among children born after denial of abortion vs after pregnancies subsequent to an abortion*, JAMA Pediatrics, 172(11):1053-1060 (September 2018) (finding that children born as a result of abortion denial are more likely to live below the federal poverty level than children born from a subsequent pregnancy to women who received the abortion).

statutory framework designed to guard against bias, prejudice, deception, and favoritism in the initiative process, and to promote, not hamper democracy.

CONCLUSION

The Court should issue a writ of mandamus and ensure prompt production of a ballot title by directing Attorney General Bailey to approve the fiscal note summary for the initiatives as to legal content and form and promptly deliver notice of approval to Secretary Ashcroft. Alternatively, the Court should enter a declaratory judgment that Attorney General Bailey has a ministerial duty that compels that result.

Respectfully submitted,

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Dated: June 6, 2023

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically with the Court's electronic filing system on June 6, 2023. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

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