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IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

BARBARA FINCH, and MARY LUCY BRENNER,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	**Case No. 10AC-CC00413**
ROBIN CARNAHAN, Secretary of State, et al.,	)	
	)	
Defendants.	)	

FINAL JUDGMENT

House Bill 1764 ("HB1764") makes no reference to the recent federal healthcare reform law, and all parties agree that, if approved by the voters, HB1764 will have no immediate (or even near-term) effect regarding this new federal law. Moreover, even assuming that the voters approve HB1764, the laws enacted thereby will not – and legally cannot – prevent a future General Assembly from taking any action it desires regarding the implementation of the new federal legislation any time between now and 2014, when most of the provisions of the federal legislation will begin to have effect, or later. Nevertheless, the Missouri General Assembly has exercised its constitutional prerogative to submit HB1764 to the voters on August 3, 2010, for their approval or rejection. This Court's duty is to give effect to that decision unless the process employed by the General Assembly (and others) clearly and undoubtedly violated the constitutional and statutory provisions invoked by Plaintiffs.

Plaintiffs claim that the General Assembly, in the process of enacting HB1764, violated Article III, Sections 21 and 23, of the Missouri Constitution. They also claim that the State Auditor's fiscal note summary for HB1764 fails to satisfy the requirements of Chapter 116 of the Revised Statutes of Missouri. Finally, Plaintiffs claim that the voters cannot be allowed to approve or reject HB1764 because the Secretary of State did not certify HB1764's ballot title and send out certified copies of the legal notice for the August 3 special election until after the statutory deadline for that action had passed. The Court concludes that Plaintiffs failed to establish any of these grounds and therefore ENTERS this Final Judgment in favor of Defendants, DISMISSES Plaintiffs' Petition in its entirety and with prejudice, and CERTIFIES both the fiscal note and the fiscal note summary for HB1764 to the Secretary of State pursuant to Section 116.190.4.[1]

BACKGROUND

Facts, Timing, and Available Remedies

The General Assembly passed HB1764 on May 11, 2010, and the bill was signed by the presiding officers of the House and Senate on May 25. On May 21, the Secretary of State ("Secretary") notified local election authorities ("LEA's") across the state that she intended – but was not then able – to send the legal notice and sample ballot for the August 3 special election called by the General Assembly for the purpose of a referendum on HB1764. The Secretary warned the LEA's that

1 All statutory citations are to the Revised Statutes of Missouri, Cumulative

this notice and ballot language would be forthcoming until after the May 25 deadline established in Section 116.240, *i.e.*, ten weeks prior to the August 3 special election. On May 25, the Secretary again notified the local election authorities that the legal notice and sample ballot for the August 3 special election would be sent as soon as it was available, and "strongly encouraged" these authorities to delay their preparation of the August 3 ballots until this information was received. On June 7, the Secretary certified the official ballot title for HB1764 (consisting of the summary statement prepared by the General Assembly and the fiscal note summary prepared by the State Auditor), and sent certified copies of the legal notice for the August 3 election and the sample ballot for HB1764 to the LEA's.

Plaintiffs challenge several aspects of the procedure described above, but Plaintiffs waited so long that – if their claims had merit, which they do not – the Court would have been hard-pressed to provide any meaningful remedy. For example, assuming that Plaintiffs' constitutional claims regarding the General Assembly's passage of HB1764 are properly raised *any* time before (and if) the voters have approved this measure election, such claims were as ripe on May 11 as they were on June 7 when the case was filed. The remedy Plaintiffs seek on their constitutional claims (*i.e.*, removing HB1764 from the ballot) could have been ordered – assuming such a remedy is ever warranted on such claims – with little or

Supplement 2010, unless otherwise noted or the context otherwise requires.

no disruption or expense to the LEA's on May 11, or on May 25, or for a considerable period thereafter. But, this was no longer true by the time of trial.

Regarding Plaintiffs' claims that the Secretary violated Section 116.240, Plaintiffs had irrefutable evidence as early as May 21 (and certainly no later than May 25) that the Secretary intended to issue the legal notice for the August 3 special election (and the sample ballot) *after* the statutory deadline. Plaintiffs could have sued the Secretary then – when an injunction or writ (if proper) could have issued to prevent the violation of Section 116.240 – instead of waiting for the violation to occur and then asking the Court to "put the toothpaste back in the tube." Finally, Plaintiffs' claim to change the fiscal note summary portion of the ballot title under Section 116.190 could have been brought as soon as the Secretary certified the ballot title. No ballots for HB1764 had been printed at that point, and thus a change to the ballot language (if required) could have been effected at and shortly after this time with minimal cost or disruption to the LEA's. Plaintiffs' window for effective relief under Section 116.190, of course, was quite short in this case due to the late passage of HB1764, but this again simply emphasizes the need to move as early as possible and proceed with all possible speed.

Instead of bringing each of these actions at the earliest possible dates identified above, Plaintiffs did not file their four-count Petition until June 17,

2010.[2] And, even though Plaintiffs were seeking to have HB1764 removed from the August 3 ballots altogether (or, at a minimum, to have the ballot language changed), Plaintiffs chose not to seek a temporary restraining order upon the filing of their Petition or move for any other form of preliminary or expedited relief. Instead, Plaintiffs agreed with Defendants that responsive pleadings would be due on or before July 9, and filed a motion on July 1 asking this Court to set a full trial on the Petition anywhere between July 12 and July 25. Granting Plaintiffs' motion the same day it was filed, the Court scheduled the trial for July 13.

At trial on July 13, however, Plaintiffs conceded that – assuming they prevailed on any of their claims – it would be extremely expensive to the state and disruptive to the LEA's, if not simply impossible – for this Court to order the remedies Plaintiffs had sought in their Petition, *i.e.*, removing HB1764 from the ballot or changing the ballot language. Instead, Plaintiffs urged at trial that this Court – if it concluded that Plaintiffs were entitled to relief – should order that the HB1764 votes not to be counted or, if counted, that the tallies not be reported. This remedy was not sought in Plaintiffs' Petition, nor did Plaintiffs seek leave to amend their Petition at trial. In fairness to Plaintiffs, however, this "new" remedy was first suggested by Defendants in the context of explaining that – should the

2 The Court is not suggesting that Plaintiffs acted in bad faith, and certainly the late passage of HB1764 put anyone seeking to litigate such issues at a severe disadvantage. But the General Assembly has the constitutional power to act as it did, and thus potential litigants have no margin for error if they want to assert claims in such circumstance while they can still be remedied.

Court find for Plaintiffs – the remedies originally sought by Plaintiffs were no longer practicable. But not even Defendants' consent can give this Court authority it does not have, and there is absolutely no statutory authority for this Court to order the "vote-but-don't-count" remedy Plaintiffs now seek.

As set forth below, however, the Court need not decide whether (and how) it might assert such authority and award such a remedy because the Court concludes that Plaintiffs have failed to establish the right to *any* remedy under *any* of their claims.

The People's Power to Legislate

Article III, Section 49, of the Missouri Constitution reserves legislative powers for the people through three procedures that the state's voters can use to "propose and enact or reject laws . . ., independent of the general assembly, and . . . approve or reject by referendum any act of the general assembly[.]" The first such procedure is the familiar "initiative petition" process by which proponents can bypass the General Assembly entirely and place their own statutory proposals before the voters by gathering a sufficient number of signatures from each of the state's congressional districts. Second, and by far the least utilized, is the "referendum petition" by which proponents (or opponents) of a bill passed by the General Assembly can gather sufficient signatures to require that the bill be "referred" to the voters for their approval or rejection. The third procedure, which is at issue in this case, is similar to the second except that – instead of a

referendum being demanded by the voters through petitions – the General Assembly votes to require a referendum on one of the bills it has passed, and thus sends that bill to the voters for their approval or rejection.

The Governor's veto power does not apply to bills approved by the voters, whether "referred" to them by petition or by vote of the General Assembly. Mo. Const. Art. III, sec. 52(b). The voters thus not only assume the Governor's role as the final arbiter of whether a bill passed by the General Assembly will become law, the voters' power is greater than the Governor's in this respect because the voter's rejection of a proposed statute by referendum is not subject to legislative override. Therefore, the General Assembly's constitutional power to "refer" a bill to the voters rather than send the bill to the Governor -- as well as the voters' right to accept or reject a bill when a referendum is properly invoked – are matters of the utmost importance and must be given the greatest constitutional deference.

The Missouri Constitution provides that all proposed statutes or constitutional amendments submitted to the voters for their approval or rejection are to be voted on at the next general election. *See* Mo. Const. Art. XII, sec. 2(b) (constitutional amendments); *and* Art. III, sec. 52(b) (laws). But, the Constitution also allows for earlier submission at a special election. *Id.* The Constitution carefully divides this the power to call a special election between the Governor and the General Assembly based upon the nature of the question being presented. Thus, proposed constitutional amendments are submitted to the voters "at the next

general election or at a special election called *by the governor* prior thereto[.]" Mo. Const. Art. XII, sec. 2(b) (emphasis added). On the other hand, a referendum on a bill (whether ordered by the General Assembly or demanded by petition), is to be voted upon at the next general election "except when the *general assembly* shall order a special election." Mo. Const. Art. III, sec. 52(b) (emphasis added). Here, the General Assembly exercised this power to put HB1764 before Missouri voters at a special election on August 3, 2010. *See* HB1764, Section B.

Whenever statewide ballot proposals are submitted to the voters for their approval or rejection, the Secretary must certify an "official ballot title" for the proposal consisting of a "summary statement" and a "fiscal note summary." § 116.180. When the General Assembly orders a referendum on one of its bills, however, Section 116.155.1 provides that the General Assembly retains the right to provide t3he summary statement, the fiscal note summary, or both (or neither). For HB1764, the General Assembly exercised this right and provided the summary statement that the Secretary approved as part of the official ballot title on June 7.

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3 Plaintiffs repeatedly point to the General Assembly's summary statement, which is phrased in the form of two separate questions. Though many proposals put before the voters contain enough separate provisions that they *could* be summarized in terms of multiple questions, this does not mean that the underlying proposal necessarily violates the constitutional "single subject" requirement. But, to actually put multiple questions on the ballot in a single summary is a highly unusual and risky practice that has, in some cases, been a sufficient basis to enjoin an election or invalidate its results under the "two questions, one box" theory advanced here by Plaintiffs. Plaintiffs made a deliberate tactical decision not to challenge the General Assembly's summary statement in this case, however, and thus the "two questions, one box" problem with HB1764 must go unaddressed.

This summary statement is required to be "a true and impartial statement of the purposes of the proposed measure in language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure." § 116.155.2. Plaintiffs have not challenged the General Assembly's summary statement for HB1764 under this standard or any other.

Even though the General Assembly chose to exercise its prerogative to draft the summary statement for HB1764, the General Assembly chose *not* to exercise this same prerogative to provide the fiscal note summary. A fiscal note summary is presented to the voters (together with the summary statement) on the face of every ballot in order to give voters a summary of the proposal's "estimated cost or savings (if any) to state or local governmental entities." § 116.175.3. Because the General Assembly decided *not* to provide the fiscal note summary for HB1764, Section 116.170 assigns that duty to the State Auditor. Though Plaintiffs chose *not* to challenge the fairness or sufficiency of the General Assembly's summary statement, Count III of Plaintiffs' Petition *does* challenge the fairness and sufficiency of the State Auditor's fiscal note and fiscal note summary.

ANALYSIS

Plaintiffs' Petition raised four claims. Count I is a challenge under Article III, Section 21, prohibiting amendments that change a bill's original purpose. Count II is a challenge under Article III, Section 23, prohibiting bills containing "more than one subject which must be clearly expressed in its title." Count III is a

challenge to the State Auditor's fiscal note and fiscal note summary under Section 116.190. Count IV alleges a "violation" of Section 116.240, which deals with communications between the Secretary of State and local election authorities. The Court will address these claims in reverse order.

Count IV (Late Notice to Election Authorities)

Plaintiffs' Petition asserts that the voters should not be allowed to vote in the referendum on HB1764 because the Secretary failed to send the certified copies of the legal notice of the August 3 special election (including the sample ballot containing the certified ballot title) to the LEA's until *after* May 25 deadline established by Section 116.240. At trial, Plaintiffs did not abandon this claim entirely but were appropriately candid with the Court in conceding that – upon closer examination Plaintiffs' counsel – this claim lacked the legal footing that a reading of Section 116.240 in isolation might suggest.

In addition, Plaintiffs conceded that it was no longer practically possible – even if Plaintiffs are correct in this claim – for this Court to "remove HB1764 from the ballot," provide Defendants an opportunity for meaningful appellate review of such a remedy, and then effect that remedy all before the August 3 election. Therefore, Plaintiffs at trial abandoned the remedies they sought in their Petition and urged this Court to allow the August 3 election to proceed and to simply to order the LEA's not to *count* any such votes or, if they are automatically counted, not to *report* such votes.

As noted above, Plaintiffs' concession at trial that they would essentially abandon the remedies sought in their Petition and seek, instead, a different remedy was not made for purposes of surprise or to seek any tactical advantage. Plaintiffs' counsel – working admirably under great time pressure – were trying to responding reasonably to Defendants' arguments regarding what remedies (assuming Plaintiffs prevailed on one or more counts) were still possible as a practical matter. Of course, none of the parties had much time to analyze, let alone brief, the concerns– both legal and practical – raised by the Court when the issue of this "vote-but-don't-count" remedy arose at trial.

First, this remedy was not sought in Plaintiffs' Petition, nor did Plaintiffs seek to amendment their pleadings at or after trial. More important, there is no statute (or other law) even suggesting that this Court has the authority to issue such an order, and many sound legal and policy reasons why it should not. Second, assuming that the Court has the authority to order such a remedy and that Defendants' failure to object resolves the balance of the Court's "legal" concerns, substantial "practical" concerns remain. The LEA's are not parties to this lawsuit and thus will not be bound by this Court's Judgment. Nor are the LEA's the Secretary's "agents," "employees," or subordinates in any regard relevant to this lawsuit such that they might be bound by the terms of an injunction against the Secretary under Supreme Court Rule 92.02(e).

Therefore, even if the Court was convinced that the Plaintiffs had proven a right to relief (which it is not), it is not at all clear that this Court is authorized to order the remedy that Plaintiffs now seek, or that that the Court could enforce compliance with such an order if it was ordered. Finally, the abuse of the voters' time and attention inherent in allowing them to cast ballots that the state already knows will not be given effect would weigh heavily against this Court ordering such a remedy, even if the legal and practical concerns above could be addressed.

The Court's concerns about the legality or practicality of the remedy sought by Plaintiffs at trial need not be resolved in this case, however, because the Court concludes that the Plaintiffs have failed to establish that they are entitled to any relief based upon the Secretary's "violation" of Section 116.240 or any of Plaintiffs' other claims.

Section 116.190 deals with communications between the Secretary and the LEA's. Nothing in the text (or context) of this statute suggests that Plaintiffs' taxpayer/voter status, by itself, is sufficient to give them the right to sue for a "violation" of this provision. Nor is there any reason to believe that the General Assembly intended this statute for any purpose other than to provide a deadline after which – in the ordinary course – LEA's may reasonably assume they are safe to begin printing ballots and programming voting machines in preparation for an election. Of course, special elections called by the General Assembly are not "the

ordinary course," which was the purpose for – and point of – the Secretary's letters on May 21 and May 25 to the LEA's.

In *State ex rel. Nixon v. Blunt*, 135 S.W.3d 416 (Mo. banc 2004), the Missouri Supreme Court found the constitutional prerogative to control the *timing* of a special election is such an important power that the Secretary has a "duty to take such actions as are necessary" to effectuate such timing decisions *even when* the those decisions cannot be given effect within the ordinary timetables established by state law. *Id.* at 420. In that case, the issue was the Governor's right to set the date at which voters would approve or reject a proposed constitutional amendment. But, there is nothing in the Court's reasoning (or otherwise) suggesting that the Secretary does not have the very same duty to give effect to the General Assembly's decisions when it exercises its constitutional prerogative to control the date at which the voters will approve or reject a bill by way of referendum.

Here, the Secretary did all she could to perform the duty described for her by the Supreme Court in *Nixon v. Blunt*. Even before HB1764 had been signed by the presiding officers in the House and Senate, and before the 10-week deadline had arrived, the Secretary warned the LEA's that the General Assembly had ordered a special election, that the certified copy of the notice would be forthcoming, but that this notice could not occur until after the 10-week deadline. She explained to the LEA's that – even though the General Assembly had ordered

the special election – the notice could not be sent until the ballot title had been certified and that the State Auditor's portion of the ballot title could not be prepared until after May 25. The Secretary sent a second letter to the LEA's on May 25 (*i.e.*, the tenth Tuesday prior to the August 3 election) reminding them that the General Assembly had ordered the August 3 special election for HB1764 and that the Secretary would send the legal notice and sample ballot as soon as the ballot title was certified. Having no authority to "order" the LEA's to delay their printing and other ballot preparations, the Secretary "strongly encouraged" them not to start these processes until this information was received. On June 7, well in advance of her statutory deadline, the State Auditor sent the fiscal note and fiscal note summary for HB1764 to the Secretary, who certified the Auditor's summary (together with the "summary statement" language prepared by the General Assembly) as the official ballot title for HB1764. The Secretary then sent the legal notice for the August 3 special election (including the newly certified ballot language) to the LEA's.

In short, the Secretary did everything within her authority to facilitate the General Assembly's decision to "refer" HB1764 to the voters on August 3, while trying to minimize the disruption and cost to the LEA's of this special election. There was nothing the Secretary could do to deliver the notice and sample ballot to the LEA's by May 25 because the General Assembly did not even deliver the bill to her until that date. Even after that statutory deadline passed, the Secretary acted

just as *Nixon v. Blunt* instructs her to act. The General Assembly's constitutional prerogative to control the date of this referendum, together with the voters' constitutional right to participate in this referendum, had to be given precedence over the statutory deadline in Section 116.240. Accordingly, this Court rejects Plaintiffs' Count IV in its entirety and against all Defendants.

Count III (Fiscal Note Summary)

In Count III of their Petition, Plaintiffs claim that HB1764's fiscal note and fiscal note summary, which were prepared by the State Auditor, are "insufficient or unfair" under Section 116.190. Section 116.190.4 authorizes only one remedy if the Plaintiffs succeed, *i.e.*, the fiscal note and/or fiscal note summary must be returned to the State Auditor for revision. At trial, Plaintiffs conceded that there simply is not enough time before the August 3 election to go through this remand process and incorporate the resulting changes into ballots across the state, while still allowing time for appellate review of this Court's decision and/or some degree of judicial review (at some level) of the Auditor's actions after the remand.

As discussed above, Plaintiffs announced at trial that they were seeking a new remedy that would allow the voters to cast votes for or against HB1764 but require state and local officials to ignore the results. To be fair, it was not clear that Plaintiffs intended that this new remedy apply to their fiscal note and summary claims in Count III, or only to their claims in Counts I, II and IV. What is clear, however, is that this Court cannot impose any remedy under Section 116.190 other

than to remand the fiscal note and its summary to the Auditor. Plaintiffs acknowledged at trial that – as a practical matter – this remedy was no longer available to them.

Even though there is no longer any effective remedy that this Court can order with respect to Count III, the Court declines to dismiss Plaintiffs' fiscal note and fiscal note summary claims on that ground. Instead, the Court dismisses Count III on the ground that Plaintiffs failed to show that either the fiscal note or the fiscal note summary for HB1764 is insufficient or unfair. On the basis of the evidence presented, the Court concludes that the State Auditor reasonably "assess[ed] the fiscal impact of the proposed measure" as required by Section 116.175.1, and the resulting fiscal note and summary fairly and sufficiently "state the measure's estimated costs or savings, if any, to state or local entities . . . in language neither argumentative nor likely to create prejudice either for or against the proposed measure" as required by Section 116.175.3.

Plaintiffs concentrate their efforts in Count III on the Auditor's fiscal note summary for HB1764, which states:

> It is estimated this proposal will have no immediate costs or savings to state or local governmental entities. However, because of the uncertain interaction of the proposal with implementation of the federal Patient Protection and Affordable Care Act, *future costs to state governmental entities are unknown.* [Emphasis added.]

Plaintiffs argue that this language fails to fairly and sufficiently summarize the fiscal note because the concluding phrase (italicized above) suggests that future "savings" as a result of HB1764 are expected to occur. Because Plaintiffs believe the fiscal note precludes any possibility of future "savings" from HB1764, Plaintiffs contend that the Auditor's summary is inaccurate and thus unfair or insufficient.

Though not required to do so under Section 116.190, Plaintiffs tendered their own fiscal note summary eliminating the insufficiency and/or unfairness which Plaintiffs contend resides – at least implicitly – in the State Auditor's summary. Plaintiffs' proposed fiscal note summary tracks the Auditor's version precisely, except it replaces the concluding phrase "future costs to state government are unknown" with the following:

> . . . certain governmental entities predict a negative fiscal impact in an unknown amount.

Plaintiffs' Petition, at p.24 (Count III prayer, ¶ B).

"[T]he purpose of the fiscal note is to inform the public of the fiscal consequences of the proposed measure." *Missouri Municipal League v. Carnahan,* 303 S.W.3d 573, 582 (Mo. App. 2010) ("MML"). The Court of Appeals has repeatedly held that the Auditor is not required to draft the "best" summary, only one that is fair and sufficient. *Hancock v. Secretary of State,* 885 S.W.2d 42, 49 (Mo. App. 1994). Thus, even if the Plaintiffs' suggested language

is "better" than that chosen by the Auditor, this is not a sufficient basis for this Court to reject the Auditor's summary. Here, the Plaintiffs' language is not better, it is worse.

First, the Court is convinced that few (if any) voters would perceive any meaningful difference between the phrase drafted by the Auditor ("future costs to state governmental entities are unknown") and that tendered by the Plaintiffs ("certain governmental entities predict a negative fiscal impact in an unknown amount"). Second, to the extent voters can be expected to differentiate between these two statements, the Auditor's language refutes the possibility of future "savings" from HB1764 at least as well – if not better – than does Plaintiffs' language.

The Auditor's summary expressly addresses – and flatly rejects – the possibility that HB1764 could result in any "immediate costs or savings to state or local governmental entities." Her summary then references the recent federal healthcare reform bill (even though it is never mentioned in HB1764) and states that, because of the "uncertain interaction" between HB1764 and this new federal law, "future costs to state governmental entities are unknown." Thus, voters cannot help but notice that both "costs" and "savings" are expressly referenced in the first sentence regarding HB1764's immediate effect, but only "costs" are mentioned in the last sentence regarding future effects. The inclusion of "costs" in the former and its exclusion in the latter strongly suggests that future "savings" are

not anticipated. Instead, the concluding phrase makes clear that *only* future "costs" are anticipated, but that the amount of such costs cannot be estimated at present.

Section 116.175.3 requires fiscal notes and fiscal note summaries to "state the measure's estimated costs or savings, if any, to state or local governmental entities." The General Assembly's decision to focus the voters' attention on concrete and universally understandable concepts such as "costs" or "savings" was purposeful, and should be respected. Moreover, the General Assembly intended to further focus fiscal notes and their summaries by limiting their scope to costs or savings that will affect state or local governments, rather than include costs or savings to voters, businesses, or the economy as a whole. Both restrictions reflect the General Assembly's intent not to allow fiscal notes or fiscal note summaries to devolve into abstract statements concerning a measure's anticipated "fiscal impact." Plaintiffs' proposed summary violates this intent.

Plaintiffs' summary refers to "costs" and "savings" in the first sentence, but then never refers to either of them again. Instead, in the last sentence, Plaintiffs use the phrase "negative fiscal impact." Plaintiffs do not explain whether "negative fiscal impact" means the same as "costs," or whether "negative fiscal impact" is meant to refer to some different and distinct type of impact that could result from HB1764. If it is the former, it merely invites confusion, and if it is the latter it goes beyond the proper scope of the fiscal note summary. Regardless of

which it is, however, Plaintiffs' language leaves voters with a puzzle instead of information. Therefore, because the Court concludes that the Auditor's summary is not reasonably susceptible to the inference about which Plaintiffs complain, and because the language tendered by Plaintiffs further highlights the unambiguous nature of the language chosen by the Auditor, the Court rejects Plaintiffs' claim that the fiscal note summary for HB1764 is insufficient or unfair.

Plaintiffs also claim that the fiscal note for HB1764 is insufficient and unfair because the Auditor should have rejected the conclusions reached by certain state departments about the "costs or savings" HB1764 might produce, or that the Auditor should have made further inquiry of those departments before relying upon their responses to the Auditor's requests for information. Specifically, Plaintiffs claim that the fiscal note is unfair or insufficient because it does not separately assesses the costs associated with those portions of HB1764 that provide an expedited procedure for the voluntary dissolution and liquidation of certain domestic insurance companies.

First, Plaintiffs' claim is defeated by the language of Section 116.375.3, which only requires that fiscal notes and fiscal note summaries to "state *the measure's* estimated costs or savings[.]" [Emphasis added.] Thus, it is the overall "costs or savings" of the proposal, not the "costs or savings" of the individual provisions in the proposal, that the fiscal note must address. Second, this type of challenge to the Auditor's "process" is largely foreclosed by *MML*, 303 S.W.3d at

582, which upheld the Auditor's approach to fiscal notes and holds that she may rely on the conclusions of those departments directly affected by proposals for estimates of "costs or savings," provided the departments' estimates are not unreasonable.

Here, the Department of Insurance, Financial Institutions and Professional Registration informed the Auditor of its conclusion that the impact of HB1764 was "unknown," and did not provide a separate assessment for those portions of HB1764 dealing with dissolution and liquidation of domestic stock insurance companies. The Department's conclusion was reasonable, and thus the Auditor was entitled to rely upon it, because (1) the procedures in HB1764 allow the Department to approve such dissolutions quickly and easily where the company was recently examined and there are no other indications that the Department's intervention is necessary, and (2) that the Department's costs associated with these procedures could easily be subsumed in the costs that could occur as a result of the other portions of HB1764. Accordingly, the fiscal note is not insufficient for failing to separately identify and assess the "costs or savings" that could result from each separation provision of HB1764, and the Auditor was entitled to rely upon the Department's opinion that the overall impact of HB1764 on the Department's operations was "unknown."

The Auditor's tasks regarding the fiscal note and fiscal note summary for HB1764 were complicated by, and the Auditor ultimately decided to make

reference in the summary to, the "uncertain interaction of the proposal with implementation of the federal Patient Protection and Affordable Care Act." One reason for this uncertainty is that many of the federal regulations that will implement the new federal law have yet to be written, and thus the exact procedure for states to participate in these new federal provisions – or to "opt out" of them – is not fully known. Conceptually, however, it seems clear that states will either have to enact new laws to adapt to the new federal procedures, or will be able to adapt to this new procedures by promulgating new administrative rules under state law grants of rulemaking authority that presently exist.

As noted at the outset, if new state laws are necessary in the coming years in order for Missouri to participate in the new federal provisions, HB1764 cannot prevent a subsequent General Assembly from responding to those federal provisions in any way it deems appropriate, regardless of whether the voters approve it or not. *See Independence NEA v. Independence School Dist.*, 223 S.W.3d 131, 147-48 (Price, J., dissenting) (discussing "long recognized prohibition of one legislative body from binding a subsequent legislative body") (quoting *Watson Seminary v. Pike County Court*, 50 S.W. 880, 883 (Mo. 1889) ("indisputable" that a legislative enactment could not bind subsequent legislatures).

On the other hand, assuming that new state laws are not required between now and 2014 in order for Missouri to adapt to the new federal provisions, and

assuming further that Missouri can adapt to the new federal law solely by promulgating new administrative rules under existing grants of rulemaking authority, then Section 1.330 in HB1764 purports to prohibit such rules. Thus, assuming the voters adopt HB1764, and assuming that HB1764 is effective in limiting[4] all of the existing statutory grants of rulemaking authority to the various state agencies that administer the Medicaid program simply by enacting a new section that purports to prohibit such rules (and without identifying the statutes thus being amended or restricted), HB1764 could result in future costs to the state.

In sum, it appears that HB1764 cannot prevent a future General Assembly from deciding whether to "opt in" or "opt out" of the new federal healthcare provisions if state legislative action is required or permitted in the future. In any event, future "costs or savings" associated with such future decisions cannot be attributed to HB1764 now. On the other hand, assuming that Missouri can "opt in" or "opt out" of the new federal healthcare provisions simply by administrative agencies promulgating additional rules the statutory rulemaking authority they already have, it appears that HB1764 intends to prohibit such rules (at least as long as the General Assembly does not amend or repeal Section 1.330). But even in that event, it is impossible to estimate the amount of and future "costs" to the state

4 Such an amendment would seem to be necessary if the bill's intent is to limit the authority to promulgate rules that these agencies' already have, but such an amendment also seems inconsistent with the plain language of the proposed Section 1.330.4(4), which states that HB1764 does not "[a]ffect laws or regulations in effect as of January 1, 2010."

as a result HB1764 in such circumstances. From this tortured and largely hypothetical analysis, it is clear why the State Auditor phrased the fiscal note and fiscal note summary as she did, and it is equally clear that summary's conclusion that future "costs" are unknown is not unfair or insufficient. Accordingly, the Court rejects all of Plaintiffs' claims under Section 116.190.

Count II (Clear Title and Single Subject Requirements)

Plaintiffs contend that HB1764 violated the "single subject" and "clear title" provisions of Article III, Section 21 of the Missouri Constitution. However, "[a]ttacks against legislative action founded on constitutionally imposed procedural limitations are not favored," and Missouri courts will not sustain such challenges "unless the act clearly and undoubtedly violates the constitutional limitation." *Hammerschmidt v. Boone Co.*, 877 S.W.2d 98, 102 (Mo. banc 1994).

Plaintiffs argue that HB1764 is not entitled to this presumption of constitutionality because it has been referred to – but not yet approved by – the voters. Paraphrased, Plaintiffs argue that it should be easier to strike down a law if you sue before it becomes a law. Because Plaintiffs Counts I and II fail regardless of who has the burden or how high that burden is, this Court need not resolve Plaintiffs' novel theory concerning how the timing of the challenge should impact the substantive law applied to that challenge. But Plaintiffs' curious argument highlights one of the most troubling things about this case. Ordinarily, courts will not give advisory judgments in cases where the dispute is merely hypothetical.

But that is what Plaintiffs are seeking in this case, at least with respect to Counts I and II.

As noted at the outset, the voters in a referendum assume a role regarding bills passed by the General Assembly that is substantially the same as – and even more powerful than – the role ordinarily played by the Governor. If the voters reject HB1764 on August 3, that bill will never become law and thus there will never be a dispute over whether the General Assembly's passage of that bill complied with Article III, Section 23. Yet, Plaintiffs want this Court to rule on this constitutional question "just in case" the voters approve HB1764. No plaintiff would attempt to bring a *Hammerschmidt* claim in the brief period between when the General Assembly had passed a bill and before the Governor had signed it. If any brought such a claim, no court would entertain it. This Court sees no reason why this case should be treated differently.

It is suggested that *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 831 (Mo. banc 1990) addresses this Court's concern. There, the Court allowed the plaintiff to bring a pre-election challenge to a proposed constitutional amendment on the ground that it violated the provisions of Article III, Section 50, which imposes a "single subject" requirement on proposed constitutional amendments. But the *Blunt* case dealt with an initiative petition, not an act of the General Assembly, and the general provisions of Article III, Section 23, did not apply. More important, the "single subject" claim in *Blunt* arose in the

context of an action under Section 116.200 challenging the Secretary's determination that the petition complied with all applicable constitutional provisions. The Court held that the Secretary's duty to enforce compliance with Article III, Section 50, on a pre-election basis was sufficient justification to allow judicial review of her determination on a pre-election basis as well. Here, however, Plaintiffs seek to challenge the constitutionality of HB1764 in an ordinary, declaratory judgment action based on taxpayer standing.

Of course, since *Blunt*, there have been other cases in which pre-election challenges have been permitted, and the ground has eroded to the point it is hard to discern the proper rule to apply to decide whether to entertain Plaintiffs' pre-election constitutional challenges. Because the Defendants do not urge dismissal, and because the election is so close, the Court will err on the side of providing Plaintiffs a substantive answer to their claims and, hopefully, bring some degree of finality to the voters' decision on August 3.

With this threshold issue out of the way, the substance of Plaintiffs "single subject" and "clear title" claims requires little analysis. The title of HB1764 is, in relevant part, "relating to insurance." Plaintiffs challenge this title, not because they assert it is not "clear," but because they argue "insurance" is so broad as to be meaningless. The Missouri Supreme Court has approved numerous titles as broader or broader than "relating to insurance," while reserved its condemnation under Article III, Section 23, only for those titles that are so broad and amorphous

that they "could describe the better part of all legislation passed by the General Assembly." *Sports Complex Auth. v. State*, 226 S.W.3d 156, 161 (Mo. banc 2007) (approving "relating to political subdivision"). *See also Trout v. State*, 231 S.W.3d 140 (Mo. banc 2007) (approving "relating to ethics"); *Mo. State Med. Ass'n v. Mo. Dept. of Health*, 39 S.W.3d 837, 841 (Mo. banc 2001) (approving "relating to health services"). Under these and many other cases, "relating to insurance" is well within the constitutional perimeter of "clear titles."

Plaintiffs' "single subject" claim under Article III, Section 23, fairs no better than their "clear title" claim. It is well established that the test for whether a bill violates the "single subject" requirement is "*not* whether the individual provisions of the bill relate to each other," which might be difficult for HB1764 (and many other bills) to meet, "but whether the challenged provision fairly relates to the subject described in the *title of the bill*, has a natural connection to the subject, or is a means to accomplish the law's purpose." *Trout*, 231 S.W.3d at 146 (emphasis added).

Thus, the constitution does not require that HB1764's provisions relating to mandatory health insurance have any reasonable relationship to its provisions for the dissolution of domestic stock insurance companies. Instead, Article III, Section 23, is satisfied so long as the provisions relating to mandatory health insurance bear some reasonable relationship to "insurance." That relationship is

obvious and sufficient. Accordingly, this Court rejects Plaintiffs' "single subject" claims.

Count I (Change of Purpose Prohibition)

This leaves only Plaintiffs' claim under Article III, Section 21, which prohibits changes to a bill's original purpose. Plaintiffs claim that the original purpose of HB1764 changed from the time it was introduced (when the purpose was liquidation of certain domestic insurance companies) to the time it passed the General Assembly (when the purpose was to enact two wildly disparate provisions whose only connection is that they both pertain to insurance or insurance companies). The Court rejects Plaintiffs' unduly narrow characterization of HB1764's original purpose and finds that the bill's original purpose was to regulate insurance and insurance companies. This purpose remained the same through HB1764's passage, and thus Plaintiffs' "change of purpose" claim fails.

It is clear that "[o]riginal purpose refers to the general purpose of a bill." *Missouri Assn of Club Exec's v. State*, 208 S.W.3d 885, 888 (Mo. banc 2006). The Supreme Court has stated that "the general purpose is often interpreted as an overarching purpose, not necessarily limited by specific statutes referred to in the bills original title or text." *Trout*, 231 S.W.3d at 144. Article III, Section 21, does not "restrict legislators from making 'alterations that bring about an extension or limitation in the scope of the bill,' and 'even new matter is not excluded if germane." *Id.* (quoting *Sports Complex*, 226, S.W.3d at 160).

Plaintiffs look to the title and single section of HB1764 at the time it was introduced to conclude the very narrow purpose it claims was violated by the addition of the proposed Section 1.330. But, by focusing on the bill only as introduced and as finally enacted, Plaintiffs miss an important clue. The bill came out of the House as a slightly longer version of the bill that was introduced. But, in the Senate "Small Business, Insurance and Industry" Committee, HB1764 grew to become a much more extensive insurance regulation and oversight bill before it was trimmed back before final passage. Though a bill's original purpose is established when it is filed, the Court finds it compelling that the General Assembly treated this bill as if it had a very broad purpose (*i.e.*, general insurance regulation), and it did so *long before* the addition of the mandatory health insurance provisions that are challenged by Plaintiffs.

Plaintiffs rely heavily on *Club Exec's* and *Allied Mutual Insurance Co. v. Bell*, 185 S.W.2d 4 (Mo. 1945) and, if these were the Supreme Court's only words on Article III, Section 21, this Court might have agreed with Plaintiffs. The analysis in *Club Exec's*, in particular, bears more than a casual relationship to this case because, in that case, the Supreme Court condemned the end-of-session addition of provisions regulating adult entertainment onto a bill in which all of the provisions were (until the amendment) related to "alcohol-related offenses." Thus it appears that the analyses for "change of purpose" and "single subject" are mirror images of each other. For "single subject" claims, the Court will evaluate the new

language by the title of the bill after the amendment. For "change of purpose" claims, however, the Court will evaluate the new language in terms of the original purpose. Put another way, the basic test for "change of purpose" claims is whether the new matter was germane. *Sports Complex*, 226, S.W.3d at 160.

But *Club Exec's* is not the case that controls the outcome of Plaintiffs' claim. In *Trout*, the bill started out as a relatively short list of enactments relating to "campaign finance." During passage, its title was amended to "relating to ethics" and provisions were added with no connection to "campaign finance." Just as the language "relating to insurance" was not added to HB1764's title until it was in the Senate Committee, the Supreme Court in *Trout* held that the bill's original purpose was "ethics" even though that language was not added to the title until long after it was introduced. *Trout*, 231 S.W.3d at 145-46. The Court found this broader purpose by evaluating the public policy behind the initial provisions and asking whether the same or similar policies were served by the challenged provisions. *Id.* There, the original campaign finance provisions were intended to promote ethical conduct, as were the candidate disqualification provisions being challenged. *Id.* at 146. On that basis, the Court found the original purpose was the broad subject of "ethics."

With regard to HB1764, the policy behind the original provisions relating to the dissolution and liquidation of insurance companies is the same policy behind all regulation of insurance companies, *i.e.*, to protect the "insured" who are served

by those companies. The policy behind the proposed Section 1.330 in HB1764 is to ensure that no one becomes an "insured" unless they want to be. This at the policy-level connection brings this case within the holding of *Trout*, and takes it outside the holding of Club Exec's. Therefore, this Court rejects Plaintiffs' Article III, Section 21, claim.

Remaining Procedural Matters

It is this Court's intention that this Final Judgment dispose of all claims and all parties. To the extent the Court has not addressed explicitly any argument by Plaintiffs in support of any of their claims, those arguments have been considered and rejected.

Findings of Fact

The facts in this case are not disputed. Plaintiffs nevertheless requested "findings of facts" pursuant to Rule 73.01. At trial, and in light of the parties' extensive stipulation, the Court requested Plaintiffs remove from their list of requested "findings" all but the controverted facts as required by the Rule. Plaintiffs' amended motion, however, still seeks findings regarding facts that were not controverted (especially given that Defendants adduced no evidence), and facts that are not material. In some cases, the facts Plaintiffs want found are not "facts" at all.

The facts stated in this opinion are those the Court believes are material. In addition, the Court found, on the record during the trial, that both Plaintiffs are

Missouri taxpayers and voters. Defendants did not contest these facts, but they were not admitted in the pleadings and are (in some sense) material. Therefore, they are included here. In addition to the parties' stipulation, the whole legislative history of HB1764 is properly the subject of judicial notice, and there was no actual dispute among the parties about what happened or when. Where such history is material or even helpful to the decision, it is set forth above. Finally, the evidence (or lack of evidence) about the details regarding future implementation of the new federal healthcare bill is not a contested material fact. It is referenced above merely as context for the State Auditor's work and this opinion. To the extent Plaintiffs seek "findings" beyond those facts stated herein, they are denied.

Representative Diehl's Cross-Motion

On July 9, 2010, Representative Diehl – who Plaintiffs sued solely in his official capacity – filed a cross-claim against the other Defendants asserting the legality and constitutionality of HB1764 and the processes used to put it before the voters at the special election called for August 3. Representative Diehl purported to bring that cross-claim in his personal as well as his individual capacity. As noted in this Court's July 12 order finding that Representative's "invocation" of the legislative stay was not appropriate, Representative Diehl is not a party to this lawsuit in his individual capacity and thus cannot assert any claims in that capacity against any party. Because no party had an opportunity to respond to the

Representative's "official capacity" cross-claim before trial, it was not tried on July 13 with Plaintiffs' Petition.

The Court now dismisses Representative Diehl's cross-claim on its own motion. This cross-claim fails to state a claim because there is no genuine dispute about the constitutionality of HB1764 between Representative Diehl and the other defendants. They all defended the constitutionality, and none of them asserted that that the bill or the election was illegal or unconstitutional in any respect. Therefore, rather than leave Plaintiffs stuck in limbo with no right to appeal while the defendants litigate Representative Diehl's cross-claim, this Court dismisses that cross-claim with prejudice. The Representative remains a party to this action, of course, and may participate on appeal as a Respondent if he cares to do so.

CONCLUSION

For the reasons stated above, the Court concludes that Plaintiffs failed to establish any of their four Counts. The Court therefore ENTERS this Final Judgment in favor of Defendants, DISMISSES Plaintiffs' Petition in its entirety and with prejudice, and CERTIFIES both the fiscal note and the fiscal note summary for HB1764 to the Secretary of State pursuant to Section 116.190.4.

July 16, 2010

Circuit Judge Date