

Summer 2024

Calvinball in Cole County: State ex rel. Fitz-James v. Bailey

Eric Humphrey

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Eric Humphrey, *Calvinball in Cole County: State ex rel. Fitz-James v. Bailey*, 89 Mo. L. REV. ()

Available at: <https://scholarship.law.missouri.edu/mlr/vol89/iss3/10>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

NOTE

Calvinball in Cole County: *State ex rel. Fitz-James v. Bailey*

State ex rel. Fitz-James v. Bailey, 670 S.W.3d 1 (Mo. 2023).

*Eric Humphrey**

I. INTRODUCTION

In the comic strip *Calvin and Hobbes*, the titular boy and tiger often play a game called Calvinball.¹ There is only one rule to Calvinball: The game cannot be played the same way twice.² In one strip, Calvin and Hobbes try to play football. Hobbes yells, “The center snaps the ball to the quarterback.”³ Calvin retorts, “No he doesn’t! He’s secretly the quarterback for the other team! He keeps the ball!”⁴ The game descends into chaos. At the end of the strip, Calvin says, “Sooner or later, all our games turn into Calvinball.”⁵

Much like the rules of Calvinball, the rules for submitting a ballot initiative in Missouri are complex and ripe for abuse, and they never seem to play out the same way twice. Article III, Section 49 of the Missouri Constitution provides a constitutional right to ballot initiative and referendum.⁶ Prior to a public vote, a Missouri ballot initiative must go

*B.S., Applied Economics, University of Missouri, 2022; J.D. Candidate, University of Missouri School of Law, 2025; Associate Member, *Missouri Law Review*, 2023–2024. I would like to thank my lovely partner Katie, my parents Michelle and Steve, my sisters Melanie and Mallory, and my friends Mac, Noah, Tasneem, Magdee, and Hunter for their unending guidance and support.

¹ Bill Watterson, *Calvin and Hobbes*, PRESS SYNDICATE, May 5, 1990.

² Bill Watterson, *Calvin and Hobbes*, PRESS SYNDICATE, May 27, 1990, reprinted in SCIENTIFIC PROGRESS GOES “BOINK” 113 (Andrews and McMeel 1991).

³ Bill Watterson, *Calvin and Hobbes*, PRESS SYNDICATE, Sept. 24, 1995, reprinted in CALVIN AND HOBBS SUNDAY PAGES 87 (Andrews and McMeel 2001).

⁴ *Id.*

⁵ *Id.*

⁶ MO. CONST. art. III, § 49. Ballot initiatives are proposed directly by citizens, and referenda are placed on the ballot to allow citizens to approve or repeal an act by the legislature. NAT’L CONF. OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY 1, 6 (2002). In Missouri, a ballot initiative that proposes a constitutional amendment requires the signatures of eight percent of the legal voters

through an extensive approval process—all before proponents can even gather the requisite signatures.⁷ Step one: The initiative’s proponent must submit a sample sheet to the Secretary of State.⁸ Step two: The State Auditor must prepare a fiscal note summary that summarizes the initiative’s estimated cost or savings.⁹ Step three: The Secretary of State must prepare a summary statement.¹⁰ Step four: The Attorney General must approve the fiscal note summary’s legal content and form.¹¹ Step five: The Secretary of State must certify the official ballot title, which contains the summary statement and fiscal note summary.¹² Even if all five steps are functioning properly, this entire process can take up to fifty-one days.¹³ Then, and only then, can the proponent start gathering signatures.¹⁴ Due to the lengthy and bureaucratic process, state officials who oppose an initiative can delay signature gathering and effectively block it entirely.

On April 10, 2023, the Attorney General of Missouri refused to approve fiscal note summaries for eleven petitions submitted by Dr. Anna Fitz-James, the primary proponent of the initiatives.¹⁵ Much like Calvin, the Attorney General turned the process into a game of Calvinball and refused to pass the football. In doing so, the Attorney General triggered a dispute involving himself, the Secretary of State, the State Auditor, and Dr. Anna Fitz-James.¹⁶ This dispute highlights how the Missouri ballot initiative process is vulnerable to partisan abuse and in need of reform. Part I one of this Note details the facts and holding of *State ex rel. Fitz-James v. Bailey*. Part II discusses the legal background of ballot initiatives in Missouri. Part III details the Supreme Court of Missouri’s holding in *State ex. Rel Fitz-James v. Bailey*. Part IV discusses the ramifications of this decision and argues that two Missouri statutes implicated in this dispute are unconstitutional.

in each of two-thirds of the congressional districts in the state. MO. CONST. art. III, § 50. In the last election, the minimum number of signatures needed for an initiative proposing a constitutional amendment was 171,592. JOHN R. ASHCROFT, MAKE YOUR VOICE HEARD: MISSOURI’S INITIATIVE PETITION PROCESS 6 (last visited Apr. 17, 2024).

⁷ See MO. REV. STAT. § 116.332.1 (2014).

⁸ *Id.*

⁹ *Id.*; *id.* § 116.175 (2003). A fiscal note assesses a ballot initiative’s estimated cost or savings to state or local government. *Id.* § 116.175. A fiscal note summary summarizes the content of a fiscal note in 50 words or less. *Id.*

¹⁰ MO. REV. STAT. § 116.332.1 (2014).

¹¹ *Id.* § 116.175 (2003).

¹² *Id.* § 116.180 (1999).

¹³ *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 491 (Mo. 2022) (en banc). In the meantime, proponents cannot gather signatures. MO. REV. STAT. § 116.180 (1999).

¹⁴ MO. REV. STAT. § 116.180 (1999); *id.* § 116.332 (2014).

¹⁵ *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 5 (Mo. 2023) (en banc).

¹⁶ *Id.* at 3–4.

II. FACTS AND HOLDING

On March 8, 2023, Dr. Anna Fitz-James submitted eleven ballot initiative petitions to the Missouri Secretary of State.¹⁷ All eleven petitions were nearly identical and,¹⁸ if enacted, would amend the Missouri Constitution to include a right to reproductive freedom.¹⁹ Each petition contained language protecting “the right to make and carry out decisions about all matters relating to reproductive health care.”²⁰ Once received, the Secretary of State sent the petitions to the Attorney General and State Auditor.²¹ The State Auditor then began creating fiscal notes for each initiative pursuant to the statutory procedure.²² During this process, sixty state and local government entities were solicited to estimate the cost of each initiative, and unsolicited responses from the public were also accepted.²³ The Governor’s Office and the Attorney General provided the State Auditor with estimates of the fiscal impact on their offices, which was reported as minimal.²⁴

After compiling all responses, the State Auditor created fiscal notes and summaries for each initiative.²⁵ On March 29, the State Auditor sent these to the Attorney General in compliance with the initiative process.²⁶ From that point on, the Attorney General had ten days to approve the “legal content and form” of the summaries and notify the State Auditor.²⁷ With one day to spare,

¹⁷ *Id.* at 4; see MO. REV. STAT. § 116.332 (2014).

¹⁸ John R. Ashcroft, *2024 Initiative and Referendum Petitions Filed*, MISSOURI SEC’Y OF STATE, <https://www.sos.mo.gov/elections/petitions/2024> [<https://perma.cc/K7AX-R9CH>] (last visited May 18, 2024).

¹⁹ Brief of Relator-Respondent at 8, *Fitz-James*, 670 S.W.3d 1 (No. SC100132).

²⁰ Ashcroft, *supra* note 18.

²¹ *Fitz-James*, 670 S.W.3d at 4 (citing MO. REV. STAT. § 116.332 (2014)). The Attorney General approved the form of the petitions. *Id.*

²² *Id.* at 5.

²³ *Id.* (citing MO. REV. STAT. § 116.175.1 (2003)).

²⁴ Brief of Respondent State Auditor Scott Fitzpatrick at 5, *Fitz-James*, 670 S.W.3d 1 (No. SC100132). The Attorney General’s estimates suggested the initiatives may require additional appropriations if they resulted in significant litigation but did not mention any other fiscal impact. *Id.* Opponents of the initiatives argued that they could cause Missouri to lose Medicaid funding; however, no government entity indicated this would occur. *Fitz-James*, 670 S.W.3d at 4–5. The Department of Social Services, Department of Mental Health, and Department of Health and Senior Services reported no fiscal impact other than an unknown impact related to federal regulations. *Id.* at 4. Moreover, Greene County was the only county to report any anticipated fiscal impact. *Id.* at 5. Greene county estimated a \$51,000 fiscal loss. *Id.*

²⁵ *Fitz-James*, 670 S.W.3d at 5. A fiscal note summary summarizes a fiscal note for in under fifty words and appears on the ballot as part of an official ballot title. MO. REV. STAT. § 116.175.3 (2003).

²⁶ *Fitz-James*, 670 S.W.3d at 5 (citing MO. REV. STAT. § 116.175.2 (2003)).

²⁷ *Id.* (citing MO. REV. STAT. § 116.175.4 (2003)).

the Governor's Office sent the State Auditor a new estimate of fiscal impact for each initiative.²⁸

On April 10, the Attorney General notified the State Auditor that he believed the legal content of all fiscal notes and summaries were misleading.²⁹ Eleven days later, the State Auditor resubmitted the original fiscal notes and summaries to the Attorney General,³⁰ explaining that each summary met all statutory requirements, as they were within the proper word limit and summarized the fiscal note using language that was not likely to create prejudice.³¹ On May 1, thirty-three days past the original deadline, the Attorney General refused to approve the fiscal note summaries for the second time.³²

The Secretary of State cannot certify a ballot title unless the Attorney General approves a fiscal note summary.³³ Signatures gathered before the Secretary of State certifies an official ballot title are also not counted.³⁴ As a result, while the Attorney General and State Auditor were entangled in their own dispute, Dr. Fitz-James could not collect any signatures.³⁵ Dr. Fitz-James filed a petition in the Circuit Court of Cole County on May 4, 2023 seeking a writ of mandamus to compel the Attorney General to approve the fiscal note summaries under Section 116.175.4 of the Missouri Revised Statutes.³⁶ The Circuit Court of Cole County found no defect in the legal content and form of the fiscal note summaries submitted by the State Auditor and granted a writ of mandamus.³⁷ In response, the Attorney General appealed to the Supreme Court of Missouri.³⁸

The Attorney General raised three main arguments on appeal: (1) that the legal content of the fiscal note summaries were deficient;³⁹ (2) that Section 116.175 gives the Attorney General authority to compel the State Auditor to revise any fiscal note summary;⁴⁰ and (3) that mandamus was not appropriate because the Attorney General's duties under Section 116.175 were not

²⁸ Brief of Respondent State Auditor Scott Fitzpatrick, *supra* note 24, at 5. The new fiscal estimates were not based on additional costs identified by other state agencies, but they stated there may be additional costs to state agencies associated with regulation and enforcement. *Id.* No agencies identified such costs. *Id.*

²⁹ *Fitz-James*, 670 S.W.3d at 5.

³⁰ *Id.*

³¹ Brief of Respondent State Auditor Scott Fitzpatrick, *supra* note 24, at 6.

³² *Fitz-James*, 670 S.W.3d at 5.

³³ MO. REV. STAT. § 116.180 (1999); *Fitz-James*, 670 S.W.3d at 5.

³⁴ MO. REV. STAT. § 116.334.2 (1999).

³⁵ *Fitz-James*, 670 S.W.3d at 5.

³⁶ *Id.* at 6. Dr. Fitz-James also sought a declaratory judgment that various ballot title provisions are unconstitutional. *Id.*

³⁷ *Id.* at 4.

³⁸ *Id.* at 6.

³⁹ *Id.* at 8.

⁴⁰ *Id.* at 10.

ministerial, and Dr. Fitz-James had an adequate remedy in declaratory judgment.⁴¹

In response, Dr. Fitz-James argued that the Attorney General was required to approve the fiscal note summaries.⁴² Dr. Fitz-James noted that the Attorney General's challenge to the legal content and form of the fiscal note summaries was actually a challenge to the substance of the fiscal notes, which Section 116.175 did not authorize.⁴³ Further, Dr. Fitz-James contended that Section 116.175.4 required the Attorney General to approve any fiscal note summary that complied with the statutory word limit, contained an estimate of governmental costs, and did not contain prejudicial language.⁴⁴ Dr. Fitz-James argued that if the Attorney General had discretion to reject fiscal note summaries at will, then Sections 116.010(4), 116.175, 116.180, 116.190.5, 116.230.3, and 116.334 were unconstitutional.⁴⁵ In making this argument, Dr. Fitz-James invoked Article III, Section 49; Article III, Section 50; and Article XII, Section 2(b) of the Missouri Constitution, arguing that the aforementioned sections did not require a ballot title certification before the signature-collection stage.⁴⁶ In addition, Dr. Fitz-James pointed to *Rekart v. Kirkpatrick*, which held that statutes “interfer[ing] with or imped[ing]” the right to initiative “must be held unconstitutional.”⁴⁷ Dr. Fitz-James argued that barring signature gathering before an official ballot title was certified interfered with and impeded the right to initiative.⁴⁸

The Supreme Court of Missouri found that the first subsection of Section 116.175 assigns the State Auditor with the task of assessing the fiscal impact of a proposed measure—not the Attorney General.⁴⁹ In addition, the court found that Section 116.175.5 did not authorize the Attorney General to compel the State Auditor to make revisions to a fiscal note summary.⁵⁰ The court did not consider Dr. Fitz-James's constitutional arguments.⁵¹ Ultimately, the court held that granting mandamus was appropriate because the Attorney General's duties were ministerial, and the Attorney General did not have authority to challenge fiscal note summaries that complied with Section 116.175.⁵² Therefore, the Attorney General was required to approve the fiscal note summaries.⁵³

⁴¹ *Id.* at 11.

⁴² Brief of Relator-Respondent, *supra* note 19, at 18.

⁴³ *Id.*

⁴⁴ *Id.* at 19.

⁴⁵ *Id.* at 38.

⁴⁶ *Id.* at 39–41.

⁴⁷ Brief of Relator-Respondent, *supra* note 19, at 26 (quoting *Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608 (Mo. 1982) (en banc)).

⁴⁸ *See id.* at 45.

⁴⁹ *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 8 (Mo. 2023) (en banc).

⁵⁰ *Id.* at 10.

⁵¹ *Id.* at 6.

⁵² *Id.* at 12.

⁵³ *Id.* at 12–13.

III. LEGAL BACKGROUND

Missouri's approach to ballot initiative and referendum has evolved drastically over time, both in terms of procedure and in the government officers in charge of overseeing it. Initiatives are legislation proposed by citizens and referenda allow citizens to approve an act of the legislature.⁵⁴ A referendum alternatively allows voters to repeal an act of the legislature.⁵⁵ While some form of initiative and referendum have existed in the United States since the 1600s,⁵⁶ the late nineteenth and early twentieth centuries experienced a renewed interest in initiatives and referenda through populist and progressive political movements.⁵⁷ During this period, the right to ballot initiative and referendum was added to the Missouri Constitution.⁵⁸ The process to amending the constitution, however, was far from straightforward.

The constitutional right to initiative and referendum was first proposed in Missouri in 1900.⁵⁹ Initially, the Missouri legislature rejected the proposal, but it later approved the amendment in 1904.⁶⁰ Despite this legislative approval, Missouri voters rejected the amendment and voted not to codify the right to initiative and referendum in the constitution.⁶¹ In 1907, however, the right was enshrined in Article 49 of the Missouri Constitution after years of voter education efforts.⁶² Article 49 provides, "The people reserve power to propose and enact or reject laws and amendments to the constitution by the initiative, independent of the general assembly[.]"⁶³

Today, Chapter 116 governs Missouri's ballot initiative process.⁶⁴ A sample sheet of the petition must first be submitted to the Secretary of State.⁶⁵

⁵⁴ See Nat'l Conf. of State Legislatures, *supra* note 6, at 6.

⁵⁵ *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 491 (Mo. 2022) (en banc). Because a referendum is tied to an act of the legislature, the time for signature gathering is dependent on when legislation is passed. *Id.* at 490. For example, in Missouri, if legislation is passed on the last day of the legislative session, there is less time to gather signatures as the signature collection period at the close of the session is only ninety days. *Id.* at 491.

⁵⁶ M. Dane Waters, *Do Ballot Initiatives Undermine Democracy?*, in Cato Policy Report 6 (2000).

⁵⁷ *The History of the Initiative and Referendum Process in the United States*, INITIATIVE AND REFERENDUM INST., <https://www.initiativeandreferenduminstitute.org/history-us-direct-democracy> [<https://perma.cc/FT8F-382Z>] (last visited May 26, 2023).

⁵⁸ *Missouri*, INITIATIVE AND REFERENDUM INST., <https://www.initiativeandreferenduminstitute.org/missouri> [<https://perma.cc/ZT85-D9PJ>] (last visited May 20, 2024).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ MO. CONST. art. III, § 49.

⁶⁴ MO. REV. STAT. § 116.020 (1981).

⁶⁵ *Id.* § 116.332.1 (2014).

The Secretary of State refers a copy of the petition to the Attorney General for review, sends a copy to the State Auditor for preparation of a fiscal note summary, and posts a copy of the sample petition on the Secretary of State's website.⁶⁶ After the Attorney General approves the petition and the State Auditor submits a fiscal note summary, the Secretary of State creates an official ballot title, which appears on every page of the petition.⁶⁷ The official ballot title includes a summary statement, drafted by the Secretary of State, and the State Auditor's fiscal note summary.⁶⁸ This process is even more complex than it appears, as preparing a fiscal note summary itself requires multiple steps.⁶⁹

To prepare a fiscal note, the State Auditor must assess the fiscal impact of the proposed measure.⁷⁰ This process involves compiling the estimated costs or savings from governmental entities.⁷¹ Upon completion, the State Auditor then prepares the fiscal note summary by summarizing the content of the fiscal note in less than fifty words.⁷² Both the summary statement and fiscal note summary are then sent to the Attorney General for approval of legal content and form.⁷³ The Attorney General must approve the legal content and form of the fiscal note summary within ten days.⁷⁴ Until the Attorney General approves the fiscal note summary, the Secretary of State cannot certify the official ballot title.⁷⁵ Any signatures gathered before an official ballot title is certified do not count.⁷⁶

In Missouri, the process for preparing a fiscal note summary and official ballot title has varied throughout the years.⁷⁷ Before 1981, the Attorney General prepared the fiscal note and fiscal note summary.⁷⁸ In 1981, the Missouri Legislature's Joint Committee on Legislative Research took this

⁶⁶ *Id.* The Attorney General may offer his views as to whether the petition is in the proper form. *Id.* However, the Secretary of State makes the final decision. *Id.* § 116.332.4 (2014). If the petition is in the proper form, the Secretary of State must make a copy of the sample petition available on the Secretary of State's website and accept public comment for fifteen days. *Id.* § 116.334.1 (2014).

⁶⁷ *Id.* § 116.180 (1999).

⁶⁸ *Id.*; *id.* § 116.175.2 (2003).

⁶⁹ MO. REV. STAT. § 116.175.1 (2003).

⁷⁰ *Id.* To assess the fiscal impact of an initiative, the State Auditor may consult state departments, the State Legislature, local government entities, and others with pertinent knowledge. *Id.* In addition, opponents or proponents of the proposed measure may submit a statement of fiscal impact to the State Auditor. *Id.*

⁷¹ *Id.* § 116.175.3 (2003).

⁷² *Id.*

⁷³ *Id.* § 116.175.4 (2003).

⁷⁴ *Id.*

⁷⁵ *Id.* § 116.180 (1999); *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 5 (Mo. 2023) (en banc).

⁷⁶ *Fitz-James*, 670 S.W.3d at 5–6.

⁷⁷ See MO. REV. STAT. § 126.081 (1978) (repealed 1981); see also S.B. 658, 80th Gen. Assemb., 2d. Reg. Sess. (Mo. 1980).

⁷⁸ MO. REV. STAT. § 126.081 (repealed 1981).

power away from the Attorney General and assumed the role of preparing fiscal notes and fiscal note summaries.⁷⁹ The committee's power was short-lived.⁸⁰

In 1997, the legislature delegated the authority to prepare fiscal notes and fiscal note summaries to the State Auditor after *Thompson v. Committee on Legislative Research*.⁸¹ There, the Supreme Court of Missouri found that Section 116.170.2 was unconstitutional because it granted the Missouri Legislature's Joint Committee on Legislative Research the authority to prepare and summarize fiscal notes for ballot initiatives, whereas Article III, Section 35 of the Missouri Constitution limited the committee's authority to advisory duties for the legislature.⁸² The court found that by preparing fiscal note summaries, the committee was advising Missouri voters rather than the Missouri Legislature.⁸³ As such, the court held that Section 116.170.2 was unconstitutional.⁸⁴ In response, the legislature delegated the authority to create and summarize fiscal notes to the State Auditor in the current version of Section 116.175.⁸⁵ *Thompson* led to the current versions of Sections 116.180 and 116.334.2, which for the first time required an official ballot title to be certified before signatures could be gathered.⁸⁶

There have been many disputes over Missouri's ballot initiative and referendum process.⁸⁷ In *United Electric Co. v. Kirkpatrick*, the Supreme Court of Missouri established the standard when considering whether a ballot initiative violates the Missouri Constitution's single-subject requirement.⁸⁸ This requirement is intended to prevent misleading ballot titles from deceiving voters.⁸⁹ The court found that if the title gave adequate notice of the subject of a proposed initiative, the single-subject requirement was satisfied.⁹⁰ Since the ballot title at issue did so, the court held that the initiative did not violate the single-subject rule.⁹¹ Stressing the importance of the right to ballot initiative and referendum, the court stated, "The ability of the voters to get

⁷⁹ See MO. REV. STAT. § 126.081 (1978) (repealed 1981); see also S.B. 658, 80th Gen. Assemb., 2d. Reg. Sess. (Mo. 1980).

⁸⁰ See MO. REV. STAT. § 126.081 (1978) (repealed 1981); see also S.B. 658, 80th Gen. Assemb., 2d. Reg. Sess. (Mo. 1980).

⁸¹ 932 S.W.2d 392 (Mo. 1996) (en banc); see MO REV. STAT. § 116.175.2 (2003).

⁸² *Thompson*, 932 S.W.2d at 393.

⁸³ *Id.* at 395.

⁸⁴ *Id.*

⁸⁵ MO. REV. STAT. § 116.175.2 (2003).

⁸⁶ *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 487 (Mo. 2022) (en banc).

⁸⁷ See, e.g., *Union Elec. Co. v. Kirkpatrick*, 606 S.W.2d 658, 660 (Mo. 1980) (en banc); *Brown v. Carnahan*, 370 S.W.3d 637, 647 (Mo. 2012) (en banc); *No Bans on Choice*, 638 S.W.3d at 492.

⁸⁸ *Union Elec. Co.*, 606 S.W.2d at 660.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

before their fellow voters issues they deem significant should not be thwarted in preference for technical formalities.”⁹²

In *Brown v. Carnahan*, the Supreme Court of Missouri considered whether it was constitutional for the State Auditor to prepare fiscal notes and fiscal note summaries.⁹³ The court first analyzed Article IV, Section 13 of the Missouri Constitution, which provided, “[The State Auditor] shall make all other audits and investigations required by law, and shall make an annual report to the governor and Missouri Legislature.”⁹⁴ In addition, Section 13 stated, “No duty shall be imposed on him [or her] by law which is not related to the supervising and auditing of the receipt and expenditure of public funds.”⁹⁵ The court determined that the preparation of fiscal notes and fiscal note summaries for ballot initiatives was an “investigation” under the meaning of Article IV, Section 13.⁹⁶ The court also found that fiscal note preparation was related to the supervision of the receipt and expenditure of public funds.⁹⁷ As such, the court held it was constitutional for the State Auditor to create fiscal notes and fiscal note summaries.⁹⁸ The court again emphasized the importance of the constitutional right to ballot initiative, stating, “Nothing in our constitution so closely models participatory democracy in its pure form.”⁹⁹

The most recent constitutional challenge to the ballot initiative and referendum process was considered by the Supreme Court of Missouri in *No Bans on Choice v. Ashcroft*.¹⁰⁰ The parties there challenged Sections 116.180 and 116.334, which required the Secretary of State to certify an official ballot title before proponents could circulate a referendum petition and gather signatures.¹⁰¹ The court stated, “[L]aws enacted to implement the referendum process must be invalidated when they ‘interfere with or impede a right conferred by the constitution[.]’”¹⁰² The court acknowledged there was no constitutional requirement that an official ballot title must be certified before the proponent of a referendum can gather signatures;¹⁰³ therefore, Sections

⁹² *Id.* (quoting *United Lab. Comm. v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. 1978) (en banc)).

⁹³ 370 S.W.3d 637, 647 (Mo. 2012) (en banc).

⁹⁴ *Brown v. Carnahan*, 370 S.W.3d 637, 648 (Mo. 2012) (en banc) (citing MO. CONST. art. IV, § 13).

⁹⁵ *Id.* (citing MO. CONST. art. IV, § 13).

⁹⁶ *Id.* at 650.

⁹⁷ *Id.* at 653.

⁹⁸ *Id.*

⁹⁹ *Id.* at 645 (quoting *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. 1990) (en banc)).

¹⁰⁰ *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 492 (Mo. 2022) (en banc).

¹⁰¹ *Id.* at 486.

¹⁰² *Id.* at 489 (quoting *Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608 (Mo. 1982) (en banc)).

¹⁰³ The Supreme Court of Missouri has repeatedly stressed that “[t]here is no . . . express constitutional authorization for statutes to impose a requirement that an

116.180's and 116.334's bar on collecting signatures before ballot title certification "interfere[d] with and impede[d]" the constitutional right of referendum by unreasonably shortening the timeframe for signature gathering.¹⁰⁴ Although Sections 116.180 and 116.334 apply to both initiative and referendum petitions, the court's holding applied only in the referendum context.¹⁰⁵ The court has never considered the constitutionality of Sections 116.180 and 116.334 with respect to ballot initiatives.

IV. INSTANT DECISION

In *Fitz-James*, the Supreme Court of Missouri addressed and rejected several arguments advanced by the Attorney General and ultimately held that the Circuit Court of Cole County did not abuse its discretion in granting a writ of mandamus that required the Attorney General to approve the State Auditor's fiscal note summaries.¹⁰⁶ The court began its analysis with a preliminary question: Which state official is authorized to estimate the fiscal impact of a ballot initiative?¹⁰⁷ The court answered this question in no uncertain terms, ruling that the State Auditor has the sole authority to assess the fiscal impact of proposed ballot initiatives.¹⁰⁸

The court reasoned that the Attorney General's basis for refusing to approve the fiscal note summaries did not relate to the legal content and form requirements, which he was authorized to enforce.¹⁰⁹ It noted that Section 116.175.4 provides that "[t]he 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[.]"¹¹⁰ According to the court, this subsection authorizes the Attorney General to approve *only* the legal content and form of the fiscal summary—not the substantive content of the fiscal note.¹¹¹ The court found that Section 116.175 set forth three legal content and form requirements for a fiscal note summary: It must (1) summarize the content of the State Auditor's fiscal note,

'official ballot title'—or a title of any sort—must be displayed on the pages of initiative petitions proposing constitutional amendments before they may be circulated for signatures." *Boeving v. Kander*, 496 S.W.3d 498, 507 (Mo. 2016) (en banc); see *No Bans on Choice*, 638 S.W.3d at 490; *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402, 405 (Mo. banc 1984); *United Lab. Comm. v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. 1978) (en banc). In addition, the Supreme Court of Missouri has held that an official ballot title is not necessary to prevent the public from being deceived at the petition-signing stage. *United Lab. Comm.*, 572 S.W.2d at 454.

¹⁰⁴ *No Bans on Choice*, 638 S.W.3d at 492.

¹⁰⁵ *Id.*

¹⁰⁶ *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 4 (Mo. 2023) (en banc).

¹⁰⁷ *Id.* at 7.

¹⁰⁸ *Id.* at 8.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*; see MO. REV. STAT. § 116.175 (2003).

(2) be less than 50 words, and (3) not use language that is argumentative or likely to create prejudice.¹¹²

The Attorney General argued that the legal content of the fiscal note summaries was prejudicial because the fiscal notes underestimated the cost of the ballot initiatives.¹¹³ The court rejected this argument, noting that the Attorney General never identified any specific language that was prejudicial.¹¹⁴ Further, as long as the fiscal note summaries reflected the State Auditor's estimate and the legal content and form requirements were satisfied, the Attorney General had no basis to object.¹¹⁵ As such, the court found that the Attorney General had no grounds to challenge the fiscal note summaries in his official capacity.¹¹⁶

But that was not the Attorney General's only argument. He also argued that Section 116.175.5 gave him the authority to compel the State Auditor to make unlimited revisions to fiscal note summaries.¹¹⁷ The court admonished this argument as "stand[ing] the entire statute on its head."¹¹⁸ The court explained that, under Section 116.175.5, the State Auditor can be compelled to make revisions if the Attorney General, or the Circuit Court of Cole County, determines that the fiscal note summary is deficient.¹¹⁹ However, the Attorney General is still only authorized to enforce the legal content and form requirements.¹²⁰ Section 116.190 provides the Circuit Court of Cole County with sole authority to review the substance of a fiscal note summary to determine if it is insufficient or unfair.¹²¹ Since the court determined the Circuit Court of Cole County had the sole authority to compel revisions on substantive grounds, the Attorney General had no legitimate basis to compel the State Auditor to make such revisions.¹²²

The court then addressed the Attorney General's argument that mandamus was inappropriate because Dr. Fitz-James had an adequate remedy at law in declaratory judgment.¹²³ While the court conceded that mandamus is not available where there is an adequate remedy available,¹²⁴ it stressed that

¹¹² *Fitz-James*, 670 S.W.3d at 7–8; see MO. REV. STAT. § 116.175 (2003).

¹¹³ *Fitz-James*, 670 S.W.3d at 8–9.

¹¹⁴ *Id.* at 9.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 8. However, the court noted that the attorney general could challenge the substance of the fiscal note summaries as a private citizen once an official ballot title has already been certified. *Id.* at 9 n.6.

¹¹⁷ *Id.* at 10.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (citing MO. REV. STAT. § 116.175.5 (2003)).

¹²⁰ *Id.* at 10.

¹²¹ *Id.*

¹²² *Id.* at 11.

¹²³ *Id.*

¹²⁴ *Id.* (citing *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 265 (Mo. 1980) (en banc)).

alternative remedies must provide adequate relief.¹²⁵ Because enforcing a declaratory judgment would cause a delay, making it difficult for Dr. Fitz-James to gather and submit the required signatures by the deadline, the court determined that declaratory judgment was inadequate.¹²⁶

The court further assessed the Attorney General's argument that mandamus was inappropriate because the Attorney General's duties under Section 116.175 were not merely ministerial.¹²⁷ Stressing the plain language of Section 116.175.4, if the summaries satisfy the three legal content and form requirements, the court stated that "the Attorney General 'shall forward notice of such approval to the' Auditor."¹²⁸ Because the Attorney General had no discretion to reject a fiscal note summary that satisfied the requirements of Section 116.175.3, the court found his duty was ministerial.¹²⁹

The court did not address Dr. Fitz-James's constitutional arguments.¹³⁰ Dr. Fitz-James only raised these arguments in the event that the court favored the Attorney General's interpretation of Section 116.175.¹³¹ Since the court did not favor the Attorney General's interpretation, it expressed no view on the constitutionality of Sections 116.180 and 116.334.¹³²

Ultimately, the court held that mandamus was appropriate.¹³³ The Attorney General had authority only to assess a fiscal note summary for legal content and form (not substance) and, as such, was required to approve the summaries because no deficiencies in legal content or form existed.¹³⁴

V. COMMENT

The Supreme Court of Missouri correctly interpreted Section 116.175 and properly affirmed the Circuit Court of Cole County's writ of mandamus. Still, *Fitz-James* foreshadows many ballot initiative disputes to come. Even the extraordinary remedy of mandamus could not address the significant costs

¹²⁵ *Id.* (citing *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 806 (Mo. 2015) (en banc)). The court stated that mandamus is appropriate when alternatives waste judicial resources or result in burdensome delay that causes irreparable harm. *Id.* (citing *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 806 (Mo. 2015) (en banc)).

¹²⁶ *Id.* at 11.

¹²⁷ *Id.* The court defined ministerial as "a duty of a clerical nature 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 to be performed." *Id.* (quoting *Curtis v. Mo. Democratic Party*, 548 S.W.3d 909, 916 (Mo. 2018) (en banc)).

¹²⁸ *Id.* at 12 (quoting MO. REV. STAT. § 116.175.4 (2003)).

¹²⁹ *Id.*

¹³⁰ *Id.* at 6 n.4.

¹³¹ *Id.* at 6.

¹³² *Id.* at 6–7.

¹³³ *Id.* at 12–13.

¹³⁴ *Id.*

caused by delays in signature gathering.¹³⁵ In Missouri, the average total cost for gathering signatures for an initiative is \$3,659,401, with an average cost per signature of \$21.33.¹³⁶ Dr. Fitz-James could not gather signatures for over 100 days before the Supreme Court of Missouri made its decision.¹³⁷ With that cost and the court's acknowledgement that "every day the time for signature collection on a referendum petition is reduced, the cost of gathering enough signatures to get the referendum before voters will go up," it is clear this problem could be significant.¹³⁸

This harm is even more acute in the case of Dr. Fitz-James, as it is not the only dispute regarding Dr. Fitz-James's set of initiatives.¹³⁹ On May 4, 2023, Dr. Fitz-James filed a petition in the Circuit Court of Cole County contending that the Secretary of State's summary statement for her initiatives was prejudicial.¹⁴⁰ The summary statement began, "Do you want to amend the Missouri Constitution to allow for dangerous, unregulated, and unrestricted abortions?"¹⁴¹ On September 25, 2023, the Circuit Court of Cole County ruled in favor of Dr. Fitz-James, finding the Secretary of State's

¹³⁵ *Id.* at 13.

¹³⁶ *Ballot Measure Signature Costs, 2022*, BALLOTPEDIA, https://ballotpedia.org/Ballot_measure_signature_costs_2022 [<https://perma.cc/KCB4-4C8T>] (last visited May 27, 2024).

¹³⁷ *Fitz-James*, 670 S.W.3d at 13.

¹³⁸ *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 491 (Mo. 2022) (en banc).

¹³⁹ *23AC-CC03167 – Anna Fitz-James v. John R Ashcroft (E-Case)*, MO. CASENET, https://www.courts.mo.gov/cnet/cases/newHeader.do?inputVO.caseNumber=23AC-CC03167&inputVO.courtId=SMPDB0004_CT19&inputVO.isTicket=false#docket [<https://perma.cc/A976-8EPH>] (last visited May 27, 2024).

¹⁴⁰ *See Verified Petition for Writ of Mandamus and Declaratory Judgment, Fitz-James v. Ashcroft*, No. 23AC-CC03167 (Mo. May 4, 2023).

¹⁴¹ The summary statements read in their entirety:

Do you want to amend the Missouri Constitution to allow for dangerous, unregulated, and unrestricted abortions from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice; nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion; require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax payer funding; and prohibit any municipality, city, town, village, district, authority, public subdivision, or public corporation having the power to tax or regulate or the state of Missouri from regulating abortion procedures?

See Fitz-James v. Ashcroft, 678 S.W.3d 194, 200 (Mo. Ct. App. 2023).

summary statement to be insufficient and confusing.¹⁴² Two days later, the Secretary of State appealed.¹⁴³

As the ongoing disputes over Dr. Fitz-James's initiatives illustrate, Missouri's ballot initiative process provides state officials many opportunities to delay signature gathering. Until the initiative and referendum process in Missouri is streamlined, Missourians may not be able to exercise their constitutional right to initiative. This Part will first argue that Sections 116.180 and 116.334 are unconstitutional and then address the ramifications of the court's holding in *Fitz-James* as it pertains to the ballot initiative right in Missouri.

A. Constitutional Argument

The most problematic parts of the Missouri ballot initiative process are Sections 116.180 and 116.334, which prevent a ballot initiative proponent from gathering signatures before an official ballot title is certified.¹⁴⁴ If this requirement were eliminated, proponents would no longer depend on the State Auditor, Attorney General, and Secretary of State's approval to gather signatures. Notably, a process allowing signature collection before an official ballot title is certified is nothing new; in fact, before 1997, this was permitted.¹⁴⁵ That said, while Sections 116.180 and 116.334 certainly make signature gathering more burdensome, they also violate the Missouri Constitution.

The court did not address Fitz-James's constitutional arguments, as they were only raised in the event the court approved the Attorney General's interpretation of 116.175.¹⁴⁶ Sections 116.180 and 116.334 though, are unconstitutional regardless of the construction of Section 116.175. While legislation to implement the initiative process is presumed to be constitutionally valid,¹⁴⁷ laws that "interfere with or impede" the constitutional right to ballot initiative must be held unconstitutional.¹⁴⁸ Article III, Section 49 of the Missouri Constitution provides that "[t]he people reserve power to propose and enact . . . amendments to the constitution by the initiative."¹⁴⁹ The Supreme Court of Missouri has repeatedly stated that technical formalities should not thwart the right to initiative and

¹⁴² 23AC-CC03167 – *Anna Fitz-James v. John R Ashcroft (E-Case)*, MO. CASNET, https://www.courts.mo.gov/cnet/cases/newHeader.do?inputVO.caseNumber=23AC-CC03167&inputVO.courtId=SMPDB0004_CT19&inputVO.isTicket=false#docket [https://perma.cc/A976-8EPH] (last visited May 27, 2024).

¹⁴³ *Id.*

¹⁴⁴ MO. REV. STAT. § 116.180 (1999); MO. REV. STAT. § 116.334 (2014).

¹⁴⁵ *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 487 (Mo. 2022) (en banc).

¹⁴⁶ Brief of Relator-Respondent, *supra* note 19, at 38.

¹⁴⁷ *Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608 (Mo. 1982) (en banc).

¹⁴⁸ *Id.*

¹⁴⁹ MO. CONST. art. III, § 49.

referendum.¹⁵⁰ Since the right to initiative and referendum is so important, constitutional provisions relating to the right to initiative are liberally construed.¹⁵¹

The Missouri Constitution does not require that an official ballot title be certified before proponents can gather signatures.¹⁵² Further, under *No Bans on Choice v. Ashcroft*, Sections 116.180 and 116.334.2 impede the constitutional right of referendum by unreasonably shortening the timeframe for signature gathering.¹⁵³ Between 2016 and 2020, it took thirty-five to forty-seven days on average to certify official ballot titles.¹⁵⁴ The lower court in *No Bans on Choice* determined that official ballot title certification could take up to fifty-one days, even if there was no dispute between state officials and proponents.¹⁵⁵ According to the court, since Sections 116.180 and 116.334.2 gave the legislature the power to make any referendum effort untenable by delaying signature gathering, the sections interfered with and impeded the right to referendum and were held unconstitutional.¹⁵⁶

The analysis in *No Bans on Choice* applies with equal force to ballot initiatives.¹⁵⁷ Since a referendum is tied to an act of the legislature, the time for signature gathering is dependent on when legislation is passed.¹⁵⁸ If legislation is passed on the last day of the legislative session, there is less time to gather signatures as the signature collection period at the close of the session is only ninety days.¹⁵⁹ In contrast, a ballot initiative is *not* dependent on acts of the legislature and may be submitted anytime up to six months before election day.¹⁶⁰ The court's reasoning in *No Bans on Choice*, however, did not depend solely on the overall time available for signature collection; rather, the court emphasized that any reduction in the available time for signature collection impaired and impeded the right of referendum, especially

¹⁵⁰ *United Lab. Comm. v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. 1978) (en banc).

¹⁵¹ *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. 1990) (en banc).

¹⁵² *Boeving v. Kander*, 496 S.W.3d 498, 507 (Mo. 2016) (en banc) (“There is no . . . express constitutional authorization for statutes to impose a requirement that an ‘official ballot title’—or a title of any sort—must be displayed on the pages of initiative petitions proposing constitutional amendments before they may be circulated for signatures.”). Nor is an official ballot title necessary to prevent the public from being deceived at the petition-signing stage. *United Lab. Comm.*, 572 S.W.2d at 454; *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402, 405 (Mo. 1984) (en banc); *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 490 (Mo. 2022) (en banc).

¹⁵³ *No Bans on Choice*, 638 S.W.3d at 492.

¹⁵⁴ *Id.* at 491.

¹⁵⁵ *Id.* at 487.

¹⁵⁶ *Id.* at 491.

¹⁵⁷ *Id.* at 492.

¹⁵⁸ *Id.* at 491.

¹⁵⁹ *Id.*

¹⁶⁰ *See* MO CONST. art. III, § 50.

where the legislature could render a referendum effort untenable.¹⁶¹ The court focused on the cost incurred by delaying signature gathering, emphasizing how delays can dramatically increase costs.¹⁶² Further, the court noted that the Missouri Constitution gave the right to referendum to all Missouri citizens and “not just those capable of raising the necessary funds to complete a signature-collection effort within the tightest of timeframes.”¹⁶³

Sections 116.180 and 116.334 give the Attorney General, Secretary of State, and State Auditor the ability to effectively stop an initiative campaign by delaying signature collection.¹⁶⁴ The power of these state officials are not adequately checked by currently available remedies. This allows the Attorney General, Secretary of State, and State Auditor to manufacture delay when they do not agree with the subject matter of a ballot initiative. Even under the construction of Section 116.175, approved by the Supreme Court of Missouri, the Attorney General may challenge a fiscal note summary’s legal content and form and potentially compel the State Auditor to make revisions.¹⁶⁵ So long as the Attorney General claims some language in a fiscal note summary is prejudicial, he can delay signature gathering by refusing to approve a fiscal note summary.¹⁶⁶ As shown in the *Fitz-James* dispute, if the State Auditor and Attorney General disagree on the need for revision, the only way to break the standoff would be for a citizen to seek a writ of mandamus in the Circuit Court of Cole County.¹⁶⁷ In the meantime, a ballot initiative proponent cannot gather signatures.¹⁶⁸

The State Auditor can also delay signature gathering because they have the sole authority to estimate a ballot initiative’s fiscal impact.¹⁶⁹ A fiscal note summary need only reflect the State Auditor’s assessment of fiscal impact, but it is not independently evaluated for accuracy.¹⁷⁰ Accordingly, it is possible for the State Auditor to create a biased or insufficient fiscal note summary. For example, a State Auditor could drastically overestimate the cost of a ballot initiative in order to prejudice voters. Since no other state official has the authority to challenge a fiscal note summary on substantive grounds, the only remedy would be for a private citizen to challenge the official ballot title in the Circuit Court of Cole County.¹⁷¹ The proponent cannot gather signatures in the meantime.¹⁷²

¹⁶¹ *No Bans on Choice*, 638 S.W.3d at 490.

¹⁶² *Id.* at 492.

¹⁶³ *Id.* at 491.

¹⁶⁴ MO. REV. STAT. § 116.180 (1999); MO. REV. STAT. § 116.334 (2014).

¹⁶⁵ MO. REV. STAT. § 116.175 (2003).

¹⁶⁶ *Id.*; *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 9 (Mo. 2023) (en banc).

¹⁶⁷ *Fitz-James*, 670 S.W.3d at 12.

¹⁶⁸ MO. REV. STAT. § 116.180 (1999); MO. REV. STAT. § 116.334 (2014).

¹⁶⁹ *Fitz-James*, 670 S.W.3d at 7.

¹⁷⁰ *Id.* at 9.

¹⁷¹ MO. REV. STAT. § 116.190 (2015).

¹⁷² MO. REV. STAT. § 116.180 (1999); MO. REV. STAT. § 116.334 (2014).

Like the Attorney General and the State Auditor, the Secretary of State can also delay signature gathering. The Secretary of State has the exclusive responsibility to write the summary statement for a ballot measure.¹⁷³ If the summary statement is biased or prejudicial, the only remedy would be to challenge the official ballot title in the Circuit Court of Cole County.¹⁷⁴ Just like the previous two examples, a proponent cannot gather signatures until the dispute is settled.¹⁷⁵

Each official—the Attorney General, State Auditor, and Secretary of State—could effectively prevent a ballot initiative proponent from gathering signatures until the end of a costly legal battle. It is evident that Sections 116.180 and 116.334 impair and impede the right to ballot initiative in the same manner they impair and impede the right to referendum, by allowing state officials to make an initiative effort unfeasible. *Fitz-James* is a prime example: Dr. Fitz-James was unable to collect signatures for over 100 days because of the Attorney General's actions.¹⁷⁶

The dissent in *No Bans on Choice* argued that as long as legislatively enacted regulations to the referendum process did not reduce the ninety days to collect signatures, the regulations were presumptively constitutional.¹⁷⁷ However, a statute is unconstitutional if it “interferes with or impedes” the right of referendum—not whether it “interferes with or impedes” any *particular* referendum effort.¹⁷⁸ The same is true in an initiative context. The focus is on overall interference with the right to initiative, not just the number of days available for signature gathering.¹⁷⁹ While state officials may not actually prevent the success of every single ballot initiative, Sections 116.180 and 116.334 allow the Attorney General, State Auditor, or Secretary of State to significantly hinder an initiative effort by delaying ballot title certification.¹⁸⁰ As seen in *Fitz-James*, when a state official refuses to perform a ministerial duty, the harm is more potent because the power of state government is being used to delay signature gathering.¹⁸¹

¹⁷³ MO. REV. STAT. § 116.332.1 (2014).

¹⁷⁴ MO. REV. STAT. § 116.190 (2015). For example, with respect to this set of initiatives, Dr. Fitz James challenged the ballot titles description for this set of initiatives which stated the initiative would allow “for dangerous, unregulated, and unrestricted abortions from conception to live birth.” *23AC-CC03167 – Anna Fitz-James v. John R Ashcroft (E-Case)*, MO. CASENET, https://www.courts.mo.gov/cnet/cases/newHeader.do?inputVO.caseNumber=23AC-CC03167&inputVO.courtId=SMPDB0004_CT19&inputVO.isTicket=false#docket [<https://perma.cc/A9768EPH>] (last visited May 27, 2024).

¹⁷⁵ MO. REV. STAT. § 116.180 (1999); MO. REV. STAT. § 116.334 (2014).

¹⁷⁶ *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 13 (Mo. 2023) (en banc).

¹⁷⁷ *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 494 (Mo. 2022) (Powell, J., dissenting).

¹⁷⁸ *Id.* at 492.

¹⁷⁹ *Id.*

¹⁸⁰ MO. REV. STAT. § 116.180 (1999); MO. REV. STAT. § 116.334 (2014).

¹⁸¹ *Fitz-James*, 670 S.W.3d at 12.

Ultimately, since the right to ballot initiative “should not be thwarted in preference for technical formalities,”¹⁸² the Attorney General, State Auditor, or Secretary of State should not be allowed to use technical formalities as justification to destroy an initiative effort where even the legislature could not do so. Sections 116.180 and 116.334 are therefore unconstitutional in both the referendum and initiative contexts. Until this is recognized by the Supreme Court of Missouri, more Missouri citizens will likely fight costly legal battles to protect their constitutional right to initiative.

B. Ramifications

The Supreme Court of Missouri did not address the substance of Dr. Fitz-James’s initiatives.¹⁸³ However, while the substance of these initiatives and the content of the fiscal notes may not have been important to the instant court’s decision, they are key to understanding why the court’s decision will have an impact on other ballot initiative efforts in Missouri and elsewhere.

All of Dr. Fitz-James’s initiatives would amend the Missouri Constitution to include a constitutional right to reproductive freedom, including abortion rights.¹⁸⁴ In this respect, Dr. Fitz-James’s initiatives are not unique; they are not even the only set of proposed constitutional amendments on reproductive rights for the 2024 Missouri election.¹⁸⁵ In the wake of the United States Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Org.*, the battle over abortion has shifted back to the state level.¹⁸⁶ There, the Court wrote that its decision “allow[ed] women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office.”¹⁸⁷ Unsurprisingly, ballot initiatives have been an increasingly common battleground for abortion rights.¹⁸⁸

¹⁸² *United Lab. Comm. v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. 1978) (en banc).

¹⁸³ *Fitz-James*, 670 S.W.3d at 12.

¹⁸⁴ Brief of Relator-Respondent, *supra* note 19, at 8.

¹⁸⁵ Ashcroft, *supra* note 18.

¹⁸⁶ See generally *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022); Yvonne Lindgren, *Dobbs v. Jackson Women’s Health and the Post-Roe Landscape*, 35 J. AM. ACAD. MATRIMONIAL LAW 235, 269 (2022).

¹⁸⁷ *Dobbs*, 597 U.S. at 289.

¹⁸⁸ *2023 and 2024 Abortion-Related Ballot Measures*, BALLOTPEdia, https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures [<https://perma.cc/3ESE-UW2V>] (last visited May 27, 2024). In Kansas, a 2022 ballot initiative seeking to ban abortion failed by 18 percentage points. Heather Hollingsworth & John Hanna, *Kansas Recount Confirms Results in Favor of Abortion Rights*, ASSOCIATED PRESS (Aug. 24, 2022, 11:34 AM), <https://apnews.com/article/kansas-abortion-vote-recounte874f56806a9d63b473b24580ad7ea0c> [<https://perma.cc/Y8HQ-97R3>]. Vermont and Michigan approved constitutional amendments subjecting infringements on reproductive freedom to strict scrutiny. Reva B. Siegel et al., *Equal Protection in*

In response, procedural challenges, like the challenges made by the Missouri Attorney General in *Fitz-James*, have been used in states to block abortion ballot initiatives.¹⁸⁹ Michigan legislators sought to keep a 2022 abortion initiative off the ballot by objecting to the formatting and spacing of the language in the amendment.¹⁹⁰ But the measure survived the legislators' challenge and was later approved by voters.¹⁹¹ There have even been efforts to alter the ballot initiative process in Missouri.¹⁹² For example, the Missouri Legislature aimed to depart from a simple majority vote by proposing to raise the threshold for passing ballot initiatives containing a constitutional amendment to 57%.¹⁹³ This measure did not pass.¹⁹⁴

Since ballot initiatives have become a battleground for the controversial issue of abortion, protecting the right to ballot initiative is important. While protecting initiatives on controversial subjects is key, the importance of the right to ballot initiative transcends the issue of abortion. Abortion-related ballot initiatives are particularly vulnerable because they are more expensive,¹⁹⁵ but the right to ballot initiative allows citizens' voices to be heard, regardless of the subject. To ensure that the people—from whom all constitutional authority is derived—can meaningfully enact their will into law, the right to ballot initiative is essential.

The current ballot initiative process in Missouri is vulnerable to partisan attack. If petitioners could gather signatures before an official ballot title was certified, it would strike the appropriate balance between the state's interest in preventing misleading petitions and protecting voters' constitutional right to initiative. Allowing signature gathering before ballot title certification

Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context, 43 COLUM. J. GENDER & L. 67, 97 (2022). In 2023, there were abortion related ballot initiatives in Ohio, Pennsylvania and Washington. Miles J. Herszenhorn, *Is Abortion Legal in Your State? After Dobbs, Abortion Access Will Be on the Ballot in 2023 and 2024*, USA TODAY (July 23, 2023, 6:52 AM), <https://www.usatoday.com/story/news/politics/2023/07/24/abortion-laws-states-legal-ban/70446746007/> [<https://perma.cc/7XHN-R28B>]. In 2024, there will be abortion related ballot initiatives in New York and Maryland. *Id.*

¹⁸⁹ Sarah McCammon, *After Wins at the Ballot, Abortion Rights Groups Want to 'Put This to the People'*, NPR (Nov. 11, 2022, 12:49 PM), <https://www.npr.org/2022/11/10/1135757008/after-wins-at-the-ballot-abortion-rights-groups-want-to-put-this-to-the-people> [<https://perma.cc/J55N-FFAX>].

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Summer Ballentine, *Missouri Lawmakers Fail to Raise Bar to Amend Constitution, Easing Path for Abortion Rights*, ASSOCIATED PRESS (May 12, 2023, 7:53 PM), <https://apnews.com/article/ballot-initiative-petition-voter-missouri-republican-8e4d5b8293eb864235cf347410d5d7f5> [<https://perma.cc/3Q6P-CXQS>].

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Abortion ballot initiatives are particularly costly, having the highest average cost per signature of ballot initiatives. *Ballot Measure Signature Costs, 2022*, *supra* note 136.

prevents partisan actors, including elected officials like the Attorney General, State Auditor, and Secretary of State, from effectively blocking initiative petitions on controversial issues from the ballot and wrongfully thwarting the will of the people.

VI. CONCLUSION

The best way to hide a partisan attack against controversial ballot initiatives is to insist on rigid compliance with obstructive technical formalities. Missouri's ballot initiative process is a prime example. Without a simplified ballot initiative process, many Missourians will not be able to exercise their constitutional rights. In the *Fitz-James* case, the Supreme Court of Missouri maintained the status quo. As it stands, the Attorney General, State Auditor, or Secretary of State can abuse their authority, delay signature gathering, and ultimately destroy an initiative effort. The will of the people matters. Missourians should be able to vote on the issues they find important. Recognizing the unconstitutionality of Section 116.180 and Section 116.334 and allowing signature gathering before ballot title certification allows the people's voice to be heard. Until the unconstitutionality of Section 116.180 and Section 116.334 are acknowledged in a ballot initiative context, the process will remain a game of Calvinball.