



ATTORNEY GENERAL OF MISSOURI

ANDREW BAILEY

April 10, 2023

OPINION LETTER NO. 216-2023

The Honorable Scott Fitzpatrick
Missouri State Auditor
State Capitol, Room 229
Jefferson City, MO 65101

Dear Auditor Fitzpatrick:

This office received your letter of March 29, 2023, submitting a fiscal note and fiscal note summary prepared under § 116.175, RSMo, for an initiative petition submitted by Anna Fitz-James, 2024-087. The fiscal note summary that you submitted reads in its entirety as follows:

State governmental entities estimate no costs or savings, but unknown impact. Local governmental entities estimate costs of at least \$51,000 annually in reduced tax revenues. Opponents estimate a potentially significant loss to state revenue.

This office has independently reviewed the submission your office received which was attached to the proposed fiscal note summary. Under § 116.175.4, RSMo, the Attorney General is tasked to review the "legal content and form of the fiscal note summary prepared by the state auditor[.]" Section 116.175.3 requires that the fiscal note and fiscal note summary "state the measure's estimated cost or savings, if any, to state and local governmental entities." If the Attorney General determines that "the fiscal note or the fiscal note summary does not satisfy the requirements of [§ 116.175, RSMo], the fiscal note and the fiscal note summary shall be returned to the auditor for revision." § 116.175.5, RSMo.

The Attorney General's Office is returning the fiscal note and fiscal note summary because the fiscal note summary does not contain the legal content required for Missourians to know the enormous financial impact this measure will have on the State of Missouri and its state and local governmental operations. If added to the Missouri Constitution, the measure would create a constitutional right abortion in

Missouri, overturning dozens of existing state laws. The actual potential fiscal impact likely is upward of \$12 billion—and potentially much higher based upon a study and report noted in conjunction with the Greene County submission discussed below. That impact is reflected in submissions from organizations and individuals who provided information to your office, yet it was not transposed into your fiscal note summary. In addition, because the impact to the State of Missouri is likely to be so drastic but is not reflected in the submissions you received from state and local entities, the fiscal note on which your summary relied is legally deficient.

A. The fiscal note is legally deficient.

- i. *The fiscal note contains inadequate and divergent submissions from local governmental entities.*

This ballot measure will affect the present and future population of Missouri. Yet while Missouri has 114 counties and one independent city, in addition to over 1,000 other cities and villages, your fiscal note requested submissions from just 12 counties and 14 cities. Only three counties and two cities responded. That is a statistically insignificant sample to be representative of the true fiscal impact.

One of those entities, Greene County, understood that the measure would have the obvious effect of reducing the population of their citizens. Greene County estimated that 135 future citizens would be lost in that county annually due to legalizing abortion in Missouri. Greene County's estimates were supported by fertility rates and the number of abortions in 2020 recorded by the Missouri Department of Health and Senior Services. Undoubtedly, this ballot measure will result in population loss. Greene County was the only entity to recognize what is facially apparent from this measure. It estimated nearly \$51,000 in lost revenue *annually* to that county based on the reduced population base. Moreover, this annual dollar amount will necessarily increase cumulatively in successive years.

Your office recognized that this was a reasonable assumption, as your fiscal note summary reflects the financial impact to Greene County. Your office, however, did not apply that same reasonable assumption when assessing the submissions from the few other entities who responded to your request for a fiscal note submission, nor did your office apply this obvious assumption to highly populous areas in the state.

—Greene County's assumption is supported by a nationwide study published by the United States Senate Joint Economic Committee. See <https://www.jec.senate.gov/public/index.cfm/republicans/2022/6/the-economic-cost-of-abortion>. It reports an estimate economic cost of abortion in 2019 alone, due to nearly 630,000 unborn lives – was at least \$6.9 trillion, or 32 percent of

the GDP. Based on this study and 4,660 abortions in Missouri in 2019,¹ the total economic loss to Missouri from these measures could be as high as \$51 billion. As Greene County appropriately presents, the substantial economic fiscal reality of abortion relating to unborn lives cannot be denied or omitted from a fiscal note to inform voters of the consequences.

In *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010) the Court of Appeals reviewed the State Auditor's Office's process in preparing a fiscal note and fiscal note summary for a ballot measure. The Court noted that it is your office's practice to "evaluate the responses and to obtain clarification from the entity if the information was unclear. If [the office] found a response to be unreasonable, that affected how much weight was given to the statement in preparing the summary." *Id.* at 582.

The fiscal note and fiscal note summary submitted to the Attorney General's Office does not comply with this process. Greene County's submission is the only reasonable submission by the few entities that responded to your request for submission. The responses from the other counties and cities were unreasonable as they employed an entirely different—and patently incorrect—methodology. It is unreasonable for those entities to conclude that the measure will have no estimated fiscal impact on their operations. Greene County's methodology, or a similar methodology that recognizes the assumptions Greene County recognizes, should be applied to the population base in all Missouri counties and take into account the number of reported abortions in Missouri from the Department of Health and Senior Services, a source referenced in Greene County's submission to your office.

ii. *The fiscal note contains inadequate submissions concerning the impact to state governmental operations.*

The fiscal note indicates that responses were received from the Department of Revenue and the Department of Social Services, among others. Neither of those entities estimated a fiscal impact despite the plain impact this ballot measure will have to their agencies.

As Greene County recognized, aborting unborn Missourians will have a deleterious impact on the future tax base. The Department of Revenue did not employ a similar methodology for the state tax base. As one submission to your office noted, there were about 2,000 abortions reported in Missouri to the Department of Health and Senior Services between 2020-2021.

The Department of Revenue's submission should be rejected under *Carnahan*, which should affect "how much weight [should be] given to the statement in preparing the summary," *Missouri Mun. League*, 303 S.W.3d at 582. In the alternative, another

¹ <https://health.mo.gov/data/vitalstatistics/mvs19/Table12ab.pdf>.

submission should be requested from the Department of Revenue that more accurately estimates the fiscal impact to its operations.

The Department of Social Services similarly estimated that the measure will have no impact on their department. This submission also fails under *Carnahan*.

Your office received submissions that correctly indicate that this measure will affect the Department of Social Services. One submission noted that under federal law, “state are barred from using Federal funds to pay for abortions except in limited cases (the Hyde Amendment). Federal funding could be in jeopardy and Missouri could be subject to the risk of litigation and sanctions, including the possibility of deferral or disallowance of federal financial participation in Missouri’s Medicaid program.” As that submission noted, in 2019, Missouri’s Medicaid program received more than \$7.2 billion in federal funds.

Another submission noted the amendment might result in a loss of federal Medicaid revenues by an unknown amount, up to \$12.5 billion annually—the amount that Missouri is estimated to receive in fiscal year 2024 in federal Medicaid dollars. Other states have recently lost Medicaid revenue because of changes in abortion policy. As two submissions to your office noted, the State of California did not receive \$200 million in federal Medicaid matching dollars due to its unlawful abortion insurance mandate.

Those numbers are reflected nowhere in the submission from the Department of Social Services. The submission should thus be afforded no weight, or another submission should be requested from the Department of Social Services that more accurately estimates the fiscal impact to its operations.

B. The fiscal note summary is legally deficient

Under § 116.175.3, a fiscal note summary must contain “language neither argumentative nor likely to create prejudice either for or against the proposed measure.” It is subject to challenge in the courts if the language is “insufficient or unfair.” § 116.190.

The fiscal note summary likely does not comply with § 116.175 for at least two primary reasons. First, the fiscal note summary conveys the misleading message that it is an accurate representation of the true cost to local and state governmental operations. The only numerical figure mentioned in the fiscal note summary is \$51,000—a sliver of the maximum (or even likely) potential financial impact to local and state governmental operations. The average, reasonable voter reading this summary will not know the small sample of entities your office solicited for submissions or the small response rate. The fiscal note summary hides an elephant

in a mouse hole. Upon revision, if your office does not receive a greater response rate or solicit new submissions, the revised fiscal note should explain that the true, statewide cost of this measure is nowhere close to the amount reported by just one Missouri county.

Second, the fiscal note summary is legally deficient for failing to adequately summarize the submissions your office received. In *Protect Consumers' Access To Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665 (Mo. App. W.D. 2015), the Court of Appeals held that “[t]he Auditor must include submissions in the fiscal note regarding the *potential* cost or savings to state or local government entities as a result of the initiative.” *Id.* at 674. The fiscal note summary merely states that “opponents estimate a potentially significant loss to state revenue.” Your office received submissions indicating that the “potentially significant loss” could be nearly \$12.5 billion dollars in Medicaid losses alone, and potentially much higher.

The fiscal note summary should reflect that number. To the extent that the fiscal note summary must have the “responses submitted [] listed verbatim in the fiscal note with only minor editing,” *Brown v. Carnahan*, 370 S.W.3d 637, 649 (Mo. banc 2012), the fiscal note summary does not meet that standard by failing to note the potential \$12.5 billion impact to the State from the potential loss of Medicaid dollars or the much higher impact from the decrease in population.

Voters reading the fiscal note summary are likely to be misled into thinking that this ballot measure will have little fiscal impact on state and local governmental entities. If it ultimately appears as part of the official ballot title, the fiscal note summary is likely to be met with a well-founded legal challenge to its fairness and sufficiency.

For these reasons, I conclude that the fiscal note and fiscal note summary do not satisfy the requirements of § 116.175 and therefore I am returning them to you for revision.

Very truly yours,



ANDREW BAILEY
Attorney General

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