

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

SCOTT FITZPATRICK, in his official)
 capacity as Missouri State Treasurer,)
)
 Plaintiff,)
)
 vs.)
)
 JOHN R. ASHCROFT, in his official)
 capacity as Missouri Secretary of State)
)
 Serve: State Capitol, Rm 208)
 Jefferson City, MO 65101,)
)
 Defendant.)

Case No:

PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

On July 9, 2021, the Secretary of State certified a summary statement and fair ballot language statements for HJR 35, a proposed constitutional amendment submitted by the General Assembly. HJR 35 proposes to amend Article IV, Section 15 of the Missouri Constitution to expand the State Treasurer's authority to invest in additional securities. The Secretary of State designated HJR 35 as Amendment 1.

The Secretary of State's summary statement of Amendment 1 is not a true and impartial statement of the purpose of the proposed measure. The use of the word "override" is intentionally argumentative and likely to create a prejudice against the proposed measure.

In addition, the Secretary of State's fair ballot language does not fairly or accurately describe the measure because it erroneously specifies that a "yes" vote would amend the Missouri Constitution to grant the General Assembly statutory authority to invest state funds. This is misleading and undeniably false. The Missouri Constitution is clear, as the

custodian of all state funds, the State Treasurer has the exclusive authority to invest state funds. Amendment 1 unequivocally does not give the General Assembly any authority to invest state funds. The fair ballot language is also misleading because it implies the General Assembly would be the sole authority for determining investment avenues available to the State Treasurer. The Missouri Constitution sets forth the allowable investment options and it is the State Treasurer's sole discretion regarding in which of those options to invest.

The erroneous and biased summary statement and fair ballot language should be vacated and replaced with corrected language that provides voters with true and impartial information about the amendment proposed by the joint resolution.

PARTIES

1. Plaintiff Scott Fitzpatrick, is the duly elected and acting Missouri State Treasurer.
2. The Treasurer is a citizen of Missouri.
3. Treasurer Fitzpatrick brings this lawsuit in his official capacity.
4. Defendant John R. Ashcroft is the duly elected and acting Secretary of State of Missouri. §116.190.2, RSMo.

JURISDICTION AND VENUE

5. "Any citizen who wishes to challenge the official ballot title . . . prepared for a proposed constitutional amendment submitted by the general assembly . . . may bring a measure in the circuit court of Cole County." §116.190.1, RSMo.
6. Section 116.190, RSMo, also authorizes challenges to fair ballot language. *See Calzone v. Ashcroft*, 559 S.W. 3d 32, 38 (Mo. App. 2018).

7. The Circuit Court of Cole County is the exclusive venue for this action.
§116.190.1, RSMo.

8. This challenge is timely. *See* §116.190.1, RSMo.

FACTUAL ALLEGATIONS

9. On May 4, 2021, the General Assembly Truly Agreed and Finally Passed HJR 35. A true and correct copy of HJR 35 is attached as **Exhibit A**.

10. On May 25, 2021, the Speaker of the House of Representatives and the President Pro Tem of the Senate signed HJR 35 and delivered it to the Secretary of State.

11. The Secretary of State prepared and certified a summary statement for that joint resolution:

“Do you want to amend the Missouri Constitution to:

- allow the General Assembly to override the current constitutional restrictions of state investments by the state treasurer; and
- allow state investments in municipal securities possessing one of the top five highest long term ratings or the highest short term rating?”

12. A true and correct copy of the summary statement for HRJ 35 is attached as **Exhibit B**.

13. The Secretary of State prepared and certified fair ballot language for HJR 35:

“A **“yes”** vote will amend the Missouri Constitution to grant the General Assembly statutory authority to invest state funds and also expand the state treasurer’s investment options. Currently the Constitution grants the General Assembly no statutory investment authority and limits the treasurer’s investment options. This amendment will allow the General Assembly by statute to determine investment avenues for the state treasurer to invest state funds, as well as allow the state treasurer to invest in municipal securities.

A **“no”** vote will not amend the Missouri Constitution and limit the treasurer to investing state funds only in those currently approved by the Constitution.”

14. A true and correct copy of the fair ballot language for HJR 35 is attached as **Exhibit C.**

15. The Secretary of State designated HJR 35 as “Amendment 1.”

16. The summary statement and fair ballot language were certified by the Secretary of State on July 9, 2021.

COUNT I – THE SUMMARY STATEMENT IS UNFAIR AND INSUFFICIENT

17. Plaintiff incorporates by reference paragraphs 1-16.

18. The summary statement claims Amendment 1 would “allow the General Assembly to override the current constitutional restrictions of state investments by the state treasurer.” Ex B.

19. This claim is inaccurate and biased.

20. The Missouri Constitution is clear, the State Treasurer shall be the custodian of all state funds and funds received from the federal government and the State Treasurer shall determine by the exercise of his or her best judgment the amount of moneys in his or her custody that are not needed for current expenses and shall place all such moneys into those investment options set forth in the Constitution. Mo. Const. art. IV, §15.

21. The State Treasurer can only invest in those financial instruments and securities that are specifically set forth in the Constitution. *Id.*

22. Amendment 1 would authorize the State Treasurer to invest in other reasonable and prudent financial instruments and securities *as otherwise provided by law*— financial instruments and securities authorized by a duly enacted state statute, by

an initiative petition approved by the voters, or by a joint resolution from the General Assembly proposing a constitutional amendment and approved by voters. Ex A.

23. Because an initiative petition or joint resolution can already be used to amend the Missouri Constitution, including to amend what investment options are available to the State Treasurer, reference to their use in the summary statement would be superfluous.

24. The summary statement appears to ignore that authorization of reasonable and prudent investment can occur via an initiative petition or joint resolution.

25. Rather, the summary statement implies only the General Assembly can dictate investment options for the State Treasurer.

26. In particular, the use of the term “override” is biased and inflammatory.

27. Amendment 1, if enacted, would authorize the new investment options specified and would also create a mechanism by which the General Assembly could provide by law other investment options to be used by the State Treasurer in his or her discretion.

28. It does not prohibit the use of any investment options currently available, nor does it mandate the State Treasurer be confined to any specific lawful investment.

29. The summary statement altogether fails to acknowledge the ability of the State Treasurer to utilize investment options that are created by ballot measures that have been approved by the voters.

30. The summary statement’s use of the term “override” to describe that portion of a constitutional amendment that simply adds new language to an existing section of the Constitution is argumentative and likely to create prejudice against the proposed measure.

COUNT II – THE FAIR BALLOT LANGUAGE IS UNFAIR AND INACCURATE

31. Plaintiff incorporates by reference paragraphs 1-30.

32. The fair ballot language claims a “yes” vote will “amend the Missouri Constitution to grant the General Assembly statutory authority to invest state funds.” Ex. C.

33. This statement is false.

34. There is no language in Amendment 1 that vests with the General Assembly any authority to invest any state funds.

35. The Constitution and statutes of Missouri require the State Treasurer to prepare, maintain, and adhere to a written investment policy that must include an asset allocation plan limiting the total amount of state money which may be invested in each category. *See* Mo. Const. art. IV, §15 and §30.260.1, RSMo.

36. Pursuant to the terms of that written Investment Policy, authority and responsibility for the management and operation of the investment program is delegated to the Director of Investments, who is required to act in accordance with the established written procedures and internal controls for the operation of the investment program. Only the Director of Investments, Deputy State Treasurer, Investment Analyst, and Investment Coordinator positions are authorized to make investments and to order the receipt and delivery of investment securities.

37. The Investment Policy mandates that the primary objectives of investment activities shall be legality, safety, liquidity, yield, and the provision of a capital base for statewide economic development.

38. While authorized by the Constitution, the State Treasurer’s Office has never purchased a banker’s acceptance, and has only intermittently invested in commercial

paper. Thus, even if an investment is authorized and legally permissible it may go unused if it does not satisfy all of the investment principles set forth in the Investment Policy.

39. While Amendment 1 would permit the State Treasurer to invest in reasonable and prudent financial instruments approved by the General Assembly in a duly enacted state statute, it does not divest the State Treasurer of his exclusive authority as the custodian of all state funds or his exclusive authority and discretion pertaining to the investment decisions regarding excess state money.

40. If Amendment 1 is approved by the voters, and the General Assembly thereafter enacted a new state statute purporting to give itself the authority to invest state funds, any such newly created state statute would be in conflict with the Constitution, as the Constitution is clear that authority rests exclusively with the State Treasurer. *See* Mo. Const. art. IV, §15.

41. There is no fair reading of Amendment 1 that leads to the conclusion it would permit the General Assembly to invest state funds.

42. To the extent the fair ballot language states otherwise it is inaccurate and unfair.

43. The fair ballot language also states the amendment “will allow the General Assembly by statute to determine investment avenues for the state treasurer to invest state funds.” Ex. C.

44. This statement unfairly implies the General Assembly would have the exclusive power to determine what investment options are available to the state treasurer, when in fact the Constitution specifies what investment options are currently allowed and ballot measures can be utilized to propose changes the State Treasurer’s investment options.

45. Further, the “no” language does not include a noun, such as “securities” or “investments” to describe which financial instruments the treasurer is limited to invest funds.

46.

PRAYER FOR RELIEF

Plaintiff respectfully requests an Order from this Court:

a. Vacating the summary statement drafted by the Secretary of State;
and

b. Requiring “a different summary statement portion of the official ballot title.” §116.190.3, RSMo; and

c. Certifying the following statutorily compliant summary statement that redresses the foregoing violations of §§116.160.1 and 116.190.3, RSMo:

“Do you want to amend the Missouri Constitution to:

- Allow state investments in municipal securities possessing one of the top five highest long term ratings or the highest short term rating; and
- Allow the state treasurer to invest in other reasonable and prudent financial instruments and securities as authorized by the General Assembly?”

or,

d. Certifying an alternative statutorily compliant summary statement that redresses the foregoing violations of §§116.160.1 and 116.190.3, RSMo; and

e. Vacating the fair ballot language statements drafted by the Secretary of State; and

f. Requiring different fair ballot language statements. §§116.025 and 116.190, RSMo; and

g. Certifying the following statutorily compliant fair ballot language that redresses the foregoing violations of §§116.025 and 116.190, RSMo:

“A “**yes**” vote will amend the Missouri Constitution to allow the state treasurer to invest in municipal securities, as well as allow the General Assembly to authorize by statute additional investment avenues for the state treasurer to invest state funds. Currently, the Constitution limits the treasurer’s investment options and grants the General Assembly no statutory authority to determine the treasurer’s investment options.

A “**no**” vote will not amend the Missouri Constitution and limit the treasurer to investing state funds only in those securities currently listed in the Constitution.”

or,

h. Certifying an alternative statutorily compliant fair ballot language statement that redresses the foregoing violations of 116.025, RSMo.

Respectfully Submitted,

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