

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

DAVID KNIGHT,)	
and)	
RAY SALVA,)	
)	
EDWIN P. McKASKEL,)	
and)	
DR. HAROLD H. HENDRICK)	
)	
Plaintiffs,)	
)	
v.)	Case No. 08AC-CC00665
)	Case No. 08AC-CC00666
ROBIN CARNAHAN, in her official)	
capacity as Secretary of State of Missouri,)	
and)	
SUSAN MONTEE, in her official capacity)	
as Missouri State Auditor,)	
)	
Defendants,)	
and)	
)	
EVERETT BAKE,)	
)	
Intervenor-Defendant.)	

ORDER AND JUDGMENT

This case involves a challenge under §116.200, RSMo, to compel reversal of the decision by the Secretary of State to certify a statewide ballot initiative to the voters on November 4, 2008. Plaintiffs claim a violation of the single subject requirement of Article III, §50 of the Missouri Constitution, a violation of the Secretary of State’s obligation to insure that a ballot measure is otherwise constitutional, and a failure by the Secretary of State to ensure that a ballot measure complies with the legal requirements as

to form pursuant to Chapter 116, RSMo.

Background

On August 5, 2008, Defendant Secretary of State Robin Carnahan (“Secretary of State”) certified for placement on the November ballot a proposed initiative that makes changes to the regulation of gambling and gambling revenues in Missouri. Plaintiffs filed two suits against Defendants Secretary of State and State Auditor Susan Montee (“State Auditor”), seeking to remove this proposed initiative from the ballot. These two lawsuits were consolidated by agreement, and Everett Baker was granted intervention as a Defendant. Pending before the Court are the motions to dismiss filed by the Secretary of State, the State Auditor and Defendant-Intervenor Everett Bake (“Intervenor”) as well as motions for judgment on the pleadings filed by Plaintiffs. The parties appeared for hearing on October 15, 2008 and filed a stipulation of facts. Plaintiffs had no additional evidence to present and requested a decision on the merits. Defendants requested leave to present evidence on yet to be filed affirmative defenses if such became necessary. The Court took all motions with the case. After consideration of the suggestions filed by the parties and the arguments presented by counsel at the hearing on October 15, 2008, the Court hereby enters judgment against Plaintiffs and in favor of Defendants for the reasons set forth below.

Multiple Subjects Claim Under Article III, § 50

Plaintiffs assert that the initiative petition violates Article III, § 50 because it has multiple subjects. These claims fail as a matter of law. The initiative in this case has a

single central purpose of regulating gambling and its revenues, and all of its provisions are properly connected to this purpose.

Article III, § 50 mandates that “[p]etitions for laws shall contain not more than one subject which shall be expressed clearly in the title...” In determining whether a proposed law has multiple subjects in violation of Art III, §50, “[a] proposal will be liberally and nonrestrictively construed so that provisions connected with or incident to effectuating the central purpose of the proposal will not be treated as separate subjects.” *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 830-31 (Mo. banc 1990). A measure may encompass one subject, and yet effect several changes and incidents, if all are germane to its one controlling purpose. *Id.*

As a result, the “subject” of a challenged law is generally a broad category that can cover a range of provisions. For instance, in *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 (Mo. 1981), the initiative petition proposal arguably included six subjects, including: 1) a taxation lid on state government; 2) a spending lid on state government; 3) a directive that state government continue financial support of local government; 4) a tax lid on local government; 5) limits on local governments obtaining revenues based on assessments and property; and 6) a grant of original jurisdiction to the Supreme Court to hear taxpayer suits to enforce the provisions of the amendment. Even so, the Court found it did not violate the single subject provision of the Missouri Constitution, as “[a]ll of these items are properly connected to the single controlling purpose of the amendment: to limit taxes and governmental expenditures within the state of Missouri.” *Id.* at 14.

Similarly in *Committee for a Healthy Future*, the initiative petition created a new tax on tobacco products, provided for collection of the tax, set out the disbursement of the revenue to tobacco cessation programs and to public health programs that included treating tobacco-related illnesses, and required the State Auditor to review “the impact of the programs, grants, and contracts performed.” 201 S.W.3d 503, 511 (Mo. banc 2006). Despite this, the Supreme Court found the “clear, single purpose of the proposed amendment was to raise and disburse a tax.” *Id.* at 511-12.

Likewise, other proposals that provided for regulation of an activity, and at the same time set forth how the funds from that activity are to be used, have been found to contain only one subject. For example, in *Payne v. Kirkpatrick*, 685 S.W.2d 891, 905 (Mo. App. W.D. 1984), the Court found that a proposal that set forth details of a racing commission and defined the appropriation of funds derived from pari-mutuel horse racing did not violate Article III, §50.

In the case at bar, the single subject of this initiative petition is gambling and gambling revenues. Connected to this subject are several provisions that modify current law related to loss limits, the requirement of identification from casino patrons, the number of casinos allowed to operate, and the gaming tax. The proposed act lays out how additional gambling revenues are to be used by creating a fund into which they are to be deposited, describing how the fund will operate, and providing for audits of this fund. The defendants correctly point out that there is some element of “logrolling” in connection with the combination of such different issues within the Proposition as the

elimination of loss limits and the capping on the number of “boats” that may be licensed. However, the constitutional prohibition on “logrolling” relates to different subjects, not different issues connected to the same subject. These provisions all relate to gambling revenues. Accordingly, the Court finds that initiative petition does not contain multiple subjects in violation of Article III, §50.

Clear Title Claim Under Article III, § 50

Plaintiffs Knight and Salva also claim that the official ballot title of the initiative petition is misleading in that it fails to present certain details of the specifics of the way that gambling revenues will be used to fund education. Knight Amended Petition at ¶16. In particular, they argue that the summary statement in the official ballot title fails to inform voters that the measure: (1) does not increase funds for higher education; (2) changes the definition of “State Adequacy Target”, a term used in the State’s Foundation Formula; and (3) does not increase funding to “hold harmless” districts. *Id.* A close inspection of Plaintiffs’ arguments reveals it is not a traditional “clear title” analysis. Plaintiffs’ petitions do not allege that the title is “over inclusive” or “under inclusive” which is the traditional clear title analysis. Instead, what Plaintiffs are really arguing is that the title is simply wrong. This is more aptly a claim of unfairness and insufficiency under §116.190. This claim was timely raised and rejected in litigation before Circuit Court Judge Patricia Joyce earlier this year. Although bound by that decision, this Court also determines that the ballot title does in fact clearly express the subject of the proposed act as required by the Missouri Constitution.

The purpose of the ballot title is to give interested persons notice of the subject of a proposed law to prevent deception through use of misleading titles. If the title gives adequate notice, the requirement is satisfied. *Missourians against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006) citing *Union Elec. Co. v. Kirkpatrick*, 606 S.W.2d 658, 660 (Mo. banc. 1990). “The ballot title need not resolve every question about cases at the periphery of the proposal.” *United Gamefowl*, 19 S.W.3d at 141. Furthermore, it is important to note the fact that the Secretary of State is limited to 100 words in describing a measure. §116.334, RSMo. “Within these confines, the title need not set out the details of the proposal.” *Id.*

The ballot title in this case, quoted in full above, clearly expresses that the purpose of this initiative is to regulate gambling and its revenues. Contrary to the contention of Plaintiffs Knight and Salva, the ballot title need not include every detail about how the additional gambling revenues will provide funding to education; rather, it is sufficient to apprise voters that the purpose of the proposed law is to regulate gambling and gambling revenues. A “ballot title is sufficient and fair if it ‘makes the subject evident with sufficient clearness to given notice of the purpose to those interested or affected by the proposal.’” *Overfelt v. McCaskill*, 81 S.W.3d 732, 738 (Mo. App. W.D. 2002) (*quoting United Gamefowl Breeders*, 19 S.W. 3d at 140). Therefore, Plaintiffs’ clear title challenge is rejected.

Remaining Constitutional Claims

Plaintiffs claim that the initiative petition, if passed by the voters, would operate to violate several other provisions of the Missouri Constitution, including Article III, §39(d), §39(e), §40(28), and Article I, §2. The Court concludes that all of these constitutional claims are premature and may not be reviewed prior to the election. *See United Gamefowl*, 19 S.W.3d at 139 (“Before the people vote on an initiative, courts may consider only those threshold issues that affect the integrity of the election itself, and that are so clear as to constitute a matter of form.”). Plaintiffs have cited no authority that would allow the Court to review these claims before the election; because of standing and ripeness issues, these claims are dismissed.

Section 116.050 Claim

Plaintiffs’ next claim is under §116.050, RSMo. This statute reads: “The full and correct text of all initiative and referendum petition measures shall: (1) Contain all matter which is to be deleted included in its proper place enclosed in brackets and all new matter shown underlined; (2) Include all sections of existing law or of the constitution which would be repealed by the measure....” §116.050, RSMo.

Plaintiffs contend that the proposed initiative violates this statutory provision in that proposed initiative does not reference several sections of existing law related to the authority of the Missouri Gaming Commission that will be “affected” by the proposed law. Knight Petition at ¶¶42-44. However, the express statutory language of §116.050, RSMo. does not require that every measure “affected” by the proposed law be included in

the proposed initiative petition. Rather, this statute only requires that those provisions of law which would be “repealed” be included in the initiative petition. While the initiative would indeed “affect” or impact the authority of the Missouri Gaming Commission, it would in no way repeal any statutory provisions setting forth such authority.

Though not in the statutory context, the Supreme Court in *Buchanan v. Kirpatrick*, 615 S.W.2d 6, 14-15 (Mo. 1981), addressed a claim that an initiative petition did not list all the provisions that could possibly or by implication be modified by the proposed amendment. The Court noted that to require an initiative petition to detail those provisions which will be changed or affected would “tend to stifle the constitutional initiative process.” *Id.* at 15. Furthermore, “[t]ime alone can ferret out all the consequential and remote conflicts between statutes or constitutional provisions in all their implications.” *Id.* at 14, *citing Moore v. Brown*, 165 S.W.2d 657 (Mo. 1942). Likewise, requiring the initiative petition proponent in this case to include in the proposed measure statutes that are “affected” by the proposed amendment, when the requirements of §116.050, RSMo are not so broad, would stifle the initiative process.

Additionally, asking this Court to determine in the abstract, without a pending controversy, that this proposed measure implicitly conflicts with other statutory provisions is premature. Assuming that the measure passes, the courts can determine what, if any, affect this proposed act will have on other statutory provisions if and when aggrieved parties come forward with concrete non-speculative claims. Accordingly, this claim lacks merit and is therefore dismissed.

Fiscal Note Summary Claim

Plaintiffs Knight and Salva claim that the fiscal note summary is insufficient and inaccurate. Knight Amended Petition at ¶¶34-39. Section 116.190.1 provides that “[a]ny citizen who wishes to challenge the official ballot title or the fiscal note prepared...for a statutory initiative...may bring an action in the circuit court of Cole County.” §116.190.1 RSMo. However, the statute requires that “[t]he action must be brought within ten days after the official ballot title is certified by the secretary of state in accordance with the provisions of this chapter.” *Id.*

In this case, the Secretary of State certified the official ballot title on February 27, 2008. Knight Amended Petition at ¶8 and Exhibit 2 (Certification of Official Ballot Title). Plaintiffs Knight and Salva did not file this suit until August 14, 2008, approximately 169 days after the certification, and 159 days after the date this suit “must be brought” pursuant to §116.190.1, RSMo. Considering this, their fiscal note challenge in Count VI is untimely pursuant to §116.190.1, RSMo. On this basis, the Court concludes it is without jurisdiction to hear the claim and it must be dismissed with prejudice.

Order and Judgment

For the reasons set forth above, the Court enters Judgment in favor of Defendants against Plaintiffs on all claims. Costs taxed to Plaintiffs.

SO ORDERED this 20th day of October, 2008.

Richard G. Callahan
Circuit Court Judge, Division II