

**IN THE CIRCUIT COURT OF COLE COUNTY**

ANNIE BUSCH, ROSEANN	)	
BENTLEY, AND JOHN D.	)	
SCHNEIDER,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 09AC-CC00683
	)	
ROBIN CARNAHAN, Secretary of	)	
State	)	
Defendant,	)	
	)	
and	)	
	)	
JAMES HARRIS,	)	
	)	
Intervenor-Defendant.	)	

**JUDGMENT**

This matter came before the Court for hearing on February 8, 2010. For the reasons outlined below, this Court finds that the Secretary of State’s summary statement is fair and sufficient, and Plaintiffs have failed to meet their burden of showing otherwise. Plaintiffs’ challenges to the form and substance of the proposed initiative are dismissed without prejudice. Based on the facts and arguments of counsel, the Court finds the following facts and makes the following conclusions of law:

**FINDINGS OF FACT**

1. Plaintiff Annie Busch is a registered voter and taxpayer in the State of Missouri. She is a resident of Greene County, Missouri.

2. Plaintiff Roseann Bentley is a registered voter and taxpayer in the State of Missouri. She is a resident of Greene County, Missouri.

3. Plaintiff John D. Schneider is a registered voter and taxpayer in the State of Missouri. He is a resident of St. Louis County, Missouri (Plaintiffs Busch, Bentley, and Schneider are hereinafter collectively referred to as “Plaintiffs”).

4. Defendant Robin Carnahan (“Secretary”) is the duly elected, qualified, and acting Secretary of State of the State of Missouri.

5. On October 7, 2009, James Harris (“Harris”) submitted to the Secretary a sample sheet for a proposed initiative petition to amend the Missouri Constitution.

6. A true and correct copy of the proposed initiative petition is attached to Plaintiffs’ Petition as Exhibit 1.

7. Chris Koster, the Missouri Attorney General (“Attorney General”), reviewed the proposed initiative petition and, on October 14, 2009, approved it as to form. The Secretary gave final approval of the form of the proposed initiative petition.

8. The Secretary prepared a proposed summary statement for Harris’s proposed initiative petition. On October 29, 2009, the Secretary submitted the proposed summary statement to the Attorney General for review. By letter dated November 6, 2009, the Attorney General approved the legal content and form of the proposed summary statement.

9. On November 12, 2009, the Secretary certified the official ballot title.

10. A true and correct copy of the Secretary’s certification of the official ballot title is attached to Plaintiffs’ Petition as Exhibit 5.

11. On November 20, 2009, Plaintiffs filed with this Court a Petition challenging the certification of the official ballot title.

12. On January 6, 2010, Harris was granted leave to intervene as a Defendant in this case. One week later, he filed a motion for judgment on the pleadings and suggestions in support.

13. This Court held a hearing on Harris's motion on February 8, 2010. Harris and Plaintiffs presented arguments for and against the motion. At the conclusion of the hearing, the Court took the case under advisement in anticipation of further briefing by the parties.

14. Subsequently, Plaintiffs and the Secretary filed written briefs with the Court.

### **CONCLUSIONS OF LAW**

Upon the findings made above, and having been duly advised in the premises, the Court enters the following conclusions of law:

**A. Plaintiffs' Challenges to the Form and the Legal Sufficiency of the Proposed Initiative Petition Are Not Ripe for Judicial Consideration.**

Counts I and II of Plaintiffs' Petition allege that the Secretary should never have approved the proposed initiative petition as to form because the proposed initiative petition is non-compliant with the constitutional and statutory requirements that govern the initiative process and because the proposed amendment, if adopted, would violate various state and federal constitutional provisions. Plaintiffs' claims are not ripe for judicial consideration at this time.

1. Plaintiffs' challenges to the form of the proposed initiative petition are not ripe.

Missouri law contains only two provisions by which concerned parties may seek judicial review of the legal sufficiency of proposed initiative petitions prior to the proposal's placement on the ballot. First, § 116.190, RSMo,<sup>1</sup> allows citizens to challenge the sufficiency and fairness of the summary statement prepared by the Secretary as well as the fiscal note and fiscal note summary prepared by the State Auditor. This challenge must be made within ten days of the certification of the official ballot title. Nothing in § 116.190 authorizes a challenge to the Secretary's "approval as to form" of the proposed initiative petition. And the relief available to a challenging party under § 116.190 is limited to the certification of a summary statement. § 116.190. The statute does not authorize a reviewing court to quash the summaries altogether or to enjoin the Secretary from receiving signatures gathered after the official ballot title has been certified based on the Secretary's "approval as to form" of the proposed ballot initiative petition.

Second, § 116.200 permits any citizen to seek judicial intervention "[a]fter the secretary of state certifies a petition as sufficient or insufficient . . . ." The Secretary's certification as to the sufficiency of a petition occurs *after* signatures have been collected, submitted, and verified. *See* §§ 116.120, 116.150. Only after the Secretary certifies a petition as sufficient or insufficient may a challenging party file suit in the circuit court

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<sup>1</sup> All statutory references are to the 2009 Cumulative Supplement of the Revised Statutes of Missouri.

seeking to reverse the certification. *See* § 116.200. In an action pursuant to § 116.200, the challenging party may contest the Secretary’s certification not only by alleging that the signatures were insufficient, but also by challenging the petition’s compliance with constitutional requirements as to its form. *See Missouriians to Protect the Initiative Process v. Blunt* (“*Missourians*”), 799 S.W.2d 824, 828-29 (Mo. banc 1990) (concluding that pursuant to § 116.200, the court could review whether the initiative petition certified by the Secretary complied with article III, § 50’s “single subject rule”).

No provision of law authorizes an attack against the form of a proposed initiative petition before the petition is circulated, signatures are gathered and verified, and the petition is certified as sufficient by the Secretary. Although Plaintiffs argue that their claims are justiciable at this point, the cases upon which they rely all indicate that the proper time to challenge the form of an initiative petition is after the signature-phase is complete and the Secretary certifies that the petition is sufficient or insufficient. *See State ex rel. Halliburton v. Roach*, 130 S.W. 689, 691 (Mo. 1910) (petitioner challenged the Secretary’s refusal to certify a petition as sufficient after the petition and signatures were submitted); *Moore v. Brown*, 165 S.W.2d 657, 659 (Mo. 1942) (petitioner sought to enjoin certification but did not challenge signatures); *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 8 n.4 (Mo. banc 1981) (petitioner contested form and constitutionality of initiative petition after signatures had been gathered and the Secretary issued certification); *Payne v. Kirkpatrick*, 685 S.W.2d 891, 894 (Mo. App. W.D. 1984) (petitioner filed suit after the Secretary refused to certify the initiative petition as sufficient because the signatures gathered were inadequate); *Missourians*, 799

S.W.2d at 826 (petitioner challenged the initiative petition after signatures had been submitted and the petition was certified by the Secretary); *Kansas City v. McGee*, 269 S.W.2d 662, 663 (Mo. 1954) (petitioner sought to compel the city to put the initiative petition on the local ballot after the clerk certified that sufficient signatures had been submitted). There is no authority to support Plaintiffs' position that the summary statement or official ballot title may be quashed by a court for non-compliance with constitutional or statutory requirements for form prior to the petition's certification of sufficiency by the Secretary. Plaintiffs' claims challenging the form of the proposed initiative petition will not be ripe unless and until the Secretary certifies the petition after receiving and verifying the requisite signatures.

2. Plaintiffs' substantive constitutional challenges are not ripe.

In addition to raising various challenges to the form of the proposed initiative petition, Plaintiffs also allege that the proposed amendment, if adopted, would violate (a) Greene County voters' rights arising under §§ 2, 10, 13, and 25 of Article I of the Missouri Constitution; (b) the equal protection and due process clauses of the United States Constitution; and (c) the constitutional prohibitions against bills of attainder and ex post facto laws. These claims are not ripe for judicial consideration at this time.

**B. The Secretary's Summary Statement Is Sufficient and Fair.**

In Count III of their Petition, Plaintiffs challenge the official ballot title and statement as insufficient and unfair. This Court disagrees.

Section 116.334 requires the Secretary to prepare a summary statement that is “neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.” *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 81 (Mo. App. W.D. 2008) (citing § 116.190.3). The party challenging the official ballot title bears the burden of showing why the Secretary’s summary statement is “insufficient or unfair.” *Id.*

The Missouri Court of Appeals has described the court’s role in the initiative process as follows:

Our role is not to act as a political arbiter between opposing viewpoints in the initiative process: When courts are called upon to intervene in the initiative process, they must act with restraint, trepidation . . . Courts are understandably reluctant to become involved in pre-election debates over initiative proposals. Courts do not sit in judgment on the wisdom or folly of proposals.

*Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006).

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.” *Union Elec. Co. v. Kirkpatrick*, 606 S.W.2d 658, 660 (Mo. banc 1980). Thus, in drafting a summary statement, the Secretary’s responsibility is to ensure that the statement is fair and sufficient and promotes an informed understanding of the probable effect of the proposed amendment. “The important test is whether the language fairly and impartially summarizes the purposes of the measure, so that

the voters will not be deceived or misled.” *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999) (citing *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402, 405 (Mo. banc 1984)).

While the summary statement must be “fair” and “sufficient,” it need not include every detail of the proposed amendment. See *United Gamefowl Breeders Ass’n of Mo. v. Nixon*, 19 S.W.3d 137, 141 (Mo. banc 2000). Deference is given to the elected official responsible for preparing the summary statement. The Secretary is not required to simply mimic the language of the proponents or opponents of the proposed amendment. Even if a challenging party suggests language that is more specific than the language used in the Secretary’s summary, “and even if that level of specificity might be preferable,” the Secretary’s summary will nonetheless be upheld so long as it is fair and sufficient. *Bergman*, 988 S.W.2d at 92. As the Court of Appeals has noted, “[i]f charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions”—“there are many appropriate and adequate ways of writing the summary ballot language.” *Asher v. Carnahan*, 268 S.W.3d 427, 431 (Mo. App. W.D. 2008). The Secretary’s summary will not be invalidated simply because it is not subjectively perfect. “The ability of the voters to get before their fellow voters issues they deem significant should not be thwarted in preference for technical formalities.” *Union Elec. Co.*, 606 S.W.2d at 660.

Plaintiffs have not met their burden to show that the Secretary’s summary was “insufficient” or “unfair.” Although Plaintiffs have suggested alternative language that may provide additional detail, such language is not necessary to give voters “adequate notice” of

the subject of the proposed amendment. For example, Plaintiffs' suggestion that the phrase "all judges" be replaced with "[all] Supreme Court judges, Court of Appeals judges, Circuit judges, Associate Circuit judges, and Municipal judges" may be more specific, but it does not render the original phrase insufficient or unfair. Voters reading the summary as prepared by the Secretary are adequately notified that the "purpose" of the measure is to repeal the non-partisan court plan for the selection of judges and to replace it with partisan elections.

Plaintiffs' other arguments are similarly flawed in that they do not show the summary statement was insufficient, but rather that certain additional details could have been included. Plaintiffs contend that the summary statement should have mentioned that if the proposed amendment is adopted then party nominating committees will be authorized to nominate judicial candidates and that candidates will be permitted to solicit campaign contributions. But the summary clearly states that if this initiative is passed by the voters, judges will be selected by partisan elections and allowed to participate in political campaigns. Voters will understand that party nominations and fundraising are part of the partisan election process.

Finally, Plaintiffs argue that the summary statement should clarify that the terms of service will be reduced for "present and future" Supreme Court and Court of Appeals judges. But the summary does not contain any limiting language—voters will be on notice that the term reduction may apply to sitting as well as future judges. Plaintiffs have failed to prove that the summary statement prepared by the Secretary does not "fairly and impartially summarize the purpose" of the proposed measure. The Secretary of State prepared a summary statement that is fair and sufficient as it promotes an informed understanding of the

probable effect of the proposed initiative petition. Therefore, the Secretary's summary is sufficient and fair.

It is, therefore, ORDERED, ADJUDGED, AND DECREED that the Official Ballot Title, including the Summary Statement, is certified as prepared by the Secretary of State.

It is further ORDERED, ADJUDGED, AND DECREED that Counts I and II of Plaintiffs' Petition are DISMISSED WITHOUT PREJUDICE.

SO ORDERED THIS 26th Day of February, 2010.

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The Honorable Patricia S. Joyce  
Circuit Court Judge – Division IV

Dated: \_\_\_\_\_