

IN THE CIRCUIT COURT OF COLE COUNTY  
STATE OF MISSOURI

TIMOTHY P. ASHER,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 07AC-CC00648
	)	
ROBIN CARNAHAN,	)	
	)	
Defendant.	)	
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GREG SHUFELDT	)	
and	)	
STEVE ISRAELITE,	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 07AC-CC00666
	)	(consolidated with
ROBIN CARNAHAN, et al.,	)	Case No. 07AC-CC00648)
	)	
Defendants.	)	

**AMENDED JUDGMENT**

This case is a consolidation of two lawsuits challenging the ballot title summary prepared by the Secretary of State and the fiscal note and fiscal note summary prepared the Auditor with respect to a proposed amendment to the Missouri Constitution that was submitted to the Secretary of State as a proposed initiative petition. The lawsuits also make certain other constitutional claims. For reasons hereinafter stated, the Court sustains the challenge to the ballot title summary and denies the challenge to the fiscal note and fiscal note summary. The remaining constitutional claims are also denied.

**FINDINGS OF FACT**

1. Plaintiffs Timothy P. Asher, Greg Shufeldt and Steve Israelite are residents and citizens of the State of Missouri.

2. Defendant Robin Carnahan is the duly elected and acting Secretary of State of the State of Missouri (the "Secretary of State").

3. Defendant Susan Montee is the duly elected and acting Auditor of the State of Missouri (the "Auditor").

4. On June 15, 2007, Plaintiff Asher submitted a proposed initiative petition sample sheet proposing an amendment to the Missouri Constitution to Defendant Carnahan pursuant to 116.332, RSMo.

5. A true and correct copy of the proposed amendment is a Joint Exhibit to the Joint Stipulation of Facts and Exhibits previously filed by the parties and is also attached to this opinion as part of Attachment A.

6. On June 15, 2007, Defendant Carnahan transmitted a copy of the initiative petition sample sheet to Defendant Montee pursuant to section 116.332, RSMo for preparation of a fiscal note and a fiscal note summary as required by section 116.175, RSMo.

7. On July 2, 2007, Defendant Carnahan transmitted a copy of the proposed summary statement for the proposed initiative petition sample sheet to Attorney General Jay Nixon for review of the summary statement pursuant to 116.334, RSMo.

8. On July 5, 2007, Defendant Montee transmitted a copy of the fiscal note and proposed fiscal note summary for the proposed initiative petition sample sheet to Attorney General Jay Nixon for review of the proposed fiscal note summary. A copy of the fiscal note is attached as Joint Exhibit 2 to the Joint Stipulation of Facts and Exhibits previously filed by the parties.

9. On July 11, 2007, Attorney General Nixon approved the summary statement, and on July 13, 2007, Attorney General Nixon approved the fiscal note summary.

10. On July 19, 2007, pursuant to section 116.180, RSMo, Defendant Carnahan

certified the official ballot title, which, in accordance with 116.180, consists of the summary statement and the fiscal note summary.

11. A true and correct copy of the official ballot title is Joint Exhibit 3 to the Joint Stipulation of Facts and Exhibits previously filed by the parties and is attached to this opinion as part of Attachment A.

12. On July 26, 2007, Timothy Asher filed a lawsuit against the Secretary of State in the Circuit Court of Cole County, Missouri, Cause No. 07AC-CC00648 challenging the ballot title and summary statement prepared in connection with the proposed amendment.

13. On July 30, 2007, Greg Shufeldt and Steve Israelite filed a lawsuit against the Secretary of State and Auditor in the Circuit Court of Cole County, Missouri, Cause No. 07AC-CC00666.

14. On August 22, 2007, Cause No. 07AC-CC00648 and Cause No. 07AC-CC00666 were consolidated.

15. Plaintiffs Greg Shufeldt and Steve Israelite called Jeanne Jarrett as an expert witness to support their position that the fiscal note was not adequate. Ms. Jarrett testified she had been retained by counsel for Plaintiffs in early September, and therefore had approximately 3 ½ months to prepare an estimated costs or savings. Ms. Jarrett did not provide the court with an estimated costs or savings that should be in the fiscal note, nor did she provide the court with a minimum costs or savings, or a range of costs or savings. The Court does not find her testimony credible in support of the proposition that the fiscal note and summary are insufficient or unfair.

16. None of the parties, other than the Auditor, provided testimony or other evidence of the estimated costs or savings.

17. The Auditor's Chief of Staff Joe Martin testified he assessed responses from numerous departments and agencies to determine that the estimated costs or savings is unknown. The Court finds his testimony credible in support of the proposition that the fiscal note and summary is fair and sufficient.

### **CONCLUSIONS OF LAW**

1. Section 116.134 of the Revised Statutes of Missouri directs the Secretary of State to prepare the ballot summary for an initiative petition, using "language neither intentionally argumentative nor likely to create prejudice either for or against a proposed measure".

2. If a party contends the ballot title is "insufficient or unfair", RSMo §116.190(1) charges the Circuit Court of Cole County, Missouri with hearing that case.

3. In its decision, the Circuit Court of Cole County, Missouri is required to certify a summary statement portion of the official ballot title to the secretary of state. RSMo 116.190(3).

4. Missouri courts have previously identified "insufficient or unfair" as follows:

Insufficient means "inadequate; especially lacking adequate power, capacity or competence." The word "unfair" means to be "marked by injustice, partiality, or deception." Thus, the words insufficient and unfair . . . mean to inadequately and with bias prejudice, deception and/or favoritism state the consequences of the initiative.

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

5. The ballot summary language in this case is insufficient and unfair. Rather than remand the summary back to the Secretary, this Court is required to draft and certify a ballot title summary that is sufficient and fair.

6. The Court further finds that the fiscal note portion of the official ballot title prepared by the Auditor and certified by the Secretary of State is sufficient and fair.

## DISCUSSION

### **A. Summary Statement Portion of the Official Ballot Title**

Plaintiffs' first complaint about the summary statement is the use of the term "affirmative action." Although the proposed amendment does not use the term affirmative action, an examination of the purpose of the amendment, together with an examination of the definition of affirmative action, makes it clear that the purpose of the proposed amendment is to ban programs that fit the definition of affirmative action.

The equal protection clause of the Missouri Constitution, Art. I, Sec. 2, already severely limits any discriminatory practice by the State. Race, national origin and gender are suspect classifications that are subject to heightened scrutiny. *See Powell v. American Motors Corp.*, 834 S.W.2d 184 (Mo. banc1992); *State v. Stokely*, 842 S.W.2d 77 (Mo. banc 1992).

The proposed amendment would therefore ban programs that are currently allowed under the state constitution's equal protection clause and which are intended to improve opportunities or eliminate the lingering affects of past discrimination against women and minorities. These types of programs are commonly referred to as "affirmative action" programs. For example, Webster's Third New International Dictionary defines affirmative action as "an active effort to improve employment or educational opportunities for members of minority groups and women." Webster's Third New International Dictionary of the English Language (Philip Babcock Gove, Ph.D. ed.,

Mirriam-Webster Inc. 1993). Black's Law Dictionary defines "affirmative action" as "a set of actions designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination." Black's Law Dictionary 60 (7<sup>th</sup> ed. 1999).

The use of the term "affirmative action" allows those reviewing the ballot title to know the issue that the proponents of initiative seek to put before the voters. Regardless of whether a voter is for or against affirmative action programs, that voter will be aware of why they are being asked to sign the petition and what they may ultimately be voting on. The most significant provision of the amendment would ban affirmative action programs in Missouri, as the first bullet point in the Secretary's summary states. Accordingly, the Court finds nothing "insufficient or unfair" from the use of the term "affirmative action programs" in the ballot summary.

The second bullet point in the Secretary's summary states that the proposed amendment will:

"allow preferential treatment based on race, sex, color, ethnicity, or national origin to meet federal program funds eligibility standards..."

It is this second bullet point which the Court finds troubling because it suggests that the proposed amendment is first going to do away with one class of preferential treatment programs, i.e. affirmative actions programs, and then replace the affirmative action programs with some other kind of preferential treatment programs. The purpose and effect of the proposed amendment is to ban certain preferential programs unless a

particular program is necessary to qualify for federal funding. The federal eligibility exception, as well as the court exception, only serves as an exception to programs that are being banned by the amendment. While the Secretary argued, and this Court agrees, that the term “affirmative action programs” may be utilized to describe in the first sentence what is being banned, the second sentence containing the exception must then grammatically utilize the same subject to which the exception applies. The Court finds no merit to the Secretary’s argument that it would be “confusing, unfair, and misleading to voters to state in one bullet point of the summary that the petition bans affirmative action programs; and state in the very next bullet point that it allows affirmative action programs”, pages 12-13 of Defendants’ Post-Trial Brief.

**B. Fiscal Note**

Plaintiffs Shufeldt and Israelite claim that the Auditor’s fiscal note fails to meet a statutory requirement that the note actually provide an estimate of the measure’s cost or savings.

Section 116.175.3 provides that the fiscal note must state the measure’s estimated cost or savings, if any, to state and local governmental entities. The fiscal note prepared by the Auditor meets § 116.175.3’s requirements. Each individual entry in the fiscal note states a particular entity’s estimate of the cost or savings of the measure, if any, as to that entity. The Auditor’s decision to have the fiscal note consist of a collage of estimates of costs and savings from individual governmental units is a choice of form of presentation for the Auditor. Given the time constraints and lack of subpoena power, this Court cannot say that her choice of form fails to comply with the statute. While the Auditor

could have included a combined net estimate of cost or savings for all entities in the note, § 116.175.3 did not require her to do so.

Aside from form, Plaintiffs failed to show that the Auditor's fiscal note was insufficient or unfair. In *Overfelt v. McCaskill*, 81 S.W.3d 732, 737 (Mo. App. W.D. 2002), the court held that establishing insufficiency or unfairness of a fiscal note required a plaintiff to prove "that a better estimate was available" to the Auditor. 81 S.W.3d at 737. "Without such evidence," the court held, the plaintiff "could not establish that the [fiscal note] was insufficient or unfair..." *Id.*

Here, Plaintiffs Shufeldt's and Israelite's attack on the Auditor's fiscal note fails for a lack of proof, just like the plaintiff's claim in *Overfelt*. The testimony of their expert did not prove that there was available to the Auditor an estimate that was better than what the Auditor obtained from the state and local governmental entities. Plaintiffs' expert did not have an opinion as to what the correct estimate of cost or savings of the measure would be and she also admitted that she did not know how the proposed amendment would affect any particular state and local governmental entity.

### **C. Fiscal Note Summary**

Plaintiffs Shufeldt and Israelite failed to prove that the Auditor's fiscal note summary was insufficient or unfair. *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo. App. W.D. 1994), held that "[a]s applied to the fiscal note summary, insufficient and unfair means to inadequately and with bias, prejudice, deception and/or favouritism



synopsise in [50] words or less, the fiscal note.”<sup>1</sup> As with the summary statement portion of the official ballot title, the Auditor’s fiscal note summary is not required to present “the best language for describing the [measure’s] effect.” *Id.* The important test is whether the language fairly and impartially summarizes the fiscal note. Within the 50-word limit, the summary need not set out the details of the fiscal note. *See Bergman*, 988 S.W.2d at 92.

Here, the Auditor’s fiscal note summary fairly and impartially summarizes the fiscal note within the 50-word parameter. Indeed, Plaintiffs’ expert agreed at trial that the fiscal note summary accurately or fairly summarized the responses from the state and local governmental agencies that were listed in the fiscal note.

#### **D. Requirement of a Rule (Shufeldt/Israelite Petition – Count IV)**

In Count IV of their petition, Plaintiffs Shufeldt and Israelite make the claim that Defendant Montee was required to promulgate a rule for preparation of fiscal notes.

Plaintiffs cite no statutory provision that would require the Auditor to promulgate a rule for fiscal note preparation, and Chapter 116 does not impose one. As such, their claim fails as a matter of law. “An administrative agency need not promulgate rules ... simply because it has the power to do so.” *Missouri National Education Assoc. v. Missouri State Bd. Of Education*, 34 S.W.3d 266, 287 (Mo. App. W.D. 2000), citing *Artman v. State Bd. of Registration for the Healing Arts*, 918 S.W2d 247, 251 (Mo. banc

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<sup>1</sup> When *Hancock* was decided, the word limit for the fiscal note summary was 35 words. It is now 50 words.

1996). “In the absence of a statutory restraint the choice whether to develop policy by rule, ad hoc adjudication, or both, rests with the discretion of the agency.” *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 357 n.32 (Mo. banc 2001).

#### **E. Single Subject Violation**

Plaintiffs Shufeldt and Israelite claim in Count V that the proposed amendment violates Article III, § 50’s single-subject requirement.

This claim is not ripe until petition signatures have been gathered and the Secretary of State certifies the petition for inclusion on the ballot. *See Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990).

Accordingly, the Court dismisses this claim without prejudice.

#### **F. Federal Law and Equal Protection Violations**

Plaintiffs Shufeldt and Israelite claim in Count VI that the proposed amendment, if adopted, would violate various federal statutory and constitutional provisions.

These claims are not ripe either. As the Missouri Supreme Court held in *State ex rel. Dahl v. Lange*, 661 S.W.2d 7 (Mo. banc 1983):

Until the people have voted on the initiative, judicial assessment of the constitutional validity of the proposal would be premature and an encroachment on the legislative function. Should the voters reject the amendment, the Court’s decision as to constitutionality would be an advisory opinion. Courts in Missouri will not render advisory opinions.

*Id.* at 8 (internal citations omitted). *See also Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990) (Missouri courts do not “give advisory

opinions as to whether a particular proposal would, *if adopted*, violate some superseding fundamental law, such as the United States Constitution.”).

**ORDER**

IT IS HEREBY ORDERED that Plaintiffs’ request for alternative summary language is granted and the following Summary Statement portion of the Ballot Title is certified to the Secretary of State:

Shall the Missouri Constitution be amended to:

Ban state and local government affirmative action programs that give preferential treatment in public contracting, employment, or education based on race, sex, color, ethnicity, or national origin unless such programs are necessary to establish or maintain eligibility for federal funding or to comply with an existing court order ?

IT IS FURTHER ORDERED that the Fiscal Note and Fiscal Note Summary is certified as previously prepared by the Auditor and certified by the Secretary of State. Plaintiffs Shufeldt and Israelite’s claims with respect to the Fiscal Note and Fiscal Note Summary are denied.

IT IS FURTHER ORDERED that all remaining Plaintiffs’ claims are denied.

SO ORDERED THIS 10<sup>th</sup> Day of January, 2008.

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Richard G. Callahan  
Circuit Court Judge, Division II

# COURT ATTACHMENT A

## THE MISSOURI CIVIL RIGHT INITIATIVE

Be it resolved by the people of the State of Missouri that the Constitution be amended.

One new section is adopted to be known as section 34 of Article I, to read as follows:

Section 34. 1. The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

2. This section shall apply only to action taken after the section's effective date.
3. Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.
4. Nothing in this section shall be interpreted as invalidating any court order or consent decree that is in force as of the effective date of this section.
5. Nothing in this section shall be interpreted as prohibiting action that must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.
6. For the purposes of this section, "state" shall include, but not be necessarily limited to, the state itself and any of its departments, agencies, commissions, boards, and other units; any political subdivision and any department, agency, commission, board, or other unit of a political subdivision; any public institution of higher education, junior college district, and school district; any municipal corporation; any public corporation, public entity, or other instrumentality of the state or a political subdivision, irrespective of the capacity in which the state or any such instrumentality or entity shall be acting.
7. The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing Missouri antidiscrimination law.
8. This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

### OFFICIAL BALLOT TITLE AS CERTIFIED BY SECRETARY OF STATE

Shall the Missouri Constitution be amended to:

- Ban affirmative action programs designed to eliminate discrimination against, and improve opportunities for, women and minorities in public contracting, employment and education; and
- Allow preferential treatment based on race, sex, color ethnicity, or national origin to meet federal program funds eligibility standards as well as preferential treatment for bona fide qualifications based on sex ?

The total cost or savings to state and local governmental entities is unknown. Most state governmental entities estimate no costs or saving; however, costs or savings related to future contracts are unknown. Some local governments estimate no costs or savings, but prohibition of certain municipal policies may result in unknown costs.