

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

TIMOTHY P. ASHER)	
)	
Plaintiff,)	
v.)	Case No. 08AC-CC01012
)	
ROBIN CARHAHAN,)	
)	
Defendant)	
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)	
BRENDA L. JONES, et al.)	
)	
Plaintiffs)	
v.)	Case No. 08AC-CC01047
)	
ROBIN CARNAHAN)	
)	
Defendant)	
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)	
STEVE ISRAELITE,)	
)	
Plaintiff)	
v.)	Case No. 08AC-CC01019
)	
ROBIN CARNAHAN and)	
SUSAN MONTEE,)	
)	
Defendants)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND JUDGMENT OF THE COURT**

Now on this 26th day of June, 2009, the Court again takes up this matter for the purpose of entering its final order and judgment.

This case is a consolidation of three lawsuits. On May 19, 2009, the cases were called for trial. All parties appeared by counsel; Plaintiffs Asher and Jones appeared in person. The Court heard and ruled upon preliminary matters. Plaintiffs requested findings of fact and conclusions of law. Evidence was thereafter adduced. At the close of the evidence, the Court heard arguments from the parties and allowed the parties until June 1, 2009, to submit post-trial briefs. The parties thereafter filed their briefs, and the matter was taken under submission.

All three lawsuits make various constitutional claims as well as challenges to the ballot title summary prepared by the Secretary of State and the fiscal note and fiscal note summary prepared by 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. Two of the lawsuits also claim that the Secretary of State should have rejected the proposed initiative petition for failure to comply with Section 116.050, RSMo, because the petition proposes to enact one new section to the Constitution to be known as "Section 34 of Article I" when a "Section 34" already exists in the Missouri Constitution. Because the Court concludes that the Secretary should have rejected the proposed petition because of the failure to include the text of the existing Article I, Section 34, and the duplicative numbering of constitutional sections, the remaining claims may be moot. Nevertheless, in the interest of judicial efficacy, the Court addresses all issues raised so that the parties' rights may be finally determined.

FINDINGS OF FACT

The Court, having been duly advised in the premises, now enters the following as its findings of fact.

1. Plaintiffs Timothy Asher, Steve Israelite, Brenda Jones, Rabbi Randy Fleisher, Christine J. Bierman, and Sayra Gordillo 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 November 5, 2008, Plaintiff Asher submitted a sample sheet for a proposed initiative petition to amend the Missouri Constitution to Defendant Carnahan pursuant to

Section 116.332, RSMo.

5. A true and correct copy of the text of the proposed amendment was received into evidence as Joint Exhibit 1.

6. On November 6, 2008, Defendant Carnahan transmitted a copy of a sample sheet for a proposed initiative petition 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 November 25, 2008, Defendant Carnahan transmitted a copy of the proposed summary statement for the proposed initiative petition to Attorney General Jay Nixon for review pursuant to Section 116.334, RSMo.

8. On November 26, 2008, Defendant Montee transmitted a copy of the fiscal note and proposed fiscal note summary for the proposed initiative petition to Attorney General Jay Nixon for review of the proposed fiscal note summary. A true and correct copy of the fiscal note and fiscal note summary was received into evidence as Joint Exhibit 2.

9. On December 5, 2008, Attorney General Nixon issued Opinion Letter 183-2008 approving the legal content and form of the summary statement.

10. On December 5, 2008, Attorney General Nixon issued Opinion Letter 184-2008 approving the fiscal note summary.

11. On December 5, 2008, the Office of Defendant Montee transmitted the fiscal note and fiscal note summary to Defendant Carnahan.

12. On December 10, 2008, pursuant to Section 116.180, RSMo, Defendant Carnahan certified the official ballot title, which, in accordance with Section 116.180, consists of the summary statement and the fiscal note summary.

13. A true and correct copy of the official ballot title was received into evidence as Joint Exhibit 3.

14. On December 19, 2008, Timothy Asher filed his Petition Challenging Ballot Title against Defendant Carnahan in the Circuit Court of Cole County, Missouri, Cause No. 08AC-CC01012.

15. On December 19, 2008, Steve Israelite filed his Petition for Declaratory Judgment and Injunctive Relief against Defendant Carnahan and Defendant Montee in the Circuit Court of Cole County, Missouri, Cause No. 08AC-CC01019.

16. On December 18, 2008, Brenda Jones and Rabbi Randy Fleisher filed their Petition for Declaratory Judgment and Injunctive Relief against Defendant Carnahan, Cause No. 08AC-CC01047.

17. On February 5, 2009, Brenda Jones, Rabbi Randy Fleisher, Christine J. Bierman, and Sayra Gordillo filed their First Amended Petition for Declaratory Judgment and Permanent Injunction against Defendant Carnahan in Cause No. 08AC-CC01047.

18. On February 17, 2009, Cause No. 08AC-CC01019 and Cause No. 08AC-CC01047 were consolidated into Cause No. 08AC-CC01012, with Cause No. 08AC-CC01012 as the lead case.

19. On March 24, 2009, Defendant Montee filed her Motion to Dismiss Counts III and IV of Plaintiff Israelite's Petition, or in the Alternative, for Judgment on the Pleadings on Counts III and IV of Plaintiff Israelite's Petition. (This motion will be referred to as a "Motion to Dismiss" below.) On April 8, 2009, the Court ruled that said Motion would be taken with the case.

20. On May 1, 2009, Plaintiffs Jones, et al. filed their Motion for Leave to File a

Second Amended Petition and to Shorten Time to File Responsive Pleadings, which was granted by the Court on May 11, 2009.

21. On May 15, 2009, Defendant Montee filed her Motion to Dismiss the pleadings of the Jones Plaintiffs' Second Amended Petition that challenged the fiscal note and fiscal note summary.

22. On May 18, 2009, Plaintiff Asher filed his Motion to Dismiss Counts III, IV and V of Plaintiff's Israelite's Petition.

23. Before trial on May 19, 2009, Plaintiff Asher filed his Motion to Dismiss Counts IV and V of the Jones' Plaintiffs Second Amended Petition.

24. At trial, certain testimony of Jeanne Jarrett was received into evidence. Ms. Jarrett was employed as an expert witness in September, 2007, by Plaintiff Steve Israelite and a co-plaintiff in a case filed in 2007 that challenged, among other things, the State Auditor's fiscal note and fiscal note summary issued in connection with an earlier, identical proposed initiative. (*Shufeldt v. Carnahan*, Cause No. 07AC-CC00666, consolidated with *Asher v. Carnahan* under Cause No. 07AC-CC000648, Circuit Court of Cole County, Missouri.) Transcripts of two depositions of Jeanne Jarrett in the previous case, taken on November 1 and December 6, 2007, respectively, were received into evidence at the trial of this case. The transcript of the cross-examination of Ms. Jarrett in the trial of the previous case on December 17, 2007, was also received into evidence in the trial of this case.

25. Ms. Jarrett testified that she had been retained by counsel for Plaintiffs in early September, 2007, but that she had not prepared an estimate of costs or savings that would result from the proposed initiative. 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.

26. The deposition testimony of Louis Kruger, Executive Director of Public Schools for the St. Louis Public Schools, was received into evidence. Mr. Kruger had not consulted any reports or budgets before his testimony. He had not made any estimates of dollar figures of the effect of the proposed amendment. The Court does not find his testimony credible in support of the proposition that the fiscal note and fiscal note summary are insufficient or unfair.

27. The Auditor's Chief of Staff, Joe Martin, testified in person, and transcripts of Mr. Martin's depositions in this case and in the previous case referred to above (*Shufeldt v. Carnahan*, Cause No. 07AC-CC00666, consolidated with *Asher v. Carnahan* under Cause No. 07AC-CC000648, Circuit Court of Cole County, Missouri.), were admitted into evidence. Mr. Martin assessed responses from numerous departments and agencies to determine that the estimated costs or savings are 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

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

A. Section 116.050 Claim (Jones Count II, Israelite Count I)

Section 116.050 R.S.Mo. 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,

R.S.Mo. Asher's proposed initiative petition submitted to the Secretary of State indicated that it would “create a new Section 34 to Article I of the Missouri Constitution.” The proposed petition includes no reference to the existing Section 34 of Article I of the Missouri Constitution and does not include the text of the current constitutional provision. The Secretary of State is required to reject a proposed initiative petition if its form does not comply with the requirements of § 116.050, R.S.Mo. *See* R.S.Mo. § 116.332.

Plaintiffs, other than Asher, contend and the Court agrees that the proposed initiative by its plain language will repeal the existing Section 34 of Article I. The plain language of Asher’s initiative petition — stating that it would create a “new” Article I, § 34 — implies that the existing Article I, § 34 would be replaced. At trial, Asher offered no evidence as to his intention with respect to the current constitutional provision, although it is doubtful that such parole evidence would have been admissible.

Defendant Carnahan, along with Plaintiff Asher, argue that the failure of the proposed initiative petition to include the existing Section 34 in bracketed material shows there is clearly no intent to repeal the existing Section 34, Article I of the Missouri Constitution. As to the seeming untidiness of having multiple sections of Constitution with the same number, they point to *Barnes v. Bailey*, 706 S.W.2d 25 (Mo. banc. 1986), for the proposition that our State Supreme has given its blessing to the practice of duplicative numbering of sections of our State Constitution.

The case before this Court is distinguishable from *Barnes v. Bailey* on the key fact that the duplicate sections at issue in *Barnes* had already been adopted by the voters at the same election. To the extent that new duplicative sections were created, they were created simultaneously at the same election. Accordingly, the Court interpreted § 116.030, which

addresses conflicting measures approved at the same election, and decided the case based on its interpretation. Section 116.030 is not at issue in the present case.

The result in *Barnes v. Bailey* was premised on the Court’s view that it is the function of courts “to give effect, if at all possible, to the will of the people in passing the amendments.” *Id.* at 28. The current case is distinguishable from *Barnes*. The voters have not yet considered Asher’s proposal; indeed, no voter has yet signed a petition to put it before voters. Unlike an initiative to amend the Constitution that has been already approved by voters, Asher’s proposed initiative is not entitled to deference. Asher may still proceed to put his initiative on the ballot in one of two ways. He may submit to the Secretary of State an initiative petition that indicates the current Article I, § 34 would be repealed by including its text in brackets and underlining the new language he proposes for the Constitution, or he may submit a petition that would result in the creation of a new section of the Missouri Constitution in a place within that constitution that is not already occupied. Whichever he chooses, *Barnes* does not stand for the proposition that the Courts are powerless to prohibit duplicative numbering of sections in our Constitution in the pre-initiative petition process.

B. Summary Statement Portion of the Official Ballot Title

Section 116.334 of the Revised Statutes of Missouri directs the Secretary of State to prepare the summary statement for an initiative petition, using “language neither intentionally argumentative nor likely to create prejudice either for or against a proposed measure”. If a party contends the ballot title is “insufficient or unfair”, § 116.190.1, RSMo. charges the Circuit Court of Cole County, Missouri with hearing that case. 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).

The language of the summary statement of the ballot title in this case is inadequate, insufficient, unjust and unfair because of its use of two separate subjects in its bullet points. Rather than remand the summary back to the Secretary as the Secretary requests, this Court is required to draft and certify a ballot title summary that is sufficient and fair. *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 83 (Mo. App. W.D. 2008); § 116.190.4, RSMo.

The ballot summary statement prepared by the Secretary contains two separate “bullet points” with two separate subjects. Taken together, the Summary erroneously and unfairly indicates that the amendment contains two different aims: one aim which addresses “affirmative action programs,” which will be banned; and a second aim which addresses certain types of “preferential treatment,” which will be allowed. The error is exasperated by describing the groups affected as two different groups, the first group as “women and minorities,” while the second group as those defined by “race, sex, color, ethnicity, or national origin.” The error is then further compounded by describing the scope of the first aim as “public contracting, employment and education,” while there is no limitation of scope described for the preferential treatment of the second aim.

The Court finds the summary statement unfair and insufficient because 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, to comply with an existing court order, or consists of bona fide job qualifications based on sex. The three exceptions only serve as exceptions to programs that are being banned by the amendment.

Plaintiffs also challenge the choice of certain words in the summary statement. First, Plaintiff Asher challenges the words “affirmative action.” The use of the words “affirmative action” in the first bullet point of the summary statement is fair and sufficient. Although the proposed amendment does not use “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, Article I, Section 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. banc 1992); *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 effects of past discrimination against women and minorities. These types of programs are commonly referred to as “affirmative action” programs. *See Webster’s Third New International Dictionary* (Philip Babcock Grove, Ph.D. ed., Mirriam-Webster Inc. 2002) (defining affirmative action as “an active effort to improve employment or educational opportunities for members of minority groups and women”); *Black’s Law Dictionary* 60 (7th ed. 1999) (defining 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”).

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 of State's summary states. Accordingly, the Court finds nothing "insufficient or unfair" from the use of the words "affirmative action programs" in the ballot summary.

Plaintiff Asher also argues that the Secretary's description of affirmative action programs as programs that are "designed to eliminate discrimination against, and improve opportunities for women and minorities" is duplicative because the use of the term "affirmative action program" already incorporates this meaning. While the Court is sympathetic to that argument and would perhaps use different language, the Court does not find that such redundancy renders the Summary unfair or inadequate.

Some plaintiffs also argue that the use of the term "women and minorities," rather than all five categories of persons specified in the proposed amendment render the Summary unfair and inadequate because the proposed amendment only targets some minorities (of certain racial, color, ethnic, or national origins) and not others (based on religion, disability, veteran's status, age, or sexual orientation). However, as the Missouri Supreme Court held in *Bergman*, "whether the summary statement prepared by the Secretary of State is the best language for describing the [initiative] is not the test." *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999). "[E]ven if the language proposed by [the opponents] is more specific, and even if that level of specificity might be preferable," that does not establish that the existing title is unfair or insufficient. *Id.* That "aspects of the ballot initiative or consequences resulting there from" are not included "does not render the summary statement either insufficient or unfair." *Overfelt v. McCaskill*, 81 S.W.3d 732, 739 (Mo. App. W.D. 2002). *See also Brown v. Blum*, 9 S.W.3d 840, 851 (Tex. App. – Houston [14th Dist.] 1999) (rejecting argument that a reference in ballot title to

“minorities” was overly broad and misleading). Therefore, even though the Secretary of State could have used a more specific word than “minorities,” she was not required to do so.

“Minorities” is a common word used in descriptions of existing state affirmative action programs. For example, the State’s Office of Supplier and Workforce Diversity within the Office of Administration has a certification program for minority and women business enterprises (MBEs and WBEs), and Executive Order 05-30 requires all state agencies “to make every feasible effort to target the percentage of goods and services procured from certified MBEs and WBEs to 10% and 5%, respectively.” Exec. Order 05-30.¹ It is also commonly used in dictionary definitions. *See, e.g.,* Webster’s Third New International Dictionary (Philip Babcock Gove, Ph.D. ed., Merriam-Webster Inc. 2002). Thus, the word “minorities” fairly and sufficiently puts voters and potential petition signers on notice about the types of programs that the proposed amendment would affect because “minorities” is the word used by many such programs.

In conclusion, neither the proponents, the opponents, nor the Court, write summary statements; Defendant Carnahan, in her official capacity as Secretary of State does. The important, and only test, is whether the language fairly and impartially summarizes the purposes of the measure, so that voters will not be deceived or misled. In this case, the Secretary of State prepared a summary statement that, with the exception of the double subjects, is not unfair, insufficient, or inadequate as it promotes an informed understanding of the probable effect of the proposed initiative petition. Mindful of the Court’s authority only to modify what is insufficient and unfair, the Court does not have the authority to re-write the entire summary, *Cures Without Cloning*, 259 S.W.3d 76, at 83. If it did have such authority, it would certify the Summary

¹ Available at http://www.sos.mo.gov/library/reference/orders/2005/eo05_030.asp. See also <http://www.oswd.mo.gov/> (last visited May 28, 2009).

adopted in its earlier case, *Asher v. Carnahan, Cole county # 07AAC-CC00648 and 07AC-CC00666*.

C. Fiscal Note, Plaintiff Israelite

Plaintiff Israelite claims 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, Plaintiff Israelite 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, Plaintiff's attack on the Auditor's fiscal note fails for a lack of proof, just like the plaintiff's claim in *Overfelt*. Neither the testimony of the expert from the previous case, Jeanne Jarrett, nor the testimony of Louis Kruger proved that there was available to the Auditor an

estimate that was better than what the Auditor obtained from the state and local governmental entities. Neither of Plaintiffs' witnesses had an opinion as to what the correct estimate of cost or savings of the measure would be. Plaintiffs' expert, Jeanne Jarrett, did not have any opinion how the proposed amendment would affect any particular state and local governmental entity.

D. Fiscal Note Summary, Plaintiff Israelite

Plaintiff 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, or favoritism synopsise in [50] words or less, the fiscal note."² (Internal citation omitted.) 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 v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999).

Here, the Auditor's fiscal note summary fairly and impartially summarizes the fiscal note within the 50-word parameter. Indeed, Plaintiffs' expert agreed 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.

E. Motions to Dismiss by Defendant Montee and Plaintiff Asher

The Motion to Dismiss filed by Defendant Montee in respect to Counts III and IV of Plaintiff Israelite's Petition asserted that those counts were barred under the principles of *res judicata* and collateral estoppel. Similarly, the Motion to Dismiss filed by Plaintiff Asher as to

² When *Hancock* was decided, the word limit for the fiscal note summary was 35 words. It is now 50 words.

Counts III, IV & V of Plaintiff's Israelite's Petition rested on the ground of *res judicata*. Because the Court has considered the evidence on the merits above, the two motions to dismiss are denied as moot.

Defendant Montee and Plaintiff Asher filed motions to dismiss the allegations against Defendant Montee that were asserted in the Second Amended Petition of the Jones Plaintiffs as first proposed in their Motion for Leave to file it on May 1, 2009. The controlling statute, section 116.190, provides that all challenges to the fiscal note or fiscal note summary shall be filed within ten (10) days of the Secretary of State's certification of the ballot title. The Jones Plaintiffs did not make any effort to challenge the fiscal note and fiscal note summary within the appointed time; their pleadings related solely to the summary statement portion of the ballot title only. Subsection 3 of the statute provides for separate challenges to the summary statement on one hand and to the fiscal note or fiscal note summary on the other hand. Separate remedies are provided for each type of challenge in subsection 4. The statutes and controlling case law leave no doubt that the two types of challenges are separate things. *Cures Without Cloning v. Pund*, 259 S.W.3d 76 (Mo. App. W.D. 2008); § 116.190.3 & .4.

The Jones Plaintiffs failed to plead any cause of action concerning the fiscal note or fiscal note summary within the ten days specified by statute, and Defendant Montee was not named as a party in their original petition. There was no relevant pleading, then, back to which an amended pleading could relate. *Goodkin v. 8182 Maryland Assoc. Ltd. Partnership*, 80 S.W.3d 484 (Mo. App. E.D. 2002). All of the Jones Plaintiffs' claims against Defendant Montee are barred by the time limitation of section 116.190.1 and shall be dismissed with prejudice.

F. Requirement of a Rule

1. Plaintiff Israelite claimed that Defendant Montee was required to promulgate a rule for preparation of fiscal notes. Plaintiff cited 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.W.2d 247, 251 (Mo. banc 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).

G. Single Subject Violation

Plaintiff Israelite and the Jones Plaintiffs urged that the proposed amendment violates Article III, § 50’s single-subject requirement. Missouri courts have developed clear rules of construction in applying this constitutional principle. A proposed constitutional amendment will be liberally and nonrestrictively construed so that provisions connected with or incident to the central purpose of the proposal are harmonized and not treated as separate subjects. *Committee for a Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503, 511 (Mo. banc 2006); *United Gamefowl Breeding Association v. Nixon*, 19 S.W. 3d 137, 140 (Mo. banc 2000); see also *Knight v. Carnahan*, 2009 Mo. App. LEXIS 140 (WD70257, February 10, 2009). A proposal may amend several articles in the constitution so long as all proposals are germane to a single purpose. *Id.*

The proposed amendment clearly focuses on the single subject of discriminatory treatment in certain government functions. It does not violate the single-subject rule of the Constitution.

H. Federal Law and Equal Protection Violations

Count VII of Plaintiff Israelite's petition alleges that the proposed amendment, if adopted, would violate various federal statutory and constitutional provisions. These claims are not ripe for decision at this time. 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.").

JUDGMENT

On the findings and conclusions hereby entered by the Court,

IT IS ORDERED that the Certification of Official Ballot Title issued on December 10, 2008, is hereby vacated and set aside. In the alternative,

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiffs' requests for alternative summary language are 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 affirmative action programs designed to eliminate discrimination against, and improve opportunities for, women and minorities in public contracting, employment, and education unless such programs and opportunities are necessary to establish or maintain eligibility for federal funding, to comply with an existing court order, or consists of bona fide qualifications based on sex ?

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all claims with respect to the Fiscal Note and Fiscal Note Summary are denied.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Count VII of Plaintiff Israelite's Petition concerning violations of certain federal statutory and constitutional provisions is not ripe for determination and is DISMISSED, without prejudice.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all remaining requests for relief in the Plaintiffs' several petitions and in any remaining motions, to the extent they are not adjudicated above, are DENIED.

Richard G. Callahan
Circuit Court Judge, Division II