IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

TIMOTHY P. ASHER, Plaintiff, v. ROBIN CARNAHAN, Secretary of State, Defendant.	)	Case No. 07-AC-CC00648 Division II

GREG SHUFELDT and STEVE ISRAELITE, Plaintiffs, v. ROBIN CARNAHAN, Secretary of State, and SUSAN MONTEE, State Auditor, Defendants.	)	Case No. 07-AC-CC00666 Division II **CONSOLIDATED CASES**

AMICI CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI, AMERICAN CIVIL LIBERTIES UNION RACIAL JUSTICE PROGRAM, AND AMERICAN CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT

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I. INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in this nation's Constitution and civil rights laws. The Racial Justice Program (RJP) of the ACLU aims to preserve and extend constitutionally guaranteed rights to people who have historically been denied their rights on the basis of race. The RJP is committed to addressing the broad spectrum of issues that disproportionately and negatively impact people of color. The Women's Rights Project (WRP) was founded in 1972 by Ruth Bader Ginsburg, and since that time has been a leader in the legal battle to ensure women's full equality in American society. The WRP is dedicated to the advancement of the rights and interests of women, with a particular emphasis on issues affecting low-income women, immigrant women, and women of color. The ACLU of Eastern Missouri is a state affiliate of the national ACLU, with more than 4,000 members in the state.

Since its founding in 1920, the ACLU has played an active role in the battle for racial justice and women's rights and has long championed the constitutionality of affirmative action in appropriate circumstances. The ACLU supports affirmative action to secure racial diversity and gender equality in educational settings, workplaces, and government contracts, to remedy continuing systemic discrimination against people of color and women, and to help ensure equal opportunities for all people. In support of these principles, the ACLU has appeared in numerous cases before the Supreme Court of the United States both as direct counsel and as *amicus curiae*, including *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007), *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007), *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*,

539 U.S. 306 (2003), *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), *Craig v. Boren*, 429 U.S. 190 (1976), and *Reed v. Reed*, 404 U.S. 71 (1971).

In Missouri, the ACLU has appeared as *amicus curiae* in cases before the Supreme Court of Missouri (*e.g.*, *Saint Louis Univ. v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721 (Mo. 2007); *In re C.W.*, 211 S.W.3d 93 (Mo. 2007)), the Court of Appeals (*e.g.*, *State ex rel. Diehl v. Kintz*, 162 S.W.3d 152 (Mo. Ct. App. 2005); *In re C.W.*, No. ED 87800, 2006 WL 2728583, (Mo. Ct. App. 2006)), and in Circuit Courts (*e.g.*, *In re P.A.M.*, Cir. Ct. St. Charles Co., No. 06ADJU00114 (2006)). The ACLU has also appeared as direct counsel before this Court in *Jackson County v. State of Mo.*, Cir. Ct. Cole Co., No. 06AC-CC00587 (2006).

II. SUMMARY OF ARGUMENT

Plaintiff Timothy Asher and the Missouri Civil Rights Initiative's ("MoCRI") proposed Initiative ("the Initiative") seeks to dismantle current and prevent future affirmative action programs for women and minorities in the State of Missouri. In order to clarify the misleading language of the Initiative, Secretary of State Robin Carnahan has properly drafted ballot language that provides voters with the necessary notice of the true purpose and foreseeable effects of the Initiative. Since Secretary of State Carnahan's ballot language provides adequate notice, Plaintiffs cannot meet their burden of demonstrating that the language is either insufficient or unfair.

Courts and election officials have consistently recognized that affirmative action programs were the direct target of similar initiatives introduced in other states, and Secretary of State Carnahan's use of the term "affirmative action" comports with these previous interpretations. Additionally, courts have found that the term "affirmative action" has a commonly understood definition, which, in contrast to "discriminate" or "preferential treatment," provides voters with clear notice of the actual effects of the Initiative. In each state where a similar initiative has passed, it has been cited as the basis for dismantling a broad range of affirmative action programs, from college admissions programs to programs requiring data collection and reporting, targeted outreach, mentoring, and development.

Plaintiff Asher and the MoCRI boldly misappropriate the terminology of the American Civil Rights Movement in support of an Initiative that seeks to roll back the advances made in furtherance of race and gender equality, and the confusion that has been caused by this similarly worded initiative is well-established. The uncertainty inherent in the Initiative's language is further compounded by the deceptive tactics that have historically been employed by the

American Civil Rights Institute ("ACRI"), the national organization of which the MoCRI is an affiliate. A federal district court in Michigan found that the Michigan affiliate of ACRI had engaged in systematic voter fraud by telling voters that they were signing a petition *supporting* affirmative action programs—the very programs that initiative sought to dismantle—and similar behavior is alleged in a current initiative drive in Oklahoma. Whether a voter is for or against affirmative action, Secretary of State Carnahan's ballot language fairly and clearly alerts voters to the purpose of the Initiative and the consequences of their decision.

In contrast, the alternative ballot language proposed by Plaintiff Asher, which simply mirrors the language in the Initiative, is insufficient and deceptive for failing to mention that the purpose of the Initiative is to ban affirmative action programs. Neither the Secretary of State nor this Court is required to accept the ballot language put forth by the proponents of the Initiative, particularly when it is abundantly clear what the consequences of the Initiative are intended to, and will, be.

Finally, Plaintiff Asher's Initiative violates the single-subject rule of the Missouri Constitution, and Amici submit that this Court can and should review this deficiency at this stage of the initiative process. Where an initiative petition seeks to amend multiple subjects of the Constitution, voters asked to sign the petition are forced into the very predicament the single-subject rule was designed to prevent: choosing to support all of the propositions by placing them on the ballot or rejecting them in full. In this case, the Initiative violates the single-subject rule by combining five distinct classifications (race, sex, color, ethnicity, and national origin) and three separate governmental operations (public education, public employment, and public contracting). Based on the cost and energy expended in the initiative process and the likely public confusion perpetuated by single-subject rule violations, judicial review at this stage of the case is appropriate.

III. ARGUMENT

A. The Secretary of State's Ballot Language Should Be Upheld Since It Provides Adequate Notice in a Fair and Impartial Manner.

1. The Secretary of State's Ballot Title and Summary Is Presumptively Fair and Sufficient When Adequate Notice of the Initiative's Effect Is Conveyed.

It is axiomatic that there is a presumption in favor of the Secretary of State's ballot title and summary statement when such language provides adequate notice to the public.

Missouri statutes establish that the responsibility for preparing a summary statement of a proposed initiative petition lies solely with the Secretary of State, who must provide a "concise statement" that frames the question "using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure." Mo. Rev. Stat. § 116.334. The purpose of a ballot title and summary statement "is to give interested persons notice of the subject or a proposed [law] to prevent deception through use of misleading titles." *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. Ct. App. 2006) (quoting *Union Elec. Co. v. Kirpatrick*, 606 S.W.2d 658, 660 (Mo. 1980)). "If the title gives adequate notice, the requirement is satisfied." *Id.* (quoting *Union Elec. Co.*, 606 S.W.2d at 660).

In the instance of a challenge to the title and summary statement, a court should determine whether the text proffered by the Secretary of State gives prospective voters adequate notice about what the initiative would accomplish. *See id.* at 456. Ultimately, the test is not whether the language utilized by the Secretary of State is the *best* language, but whether the language fairly and impartially summarizes the purposes of the initiative. *See id.* at 457 (citing *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. Ct. App. 1999)).

Here, Plaintiffs bear the burden of showing that Secretary of State Carnahan's ballot title and summary statement are "insufficient or unfair." *See* Mo. Rev. Stat. § 116.190.3; *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d at 456 (quoting *Hancock v. Sec'y of State*, 885 S.W.2d 42, 49 (Mo. Ct. App. 1994)). The terms "insufficient" and "unfair" have been previously defined. "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 consequence of passage of the initiative]." *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d at 456 (quoting *Hancock*, 885 S.W.2d at 49) (citations omitted). The burden a plaintiff bears to establish insufficiency or unfairness is a heavy one – indeed, Amici are aware of no Missouri precedent in which a plaintiff has successfully displaced the Secretary of State's certified ballot title and language.

Plaintiffs cannot meet their burden of showing that the current ballot title and summary statement are inadequate or conveyed in a biased or deceptive manner because Secretary of State Carnahan's language fairly and adequately summarizes the purposes of the Initiative. Indeed, Secretary of State Carnahan's certified language describes the Initiative in a manner that is fundamental to a proper understanding of its actual purpose and likely effects.[1]

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[1] This case is similar to those in which courts have found that plaintiffs have failed to meet the heavy burden of showing that the ballot title and description are insufficient and unfair. *See Missourians Against Human Cloning*, 190 S.W.3d at 457 (finding that burden was not met and declining to choose between competing definitions of "human cloning" because "[t]o do so would edge [the court] toward a review of the merits of the initiative itself[,] . . . which is beyond the scope of review [the court has] been assigned by the legislature . . . ."); *Bergman*, 988 S.W.2d at 92 (finding that even if the level of specificity in plaintiffs suggested language might be preferable, plaintiffs were not able to show that the Secretary of State's summary statement on the conceal weapons referendum was insufficient and unfair); *Overfelt v. McCaskill*, 81 S.W.3d 732, 738 (Mo. Ct. App. 2002) (affirming trial court's finding that the summary statement was neither insufficient nor unfair in that it "sets forth the proposed tax increase and describes the types of programs that would be funded by the revenue generated by the tax increase"); *United Gamefowl Breeders Ass'n of Mo. v. Nixon*, 19 S.W.3d 137, 141 (Mo. 2000) (finding that the "ballot title here sufficiently and fairly indicates the single purpose: to prohibit fighting involving animals for the purpose of amusement, entertainment, wagering or gain," and the "title clearly poses whether such fighting should be outlawed, mentioning several common animal fights and summarizing the prohibitions" of the proposition).

2. *Plaintiffs Cannot Meet Their Burden Because the Secretary of State's Ballot Title and Summary Statement Fairly and Impartially Summarize the Purpose and Foreseeable Effects of the Initiative.*

The ballot title and summary statement prepared by the Secretary of State fairly and adequately summarize the purposes of the Initiative. As certified by the Secretary of State, the language that would appear on the ballot is:

> 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 savings, 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.

(Official Ballot Title As Certified by Sec'y of State on July 19, 2007)

In order to preserve and advance democratic values, the Secretary of State must ensure that the electorate is fairly apprised of what it is being asked to consider. As demonstrated below, Secretary of State Carnahan has fulfilled this mandate. The certified title and summary are fair and impartial so as to give adequate notice to voters of the Initiative's purpose and effect.

a. Use of the Term "Affirmative Action" Provides Necessary Notice of the Initiative's Actual Effects.

Plaintiff Asher argues that the Secretary of State's ballot title is "argumentative, prejudicial, conclusory, and untrue" because it states that the amendment would ban affirmative action programs for women and minorities. (*See* Asher Pet. ¶ 12(b).) While it is true that the Initiative itself does not use the term "affirmative action," affirmative action programs are and

have been consistently recognized to be the direct target of like initiatives introduced in other states. "Affirmative action" has a commonly understood meaning that encompasses the broad range of programs likely to be affected by the Initiative, and reference to it within the ballot title is necessary to provide the public with adequate notice of the Initiative's actual effects.

i. Courts and Election Officials Have Consistently Recognized Similarly Worded Initiatives as Seeking to Ban Affirmative Action Programs.

Plaintiff Asher and the MoCRI have modeled their Initiative after previous initiatives forwarded by the ACRI, a national organization of which the MoCRI is an affiliate.[2] Each of these initiatives, including those in California (Proposition 209 in 1996), Houston (Proposition A in 1997), Washington (state statute I-200 in 1998), and Michigan (Proposal 2 in 2006), was nearly identical in form and substance to the present Initiative. (*See* Appendix, Ex. 1, giving initiative language for each state.) Each such initiative was widely considered to have affirmative action as its target, and courts and election officials in each of these instances described the respective initiative as an anti-affirmative action proposal.

In California, the Legislative Analyst's Office portrayed Proposition 209 in the informational California Ballot Pamphlet provided to California voters in advance of the election as a measure that would eliminate public race- and gender-based *affirmative action* programs. The Ballot Pamphlet stated:

> A YES vote on [Proposition 209] means:
> The elimination of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting, and education that give "preferential treatment" on the basis of sex, race, color, ethnicity, or national origin.

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[2] *See* About the American Civil Rights Institute, *available at* http://www.acri.org/about.html (last visited Dec. 5, 2007); *see also* Civil Rights Initiative more Complex than Black and White, *available at* http://missouricri.org/the_point_10_17_07.html (last visited Dec. 5, 2007) (stating that "The Missouri Civil Rights Initiative is part of a larger movement spearheaded by Ward Connerly").

> A NO vote on this measure means State and local government affirmative action programs would remain in effect to the extent they are permitted under the United States Constitution.

See Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 696 (9th Cir. 1997).[3]

In Houston, the City Council also described an initiative nearly identical to the present Initiative as one seeking to ban affirmative action programs. The City Council passed an ordinance approving the following ballot language:

> Shall the Houston Constitution be amended to:
>
> End the use of Affirmative Action for women and minorities in the operation of public employment, education, or contracting, including ending current programs and any similar programs in the future?

Brown v. Blum, 9 S.W.3d 840, 843 (Tex. App. 1999). In approving this language, the Texas Court of Appeals found that City Council's use of "the term 'affirmative action,' in particular, gave voters *fair notice* of the character and purpose of the proposed amendment." *Id.* at 849-50 (emphasis added). Likewise, the Washington Supreme Court described the vote in favor of the ACRI-sponsored I-200 as arising out of "the movement during the late 1990s aimed at curtailing affirmative action." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 72 P.3d 151, 160 (Wash. 2003).

Most recently, when a similar initiative was proposed in Michigan, Michigan's State Director of Elections prepared a ballot summary stating, in relevant part:

> A proposal to amend the state constitution to ban affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education, or contracting purposes.
>
> The proposed constitutional amendment would:
>
> Ban public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color,

[3] Ultimately, the ballot language presented to voters in the 1996 election did not include the phrase "affirmative action" – a decision that may have contributed to voter confusion on the subject matter of Proposition 209 (see Section III.A.2.b *infra*).

> ethnicity or national origin for public employment, education, or contracting purposes. Public institutions affected by the proposal include state government, local governments, public colleges and universities, community colleges and school districts.

Operation King's Dream v. Connerly, No. 06-CV-12773, 2006 WL 2514115, *4 n.5 (E.D. Mich. 2006). The District Court for the Eastern District of Michigan endorsed the Michigan Secretary of State's characterization of the proposed initiative as specifically targeting affirmative action programs. *See id.* at *2 n.1. The court noted that "in order to understand what the proposal and petition mean, voters should, at a minimum, be apprised of the fact that their purpose is to ban affirmative action." *Id.* The court highlighted the fact that "in recognition of this fact, the Michigan Secretary of State's approved ballot language uses the term 'affirmative action' in summarizing the proposal and its intended consequences." *Id.* The amendment was approved by the Michigan voters in November of 2006, and Article 1 of the Michigan Constitution was then amended to include a section entitled "Affirmative Action." Mich. Const. art. 1, § 26, (effective as of Dec. 23, 2006).

Secretary of State Carnahan's drafted ballot language comports with previous characterizations of nearly identical initiatives, and properly provides the public with fair notice of the Initiative's purpose: a ban on affirmative action programs.

ii. The Term "Affirmative Action" Has a Commonly Understood Definition That Provides Voters With Notice of the Initiative's Purpose.

Plaintiff Asher argues that the term "affirmative action" is ambiguous. (*See* Asher Pet. ¶ 12(b).) However, beyond consistently characterizing these initiatives as seeking to ban affirmative action programs, courts have also found that the term "affirmative action" has a commonly understood definition that provides voters with clear notice of the actual effects of the Initiative.

For example, in upholding the Houston City Council's use of the term "affirmative action" in its ballot language, the Texas Court of Appeals rejected the argument that this term is vague and misleading. *See Blum*, 9 S.W.3d 840, 848 (Tex. App. 1999). Relying on definitions provided by Black's Law Dictionary, the court found that "by definition, the term 'affirmative action' encompasses minority- or gender-based . . . 'preferences,' [and c]onsistent with this definition, the ballot language proposes a charter amendment to end affirmative action for women and minorities."[4] *Id.* at 850. Ultimately, the court found that the plaintiff had failed to demonstrate that that City had not given voters fair notice of the purpose of the amendment. *See id.* Similarly, in Michigan, the court found that "there is a commonly understood definition of the term ["affirmative action"] which is material to the purpose of the . . . petition and proposed constitutional amendment." *Operation King's Dream*, 2006 WL 2514115, at *2 n.1. Secretary of State Carnahan's use of the term "affirmative action" reflects this commonly understood definition.

Additionally, the Secretary of State's description of the nature and purpose of affirmative action programs as programs that are "designed to eliminate discrimination against, and improve opportunities for, women and minorities" is fair and impartial and comports with the federal government's characterization of affirmative action programs. For example, the Equal Employment Opportunity Commission ("EEOC") guidelines describe the purpose of affirmative action programs as eliminating discrimination and improving opportunities for women and minorities:

> The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to title VII should take voluntary action to correct the effects of past discrimination and *to prevent present and future discrimination* without awaiting litigation, are mutually consistent and interdependent methods of addressing social and

[4] 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 (8th ed. 2004).

> economic conditions which precipitated the enactment of title VII. *Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII.* Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity.

29 C.F.R. § 1608.1(c) (emphasis added). Thus, the terminology utilized by the Secretary of State in describing the affirmative action programs that are targeted by the Initiative carefully tracks the federal government's description of affirmative action programs that are encouraged to eliminate barriers to equal opportunities.

Here, the Secretary of State's decision to call attention to the impact of the Initiative on minorities and women comports not only with the EEOC definition, but also with the known effects of similar initiatives as applied in other states. In each state where an ACRI initiative similar to the present Initiative has been passed, the initiative has affected a variety of race- and gender-based programs and has caused notable declines in participation of women and minorities in a variety of public education, contracting, and employment opportunities.[5] Thus, the language referring to women and minorities gives voters fair notice of the likely effects of the Initiative. Use of these terms is not biased or prejudicial because they accurately describe the

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[5] For instance, in California, the number of women employed in construction declined by 33% after Proposition 209, following an increase of 26% between 1990 and 1996. *See A Vision Fulfilled?: The Impact of Proposition 209 on Equal Opportunity for Women Business Enterprises*, The Thelton E. Henderson Center for Social Justice at the University of California, Berkeley School of Law, 15 (Sept. 2007) (Ex. 2). After Proposition 209, the real money awarded to women business enterprises fell 40%, and only 36% of women business enterprises certified by Caltrans in 1996 are still in business today. *See id.* Similarly, four years after the passage of I-200, Washington state saw a decrease of over 25% in the share of Seattle public works contracts awarded to women- or minority-owned firms. *See* Alex Fryer, *Private Jobs Elude Black Contractors*, The Seattle Times (August 13, 2002) (Ex. 3).

The passage of Proposition 209 also led to a dramatic reduction in the enrollment rates of minority students in California's flagship institutions, and in 2006, UCLA enrolled the smallest number of African-American freshman since at least 1973. *See* Susan Kaufman, *The Potential Impact of the Michigan Civil Rights Initiative on Employment, Education and Contracting*, The Center for the Education of Women at the University of Michigan, Ann Arbor, 7 (Sept. 2006) (citing Rebecca Trounson, *A Startling Statistic at UCLA*, Los Angeles Times (June 3, 2006)) (Ex. 4). Hiring of women in the UC system decreased as well: at UC-Davis, for instance, the percentage of new faculty hires that were women dropped from 52% in 1994 to 13% in 1998, the year after Proposition 209 went into effect. *See* Susan Kaufmann and Anne K. Davis, *The Gender Impact of the Proposed Michigan Civil Rights Initiative*, The Center for the Education of Women at the University of Michigan, Ann Arbor, 6 (March 2007)

type of programs that the Initiative would eliminate, and the impact of such elimination on women and minorities.

iii. Secretary Carnhan's Certified Ballot Language Also Provides Notice of the Broad Range of Affirmative Action Programs that Will Be Affected by the Initiative.

The effects of recent initiatives nearly identical to the present Initiative are well established, and thus the effects of the Initiative are readily foreseeable. In each locality where a similar initiative has been passed, the initiative has been cited as the basis for dismantling affirmative action programs. Passage of this Initiative would likely result in the dismantling of an array of affirmative action programs, from college admissions programs that consider a candidate's race, gender, or socio-economic status as part of a holistic evaluation of each candidate, to mentoring and development programs, targeted outreach, and data collection requirements. Secretary of State Carnahan has fulfilled the requirements of fair notice by describing the Initiative as an end to affirmative action. Unlike "discrimination" and "preferential treatment" – terms that are vague and likely to confuse voters (*see* Section III.A.2.b., *infra*) – the phrase "affirmative action" conveys the type and scope of programs that stand to be affected by the Initiative and clearly states the issue at hand.

In California, Proposition 209, an initiative substantively identical to the proposed Initiative, has served as the basis of numerous lawsuits challenging affirmative action programs. For example, in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000), the California Supreme Court ruled that Proposition 209 prohibited a program adopted by the City of San Jose that required contractors bidding on city projects to utilize a specified percentage of minority and women subcontractors or to document efforts to include minority and women subcontractors in their bids. *See id.* at 1084. The court held that engaging in targeted outreach to

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(citing Martha S. West, Gyöngy Laky, Kari Lokke, and Kyaw Tha Paw, *Unprecedented Urgency: Gender*

minority or women subcontractors to provide them with notice of bidding opportunities, to solicit their participation, and to negotiate for their services constituted "preferential treatment." *See id.* As a result of this ruling, many local governments suspended women business enterprise ("WBE") and minority business enterprise ("MBE") certification programs and ended outreach specifically targeted to women and minority business enterprises. *See A Vision Fulfilled?*, *supra* at 8.

In *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16 (Cal. Ct. App. 2001), the ACRI's Ward Connerly used Proposition 209 as the basis for a challenge that invalidated several statutory affirmative action programs, among them a state lottery statute mandating an "affirmative duty" to maximize participation of socially and economically disadvantaged small business concerns, including MBEs and WBEs; participation goals for MBEs and WBEs in professional bond service contracts; state civil service affirmative action provisions, including requirements for the establishment of goals and timetables to overcome identified underutilization of women and minorities; and affirmative action employment programs at community colleges, including even their data collection and reporting requirements. *See id.* at 27, 47, 51, 55, 61. The Court held that Proposition 209 made race- and gender-based "discrimination" and "preferential treatment" *per se* impermissible, even if such considerations could be justified under strict scrutiny as in federal equal protection principles. *See id.* at 42.

A program mandating outreach to and encouraging participation of WBEs and MBEs was likewise struck down as violative of Proposition 209 in *C & C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284 (Cal. Ct. App. 2004). The Sacramento Municipal Utility District ("SMUD") Equal Business Opportunity Program had provided a price advantage and extended evaluation credits for prime contractors that met MBE and WBE participation goals,

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Discrimination in Faculty Hiring at the University of California, 1 (May 2005)) (Ex. 5).

mandated broad outreach procedures, and required contractors to document their efforts. *See id.* at 292. Although the SMUD program had undertaken disparity studies and the Court recognized empirical data suggesting past and ongoing discrimination, the program was nevertheless invalidated. *See id.* at 294. While the Court also found that the program did not comply with federal law, this case is indicative of the far reaching use of Proposition 209 to challenge affirmative action programs. *See id.* at 311.

In a suit ultimately dismissed for lack of standing, the plaintiff argued that state and county funding for battered women's shelters violated Proposition 209 because the shelters provided services only to women. *See Blumhorst v. Jewish Family Servs. of L.A.*, 126 Cal. App. 4th 993, 997 (Cal. Ct. App. 2005). In another case dismissed for lack of standing, the Coalition of Free Men challenged eighty-one statutes and four regulations providing services to women, including domestic violence protection and job training for women in nontraditional employment. *See Coal. of Free Men v. State of Cal.*, No. B172883, 2005 WL 713816, *2-3 (Cal. Ct. App. Mar. 30, 2005)

Constitutional amendments facially similar to the Initiative have served not only as a tool in litigation to dismantle affirmative action programs, but also as an uncertain background against which policymakers must judge their actions. Seeking to comply with the requirements of ACRI initiatives, policymakers have frequently declared the noncompliance of affirmative action programs that take *any* consideration of race and gender into account. For example, in the wake of the 1996 passage of California's Proposition 209 and prior to any court interpretation of the amendment's scope, then-Governor Pete Wilson announced a list of over 30 programs he believed to be in violation of it, including pre-college outreach and preparation for minority and low-income students; outreach programs and notification of bidding opportunities for women- and minority-owned businesses; and outreach and funding for women and minority math,

science, and technology teachers. *See* California Governor's Office, PR97:331, *Wilson Unveils List of 30 Offending Statutes,* Sept 9, 1997, *available at* http://aad.english.ucsb.edu/docs/wilson.9-97.html (last visited Dec 4, 2007). References to race and gender in those programs have since been eliminated. *See The Potential Impact of the Michigan Civil Rights Initiative, supra* at 4 (discussing the effect of Proposition 209).

More recently, the Attorney General of Michigan issued an advisory opinion concluding that a construction policy implemented by the City of Lansing, Michigan, prescribing bid discounts for contractors that utilize "Disadvantaged Business Enterprises" owned or operated by women or racial minorities, violates the provision of the Michigan constitution amended by Proposal 2 because it provides "preferential treatment." *See* Constitutionality of City's Construction Policy that Provides Bid Discounts on the Basis of Race or Sex, 2007 Mich. Op. Att'y Gen. 7202, 2007 WL 1138859, at *5. Research from the Center for Education of Women suggests that a broad interpretation of Proposal 2 may likewise threaten a range of targeted programs, including science and technology programs for girls, higher education funding for minority health professionals, review systems designed to monitor and address discrimination, domestic violence programs, breast cancer screenings, and much more. *See The Gender Impact of the Proposed MCRI, supra* at 9.

The question before this Court is not whether affirmative action should or should not be banned, but rather whether the Secretary of State's ballot title and description provide voters fair notice that the Initiative will ban affirmative action programs. While Plaintiff Asher argues that the use of the term "affirmative action" is over-inclusive, the preceding examples make clear that the present Initiative stands to affect not a single set of practices commonly understood as race- and gender-based "discrimination" and "preferential treatment," but instead the universe of affirmative action programs, including *inter alia* targeted outreach, mentoring, development,

admissions, hiring, and data-keeping. The fact that initiatives substantively similar to the proposed Initiative have consistently been used to challenge affirmative action programs that many voters would *not* think of as simply "discrimination" or "preferential treatment" makes clear that ballot language merely mirroring the language of the proposed Initiative would not alert voters to the Initiative's likely, and foreseeable, effects. Whether a voter is for or against affirmative action, Secretary of State Carnahan's ballot language fairly and clearly alerts voters to the question at issue and the consequences of their decisions.

b. Fair Notice of the Effects of the Initiative Is Needed to Counter the Confusion Caused by the Initiative's Language and Compounded by the Deceptive Tactics Used by Its Proponents.

The Initiative proposed by Plaintiff Asher and the MoCRI thwart the common understanding of "civil rights" in a manner that is likely to confuse voters as to the true effects of the Initiative. However, Secretary of State Carnahan has properly drafted ballot language that will provide voters with a clearer understanding of the Initiative.

The American Civil Rights Movement sought to end the second-class citizenship of women and racial minorities. As a legacy of the Movement, hundreds of thousands of Americans have an intimate understanding of civil rights as a series of concrete interventions designed to end race and gender discrimination and improve opportunities for historically marginalized groups. However, Plaintiff Asher and the MoCRI boldly misappropriate "civil rights" terminology in support of an Initiative that will roll back the advancements made through the Movement in furtherance of race and gender equality. The Initiative's use of the term "discriminate" in this context furthers the misperception that the Initiative supports the historical understanding of "civil rights," while it will in fact serve to undermine the very programs that are, by definition, "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 (8th ed. 2004) (defining "affirmative action").

The confusion caused by similarly worded initiatives is well-established. In California – one of the only localities in which electoral authorities failed to provide a ballot summary statement identifying an ACRI initiative as banning "affirmative action" (*see* Bettina Boxall, *Ruling on Prop 209 Description Voided,* L.A. Times, 1996 WLNR 5089533 (August 13, 1996)) – polling suggested that a significant number of voters did not understand the actual purpose and likely effect of Proposition 209. In the 1996 election in which Proposition 209 was considered, the Los Angeles Times conducted an exit poll of thousands of voters in forty polling places throughout California. Of those surveyed, 54% stated that they had voted *for* Proposition 209, and 46% against; of these same voters, however, 54% stated *support* for affirmative action programs and 46% indicated opposition to such programs. *See* Los Angeles Times, Study #389, Exit Poll: The General Election, November 5, 1996 (Ex. 6); *see also Affirmative Action Needs Open and Honest Airing*, The Seattle Post-Intelligencer, 1997 WLNR 1922495 (Aug. 10, 1997) (describing a Los Angeles Times poll as suggesting that "as many as one out of four Californians who voted for Proposition 209 thought they were voting for affirmative action, not against it."). These results suggest that a significant number of voters were confused as to the actual purpose of Proposition 209, voting to ban the very programs they purported to support.

The confusion inherent in the Initiative's language is compounded by the well-documented, deceptive tactics employed by the ACRI and its allies. Plaintiff Asher's and MoCRI's resistance to admitting that their proposal is about banning affirmative action is part and parcel of a pattern of evasion and at times outright fraud that has characterized the ACRI anti-affirmative action movement. Time after time, the ACRI and its allies have not merely

failed to inform voters of the purpose and effects of its initiatives, but have gone so far as to describe their petitions as *supporting* the very programs they seek to dismantle.

In Michigan, a federal district court described at length the trickery used by the Michigan Civil Rights Initiative ("MCRI"). *See Operation King's Dream*, 2006 WL 2514115. The court found that "MCRI engaged in systematic voter fraud by telling voters that they were signing a petition supporting affirmative action." *Id.* at *1. The court cautioned that "[i]f the proposal eventually passes, it will be stained by well-documented acts of fraud and deception that the defendants, as a matter of fact, have not credibly denied." *Id.* at *2.

The court relied on the Michigan Civil Rights Commission[6] ("MCRC") report titled *Report on the Use of Fraud and Deception in the Gathering of Signatures for the Michigan Civil Rights Initiative*, which, as stated in the MCRC's Letter to the Justices of the Michigan Supreme Court, found:

> Two notable and distressing truths emerge from the hundreds of pages of testimony included in the report. First, the instances of misrepresentation regarding the content of the MCRI ballot language are not isolated or random. Acts of misrepresentation occurred across the state, in multiple locations in the same communities, and over long periods of time. Second, the impact of these acts of deception is substantial. It appears that the acts documented in the report represent a highly coordinated, systematic strategy involving many circulators and most importantly, thousands of voters.

Id. at *4 (quoting Letter from MCRC to Justices of the Mich. Sup. Ct. at 1-2) (report attached in full as Ex. 7). The court conducted an evidentiary hearing in which numerous witnesses testified that circulators of the petition had told them that the petition supported affirmative action.[7] *See*

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[6] MCRC "was created by the Michigan Constitution of 1963 to carry out the guarantees against discrimination . . . . [T]he state constitution directs the Commission to investigate alleged discrimination against any person because of religion, race, color or national origin and to 'secure the equal protection of such civil rights without such discrimination.' [S]ubsequent amendments have added sex, age, marital status, height, weight, arrest record, and physical and mental disabilities to the original four protected categories." *See* About the Michigan Civil Rights Commission, *available at* http://www.michigan.gov/mdcr/0,1607,7-138-4951_4993-11682--,00.html (last visited Dec. 5, 2007).

[7] For example, one witness testified that she and her son "were approached by a petition circulator in November 2004. The circulator told her that people were trying to abolish affirmative action and that he was petitioning to keep

id. at *5-8. The court also found that defendants' unwillingness to clarify the intentions of the proposal "seems typical of the MCRI's approach, which is best characterized by the use of deception and connivance to confuse the issues in the hopes of getting the proposal on the ballot." *Id.* at *11. Although ultimately dismissing plaintiff's appeal as moot since the amendment had already passed, the Sixth Circuit Court of Appeals found:

> The record and the district court's factual findings indicate that the solicitation and procurement of signatures in support of placing [MCRI's proposed amendment to the Michigan Constitution] on the general election ballot was rife with fraud and deception. Neither Defendant group has submitted anything to rebut this. By all accounts, [the] Proposal . . . found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes.

Operation King's Dream v. Connerly, 501 F.3d 584, 591 (6th Cir. 2007).

Nor are these deceptive practices a thing of the past—in Oklahoma, where the ACRI is sponsoring another initiative similar to the Initiative before this Court, allegations that petitioners are misleading voters have prompted two area lawmakers to speak out against the ACRI's campaign of deception. Krehbiel, Randy. *Two Area Lawmakers Say Its Circulators Are Deliberately Misleading People About Its Intent*, Tulsa World, *available at* http://www.tulsaworld.com/news/article.aspx?articleID=071106_1_A13_hTwoa76356 (last visited Dec 5, 2007). Concern over voter fraud is so great that a state representative plans to file legislation in the 2008 session that allows voters to have their name removed from a ballot petition. *State Representative Seeks Reform In Petition Gathering,* News Channel 8, *available at* http://www.ktul.com/news/stories/1107/470020.html.(last visited Dec 5, 2007).

As in Michigan and Oklahoma, Plaintiff Asher and the MoCRI refuse to disclose that the purpose of the Initiative is to dismantle current and prevent future affirmative action programs. Plaintiff Asher's insistence that this Initiative is solely about ending "discrimination" and not

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affirmative action on the books . . . Wright read the language of the petition but did not understand it. She testified that she does not consider affirmative action to be a 'preference.' " *Operation King's Dream*, 2006 WL 2514115, at *5.

about affirmative action is simply disingenuous. As explained above, it is the duty of the Secretary of State to certify language that "fairly and impartially summarizes the purposes of the measure, so that the voters will not be deceived or misled." *Bergman,* 988 S.W.2d at 92. This task is all the more significant where proponents of an initiative submit misleading language and compound voter confusion by repeatedly and deliberately mischaracterizing its aim, as here. Secretary of State Carnahan was required to, and did, fulfill her duty by clarifying that the purpose of the Initiative is to ban affirmative action programs.

Given the fair notice provided by Secretary of State Carnahan's ballot title and summary statement, Plaintiffs cannot establish that the certified language is insufficient or unfair.

B. The Alternative Ballot Language Proposed By Plaintiffs Is Not Appropriate.

1. MoCRI's Alternative Proposed Summary Statements Are Deceptive.

Both of Plaintiff Asher's alternative summary statements violate the requirements for fairness and sufficiency and deceive voters. Plaintiff Asher proposes two alternative summary statements, both of which mirror the vague and misleading language of the Initiative. (*See* Pet. at ¶ 13 (proposing the following alternative language: that the "state shall not discriminate against, or grant preferential treatment" or "[s]hall the Missouri Constitution be amended to prohibit discrimination against or preferential treatment to").)

However, the fact that Plaintiff Asher's alternative titles are similar to the text of the Initiative is not in itself sufficient to show that they are fair and clear, and notify voters of the Initiative's effects. The Oregon Supreme Court's ruling on this issue in *Bernard v. Keisling* is instructive:

> We recognize that the potential exists for the proponents of an initiative measure either intentionally or unintentionally to use words in the measure that obfuscate the subject, chief purpose, summary, or major effect of the measure. In reviewing the ballot title certified by the Attorney General, this court will not hesitate to go beyond the words of the measure where such an outcome has occurred. The law does not require that the certified ballot title use only the words that appear in the measure itself.

317 Or. 591, 596 (1993). The Court should look to this reasoning as guidance in light of the lack of case law in Missouri on this issue.

Plaintiff Asher's alternatives are insufficient because they do not indicate that the proposed amendment would ban affirmative action programs for women and minorities. For the reasons described above, a fair ballot title and summary statement must notify voters that the proposed amendment would ban affirmative action programs for women and minorities. By failing to mention affirmative action, Asher's alternatives inadequately state the consequences of the ballot proposal, and are, therefore, deceptive and unfair. Neither the Secretary of State nor this Court is required to accept the language put forth by the proponents of an initiative, particularly when it is abundantly clear what the consequences of the Initiative are intended to, and will, be. This Initiative is about ending affirmative action, and prospective signers of petitions and voters should have fair notice of its goal.

2. *Plaintiff Shufeldt's Language Is Unnecessarily Broad in Its Delineation of Programs Unaffected by the Initiative.*

Plaintiff Shufeldt asks that the following language be added to Secretary of State Carnahan's summary statement of the Initiative: "allow affirmative action programs based on religion, disability, and age." However, these classifications are not contemplated by the Initiative, and it is unnecessary to describe the universe of subjects unaffected by an initiative. Thus, the language proposed by Shufeldt does not significantly add to that provided by Secretary of State Carnahan. *See Overfelt v. McCaskill*, 81 S.W.3d 732, 739 (Mo. Ct. App. 2002) (finding that "the ballot title is not required to . . . resolve every peripheral question related thereto.")

C. The Initiative Violates the Single-Subject Rule, and This Issue Is Ripe for Adjudication by the Court.

Article III, Sec. 50 of the Missouri Constitution requires that proposed amendments to the Constitution "shall not contain more than one amended and revised article of this constitution, or one new article which shall not contain more than one subject and matters properly connected therewith.. ." Mo. Const. Art. 3, § 50. The Supreme Court of Missouri interprets this provision as prohibiting a proposal from appearing on the ballot "regardless of the meritorious substance of a proposition," where the constitutional requirements are not satisfied. *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 829 (Mo. banc 1990).

The Constitution is silent on when a claim that a proposal violates the single-subject rule becomes ripe for adjudication. Missouri courts have improvidently held that single-subject claims become ripe for adjudication only after sufficient petition signatures to place an initiative on the ballot have been submitted to the Secretary of State. Amici submit that this Court can and should review allegations that a ballot proposal violates the single-subject rule regardless of at what stage in the initiative process the challenge is commenced. Such a rule is consistent with the purpose of the single-subject rule, preserves the resources of the state and the parties, and prevents placing those whose signatures are sought in a confusing or otherwise untenable position.

As the Supreme Court of Missouri has held, the purpose of the single-subject rule is to,

> [P]revent "logrolling," a practice familiar to legislative bodies whereby unrelated subjects that individually might not muster enough support to pass are combined to generate the necessary support. The prohibition is intended to discourage placing voters in the position of having to vote for some matter which they do not support in order to enact that which they earnestly support. The single subject matter rule is the constitutional assurance that within the range of a subject and related matters a measure must pass or fail on its own merits.

Missourians to Protect the Initiative Process, 799 S.W.2d at 829 (citations omitted); *see also Moore v. Brown*, 165 S.W.2d 657, 662 (Mo. 1940) ("the people ought not to be required to vote on two or more separate propositions as one, so that they must either accept or reject both . . . such a course permits logrolling").

While the courts in this state have recognized the predicament into which voters are placed when an initiative dealing with multiple subjects appears on the ballot, courts have thus far failed to recognize that those whose signatures are solicited on an initiative petition are placed in the same position. Where a proposed initiative amendment concerns multiple subjects, voters asked to sign a petition are forced into the very predicament the single-subject rule was designed to prevent: choosing to support all of the multiple propositions by placing them on the ballot or instead rejecting them all. The proposed Initiative raises these very concerns.

Missouri courts should take guidance from the Supreme Court of Florida, which has dealt with comparable initiatives under the state's analogous single-subject requirement. *See* Fla. Const. Art. 11 § 3. The Florida Court considered whether four proposed constitutional amendments crafted by the ACRI-sponsored Florida Civil Rights Initiative concerned more than a single subject. Although three of the four proposals were narrower in scope than the proposed Initiative before this Court, each was found to impermissibly require consideration of more than one subject. *In re Advisory Opinion to the Attorney General re Amendment to Bar Government From Treating People Differently Based on Race in Public Education,* 778 So.2d 888, 893 (Fl. 2000). The Florida Court was guided by its earlier case rejecting a proposed amendment that would limit anti-discrimination laws to ten specific protected categories. In that case, the Court found, "The voter is essentially being asked to give one 'yes' or 'no' answer to a proposal that actually asks ten questions." *In re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination*, 632 So.2d 1018, 1020 (Fl. 1994). Applying the holding to ACRI's

broadest proposal in 2000, the Court held that "the [FCRI] omnibus petition contains the same fatal flaw by combining three distinct subjects [that] constitute separate and distinct functional operations of government – public education, public employment, and public contracting." *In re Amendment to Bar Government From Treating People Differently Based on Race*, 778 So.2d at 893. Turning to the three more limited proposed amendments – which concerned consideration of race in public education, employment and contracting, respectively – the Court nevertheless found single-subject violations because the proposals would affect multiple levels and branches of government. *Id.* at 895.

In this case, Asher and MoCRI's proposed Initiative concerns state actions that purportedly either "discriminate" or "grant preferences" on the basis of five classifications (race, sex, color, ethnicity, and national origin) in three areas (public contracting, employment, and education). The Initiative amendment thus violates Missouri's single- subject requirement for the very reasons described by the Supreme Court of Florida. Because the proposal violates the proscription on more than a single subject now in exactly the same manner that it would if the Secretary of State were to certify sufficient petition signatures to place it on the ballot, consideration of the single-subject claim at this stage is appropriate to spare voters asked to sign petitions the predicament that Article III, Section 50 of the Missouri Constitution was intended to prevent.

The Missouri Supreme Court's reasoning in *Missourians to Protect the Initiative Process* favors early consideration of single-subject challenges. While acknowledging that "general policies relating to judicial restraint and economy of judicial resources" limit the review of ballot initiatives prior to an election, the Court also recognized "equally compelling reasons to grant pre-election review." *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827-8. These reasons include "[t]he cost and energy expended relating to elections[] and the public confusion

generated by avoiding a speedy resolution of a question..." *Id.* In that case, pre-election review was sought after the Secretary of State had certified that enough signatures had been gathered to place the initiative on the ballot, and the Court found pre-election review was proper. Review is appropriate at this stage in this case for the same reasons that militated in favor of pre-election consideration in *Missourians to Protect the Initiative Process*.

IV. CONCLUSION

Plaintiffs cannot meet their burden to establish that the Secretary of State's certified ballot title and summary statement are insufficient and unfair because the language prepared by Secretary of State Carnahan fairly and impartially summarizes the purposes of the Initiative and its likely effects. For the reasons discussed above, judgment should be entered on behalf of the Secretary of State.

Respectfully Submitted,

By: ANTHONY E. ROTHERT, #44827
ACLU of Eastern Missouri
454 Whittier Street
St. Louis, Missouri 63108
(314) 652-3114
(314) 652-3112 facsimile
tony@aclu-em.org

OF COUNSEL:

Dennis Parker
Reginald T. Shuford
Andre Segura
ACLU Racial Justice Program
125 Broad Street
New York, NY 10004-2400

Lenora Lapidus
Araceli Martínez-Olguin
ACLU Women's Rights Project
125 Broad Street
New York, NY 10004-2400
(212) 549-2644

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was sent first class mail, postage pre-paid, on the December 5, 2007 to:

Charles W. Hatfield
Nicholas G. Frey
230 West McCarty Street
Jefferson City, Missouri 65101

Jane Dueker
100 South Fourth Street, Suite 700
St. Louis, Missouri 63102

Heidi Doerhoff Vollet
John K. McManus
Assistant Attorneys General
PO Box 899
Jefferson City, Missouri 65102-0899

David Wasinger
James Cole
1401 South Brentwood Boulevard, Suite 550
St. Louis, Missouri 63144