IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

TIMOTHY P. ASHER, *et al.,*	)	
	)	
Respondent,	)	
	)	
v.	)	**Case No. WD69256**
	)	
	)	
ROBIN CARNAHAN,	)	
SECRETARY OF STATE,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Richard Callahan, Judge

Appellant Carnahan's Brief

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Introduction

The first subsection of Respondent Timothy Asher's proposed constitutional amendment operates to ban affirmative action programs geared toward improving opportunities for, and eliminating discrimination against, women and minorities. The next significant provisions of the proposed amendment set forth the circumstances where preferential treatment would still be allowed. Each of these elements is fairly, sufficiently, and adequately reflected in the Secretary's summary statement. The trial court erred in finding the Secretary's summary insufficient and unfair.

Even if there may be better ways to write the summary, this Court has been clear that possible improvements in drafting or simple linguistics do not provide a basis for taking any action other than certifying the Secretary's language, contrary to what the trial court apparently thought:

> [W]hether the summary statement prepared by the Secretary of State is the best language for describing the [initiative] is not the test. The important test is whether the language fairly and impartially summarizes the purposes of the [initiative].

Missourians Against Human Cloning v. Carnahan, 190 S.W.3d 451, 457 (Mo. App. W.D. 2006) (internal quotations and citations omitted).

Furthermore, the trial court lacked authority to rewrite the summary and should have remanded to the Secretary for revision in light of separation of powers principles, if the summary had been insufficient or unfair.

Jurisdictional Statement

The Secretary of State, Robin Carnahan, appeals from a January 11, 2008 judgment of the Circuit Court of Cole County finding that the Secretary of State's summary portion of an official ballot title for an initiative petition was insufficient or unfair under § 116.190, RSMo[1], and certifying new ballot language to the Secretary.

Because this matter is not within the exclusive jurisdiction of the Supreme Court of Missouri, this Court has jurisdiction pursuant to Mo. Const. art. V, § 3 (1875), as amended. *See Yes to Stop Callaway Committee v. Kirkpatrick*, 685 S.W.2d 209, 210 (Mo. App. W.D. 1984). Jurisdiction lies in the Western District under § 477.070.

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[1] All statutory citations are to the 2000 edition of the Revised Statutes of Missouri, except for those to § 116.025 and § 116.190, which are to the 2007 Cumulative Supplement.

Statement of Facts

A. Factual and Legal Background

On June 15, 2007, Respondent Timothy Asher (Asher) submitted to the Secretary of State an initiative petition sample sheet proposing an amendment to the Missouri Constitution. Legal File (L.F.) 64. A copy of Asher's proposed amendment appears in the appendix to this brief.

The proposed amendment is similar to statewide initiatives passed in 1996 in the state of California, in 1998 in the state of Washington, and in 2006 in state of Michigan; and to an initiative to amend Houston, Texas's city charter, which was defeated in 1997.

Asher's proposed amendment would add a new section 34 to Article I of the Missouri Constitution. L.F. 67. Proposed section 34, subsection 1 provides that:

> 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.

Id.

Proposed section 34, subsection 3 provides that the amendment shall not "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." *Id.* Subsection 4 provides that the amendment shall not "be interpreted as invalidating any court order or consent decree that is in force" as of the amendment's effective date. *Id.* Subsection 5 states that:

> 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.

Id.

Under Chapter 116 of the Revised Statutes of Missouri, the Secretary of State is tasked with preparing summary statements for initiative petitions. § 116.334. Summary statements cannot exceed 100 words and must "be in the form of a question using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure." § 116.334. After approval of the petition form, the Secretary has 10 days to prepare a summary statement and transmit it to the Attorney General for

approval of the legal content and form. Once the Secretary receives the Attorney General's approval and certain fiscal note information from the State Auditor, the Secretary certifies the official ballot title for the measure. § 116.180. The official ballot title consists of two parts: the summary statement and a fiscal note summary prepared by the Auditor. § 116.010(4). Under § 116.180, the official ballot title must appear on each page of the petition during circulation for signatures, along with the complete text of the underlying proposed amendment. § 116.180, § 116.050 and § 116.120.

On October 10, 2007, the Secretary of State certified the following summary statement for Asher's initiative petition:

> 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?

L.F. 74.

B. Asher's Lawsuit

On July 26, 2007, Asher filed a lawsuit against the Secretary of State in the Circuit Court of Cole County, Missouri, challenging the summary statement portion of the official ballot title. L.F. 1, 13-18. He alleged that certain portions of the summary statement were argumentative, prejudicial, and untrue, including the use of the phrases "affirmative action programs" and "women and minorities" and the statement that "preferential treatment" was "allowed" for federal funding and bona fide qualifications based on sex. L.F. 14-16.

Two other Missouri taxpayers, Greg Shufeldt and Steve Israelite (collectively, Shufeldt), filed a second lawsuit challenging the official ballot title and the fiscal note that was prepared by the State Auditor. L.F. 131. Their case was consolidated with Asher's. *Id.*

The parties entered a joint stipulation covering the basic facts surrounding Asher's submission of the initiative petition and the Secretary's certification of an official ballot title. L.F. 10, 63-74. On December 17, 2007, the circuit court heard argument regarding the summary statement and took evidence regarding the fiscal note.

C. The Trial Court's Rulings

On January 10, 2008, the circuit court entered a final order and judgment upholding the fiscal note and fiscal note summary portion of the official ballot title. L.F. 75-85. With respect to the summary statement, the court upheld the Secretary's use of the term affirmative action, concluding:

> 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.

L.F. 79.

The circuit court found that the second bullet point of the summary statement "suggest[ed] that the proposed amendment is first going to do away with one class of preferential treatment programs, i.e. affirmative action programs, and then replace the affirmative action programs with some other kind of preferential treatment programs." L.F. 80.

Rather than remanding to the Secretary to change these limited portions of the summary statement, the court rewrote the summary

statement entirely, dropping any reference to the proposed amendment's provision regarding bona fide qualifications based on sex, and adding a new reference to the amendment's effect on court orders (even though Asher's lawsuit had not challenged its omission from the Secretary's statement). The new, court-written statement reads as follows:

> 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?

L.F. 85.

The Secretary of State appealed the summary statement ruling. L.F. 87. Shufeldt appealed the denial of his claims in the consolidated case. L.F. 108.

Points Relied On

I.

The circuit court erred in not certifying the Secretary's summary statement for Asher's proposed constitutional amendment because the Secretary of State's summary was not insufficient or unfair in that it fairly and adequately put potential petition signers and voters on notice of the principal purposes and effects of the proposed amendment, which, in this case, are to ban affirmative action programs for women and minorities in public contracting, employment, and education, while allowing preferential treatment to meet federal funds eligibility standards and for bona fide qualifications based on sex.

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

Bergman v. Mills, 988 S.W.2d 84 (Mo. App. W.D. 1999)

Overfelt v. McCaskill, 81 S.W.3d 732 (Mo. App. W.D. 2002)

II.

Even if Point I is denied, the trial court erred in not remanding to the Secretary and in certifying a wholly rewritten summary statement because the trial court lacks authority to edit or rewrite the summary statement, in that by so doing, the court infringed on the authority granted by the Missouri Constitution to the Secretary of State as an executive officer, thus violating the separation of powers doctrine; and the court lacks discretion to edit or rewrite portions of the summary statement that are not unfair or insufficient in that deference should be given to the Secretary in performing her function as the State's chief elections officer.

State ex rel. Missouri Highway and Transp. Com'n v. Pruneau, 652 S.W.2d 281 (Mo. App. S.D. 1983)

Treme v. St. Louis County, 609 S.W.2d 706 (Mo. App. E.D. 1980)

State ex rel. Curators of the University of Missouri v. Neill, 397 S.W.2d 666 (Mo. banc 1966)

Argument

A. Standard of Review

When a case is submitted on stipulated facts, "the only question before this court is whether the trial court drew the proper legal conclusions from the stipulated facts." *Midwest Division OPRMC, LLC v. Dept. of Social Services*, 241 S.W.3d 371, 376-77 (Mo. App. W.D. 2007), *citing Schroeder v. Horack*, 592 S.W.2d 742, 744 (Mo. banc 1979). "Questions of law are reviewed *de novo*." *Midwest Division*, 241 S.W.3d at 377.

Where, as here, the issue is a question of law, and no evidence was presented to the trial court, no deference is given to the trial court's determination. *See MFA Mut. Ins. Co. v. Home Mut. Ins. Co.,* 629 S.W.2d 447, 450 (Mo. App. W.D. 1981) ("No deference is due the trial court's judgment where resolution of the controversy is a question of law").

Accordingly, this Court must review *de novo* Asher's claim that the summary statement prepared by the Secretary of State is insufficient or unfair. In so doing, this Court must focus on the language as certified by the Secretary. The alternative language drafted by the trial court is not under review, nor is this Court bound to give any deference or consideration to the language certified by that court.

B. The challenger must demonstrate that the summary statement is insufficient or unfair.

Under § 116.190, the summary statement portion of an official ballot title cannot be set aside unless it is "insufficient" or "unfair." "'Insufficient' means 'inadequate; especially lacking adequate power, capacity, or competence,' [and t]he word 'unfair' means to be 'marked by injustice, partiality, or deception.'" *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006), citing *Hancock v. Secretary of State,* 885 S.W.2d 42, 49 (Mo. App. W.D. 1994) (internal citations omitted). "Thus, the words insufficient and unfair … mean to inadequately and with bias, prejudice, deception and/or favoritism state the consequences of the initiative." *Id.*

A "ballot title is sufficient and fair if it 'makes the subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal.'" *Overfelt v. McCaskill*, 81 S.W. 3d 732, 738 (Mo. App. W.D. 2002), quoting *United Gamefowl Breeder Ass'n of Mo. v. Nixon*, 19 S.W. 3d 137, 140 (Mo. banc 2000). "The important test is whether the language fairly and impartially summarizes the purposes of the measure, so that the voters will not be deceived or misled." *Bergman v. Mills*, 988 S.W.2d

84, 92 (Mo. App. W.D. 1999). "[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 therefrom" are not included "does not render the summary statement either insufficient or unfair." *Overfelt,* 81 S.W.3d at 739. The Missouri Supreme Court has noted that summary statements are limited to 100 words, and that "[w]ithin these confines, the title need not set out the details of the proposal." *United Gamefowl Breeders*, 19 S.W.3d at 141. It is not the job of the Secretary of State to simply mimic the language of the proponents or opponents, but rather to prepare a summary statement that is fair and sufficient.

Deference is given to the elected official responsible for preparing the summary statement. "[W]hether the summary statement prepared by the Secretary of State is the best language for describing the [initiative] is not the test." *Bergman*, 988 S.W.2d at 92. "[The] role [of the court] is not to act as a political arbiter between opposing viewpoints in the initiative process: When courts are called upon to intervene in the initiative process, they must act with restraint [and] trepidation . . . . Courts are understandably reluctant to

become involved in pre-election debates over initiative proposals." *Missourians Against Human Cloning,* 190 S.W.3d at 456, citing *Missourians to Protect the Initiative Process v. Blunt,* 799 S.W.2d 824, 827 (Mo. banc 1990). As a result, "[c]ourts do not sit in judgment on the wisdom or folly of proposals." *Id.* "Before the people vote on an initiative, courts may consider only those threshold issues that affect the integrity of the election itself, and that are so clear as to constitute a matter of form." *United Gamefowl Breeders,* 19 S.W.3d at 139.

I.

The circuit court erred in not certifying the Secretary's summary statement for Asher's proposed constitutional amendment because the Secretary of State's summary was not insufficient or unfair in that it fairly and adequately put potential petition signers and voters on notice of the principal purposes and effects of the proposed amendment, which, in this case, are to ban affirmative action programs for women and minorities in public contracting, employment, and education, while allowing preferential treatment to meet federal funds eligibility standards and for bona fide qualifications based on sex.

The trial court erred in not certifying the Secretary of State's summary statement as she had written it. As explained below, the Secretary's summary fairly and adequately puts potential petition signers and voters on notice of the key provisions of Asher's proposed amendment.

A. The summary statement's first bullet point fairly and adequately apprises voters of the proposed amendment's purpose and effect of banning affirmative action programs designed to benefit women and minorities.

Asher challenged the use of the term "affirmative action programs" and the reference to "women and minorities" in the first bullet point of the summary statement. The trial court correctly held that the Secretary's use of the phrase "affirmative action programs" did not render the summary statement insufficient or unfair, but erred in not certifying the phrase "women and minorities" as written.

1. The phrase "affirmative action programs" is not insufficient or unfair.

Asher's proposed amendment will not operate in a vacuum. The Equal Protection clauses of the United States and Missouri constitutions already limit discriminatory practices by the State. Race, national origin, and gender are suspect classifications that are subject to heightened scrutiny. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, 2751 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of racial classifications, that

action is reviewed under strict scrutiny."); *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991) ("equal protection guarantee is directed against invidious discrimination"; suspect classes include race and national origin); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (under Equal Protection clause, gender-based government action can stand only if has an "exceedingly persuasive justification").[2]

But the Equal Protection clauses do not bar differential treatment altogether. As the Supreme Court observed in a case involving a federal affirmative action program for transportation bids, the "unhappy persistence of both the practice and the lingering effects of racial discrimination against

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[2] Various provisions of the Civil Rights Act of 1964 also prohibit discrimination on the basis of race, sex, color, and national origin. *See, e.g.,* Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, *et seq.* (prohibiting discrimination on the basis of race, color, religion, and national origin in places of public accommodation); Title VI, 42 U.S.C. § 2000d, *et seq.* (prohibiting discrimination on the basis of race, color, and national origin in programs receiving federal financial assistance); Title VII, 42 U.S.C. § 2000e, *et seq.* (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin).

minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. … When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995).

Viewed against the existing legal backdrop, it is clear that Asher's proposed amendment would ban governmental action that satisfies the compelling interest/exceedingly persuasive justification tests for race-, national origin-, and sex-based differential treatment, respectively. Principally this would consist of programs to improve opportunities for, or eliminate the lingering effects of past discrimination against, women and minorities. *See, e.g., Adarand*, 515 U.S. at 237 (recognizing compelling government interest in remedying past discrimination); *Parents Involved in Community Schools*, 127 S. Ct. at 2752 (same); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding race-conscious admissions policy designed to further compelling interest in obtaining educational benefits of diverse student body).

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., Merriam-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 (7th ed. 1999).

Case law from other states also supports the trial court's conclusion regarding the appropriateness of using the term "affirmative action programs" to describe what Asher's proposed amendment would ban. As noted above, the initiative petition submitted by Asher is nearly identical to initiatives circulated in Houston, Texas; Michigan; and California, among other places.

The proponent of the Houston initiative challenged as vague, overbroad, and misleading to voters a ballot title that stated that the initiative would end affirmative action for women and minorities.[3] *Brown v.*

[3] The Houston ballot title language read as follows:

Blum, 9 S.W.3d 840, 843 (Tex. Ct. App. 1999). The Texas Court of Appeals rejected the argument. The court reasoned:

> [T]he term "affirmative action," in particular, gave voters fair notice of the character and purpose of the proposed amendment …. Generally, "affirmative action" is defined as "a set of actions designed to eliminate existing and continuing discrimination, to remedy the lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination." Black's Law Dictionary 60 (7th ed. 1999). It includes "employment programs … designed to remedy discriminatory practices in hiring minority group members … commonly based on population percentages of minority groups in a particular area … [and] race, color, sex, creed and age." Black's Law Dictionary

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> Shall the Charter of the City of Houston be amended to end the use of Affirmative Action for women and minorities in the operation of City of Houston employment and contracting, including ending the current program and any similar programs in the future?

Brown v. Blum, 9 S.W.3d 840, 843 (Tex. Ct. App. 1999).

> 59 (6th ed. 1990). Thus, by definition, the term "affirmative action" encompasses minority- or gender-based "quotas" and "preferences." Consistent with this definition, the ballot language proposes a charter amendment to end affirmative action for women and minorities.

Brown, 9 S.W.3d at 850. (emphasis removed)

A federal court in Michigan, in the context of a voting fraud case,[4] similarly determined that describing the proposed amendment (there, the nearly identical Michigan Civil Rights Initiative (MCRI)) as banning "affirmative action" effectively conveyed its purpose. In *Operation King's Dream v. Connerly*, 2006 WL 2514115 (E.D. Mich. Aug. 29, 2006), *aff'd by* 501 F.3d 584 (6th Cir. 2007), the federal district court held that:

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[4] Both the district court and the Sixth Circuit Court of Appeals found that the Michigan Civil Rights Initiative "engaged in systematic voter fraud by telling voters that they were signing a petition supporting affirmative action." *Operation King's Dream v. Connerly*, 2006 WL 2514115, *1 (E.D. Mich. Aug. 29, 2006); *Operation King's Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007).

> There is a disagreement among the parties as to whether or not there is a settled definition of the term "affirmative action." The Court finds that there is a commonly understood definition of the term which is material to the purpose of the MCRI petition and proposed constitutional amendment. In other words, 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. Apparently 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.

Operation King's Dream, 2006 WL 2514115, *2 n.1 (E.D. Mich. Aug. 29, 2006).[5]

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[5] The approved summary ballot language for the Michigan initiative stated:

> 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 ballot title prepared for the California initiative (Proposition 209) did not use the term "affirmative action,"[6] and was challenged for that

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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, 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.
- Prohibit public institutions from discriminating against groups or individuals due to their gender, ethnicity, race, color or national origin. (A separate provision of the state constitution already prohibits discrimination on the basis of race, color or national origin.)

Operation King's Dream, 2006 WL 2514115, *4 n.5.

[6] The California ballot title and summary read:

omission. In *Lungren v. Superior Court of Sacramento County*, 48 Cal.App.4th 435, 440-41 (Cal. App. 3rd 1996), the California court of appeals held that the attorney general's summary should be given deference and that the ballot title adequately informed the voters of the general purpose of the measure without the term "affirmative action." The court's analysis indicated that the decision to use the term lay within the discretion of the official charged with preparing the title:

> Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities. Initiative Constitutional Amendment.
>
> Prohibits the state, local governments, districts, public universities, colleges, and schools, and other government instrumentalities from discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin ….

Lungren v. Superior Court of Sacramento County, 48 Cal.App.4th 435, 438 (Cal. App.3rd 1996).

> As a general rule, the title and summary prepared by the Attorney General are presumed accurate.... [T]he title need not contain a summary or index of all of the measure's provisions. Within certain limits what is and what is not an important provision is a question of opinion. Within those limits the opinion of the attorney general should be accepted by this court.

Id. at 439-40.[7] (internal quotations omitted)

Taken together, these authorities support deferring to the Secretary's decision to state in the ballot title that that proposed amendment would ban affirmative action programs. The use of the term "affirmative action programs" allows those reviewing the ballot title to know the issue that the

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[7] The court in *Lungren* also went on to state that "[e]ven if we assume that much, most or all of the impact of the prohibition will be borne by programs commonly associated with the term 'affirmative action,' we cannot fault the Attorney General for refraining from the use of such an amorphous, value-laden term in the ballot title and ballot label." 48 Cal.App.4th at 442-43. As the concurring opinion of Judge Sims indicated, however, that portion of the court's analysis was not necessary to the decision and was dicta. *See id.* at 443 (Sims, J. conc.)

proponents 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 vote on.

2. The phrase "women and minorities" is not insufficient or unfair.

The trial court's opinion did not explicitly find fault with the summary statement's reference to "women and minorities," but the court's rewritten summary statement replaced that phrase with the longer phrase "race, sex, color, ethnicity, or national origin." This was error. There is nothing insufficient or unfair with the summary statement's use the phrase "women and minorities."

Affirmative action is commonly understood as benefiting women and minorities, as recognized in the Webster's definition cited above. This is for the commonsense reason that women and minorities historically have been subjected to disparate treatment in a way that men and majority groups have not. *See generally United States v. Virginia*, 518 U.S. at 531-32 (discussing "our Nation['s] … long and unfortunate history of sex discrimination" against women) (internal quotations omitted); *Parents Involved in Community Schools*, 127 S. Ct. at 2768 (noting that "before *Brown* [*v. Board of Education*,

349 U.S. 294 (1955)], children were told where they could and could not go to school based on the color of their skin").

In addition, the State's current affirmative action programs are principally directed at women and minorities. 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.[8] The Missouri Department of Transportation requires participation of minority-owned construction companies or enterprises in all projects financed in whole or in part with federal funds. § 226.905. Its Disadvantaged Business Enterprise program, which is required by federal law as a condition of receiving federal highway funds, rebuttably presumes that women- and

[8] Available at http://www.sos.mo.gov/library/reference/orders/2005/eo05_030.asp. See also http://www.oswd.mo.gov/ (last visited April 3, 2008).

minority-owned businesses are disadvantaged.[9] The Department of Secondary Education administers scholarships to encourage minority students to enter teaching. § 161.415.

The summary statement's use of the phrase "women and minorities" is thus not misleading or deceptive because it accords with the reality that women and minorities will be the groups affected by Asher's proposed amendment. Because these words convey one of the chief effects of the proposed amendment, they fairly and adequately place would-be petition signers and voters on notice of one of the purposes of the proposed amendment, just a summary statement should do. *See Bergman*, 988 S.W.2d at 92 ("The important test is whether the language fairly and impartially summarizes the purposes of the [initiative], so that the voters will not be deceived or misled.").

The Secretary was not required to use, in lieu of "women and minorities," the longer phrase "race, sex, color, ethnicity, or national origin," as Asher claimed. As the Missouri Supreme Court held in *Bergman*,

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[9] *See* MoDOT DBE Program, p. 6, *available at* http://www.modot.org/business/contractor_resources/External_Civil_Rights/documents/July2007-MoDOTDBEProgram.pdf (last visited April 3, 2008).

"whether the summary statement prepared by the Secretary of State is the best language for describing the [initiative] is not the test." *Bergman*, 988 S.W.2d at 92. "[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,* 81 S.W.3d at 739. *See also Brown*, 9 S.W.3d at 851 (rejecting argument that a reference in ballot title to "minorities" was overly broad and misleading).

Here, the phrase "women and minorities" is accurate and conveys to would-be petition signers and voters, perhaps better than the longer phrase, the types of programs that will be affected by the proposed amendment, because it focuses on the types of programs that currently exist in the State.

B. The summary statement's second bullet point fairly and adequately apprises voters of the proposed amendment's purpose and effect of allowing preferential treatment in instances involving federal funds and bona fide qualifications based on sex.

The trial court concluded that the second bullet point of the summary statement somehow misled voters by "suggest[ing] that the proposed amendment is first going to do away with one class of preferential treatment programs, i.e. affirmative action programs, and then replace the affirmative action programs with some other kind of preferential treatment programs." L.F. 80. But the trial court's reading of the summary statement is forced and unnatural. As explained below, the summary accurately conveys that the proposed amendment would ban affirmative action programs in Missouri while allowing preferential treatment to continue under certain circumstances that may or may not be part of an affirmative action program.

1. The statement that the amendment would "allow preferential treatment based on race, sex, color, ethnicity, or national origin to meet federal program funds eligibility standards" is not insufficient or unfair.

Proposed section 34, subsection 1 provides that 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…." L.F. 67. Proposed subsection 5 operates to limit this broad proscription. It states that "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." L.F. 67.

Under subsection 5, preferential treatment is allowed if necessary to meet federal funds eligibility standards. The Secretary's summary accurately conveys precisely this when it states that the amendment would "[a]llow preferential treatment based on race, sex, color, ethnicity, or national origin to meet federal program funds eligibility standards."

The trial court expressed the view that the federal funds provision was an exception to the type of affirmative action programs being banned by the amendment and therefore needed to "grammatically utilize the same subject to which the exception applies," *i.e.,* "affirmative action programs," to avoid misleading voters. L.F. 81.

But the Secretary's construction was neither insufficient nor unfair. She simply chose to employ a non-misleading, albeit different, grammatical

construction than what the trial court preferred. There is nothing inadequate or deceptive about the Secretary's phrasing. Indeed, if anything, the Secretary's construction is more accurate than the trial court's. For while federal funds eligibility requirements can occur in situations typically thought of as affirmative action programs, such as MoDOT's DBE program (which is a condition of receiving federal highway assistance), they are not so limited. For example, the federal government prohibits women from serving in certain combat military positions for reasons that would not be considered to be affirmative action. Consistent with Asher's proposed amendment, the State could carry forward any such restrictions to its National Guard if that were required as a condition of maintaining its eligibility for federal defense funds.

In any case, simple linguistics and phrasing preferences have never, contrary to what the trial court apparently believed, been grounds for setting aside a summary statement. As noted above, the insufficient/unfair test does not require a summary statement to have used the best language available for describing an initiative. *See Bergman*, 988 S.W.2d at 92. A challenger must show that the language actually used was "inadequate," meaning "lacking adequate power, capacity, or competence," or "unfair," meaning

"marked by injustice, partiality, or deception." *Missourians Against Human Cloning*, 190 S.W.3d at 456. Here, Asher failed to meet this burden.

2. The statement that the amendment would "allow … preferential treatment for bona fide qualifications based on sex" is not insufficient or unfair.

The trial court's opinion did not explicitly find fault with the statement in the Secretary's summary that the proposed amendment would "allow … preferential treatment for bona fide qualifications based on sex." But the court's rewritten summary statement deleted any reference to bona fide qualifications based on sex. This was error, because there is nothing insufficient or unfair about this portion of the summary statement.

Proposed section 34, subsection 3, of the proposed amendment states that "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." L.F. 67.

Bona fide qualifications based on sex are not affirmative action programs. Rather, these are instances in which preferential treatment is allowed because it is reasonably necessary to carry out a job or contract. For

example, a State may, consistent with the proposed amendment, prefer an airport screener or undercover police officer of a certain sex, depending on the needs of a particular situation. The Secretary's summary adequately conveys this information by indicating that the amendment would "allow … preferential treatment for bona fide qualifications based on sex." L.F. 74.

The trial court's rewritten summary statement dropped any reference to the proposed amendment's exception for bona fide qualifications based on race, and chose instead to highlight the proposed amendment's provision in subsection 4 regarding existing court orders, even though Asher's petition did not allege any unfairness in the Secretary's not having not referred to that. This, too, was error. As the California Court of Appeals observed in *Lungren*, "[w]ithin certain limits what is and what is not an important provision [of a proposed initiative] is a question of opinion. Within those limits the opinion of the [elected official charged with creating the summary] should be accepted by this court." *Lungren*, 48 Cal.App.4th at 439-40. *Accord United Gamefowl Breeders*, 19 S.W.3d at 141 (given word limit, "the title need not set out the details of the proposal").

Here, it was not insufficient or unfair for the Secretary to choose to highlight the provision regarding bona fide qualifications based on sex over

the provision regarding existing court orders. This is particularly true in light of the fact that the provision regarding existing court orders is likely to have diminished importance over time, given that it would apply only to court orders and consent decrees that are in effect as of the date the proposed amendment is adopted, whereas the bona fide qualifications based on sex provision would apply in the same manner to current and future actions.

* * *

For all these reasons, this Court should hold that the Secretary's ballot summary language is not insufficient or unfair.

II.

Even if Point I is denied, the trial court erred in not remanding to the Secretary and in certifying a wholly rewritten summary statement because the trial court lacks authority to edit or rewrite the summary statement, in that by so doing, the court infringed on the authority granted by the Missouri Constitution to the Secretary of State as an executive officer, thus violating the separation of powers doctrine; and the court lacks discretion to edit or rewrite portions of the summary statement that are not unfair or insufficient in that deference should be given to the Secretary in performing her function as the State's chief elections officer.

For the reasons stated above, the trial court was wrong to find fault with the Secretary's summary statement. However, if this Court were to conclude otherwise, the Court should find that the trial court erred in certifying to the Secretary a new summary statement. In so doing, the court exceeded its authority in violation of separation of powers principles. Even if the court's rewrite was somehow consistent with separation of powers, the court erred by failing to give the Secretary the deference her decisions deserve as the State's chief election authority.

A. The court lacks authority to edit or rewrite the summary statement.

The circuit court exceeded its authority, in violation of the doctrine of separation of powers, when it certified a new summary statement to the Secretary rather than remanding to her for correction.

Article II, § 1 of the Missouri Constitution states:

> The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

The Secretary of State is a constitutional officer within the executive department and shall perform such duties "in relation to elections … as provided by law. Mo. Const. art. IV, § 12 and § 14. The state constitution and statutes give the Secretary a special role in relation to initiative petitions. Under Article III, § 53, the Secretary of State and other executive

officers are tasked with "submitting" all initiative and referendum petitions to the people, with the legislature limited to making "general laws" to govern the Secretary and any such other officers in this function.

Article XII, concerning amendments to the constitution, sheds further light on the scope of the Secretary's role in "submitting" initiatives to the people. Article XII, § 2(b) provides that all constitutional amendments by initiative petition must be "submitted … by official ballot title as may be provided by law." Chapter 116 commits to the Secretary considerable discretion in formulating particular ballot titles for initiatives and referendums; her work is confined only by the broad parameters of the "insufficient" or "unfair" test. *See, e.g., Missourians Against Human Cloning*, 190 S.W.3d at 457 ("[W]hether the summary statement prepared by the Secretary of State is the best language for describing the initiative is not the test. The important test is whether the language fairly and impartially summarizes the purposes of the initiative") (internal citations and quotations omitted).

The "sole exception to the unbending rule" of separation of powers exists only in instances "expressly directed or permitted" by the Missouri Constitution. *Missouri Coalition for Environment v. Joint Committee on*

Administrative Rules, 948 S.W.2d 125, 133 (Mo. banc 1997) (internal quotations omitted). But Missouri courts have not been expressly directed or permitted to write or rewrite ballot summary language under the Missouri Constitution. "The judicial power granted to the courts by the constitution is the power to perform what is generally recognized as the judicial function – the trying and determining of cases in controversy." *State ex rel. Pulitizer Pub. Co. v. Coleman*, 152 S.W.2d 640, 646 (Mo. banc 1941). When a court actively rewrites a summary statement, rather than remanding to the Secretary for revision, it in effect mandates that the Secretary write the summary in one specific way, when many other ways of writing the summary would themselves be fair and sufficient.

Missouri courts have long recognized that infringing on the discretion afforded to an executive officer violates the bedrock principle of separation of powers. *See, e.g., State ex rel. Missouri Highway and Transp. Com'n v. Pruneau,* 652 S.W.2d 281, 289 (Mo. App. S.D. 1983) ("the courts of this state may not interfere with, or attempt to control, the exercise of discretion by the executive department in those areas where, as in this case, the law vests such right to exercise judgment in a discretionary manner with the executive branch of government."); *Commission Row Club v. Lambert*, 161 S.W.2d 732,

736 (Mo. App. St.L. 1942) ("The power and authority of the government in this country is vested in distinct, coordinate departments – legislative, executive and judicial – and the judicial may not control or coerce the action of the other two within the sphere allotted to them by the fundamental law, for the exercise of judgment and discretion.").

Missouri courts similarly recognize that they cannot usurp the functions of other branches of government when ordering relief. For example, while "[c]ourts obviously have the power to declare a legislative enactment void or invalid as contrary to constitutional mandates, … they cannot take the further step of ordering … [anything that] is, in essence, legislating, which is not the function of a court." *Treme*, 609 S.W.2d at 710 (court cannot order enactment of legislation).

When a court actively rewrites a summary statement, rather than remanding to the Secretary for revision, it goes beyond the exercise of judicial power and into power reserved to another branch of government. *See Treme v. St. Louis County*, 609 S.W.2d 706, 710 (Mo. App. E.D. 1980) (courts "cannot take the further step of ordering … [anything that] is, in essence, legislating, which is not the function of a court"); *Missouri Coalition for Environment,* 948 S.W.2d at 133 (the "sole exception to the unbending rule" of separation of

powers exists only in instances "expressly directed or permitted" by the Missouri Constitution).

Section 116.190, authorizing a court to "certify" the official ballot title to the Secretary of State, must be read in harmony with separation of powers principles. As "certify" is not defined under Chapter 116, the plain and ordinary meaning prevails. "Certify" is defined as "To attest as being true or as meeting certain criteria." Black's Law Dictionary 241 (8th ed. 2004). Consistent with the doctrine of separation of powers and the definition of "certify," the court's authority and remedy under §116.190 is limited to certifying those portions of the Secretary's summary it believes are fair and sufficient, with a remand to the Secretary to rewrite those portions that cannot be certified.[10] "If the ballot challenge is timely filed, the court is

[10] In *Overfelt v. McCaskill*, the court stated that "Section 116.190 allows the trial court to correct any insufficient or unfair language of the ballot title and to certify the corrected official ballot title to the secretary of state." 81 S.W.3d at 736. However, this language was unnecessary to the opinion, and therefore dicta, because the court also held in the case, *id.* at 737, that the plaintiffs had failed to submit sufficient evidence to prove that the ballot title was insufficient or unfair to begin with (plaintiffs had challenged the fiscal

authorized to do no more than certify a correct ballot title." *Missourians to Protect*, 799 S.W.2d at 829.

B. The courts must show deference to the Secretary of State because of her constitutional and statutory authority over the initiative process.

The Secretary of State is the chief elections officer of the State. Her authority over, and responsibility for, elections generally and the initiative and referendum process specifically are set out in Chapters 115 and 116 of the Revised Missouri Statutes. And, as noted above, the Missouri Constitution entrusts the Secretary with the authority to submit all

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note summary, as well as the underlying fiscal note). *See Swisher v. Swisher*, 124 S.W.3d 477, 482 (Mo. App. W.D. 2003) ("'Obiter dicta, by definition, is a gratuitous opinion. Statements are obiter dicta if they are not essential to the court's decision of the issue before it.'"), quoting *Richardson v. Quiktrip, Corp.*, 81 S.W.3d. 54, 59 (Mo. App. W.D. 2002). Notably, the court's statutory analysis in *Overfelt* was limited to a single paragraph, and the separation of powers issue was not raised or addressed, rendering *Overfelt*'s dicta on the court's authority of no real persuasive value. *See Swisher*, 124 S.W.3d at 477 (dicta can be persuasive only when supported by logic).

initiatives or referendum petitions to the people. Mo. Const. art. III, § 53. Chapter 116 gives her overarching responsibility for the ballot initiative process. She is charged not only with creating summary statements, but also with overseeing the ballot initiative process as a whole. She determines the sufficiency of petition forms; certifies petitions as sufficient for the ballot; verifies signatures gathered during circulation; and has the authority not to count forged or fraudulent signatures, among other things. The statutes grant her considerable discretion in her role as overseer of initiatives, and the case law reiterates this need for deference when reviewing challenges to the language of a summary statement. "[W]hether the summary statement prepared by the Secretary of State is the best language for describing the [initiative] is not the test." *Bergman,* 988 S.W.2d at 92. "[E]ven if the language proposed by [the opponents] is more specific, and even if that level of specificity might be preferable" (*id.*), that does not establish that the existing title is unfair or insufficient.

This deference due the Secretary of State parallels that given to administrative agencies when the courts review their interpretation of a constitutional or statutory provision they are responsible to administer. *See State ex rel. Curators of the University of Missouri v. Neill*, 397 S.W.2d 666,

670 (Mo. banc 1966) ("The administrative interpretation given a constitutional or statutory provision by public officers charged with its execution, while not controlling, is entitled to consideration, especially in cases of doubt or ambiguity").

The need for deference is great when dealing with an elected executive official. As this Court has recognized, the "responsibility for assessing the wisdom of [reasonable] policy choices and resolving the struggle between competing views of public interest are not judicial ones," but are left to the political branches. *Moses v. Carnahan*, 186 S.W.3d 889, 903 (Mo. App. W.D. 2006). As long as the Secretary's judgment is reasonable, the courts should not find unsufficiency or unfairness and replace her judgment with theirs.

When reviewing a claim that a summary statement prepared by the Secretary of State is insufficient or unfair, the courts should show the same deference that is granted the legislature when there are challenges to its procedures for enacting laws, including challenges to legislative titles. In such a situation there is a strong presumption that the legislature acted constitutionally. *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994). The court resolves all doubts in favor of the procedural and substantive validity of legislative acts. *Id.* Attacks against legislative action

founded on constitutionally imposed procedural limitations are not favored. *Id*. An act of the legislature must clearly and undoubtedly violate a constitutional procedural limitation before this court will hold it unconstitutional. *Id.* Similarly, here, the trial court should have resolved any doubt in favor of the Secretary.

Conclusion

For the reasons stated above, this Court should reverse the trial court's judgment certifying a new summary statement to the Secretary of State and find that the summary language as prepared by the Secretary of State is not insufficient or unfair.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 8,463 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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Assistant Attorney General

APPENDIX

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