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SC92573

IN THE SUPREME COURT OF MISSOURI

JOHN PRENTZLER,

Respondent,

vs.

ROBIN CARNAHAN, Missouri Secretary of State, et al.,

Appellants.

Appeal from the Circuit Court of Cole County
The Honorable Daniel R. Green

REPLY BRIEF OF APPELLANTS ROBIN CARNAHAN AND THOMAS A. SCHWEICH

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ARGUMENT

I. The Secretary's Summary Statement is Fair and Sufficient In Accordance With Controlling Standards.

There is no dispute that a ballot title can be challenged as "insufficient or unfair." § 116.190, RSMo (2011 Cum. Supp.). From this undisputed starting point, however, Plaintiffs generate an entirely new standard claiming that the summary statement is "insufficient or unfair" if it fails to contain "main points." Which begs the questions, what "main points," and according to whom? The trial court ventured even further down this slippery slope, finding a supposed need for a summary statement to include any "material change," or "material and substantive" changes. Judgment, pp. 3-4.

More dramatic still, Plaintiffs and the trial court are attempting to turn a purely legal question – comparing a proposed amendment to the law with a summary of the proposed amendment – into a supposed fact question requiring evidence and expert testimony. *See* Respondents' Br. pp 27-28 (*Northcott*), p. 25 (*Reuter*), pp. 75-76 (*Prentzler*), p. 95 (*Francis*) (noting that the trial court reached the decision and was "well supported by the evidence" after considering "evidence of the language" and "testimony from expert witnesses"). These are not the appropriate standards for a ballot title.

This Court established the controlling test for a ballot title in *United Gamefowl Breeders Assoc. of Mo. v. Nixon*, 19 S.W.3d 137, 140 (Mo. banc

2000). A ballot title "is not 'insufficient or unfair'" under § 116.190.3 if it "makes the subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal." *Id.* at 140. Plaintiffs repudiate this standard in a section of their brief titled: "Notice is not the standard." But in fact, the controlling test provided by this Court, unlike the more intrusive versions espoused by the Plaintiffs and trial court, gives the kind of deference repeatedly emphasized: "When courts are called upon to intervene in the initiative process, they must act with restraint [and] trepidation . . . ." *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006). Furthermore, the notice based standard recognizes that a summary statement is not required to be the most specific summary as the Secretary is limited to 100 words regardless of the size or complexity of the initiative petition.

Plaintiffs also unwittingly suggest a standard that quite aptly describes the appropriate deference a court should give to the Secretary's summary statement when reviewing for insufficiency or unfairness – discretion. According to Plaintiffs, as long as the Secretary properly exercises her discretion then a court can do nothing but certify the summary statement as written. "Discretion," of course, contemplates a range of choices, all of which may be upheld as within the discretion. This type of deference is consistent with the cases that have repeatedly held that "[i]f charged with the task of

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preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions," and "there are many appropriate and adequate ways of writing the summary ballot language." *Asher v. Carnahan*, 268 S.W.3d 427, 431 (Mo. App. W.D. 2008).

Here, the Secretary could have used many different words and many different arrangements of words to write a summary of the initiative petition so that it "makes the subject evident with sufficient clearness to give notice of the purpose." *United Gamefowl Breeders Assoc. of Mo.*, 19 S.W.3d at 140. The subject of the initiative petition in this case is clear – to prevent lenders "from charging excessive fees and interest rates." (LF LF P28; N25; F26; R123). The Secretary's summary statement makes this subject evident with sufficient clearness, and thereby gives notice of the purpose by providing that the amendment would "limit the annual rate of interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit." (LF LF P49; N44; F50; R15).

More specificity – such as the exact interest rate – is not required. *See Missourians Against Human Cloning*, 190 S.W.3d at 456 ("Even if [a plaintiffs'] substitute language would provide more specificity and accuracy in the summary 'and even if that level of specificity might be preferable' " this

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is not the test.). Indeed, a more general statement of the limit on interest rates is certainly within the discretionary choices available to the Secretary.[1/]

The Secretary provided a summary statement in this case that is less than 100 words, makes the subject evident with sufficient clearness to give notice of the purpose, and is fair and sufficient. Accordingly, the trial court should be reversed.

[1/] Plaintiffs also mention in passing that the trial court made an additional change – without explanation – by replacing the word "limit" with "allow." There was, as Plaintiffs acknowledge, no basis for this change, and it actually turns the provision upside-down. Instead of communicating an attempt to rein in "triple-digit interest rates," as described in the proposed amendment, the trial court's change gives the impression that lenders are permissively granted additional authority to charge interest. Further, the only specific limit, except as agreed to by the parties, is for loans under § 408.500 and § 408.505, and that limit is not an annual limit but for the term of the loan. This change, like all of the trial court's changes, should be reversed.

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II. A Court Does Not Have Authority to Exercise Discretion in Choosing Its Preferred Language for a Summary Statement.

Curiously, Plaintiffs all but concede that the trial court does not have authority to re-write ballot summary language. First, there is no denying that neither the Constitution nor any statute gives courts the authority to rewrite ballot summary language. Plaintiffs can cite no provision to support such authority. Second, Plaintiffs acknowledge that it is "abundantly clear that a trial court does not have the authority to completely rewrite a summary statement." Respondents' Br. p. 40 (*Northcott*), p. 38 (*Reuter*), p. 88 (*Prentzler*), p. 106 (*Francis*). And so the question must be asked, what is the difference between completely rewriting a summary statement and what the trial court did in this case. Nothing.

According to Plaintiffs, the trial court believed that the summary statement prepared by the Secretary did not include what it thought were the "main points" or "material and substantive" changes. The trial court then substituted its judgment for the Secretary and rewrote the summary statement. That certainly sounds like a complete rewriting, regardless of the number of words changed.

The problem is that the positions advocated by the Plaintiffs and the trial court are irreconcilable – something cannot be "insufficient and unfair" and then not constitute a complete rewriting in order to fix it. Moreover, if

the Secretary's drafting of the summary statement is discretionary, which it is, then a court's redrafting of the summary statement is its own exercise of discretion. Indeed, many different ways of writing a summary statement are permissible and by taking that decision away from the Secretary the courts are usurping the discretion of the Secretary in violation of separation of powers. *See State ex rel. Mo. Highway Transp. Comm'n v. Pruneau*, 652 S.W.2d 281, 289 (Mo. App. S.D. 1983) (finding that courts may not interfere with, or attempt to control, the exercise of discretion by the executive department in those areas where the law vests such right to exercise discretion with the executive branch of government). Thus, even if the summary statement in this case were insufficient and unfair, which it is not, it is the Secretary, not the courts, that should rewrite the summary statement.

III. The Auditor Did Not Abandon the Argument That the Fiscal Note and Fiscal Note Summary are Sufficient and Fair With Regards to the Initiative Petition's Impact on Local Governmental Entities.

Plaintiffs assert that the Auditor has abandoned his appeal on fiscal note issues since he allegedly did not challenge that part of the trial court's decision finding the Auditor failed to consider local impact of the proposed initiative petition. This argument is without merit.

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Plaintiffs are distorting the judgment when they claim the trial court based its decision on the Auditor's alleged failure to consider local impact of the measure since the trial court clearly based its decision on the alleged failure of the Auditor to consider the *effect of 510s*[2] *on state and local government*. The trial court did not base its decision on a failure of the Auditor to consider the local impact of the measure because the record undisputedly shows that the Auditor did consider local impact based on information provided to him at the time he prepared the fiscal note and fiscal note summary.

Plaintiffs argue in their response briefs that part of the trial court's ruling on the sufficiency and fairness has been abandoned by the Auditor. They assert that the court order was based on two separate issues (1) failure to consider 510s and (2) impact on local entities. This reading of the order is incorrect and totally contrary to the evidence on the record. The court made it abundantly clear that the sole basis of the order was "[t]hat it is the complete omission of any fiscal impact that the initiative would have on the '510' lenders that renders the fiscal note and summary defective." Judgment, p. 7, fn. 1 (Reuter LF 156-163; Francis LF 199-206; Prentzler LF 202-209; and Northcott LF 287-294). Thus, the entirety of the language in the order has to be read in this context, that the court based his ruling on his finding that

[2/] "510s" refers to business entities covered by § 408.510.

510s were not considered for fiscal impact on either the state or local governmental levels. This is the correct reading of the order for several reasons.

First, the record shows absolutely no argument in the trial court by counsel for any of the Plaintiffs that the Auditor did not consider any fiscal impact information regarding local governmental entities. In fact, questioning by various Plaintiffs' attorneys acknowledged there was fiscal impact information from local governmental bodies in the fiscal note and that input summarized, along with the rest of the fiscal note, in arriving at the part of the fiscal note summary referring to impact on local governmental bodies. (Tr. 13, 18, 23-24, 31-32, 46, 49, 51-52, 68-70, 74, 79-80, 81, 90, 95, 107).[3/]

The fact that the Auditor did receive and follow up on fiscal impact information from local government entities is acknowledged by one of the attorneys for the various plaintiffs during questioning of the Auditor's employee who drafted the fiscal note summary: "Q: [Mr. Greim] The only other point where I saw that you did some independent investigation was with respect to the local government issue…" (Tr. 107).

[3/] All transcript references are to the trial transcript of March 27, 2012.

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Second, the trial court never raised this as one of his concerns expressed at the end of the trial (Tr. 249). This is due to the fact that the trial transcript and J. Ex. 3 conclusively show that fiscal impact information from local governmental entities was sought, received and reflected in the fiscal note and fiscal note summary. (*See* J. Ex. 3; Tr. 13, 18, 23-24, 31-32, 46, 49, 51-52, 68-70, 74, 79-80, 81, 90, 95, 107).

Third, a proper reading of the full judgment (Reuter LF 156-163; Francis LF 199-206; Prentzler LF 202-209; and Northcott LF 287-294) shows that the focus, then, of the trial court's ruling is on the alleged lack of consideration of the impact of lost state (Tr. 188-192, 196-197) and local revenue (Tr. 199-204) due to the effect of the measure on 510s. This is further supported by the following exchange between an attorney for one of the Plaintiffs and Dr. Durkin at trial:

> Q: Did you see anything in the fiscal note or fiscal note summary related to impact on the 510 lenders in Missouri?
>
> A: Yea, there was something there on the last page that indicates that, I think, maybe half of them maybe go out of business or something to that effect. That's been discussed this morning.
>
> Q: Did you see any analysis-

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A: No, no analysis that I saw of what the impact on 510 lenders on revenues that arise from the 510 lending industry might be.

Q: With the fiscal note and fiscal note summary not including that impact to 510 lenders and what that impact on state government would be and local government would be, and with the unemployment-

A: Basically not there, yeah.

(Tr. 204:1-16).

Dr. Durkin's testimony provides the only support for the argument that the fiscal note and fiscal note summary are inadequate for failure to consider the impact of lost 510 revenue to state and local governmental entities. As we argued in our original brief, Durkin's testimony should not have been considered on the issue of 510s at all and the fiscal note and fiscal note summary are sufficient and fair based on the information the Auditor had available when he developed the fiscal note and fiscal note summary. To quote from our summary of argument in our initial brief in this case:

First, Section 116.175, RSMo, and current case law out of the Western District Court of Appeals strongly support the logical position that the sufficiency and fairness of the fiscal note is to be judged on the basis of the

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information provided to the Auditor during the twenty day window he has to prepare a fiscal note, and only that information. To require otherwise invites mischief and delay in the initiative process moving forward in an orderly fashion because opponents of an initiative petition could withhold fiscal information from the Auditor only to present it later at trial. That is what occurred in this case when Plaintiffs put on Dr. Thomas Durkin at trial to render his opinion about the alleged impact of the initiative petition on installment lenders defined under Section 408.510, RSMo. Dr. Durkin's opinion on fiscal impact had not been presented to the Auditor during the preparation of the fiscal note. The trial court incorrectly applied the law by considering and giving weight to Dr. Durkin's testimony on the issue of the sufficiency and fairness of the fiscal note and fiscal note summary.

Brief of Appellants Carnahan and Schweich, p. 17. Our initial brief (Points III, IV and V) does encompass the totality of the trial court's ruling on the sufficiency and fairness of the fiscal note and fiscal note summary.

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IV. Plaintiffs Have Two Forums to Impact the Sufficiency and Fairness of a Fiscal Note: (1) by Submitting a Statement of Fiscal Impact as Allowed by § 116.175, and (2) by Filing a Lawsuit Challenging the Sufficiency and Fairness of the Fiscal Note and Fiscal Note Summary.

Section 116.190, RSMo, governs review by a trial court of the fiscal note and fiscal note summary prepared by the Auditor. It is clear from a reading of § 116.190 and § 116.175 that the trial court's role consists of (1) reviewing the fiscal note to ensure that it sufficiently and fairly describes fiscal impact information the Auditor receives during the twenty-day window he has to prepare the note and (2) reviewing the fiscal note summary to ensure it sufficiently and fairly summarizes (synopsizes) the fiscal note. This is the tenor of the statutes and appellate decisions, including the *Missouri Municipal League* cases. *See Missouri Municipal League v. Carnahan,* __S.W.3d__, 2011 WL 3925612 (Mo. App. W.D. 2011); *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010).

This type of review is logical. It is similar to trial court review of an administrative agency's decision (*i.e.*, is the agency's decision supported by the record that was before it at the time of the decision) or appellate review of a trial court's decision (*i.e.*, does the record the trial court had available at the time she heard the case support her decision). Plaintiffs' proposed standard

of review allowing the fiscal note and fiscal note summary to be judged on the basis of information not before the Auditor at the time he prepares them is not supported by statute nor by any judicial review that is analogous (*e.g.*, trial court review of an administrative agency's decision or appellate review of a trial court decision).

In summary, opponents of a measure, such as Plaintiffs, have two forums to impact the sufficiency and fairness of a fiscal note and fiscal note summary. First, by submitting information to the Auditor as allowed under § 116.175.1. Second, by filing a lawsuit under § 116.190, and challenging (1) the sufficiency and fairness of the fiscal note by showing that the fiscal impact information received by the Auditor (during the twenty-day window allowed by § 116.175) was not adequately and fairly summarized in the fiscal note and/or (2) the sufficiency and fairness of the fiscal note summary by showing that the Auditor did not adequately and fairly synopsize the information contained in the fiscal note.

CONCLUSION

For the foregoing reasons, the Circuit Court's judgment holding the Secretary of State's summary statement insufficient and unfair, and then judicially re-writing the summary statement, should be reversed. Similarly, the Circuit Court's judgment holding the Auditor's fiscal note and fiscal note summary insufficient and unfair should be reversed.

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CERTIFICATE OF SERVICE AND COMPLIANCE

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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 3,122 words.

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