

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

DR. ANNA FITZ-JAMES,

Petitioner,

v.

JOHN R. ASHCROFT, in his official
capacity as Missouri Secretary of State,

Respondent.

Case No. 24AC-CC06970

Dr. Fitz-James’s Trial Brief Regarding Fair Ballot Language

Petitioners challenge the validity of the Secretary of State’s “fair ballot language” for Amendment 3, the Right to Reproductive Freedom Initiative Petition 2024-086 (“the Amendment”) that will be posted at every polling place on election day and that is prominently published on the Secretary of State’s website. On August 13, 2024, the Secretary of State published the following fair ballot language:

A “**yes**” vote will enshrine the right to abortion at any time of pregnancy in the Missouri Constitution. Additionally, it will prohibit any regulation of abortion, including regulations designed to protect women undergoing abortions and prohibit any civil or criminal recourse against anyone who performs an abortion and hurts or kills the pregnant women.

A “**no**” vote will continue the statutory prohibition of abortion in Missouri.

Exhibit 5.¹

¹ All exhibit references refer to exhibits attached to the petition filed in this case.

In violation of Sections 116.025 and 116.190, the Secretary's fair ballot language statement is neither fair nor accurate. His explanation of a "yes" vote makes false and inaccurate statements about the Amendment's purpose and effects that will mislead voters and prejudice them against the measure.

The parties have been down this road before. Petitioner challenged the Secretary's summary statement for the Amendment, and the Court of Appeals found it "partisan," "politically charged," "inaccurate," and "misleading" and re-wrote it. *Fitz-James v. Ashcroft*, 678 S.W.3d 194 (Mo. App. W.D. 2023). The Secretary's fair ballot summary merely reasserts his rejected summary in the form of a poster that will be on the wall of every polling place and that is already on his website. Among other things, it falsely states that under the Amendment there is a right to obtain an abortion "at any time of a pregnancy," when the Court of Appeals already ruled that the Amendment provides for the regulation of abortion after Fetal Viability with exceptions for the health of the pregnant person; and it falsely states that the Amendment will "prohibit any regulation of abortion," when the Court of Appeals already ruled that the Amendment allows for regulation of reproductive healthcare to improve or maintain the health of the patient.

The purpose of judicial review in cases like this one is to safeguard the right of initiative petition from partisan meddling that could prevent a voter from fairly considering a proposed measure. *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990) ("When courts are called upon to intervene in the initiative process, they must act with restraint, trepidation and a

healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course.""). Unfortunately, here, it is the Secretary acting as a partisan who is meddling. The court must step in expeditiously² to rectify the Secretary's action before any more voters are misled.

Petitioners ask in Count I for the trial court to write a different fair ballot language statement that complies with the law, and to issue an order prohibiting the Secretary from using his statement for any purpose. An injunction is a natural consequence of the court writing a different fair ballot language statement. But if there is any doubt as to the availability of injunctive relief under Section 116.190, Petitioners ask in Count II for a declaratory judgment finding the Secretary's fair ballot language statement to be neither true nor impartial, and prohibiting the Secretary from posting it on his website or otherwise disseminating it.

BACKGROUND

Amendment 3 establishes a right to reproductive freedom, defined as the "right to make and carry out decisions about matters relating to reproductive health care," including prenatal care, birth control, abortion care, and miscarriage care. Exhibit 1 at subsection 2. The Amendment states that the right to reproductive freedom shall not be denied or interfered with, unless the government demonstrates such action is "justified by a compelling governmental interest achieved by the least restrictive

² Fair ballot language statements may be challenged pursuant to §116.190, RSMo. §116.025, RSMo. "The action shall be placed at the top of the civil docket." §116.190.4, RSMo. "Any action brought under this section that is not fully and finally adjudicated within one hundred eighty days of filing, and more than fifty-six days prior to election in which the measure is to appear, including all appeals, shall be extinguished, unless a court extends such period upon a finding of good cause for such extension." §116.190.5, RSMo.

means.” Exhibit 1, subsection 3. Amendment 3 permits the General Assembly to regulate abortion after “Fetal Viability,” provided the law does not interfere with the life and health of the pregnant person. Exhibit 1 at subsection 4. The Amendment also prohibits prosecution of a person for exercising the right to reproductive freedom and discrimination against persons providing or obtaining reproductive health care. Exhibit 1 at subsections 5 & 6.

Following initial submission of the initiative, the Secretary certified the following summary statement:

Do you want to amend the Missouri Constitution to:

- allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;
- nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;
- allow for laws to be enacted regulating abortion procedures after Fetal Viability, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time; and
- require the government not to discriminate against persons providing or obtaining an abortion, potentially including taxpayer funding?

Exhibit 2.

Petitioner successfully challenged this summary statement before this Court and the Court of Appeals. Both found the Secretary’s summary to be inaccurate and misleading. See *Fitz-James v. Ashcroft*, 678 S.W.3d 194, 201 (Mo. App. W.D. 2023)

(recounting the trial court’s decision). The Court of Appeals certified the following summary statement instead:

Do you want to amend the Missouri Constitution to:

- establish a right to make decisions about reproductive health care, including abortion and contraceptives, with any governmental interference of that right presumed invalid;
- remove Missouri’s ban on abortion;
- allow regulation of reproductive health care to improve or maintain the health of the patient;
 - require the government not to discriminate, in government programs, funding, and other activities, against persons providing or obtaining reproductive health care; and
 - allow abortion to be restricted or banned after Fetal Viability except to protect the life or health of the woman?

Id. at 217.

On August 13, 2024, the Secretary issued a certification of sufficiency for the Amendment, finding that proponents had submitted more than enough signatures to qualify the measure for the ballot. Exhibit 4. On the same day, in his second attempt to sabotage the Amendment, the Secretary published on his website his inaccurate fair ballot language statement (quoted *supra*), immediately below the official ballot title certified by the Court of Appeals. Exhibit 5.

DISCUSSION

A. **COUNT I: Pursuant to Section 116.190, the “fair ballot language” for Amendment 3 is Unfair and Inaccurate.**

Section 116.025 requires the Secretary of State to prepare fair ballot language statements that “fairly and accurately explain what a vote for and what a vote against

the measure represent.” That language is posted at each polling place next to the sample ballot for the measure. Section 116.025 provides that a fair ballot language statement shall “be true and impartial statements of the effect of a vote for and against the measure in language neither intentionally argumentative nor likely to create prejudice for or against the proposed measure.”

Courts apply the same sufficiency and fairness standard to fair ballot language challenges as they do to summary statement challenges. *Fitzpatrick v. Ashcroft*, 640 S.W.3d 110, 125 (Mo. App. W.D. 2022). Those standards have been discussed in many cases. “[I]nsufficient means inadequate; especially lacking adequate power, capacity, or competence and unfair means to be marked by injustice, partiality, or deception.” *Brown v. Carnahan*, 370 S.W.3d 637, 653-654 (Mo. banc 2012). The language “should accurately reflect both the legal and probable effects of the proposal.” *Pippens v. Ashcroft*, 606 S.W.3d 689, 701 (Mo. App. W.D. 2020). The purpose is to “give[] voters a sufficient idea of what the proposed amendment would accomplish, without language that is intentionally unfair or misleading. The idea is to advise the citizen what the proposal is about.” *Fitzpatrick*, 640 S.W.3d at 125 (quoting *Sedey v. Ashcroft*, 594 S.W.3d 256, 263 (Mo. App. W.D. 2022)); see also *Hill v. Ashcroft*, 526 S.W.3d 299, 308 (Mo. App. W.D. 2017) (language is “intended to provide voters with enough information that they are made aware of the subject and purpose of the initiative and allow the voter to make an informed decision as to whether to investigate the initiative further.”).

The Secretary's fair ballot language is nothing more than a restatement of his original, misleading summary statement that was rejected as unfair, insufficient, misleading, prejudicial, and argumentative. *Fitz-James*, 678 S.W.3d at 217. A line-by-line comparison of his fair ballot language with the Court of Appeals' re-written and certified summary statement demonstrates the Secretary's defiance of the Court of Appeals ruling.

The first sentence of the fair ballot language falsely states that a "yes" vote will "enshrine" in the Constitution the right to abortion "*at any time of pregnancy*" (emphasis supplied). This sentence is substantively indistinguishable from the Secretary's rejected summary statement that the Amendment allows for "abortions, *from conception to live birth*" and "guarantee[s] the right of any woman . . . to end the life of their unborn child at any time." The Court of Appeals noted the Amendment "allows for regulation of abortion to some degree." *Fitz-James*, 678 S.W.3d at 206. The Court condemned the Secretary's claims that the Amendment would permit abortion through "all nine months" of pregnancy, *id.* at 207 ("from conception to live birth . . . is not an impartial statement of the consequences of the initiative"), and that it would guarantee the right to end the life of an unborn child "at any time," *id.* at 210 ("the right . . . to end the life of their unborn child at any time" does not accurately describe the fetal-viability provision of the initiative).

The phrase "enshrine the right to abortion at any time of pregnancy" is transparently designed to provoke prejudice against the Amendment, not neutral language describing its probable effects. It misleads voters into believing that no

regulation of abortion will be allowed at any stage of pregnancy, even up to birth. In actuality, the Amendment at subsection 3 permits regulation of abortion justified by a compelling governmental interest and achieved by the least restrictive means (i.e., strict scrutiny), and at subsection 4 permits the General Assembly to regulate abortion after fetal viability.

In the next line of his fair ballot language, the Secretary falsely states that a “yes” vote “will prohibit any regulation of abortion, including regulations designed to protect women undergoing abortion...”. This sentence resurrects the Secretary’s rejected summary statement claim that the Amendment allows for “unregulated, and unrestricted abortions.” The Court of Appeals specifically held that this claim does not “accurately reflect both the legal and probable effects of the proposal[].” *Fitz-James*, 678 S.W.3d at 206. Instead, the Amendment allows “regulation of reproductive health care to improve or maintain the health of the patient.” *Id.* at 214, 216. As noted, it allows regulation prior to fetal viability if it satisfies strict scrutiny as defined therein, and it allows regulation post-fetal viability unless the woman’s health is at risk. *Id.* at 205 (under subsection 3 of the Amendment, “while government may not restrict a person’s independent decision to obtain an abortion, it may impose health and safety regulation and require abortions be performed according to widely accepted medical standards”).

Another falsehood in the second line of the fair ballot language is the claim that the Amendment will “prohibit any civil or criminal recourse against anyone who performs an abortion and hurts or kills the pregnant woman.” This language mirrors

the Secretary’s rejected summary statement that the measure would allow abortions “without requiring a medical license or potentially being subject to medical malpractice.” The Court of Appeals expressly held that “disallowing health and safety regulation — including requirements that physicians perform abortions and that they maintain medical malpractice insurance — is not a probable effect of the initiative[.]” *Fitz-James*, 678 S.W.3d at 208. The fair ballot language falsely suggests that the Amendment prohibits medical malpractice actions and criminal prosecutions when it has no such effect. Nothing in the initiative contemplates that abortions could be performed negligently or criminally. *Id.* at 207.

Finally, the fair ballot language drafted by the Secretary, like the rejected summary statement, fixates on abortion without any reference to other reproductive health care. While the access to and regulation of abortion is one of the central features of the Amendment, the “right to make decisions about all reproductive health care,” including pre-natal care and contraceptives, and “the prohibition against governmental discrimination for providing or obtaining reproductive health care are also central features.” *Fitz-James*, 678 S.W.3d at 204. Accordingly, “inclusion of all reproductive health care, not just abortion, . . . is necessary to give voters ‘a sufficient idea of what the proposed amendment[] would accomplish.’” *Id.* (quoting *Fitzpatrick*, 640 S.W.3d at 125). The singular focus of the fair ballot language on abortion misleads voters into believing that abortion is the only topic of the measure, when it is not. That makes the language inaccurate and unfair.

Standing alone the fair ballot language statement is false and misleading. To compound these defects, the Secretary has published the fair ballot language on his website immediately below the official ballot title with the Court of Appeals' rewritten summary statement. Exhibit 5. Pursuant to Section 116.230, the fair ballot language will soon be posted next to the official ballot title on the walls of polling places. As a result, voters are seeing two different, conflicting "official" summaries about the Amendment. The fair ballot language says the Amendment will enshrine the right of abortion at any time, while the official summary statement says the Amendment will allow abortion to be restricted or banned after Fetal Viability. The fair ballot language says that the Amendment will prohibit any regulation of abortion while the summary statement says the Amendment will allow regulation of reproductive health care to improve or maintain the health of the patient. There is no way to reconcile these conflicting statements. The Secretary's actions sow confusion about the effects of the measure, which infringes upon the right to initiative petition and burdens the free exercise of the right to vote. The Secretary's fair ballot language is so false and misleading as to constitute unlawful electioneering inside the polls. See § 115.637(18) (prohibiting posting signs with respect to an issue inside the building in which a polling place is located).

The court must step in, and re-write the statement, and prohibit the Secretary from using his language for any purpose. The easiest way to resolve this problem is for the court to adopt the official summary statement as fair ballot language. Petitioner proposes as follows:

A “yes” vote establishes a constitutional right to make decisions about reproductive health care, including abortion and contraceptives, with any governmental interference of that right presumed invalid; removes Missouri’s ban on abortion; allows regulation of reproductive health care to improve or maintain the health of the patient; requires the government not to discriminate, in government programs, funding, and other activities, against persons providing or obtaining reproductive health care; and allows abortion to be restricted or banned after Fetal Viability except to protect the life or health of the woman.

A “no” vote will continue the statutory prohibition of abortion in Missouri.

If passed, this measure may reduce local taxes while the impact to state taxes is unknown.

B. COUNT II for declaratory judgment that the Secretary’s fair ballot language and its publication are unduly prejudicial to the Amendment.

Under Section 527.020, RSMo., any person “whose rights, status or other legal relations are affected by statute... may have determined any question of construction or validity arising under the . . . statute and obtain a declaration of rights, status or other legal relations thereunder.” A declaratory judgment is appropriate in the following circumstances:

- (1) a justiciable controversy that presents a real, substantial, presently existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation; (2) a plaintiff with a legally protectable interest at stake, “consisting of a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief;” (3) a controversy ripe for judicial determination; and (4) an inadequate remedy at law.

Hill v. Ashcroft, 526 S.W.3d 299, 312 (Mo. App. W.D. 2017) (quoting *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 25 (Mo. banc 2003)) (other internal citations omitted). The Court is authorized to issue supplemental relief including an injunction if necessary or appropriate to effectuate a declaratory judgment. §527.080, RSMo.; *ASARCO, Inc. v. McNeill*, 750 S.W.2d 122, 132 (Mo. App. S.D. 1988) (injunction in aid of prior declaratory judgment).

If the Court in Count I prohibits the Secretary of State from publishing or disseminating his unfair and insufficient fair ballot language, then this Count II is moot and may be dismissed as moot. If, however, the Court finds that injunctive relief is not available under §116.190, RSMo., then Dr. Fitz-James is entitled to such relief in the form of a declaratory judgment and injunction.

Clearly there is a substantial, real controversy here between the proponent of Amendment 3 who wants fair and sufficient fair ballot language and the Secretary who has resurrected in his fair ballot language the defective summary statement struck down by the Court of Appeals. As the proponent, Dr. Fitz-James has a legally protectable interest in having fair ballot language that accurately and without bias summarizes Amendment 3, and the Court can grant immediate relief to her in the form of an injunction. The controversy is ripe, because the Secretary continues to publish his fair ballot language on his website immediately below the official ballot title containing the summary statement rewritten by the Court of Appeals. Finally, if this Court finds in Petitioner's favor on Count I but refuses to enjoin the Secretary from publishing or distributing deceptive and unfair fair ballot language because

such relief is unavailable under §116.190, Petitioner will not have an adequate remedy at law.

While the Secretary may have discretion to post a fair and accurate fair ballot language statement on his website, he certainly does not have the discretion to post an unfair, inaccurate, misleading, and prejudicial one. Voters may read the “fair ballot language” as being the official summary statement or equivalent to the official summary statement, which it definitely is not. It is an abuse of discretion for the Secretary to disseminate information about the Amendment that will mislead voters, and this Court should enjoin the Secretary from continuing to do so.

CONCLUSION

For the foregoing reasons, the Secretary of State’s “fair ballot language” must be rewritten to accurately reflect what a vote for the measure would entail. In addition, the court should prohibit the Secretary from using or disseminating his language for any purpose.

Respectfully submitted,

/s/Tori Schafer

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CERTIFICATE OF SERVICE

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I hereby certify that on August 30, 2024, the foregoing was filed through the Court's electronic filing system to be served electronically on all counsel of record.

/s/Tori Schafer

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