IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

Patty Arrowood, Plaintiff, vs. Missouri Secretary of State Jason Kander, Defendant, and Raise Your Hand for Kids & Ms. Erin Brower, Intervenor-Defendants.	)	Case No. 16AC-CC00307

Jim Boeving, Plaintiffs, vs. Missouri Secretary of State Jason Kander, Defendant, and Raise Your Hand for Kids & Ms. Erin Brower, Intevenor-Defendants, Third-Party Plaintiffs, vs.	)	Case No. 16AC-CC00310

State of Missouri,	)	
	)	
Third-Party Defendant.	)	

Robert E. Pund, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 16AC-CC00323
	)	
Missouri Secretary of State Jason Kander,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
Raise Your Hand for Kids & Ms. Erin Brower,	)	
	)	
Intevenor-Defendants, Third-Party Plaintiffs,	)	
	)	
vs.	)	
State of Missouri,	)	
	)	
Third-Party Defendant.	)	

FINDINGS OF FACT, CONCLUSOINS OF LAW, AND JUDGMENT

These matters, which arise out of Initiative Petition 2016-152 ("Initiative Petition" or "IP 2016-152"), came before the Court for trial on August 19, 2016[1]. Plaintiff Arrowood has alleged in five counts that the

[1] The matter was heard on a common record and a common judgment is entered resolving all claims in all cases.

Initiative Petition is unconstitutional; Plaintiff Boeving alleges that the Secretary improperly determined that signatures collected on the Initiative Petition were valid in light of the July 8, 2016, decision from the Court of Appeals, Western District certifying a new ballot title after the signatures were collected; and Plaintiffs in the Pund action allege the signature-counting issue as well as a claim that the Initiative Petition constitutes an appropriation by initiative prohibited by the Missouri Constitution.

Defendant Secretary of State ("Secretary") and Defendant-Intervenors Raise Your Hand for Kids and Ms. Erin Brower (collectively, "Intervenors") argue that the Secretary's determination that the Initiative Petition signatures were valid was necessary to preserve the peoples' right to enact laws by initiative, because the initiative proponents had no opportunity to collect new signatures following the Court of Appeals' July 8, 2016, certification of the new ballot title, and that the Secretary acted in accordance with the requirements of Chapter 116. Each also argue that the substantive constitutional claims in the Arrowood and Pund actions are not ripe, with Intervenors arguing that even if they were ripe, the Initiative Petition does not violate any provisions of the Constitution.

Having considered the parties' written and oral arguments, the Court finds that the Secretary of State acted in accordance with its obligations in

Chapter 116 to certify the signatures as valid. The Court also finds that Arrowood and Pund's constitutional claims are not ripe at this time.

FINDINGS OF FACT

1. Plaintiffs are citizens, taxpayers, and registered voters of the State of Missouri.

2. Defendant Jason Kander is the duly elected and acting Secretary of State of the State of Missouri (the Secretary) in his official capacity.

3. Intervenor Raise Your Hand for Kids ("RYH4K") is a Missouri not-for- profit corporation and a Missouri campaign committee formed under Missouri law to support the Initiative Petition. Ms. Erin Brower is a Missouri citizen who serves as the Treasurer for RYH4K.

4. Brower is a supporter of the initiative petition and ballot measure at issue in these cases. Brower has committed her time and money toward the passage of the Initiative Petition. RYH4K has spent over $1.5 million to date toward the passage of the Initiative Petition. Both Brower and RYH4K will continue to spend money to support the passage of the Initiative Petition.

5. In November 2015, in Brower's official capacity as a Director of RYH4K, she directed Edward Greim, counsel for RYH4K, to prepare and file the initiative petition sample sheet for the Initiative Petition.

6. On November 20, 2015, RYH4K submitted to the Secretary an initiative petition sample sheet proposing to amend Article IV of the Missouri Constitution, by adding Sections 54, 54(a), 54(b), and 54(c).

7. The Secretary identified the initiative petition sample sheet by the number 2016-152.

8. On January 5, 2016, the Secretary of State issued a Certification of Official Ballot Title for IP 2016-152, containing the text of the official ballot title so certified, comprised of a summary statement and fiscal note summary ("the January 5, 2016 official ballot title"). A true and correct copy of the Secretary's January 5, 2016 Certification of Official Ballot Title for the Initiative Petition was attached to the parties' Joint Stipulation of Facts as Joint Exhibit 6.

9. RYH4K paid for the printing and the circulation of petitions, in the form approved by the Secretary of State, which used the January 5, 2016 official ballot title.

10. Signatures for all 2016 general election initiative petitions were required to be submitted to the Missouri Secretary of State by May 8, 2016.

11. At least 150,000 valid signatures were required to be submitted on or before May 8, 2016 across at least six of Missouri's eight congressional districts.

12. On January 15, 2016, Jim Boeving filed a lawsuit, Boeving v. Missouri Secretary of State, et al., Cole County Circuit Court, Case No. 16AC-CC00016, challenging the sufficiency or fairness of the summary statement and the fiscal note summary in the January 5, 2016 official ballot title (the "Boeving case"), among other claims. The Court may take judicial notice of the docket and filings in *Boeving v. Missouri Secretary of State*, et al., Cole County Circuit Court, Case No. 16AC-CC00016.

13. In the *Boeving* case, the circuit court granted the motion to intervene filed by RYH4K and Ms. Brower. RYH4K spent substantial resources in litigating the *Boeving* case.

14. On May 7, 2016, RYH4K submitted all petition pages for IP 2016-152 to the Secretary of State. RYH4K submitted over 330,000 signatures from individuals RYH4K believed to be Missouri voters, in support of placing IP 2016-152 on the November 2016 general election ballot as Amendment 3. These 330,000 signatures were obtained over four months of RYH4K's effort and at a considerable expense to RYH4K.

15. Every petition page for IP 2016-152 submitted to the Secretary contained the January 5, 2016 official ballot title, as reflected in the parties' Joint Exhibit 6.

16. On May 19, 2016, after a bench trial, the Circuit Court entered judgment in the *Boeving* case, which was appealed to the Court of Appeals, Western District.

17. On July 8, 2016, the Court of Appeals issued its decision, certifying a modified summary statement to the Secretary, containing five additional words not present in the January 5, 2016 official ballot title: "which fee shall increase annually." *Boeving v. Kander*, --- S.W.3d ---, 2016 WL 3676891, W.D. 79694 (July 8, 2016).

18. RYH4K submitted to the Secretary 209,300 signatures for IP 2016-152 on petition pages in the form approved by the Secretary and the Attorney General under the parties' Joint Exhibits 2, 3, and 6.

19. None of the petition pages RYH4K submitted to the Secretary on May 7, 2016, contained the exact ballot title language reflected in the parties' Joint Exhibit 7.

20. As of July 18, 2016, the local election authorities had begun the process of verifying signatures, but this process was not yet completed.

21. On August 9, 2016, the Secretary issued a Certificate of Sufficiency of Petition for IP 2016-152, to appear on the ballot as "Amendment 3." A true and correct copy of the Secretary's Certificate of Sufficiency of Petition for IP 2016-152 was attached to the parties' Joint Stipulation as Joint Exhibit 8.

22. In certifying that there were a sufficient number of valid signatures for IP 2016- 152 to appear on the November ballot, the Secretary included signatures that were submitted on petition pages that contained the January 5, 2016 official ballot title.

23. August 30, 2016, 10 weeks before the election, is the deadline to notify local election authorities ("LEAs") of what is on the ballot so that they can begin printing . See §§ 115.125, 115.401, and 116.240, RSMo. After this date, changes to the ballot require the order of a court. See § 115.125, RSMo. LEAs may, but are not required to, begin printing of ballots upon the receipt of notice on August 30, 2016.

24. By September 23, 2016, military absentee ballots must be available—i.e., already printed and ready. This is 46 days before the election. See §115.914, RSMo.

25. By September 27, 2016, all absentee ballots must be available—i.e., already printed and ready. This is 6 weeks before the election. See §115.281, RSMo.

26. After September 27, 2016, "no court shall have the authority to order an individual or issue be placed on the ballot less than six weeks before the date of the election, except as provided in sections 115.361 and 115.379." See §115.125, RSMo.

27. If Amendment 3 is no longer on the certified ballot as of August 30, 2016, and a court orders the Secretary to restore Amendment 3 to the certified ballot after that date but before September 23, 2016, any LEAs that have already printed their ballots using the August 30, 2016 certification will have to reprint their ballots to add Amendment 3. Printing of new ballots will cause LEAs time and expense. Coordinating new ballots will also cause the Secretary of State time and expense.

28. There is a Master Settlement Agreement entered into by the State of Missouri, other states and U.S. Territories, and certain tobacco product manufacturers on November 23, 1998. A true and correct copy of the Master Settlement Agreement with exhibits was attached to the parties' Joint Stipulation as Joint Exhibit 9.

29. In April 2016, Mr. Charles A. Arnold contributed $100 to the Coordinating Board for Early Childhood ("CBEC Fund") maintained by the Department of Social Services,

30. Prior to Mr. Arnold's contribution, the CBEC Fund did not contain any funds.

31. The proposed text of IP 2016-152 states that an Early Childhood Health and Education Trust Fund shall be created, consisting of "moneys collected as provided in Section 54(c) and shall also include the balance of the Coordinating Board for Early Childhood Fund, which shall cease to exist as a

discrete fund after its proceeds are transferred into the Early Childhood Health and Education Trust Fund upon the effective date of this section."

32. There was no evidence presented that any petition signature certified by the Secretary was from a voter who was mislead into signing the petition.

33. At a minimum, the 209,263 voters who signed the petition had the opportunity to review the full text of the measure, which was attached to every petition signature page for such voters.

CONCLUSIONS OF LAW

I. VALIDITY OF SIGNATURES COLLECTED ON PETITION PAGES WITH THE JANUARY 5, 2016, OFFICIAL BALLOT TITLE

The Court first turns to the threshold issue of whether the signatures collected on petition pages bearing the January 5, 2016, official ballot title are valid for purposes of placing the Initiative Petition on the November 8, 2016 ballot. The Court finds that they are.

In *Boeving v. Kander*, WD 79694, 2016 WL 3676891, *1, *11, *14 (Mo. App. W.D. July 8, 2016), the Court of Appeals, Western District, held that, within the ballot title, the fiscal summary prepared by the State Auditor was "fair and sufficient," but the ballot summary prepared by the Secretary of State was not, because the second bullet point of the summary needed the additional phrase, "which fee shall increase annually." The court certified the

new language—with the five new words—to the Secretary of State, noting that it gave no opinion on whether requiring the new language would invalidate the signatures gathered using the original ballot title. Id. at *14, note 8.

A. The Constitutional Requirements for Initiative Petitions.

This question must necessarily be addressed within a context that, under Missouri law, requires deference to the efforts of proponents seeking to place initiatives on the ballot. The initiative process is as close to pure "participatory democracy" as the Missouri Constitution gets. *Brown v. Carnahan*, 370 S.W.3d 637, 645 (Mo. 2012) (quoting *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. 1990)). The initiative process is a way for "those who have no access to or influence with elected representatives" to "take their cause directly to the people[.]" *Brown* at 645 (quoting *Missourians to Protect the Initiative Process* at 827); Mo. Const. Art. III, § 49. Due to respect for this power the people have reserved to themselves, and "[t]o avoid encroachment on the people's constitutional authority, courts will not sit in judgment on the wisdom or folly of the initiative proposal presented." *Brown* at 645. And, "[w]hen 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." Id. (quoting *Missourians to Protect the Initiative Process* at 827).

In considering a statutory requirement regarding the initiative process, the Supreme Court of Missouri has stated:

> The initiative power set forth in Art. III, § 50 of the Missouri Constitution is broad and is not laden with procedural detail. The form in question in the present case is not mandated by the Constitution, but is instead provided for by statute. . . . Legislation cannot limit or restrict the rights conferred by the constitutional provision. . . . Minor details may be left for the legislature without impairing the self-executing nature of constitutional provisions but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purposes, and must not in any particular attempt to narrow or embarrass it. In a contest between the two if the statute restricts a right conferred by the Constitution, the latter prevails. . . . The initiative process is too akin to our basic democratic ideals to have this process made unduly burdensome.

United Labor Committee of Missouri v. Kirkpatrick, 572 S.W.2d 449, 454-55 (Mo. banc 1978) (citations and editing marks omitted).

The requirements for the form and content of petitions are statutory, not constitutional. The constitutional provisions regarding the initiative are found at Mo. Const. Art. III, § 49-§53. Nothing in the Missouri Constitution requires a ballot title to be affixed to the initiative petition signature page for constitutional amendments. The Missouri Constitution requires that "[e]very such petition shall be filed with the secretary of state not less than six

months before the election and shall contain an enacting clause and the full text of the measure." Mo. Const. Art. III, § 50. And there is a requirement that initiative petitions that seek to create a law have a title: "Petitions for laws shall contain not more than one subject which shall be expressed clearly in the title." See *Union Elec. Co. v. Kirkpatrick*, 606 S.W.2d 658, 660 (Mo. banc 1980) (initiative petition to create an act regulating nuclear reactors). But there is no similar provision for petitions that seek to amend the constitution.

Further, Mo. Const. Art. XII, § 2(b), does not require the ballot title to be on the initiative petition. Rather, this provision states: "All amendments proposed by the general assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto, at which he may submit any of the amendments." This provision requires the official ballot title to be given to the electors at the general or special election, but does not require the ballot title to be part of the initiative petition.

There is no constitutional requirement, then, for any sort of ballot title to be placed on initiative petitions. Such a requirement must be found in statutes. Such legislation must be drafted and interpreted so as not to "limit or restrict the rights conferred by the constitutional provision," but only to address "[m]inor details" that do not "impair[]the self-executing nature of

constitutional provisions." *United Labor Committee of Missouri*, 572 S.W.2d at 454-55.

B. The Statutory Process of Certifying Official Ballot Titles.

Chapter 116 provides an orderly process for government officials to handle initiative petitions, and deadlines (in addition to the constitutional one) and requirements for those who want to submit them. If proponents fail to do what the statute requires, their proposal will not be placed on the ballot

When a proponent seeking to place a proposition on the ballot submits an initiative petition sample sheet to the Secretary of State and it is approved as to form, under Section 116.332, RSMo, the Secretary "shall prepare and transmit" summary statement of the measure. § 116.334, RSMo. The summary statement "shall be a concise statement not exceeding one hundred words," "shall be in the form of a question," and should be "neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure." § 116.334.1, RSMo.

Meanwhile, under Section 116.175.2, RSMo, the State Auditor "shall prepare a fiscal note and a fiscal note summary" for the initiative petition.

The Secretary combines the ballot summary and the fiscal note summary to create the "official ballot title." § 116.010(4), RSMo. Under Section 116.180, RSMo, after the Secretary receives the official summary and the fiscal note summary, "the secretary of state shall certify the official ballot

title in separate paragraphs with the fiscal note summary immediately following the summary statement of the measure[.]"

In the case of initiative petitions, the Secretary "shall deliver a copy of the official ballot title and the fiscal note" to the designated person on behalf of the proponents of the initiative. *Id.* On January 5, 2016, that is exactly what the Secretary did.

At that point, there is one "official ballot title": the one "certified" by the Secretary of State and "delivered" to the proponents. That "official ballot title" is referenced elsewhere in the statute in two different contexts: (a) the gathering, submission, and counting of signatures; and (b) the certification of the ballot to election authorities. These cases involve (a)—but the cases come at a time when a new "official ballot title" has been certified to the Secretary of State by the Court of Appeals—and is close to the time required for (b), when the ballot title is sent to local election authorities who print ballots.

After the Secretary's certification of official ballot title, the initiative proponents had until May 8, 2016, to submit the required amount of signatures to the Secretary of State. Section 116.180, RSMo, tells proponents precisely what to do with the "official ballot title" that the Secretary certified and delivered to them: "Persons circulating the petition shall affix the official ballot title to each page of the petition prior to circulation and signatures

shall not be counted if the official ballot title is not affixed to the page containing such signatures." *Id.*

That "official ballot title" referenced in Section 116.180, RSMo, must be "the official ballot title" certified by the Secretary of State and delivered to the proponents. Here, that is the official ballot title certified by the Secretary on January 5, 2016. Unless and until a court certifies a new title to the Secretary of State and the Secretary in turn delivers it to the proponents, there is—and was—no other choice.

C. Challenges to the Sufficiency of the Official Ballot Title.

Certainly, the official ballot title can be challenged in the courts, a process described by Section 116.190, RSMo. That is what happened in the *Boeving* case. The challenge process ultimately leads to a court certifying "the official ballot title." If the court certifies a new "official ballot title," the Secretary then delivers that title to proponents and certifying it to election authorities. § 116.190.4. That is what was done here, following the Court of Appeals' July 8, 2016, decision.

In hopes that the process can be completed before the election, the statute imposes a short time limit for suing over an "official ballot title." Section 116.190.1, RSMo, requires a litigant to file suit over the title within ten days after the Secretary certifies the official ballot title that he delivers to the proponents. The action "shall be placed at the top of the civil docket."

§ 116.190.4, RSMo. The action is "extinguished" if "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." § 116.190.5, RSMo.

Substantively, the statute requires that the person questioning the "official ballot title" "state the reason or reasons why the summary statement portion of the official ballot title is insufficient or unfair and shall request a different summary statement portion of the official ballot title[.]" § 116.190.3, RSMo. The reviewing court "shall consider the petition [and] hear arguments." *Id.*

Section 116.190 states exactly what happens to the official ballot title at the end of case. First, the court must "in its decision certify the summary statement portion of the official ballot title to the secretary of state." § 116.190.4, RSMo. Then comes the instruction to the Secretary: "In making the legal notice to election authorities . . . and for the purposes of section 116.180, the secretary of state shall certify the language which the court certifies to him." § 116.190.4, RSMo (emphasis added).

Section 116.190, RSMo, essentially describes a two-step process, which was followed here. First, the Court of Appeals certified the new official ballot title to the Secretary of State in its decision on July 8, 2016. Second, on July 18, 2016, the Secretary certified that language and, "for the purposes of section 116.180," delivered the court-certified title to the proponents. The

Secretary did what exactly what Sections 116.180 and 116.190, RSMo, requires.

D. Chapter 116, especially when construed in favor of the preservation of "participatory democracy," does not compel the Secretary to refuse to count signatures submitted on petitions circulated using the original "official ballot title," when those signatures were gathered and submitted before anyone—the Secretary or any court—certified a new title.

To determine what the impact of the new "official ballot title" on the petition process is, we turn first to Section 116.180, RSMo—because, again, Section 116.190.4, RSMo, tells the Secretary to use the new title "for the purposes of section 116.180."

Section 116.180, RSMo, instructs the Secretary to "certify the [new] official ballot title, and to "deliver a copy of [that] official ballot title . . . to the person whose name and address are designated under section 116.332." The Secretary did that; there is not a challenge to that here.

Section 116.180, RSMo, then instructs "[p]ersons circulating the petition," i.e., the proponents," to "affix the official ballot title to each page of the petition prior to circulation." That instruction is irrelevant here. Because of the deadlines for filing petitions, the proponents did not "affix the [new] ballot title" to any page, nor could they have.

Plaintiffs find relevance not in the instruction, but in the consequence for violating the instruction. Section 116.180, RSMo, ends by saying that the

"signatures [that proponents gathered] shall not be counted if the official ballot title is not affixed to the page containing such signatures. In Plaintiffs' view, the change of "the official ballot title" in both clauses is meant to be retroactive— i.e., even if the petition were signed and filed while the Secretary's original was still "the official ballot title," the petition becomes void after the fact.

Here, "the official ballot title" on each of the petitions submitted to the Secretary of State bore the only "official ballot title" that the Secretary of State had certified and delivered to the proponents at the time the petitions were circulated and signed, and at the time the petitions were delivered to him. The proponents timely did precisely what the statute required.

Section 116.120.1, RSMo, tells the Secretary what to do when the proponents deliver the petitions: "he or she shall examine the petition to determine whether it complies with the Constitution of Missouri and with this chapter." The Secretary issues the proponents a box receipt and the examination process can begin immediately upon receipt of the petition pages. The examination specifically includes two checks: (1) for "pages that have been collected by any person who is not properly registered with the secretary of state as a circulator; and (2) for "petition pages that do not have the official ballot title affixed to the page." *Id.* Such pages can be immediately eliminated from consideration, for the statute says that signatures on those

pages "shall not be counted as valid." *Id.* Here, Plaintiffs have made no showing that upon presentation to the Secretary, any of the pages did "not have the official ballot title affixed to the page." Their only showing is that the pages did not have the ballot title later certified by the Court of Appeals.

Because the proponents complied with the statute, the Secretary counted the signatures on the petitions submitted—*i.e.*, he did not and could not refuse to count the pursuant to Sections 116.120.1 or 116.120.1, RSMo. And having found a sufficient number of signatures from six congressional districts, the Secretary certified the initiative for the ballot. Plaintiffs' claim is based on the premise that those gathering signatures on petitions filed with the Secretary cannot be counted even though they bear "the official ballot title" that the Secretary of State had certified, insisting that they must bear a "title" that the Secretary certified after the filing deadline—in other words, that the certification of a new title after the proponents have completed their assignment under Section 116.180, RSMo, and after the delivery of all the pages has been accepted under Section 116.120.1, RSMo, changes the rules—not in the middle of the game, but after the players have left the field.[2]

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[2] Plaintiffs purport to find persuasive two related 2006 decisions from the Circuit Court of Cole County: *Tuohey v. Carnahan*, Case Nos. 06AC-CC00423 and 06AC-CC00424. However, the *Tuohey* cases are not on point. In *Touhey*, the proponents were still on the field—though at the very end of the

That reading cannot be reconciled with the general deference constitutionally required to the ability of the people to use the initiative process. It places the success of the initiative outside the proponents' control, thus partially defeating the people's constitutional rights.

The Missouri Constitution and Chapter 116, RSMo, are not at odds. The rights of initiative proponents must still be vindicated in a case such as this one, where the certification of new language comes after the deadline for filing petitions. That is, "the official ballot language" required to be placed on petition pages by Section 116.180, RSMo, is the same as "the official ballot language" certified by the Secretary and delivered to the proponents at the time the petition is presented to the voter and signed.

That reading is consistent with the general presumption against retrospective operation of statutes: "Statutes are generally presumed to operate prospectively, 'unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication.'" *Dep't of Soc. Servs. v. Villa Capri*

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game—when the Secretary delivered a new ballot title; in other words, the summary language was revised prior to the signature submission deadline. And the lack of an appeal there leaves us without a definitive answer regarding what happens when a change in the rules is made during the game. But that is not the situation here.

Homes, Inc., 684 S.W.2d 327, 332 (Mo. 1985) (quoting *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34 (Mo. banc 1982)).

Where, as here, proponents of an initiative petition followed all the requirements of Section 116.180, RSMo, by circulating petitions with official ballot titles certified to them by the Secretary of State, that requirement that the statute imposes on the proponents has already been fulfilled. That is, Section 116.190.4, RSMo, only requires the Secretary to certify the court's language to those gathering signatures "for the purposes" of Section 116.180, RSMo, and where those "purposes" have already been completed—as they had by the time the Court of Appeals ruled—there are no further "purposes of § 116.180," RSMo, outstanding. Section 116.190.4, RSMo, does not require voiding of all initiative petition pages that have already been signed. It operates prospectively to require that the new language be on the ballot, but not retrospectively to invalidate actions (i.e., circulating, signing, and submitting petitions) that occurred before a new "official ballot title" was certified. On that day, there was only one "official ballot title," and its use is sufficient.

The Secretary and the initiative proponents acted as they were required to do under Chapter 116, RSMo. The Secretary acted properly when he counted signatures possessing the January 5, 2016, ballot title, and acted

properly when certifying and delivering the Court of Appeals' ballot title to initiative proponents on July 18, 2016.

II. Plaintiffs' Constitutional Claims.

Only facial and procedural constitutional claims are ripe prior to election. *Kuehner v. Kander*, 442 S.W.3d 224, 230 (Mo. App. W.D. 2014). "Before a vote is held on a measure, the judiciary may review only 'those threshold issues that affect the integrity of the election itself, and that are so clear as to constitute a matter of form.'" *Knight v. Carnahan*, 282 S.W.3d 9, 22 (Mo. App. W.D. 2009) (quoting *United Gamefowl Breeders Ass'n of Missouri v. Nixon*, 19 S.W.3d 137, 139 (Mo. banc 2000)). It is a "heavy burden . . . to assert a claim so facially apparent that it comprised a matter of form." *Id.* Prior to election, the "single function is to ask whether the constitutional requirements and limits of power, as expressed in the provisions relating to the procedure and form of initiative petitions, have been regarded." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990).[3]

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[3] *See also Reeves v. Kander*, 462 S.W.3d 853, 857–58 (Mo. App. W.D. 2015):

> While courts will generally not "give advisory opinions as to whether a particular proposal would, if adopted, violate some superseding fundamental law, such as the United States Constitution," *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827, "precedent does

"Substantive issues" of constitutionality of the initiative proposal are not yet ripe for adjudication. *Knight*, 282 S.W.3d at 22 (citing *Ketcham v. Blunt*, 847 S.W.2d 824, 833 (Mo. App. W.D. 1992)). A constitutional argument in the form of "unconstitutional as applied" is not ripe. *Kuehner*, 442 S.W.3d at 230. Constitutional challenges which "have nothing to do with the prerequisites of article 3, § 50 of the constitution" are not ripe for judicial determination prior to election. *Ketcham*, 847 S.W.3d at 834. And because the initiative at issue here meets the prerequisites of article 3, § 50—and of the related statutes—the Missouri Constitution gives the proponents here a constitutional right to have their proposal on the November ballot.

Only two of the constitutional challenges raised in these consolidated cases come close to meeting the legal standard for ripeness—and one of those fails on its facts.

> grant us some discretion to review allegations that an initiative is facially unconstitutional." *Knight*, 282 S.W.3d at 21. "This exception [to the prohibition against pre-election review] comes into play where the constitutional violation in a proposed measure is so obvious as to constitute a matter of form." *Id.*; *United Gamefowl Breeders Ass'n of Missouri v. Nixon*, 19 S.W.3d 137, 139 (Mo. banc 2000) (prior to the election, the judiciary will only review "those threshold issues that affect the integrity of the election itself, and that are so clear as to constitute a matter of form.")

The question of whether the proposed constitutional amendment includes more than a single subject and is thus barred by Art. III, § 50 is ripe. However, Plaintiffs' claim necessarily rests on the proposition that the Secretary should clearly have rejected the initiative petition as a matter of form at either the petition review or certification stage. There is nothing in the text of the proposed measure that indicates that the Secretary should have done so. "When reviewing a single subject challenge to an initiative petition, [a] [c]ourt must liberally and non-restrictively construe the petition in such a way that the provisions connected with or incident to the central purpose of the proposal are harmonized and not treated as separate subjects." *Committee for a Healthy Future v. Carnahan*, 201 S.W.3d 503, 511 (Mo banc 2006) (citing *Missourians to Protect the Initiative Process*, 799 S.W.2d at 830). In a liberal reading of the Initiative Petition, it is clear that its central purpose is to raise revenue through taxes on cigarettes. This does not violate Art. III, § 50.

The question of whether the proposed constitutional amendment violates Art. III, § 51 because it constitutes an "appropriation of money" is not ripe. It is simply not possible to know, today, whether at the time Amendment 3 takes effect, if enacted by the voters, it will affect anything other than what the Missouri Constitution calls "new money." The

uncertainty surrounding the potential appropriation of funds makes the issue unripe for judicial review at this time.

All of Plaintiffs' other constitutional claims—that the Initiative Petition unconstitutionally authorizes state revenues to be paid to religious institutions; that it surrenders the power to tax in violation of Art. X, § 2; and that it violates the constitutional requirement of uniformity of taxation—fail because they do not demonstrate that the Initiative Petition is facially unconstitutional. The most that can be said about these arguments is that they are "debatable," which, under *Knight v. Carnahan*, are not obviously facially unconstitutional and certainly do not affect "the integrity of the election itself." *Knight*, 282 S.W.3d at 22. Accordingly, the Court will not consider the merits of Plaintiffs' constitutional claims.

The Court does not need to reach Intervenor-Defendants' Counterclaim and Third-Party Claim, which request relief declaring Chapter 116 unconstitutional as applied, and it denies Intervenor-Defendants' Motions to Dismiss as moot because the case was fully disposed on the facts and law adduced at the expedited trial.

This Court's opinion is limited to the factual scenario found herein and does not address any other scenarios such as a change in the official ballot title made in the midst of the petition circulation period.

Amendment 3 will be submitted to the voters using the revisions to the ballot title made by the Court of Appeals and certified by the Secretary on July 18, 2016. When voters enter the voting booths this November, they will only be asked to approve changes to the Missouri Constitution using language that was fully and finally adjudicated to be sufficient and fair. At this stage, and in the absence of any evidence that voters actually were mislead at the petition stage, let alone that they were mislead in a way that would make them change their mind merely on the question of whether the issue is worthy of presentation to the voters, the use of the revised ballot title in the November 2016 general election fully vindicates any state interest in ensuring that voters know what they are approving, and truly desire to approve a constitutional amendment. *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 463-64 (Mo. App. W.D. 2006)(Smart, J., concurring in part and dissenting in part)(citing *Union Elec. Co. v. Kirkpatrick, 678 S.W.2d 402, 504 (Mo. Banc 1984)).*

ORDER AND JUDGMENT

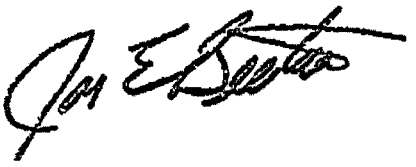
Accordingly, it is hereby ORDERED AND ADJUDGED that Counts I – V of Plaintiff Arrowood's Petition are dismissed without prejudice; that Plaintiff Boeving's Petition and Count I of Plaintiff Pund's Petition are found in favor of Defendant Secretary of State and that the signatures collected for Initiative Petition 2016-152 be upheld as valid for purposes of determining

whether the minimum registered voter signature requirement in the Missouri Constitution has been met; and that Count II of Plaintiff Pund's Petition be dismissed without prejudice.

Any remaining claims or motions for relief from this Court pending at the time of this Judgment not specifically addressed herein are denied.

Each party shall bear its own costs.

SO ORDERED:



Jon E. Beetem, Circuit Judge

Date: 8-23-2016