

**FILED**

SEP 17 2018

JOAN M. GILMER  
CIRCUIT CLERK, ST. LOUIS COUNTY

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS  
STATE OF MISSOURI

MIKE MOELLER, )  
)  
Plaintiff, )  
)  
v. )  
)  
ST. LOUIS COUNTY BOARD OF )  
ELECTION COMMISSIONERS, et al., )  
)  
Defendants, )  
)  
and )  
)  
COMMITTEE FOR A HEALTHY )  
COMMUNITY, INC., )  
)  
Intervenor-Defendant. )

Case No. 18SL-CC03283

Div. 31

**JUDGMENT**

This Court conducted a consolidated hearing/trial on Plaintiff's Application for Preliminary Injunction and Verified Petition for permanent injunctive relief on September 14, 2018.<sup>1</sup> At the beginning of the hearing, Committee for a Healthy Community, Inc.'s Motion to Intervene was granted without objection and Intervenor fully participated in the hearing. The parties submitted stipulated facts (and exhibits), presented testimony and other evidence, and made arguments to the Court at the hearing. After considering the pre-trial briefs submitted by the parties and a reply brief by Plaintiff submitted after the hearing, the stipulation of facts and exhibits and the arguments of counsel, the Court enters the following Judgment:

<sup>1</sup> The parties consented to accelerating the trial on the merits and consolidating it with the preliminary injunction hearing pursuant to an unopposed Motion to Consolidate filed by Plaintiff on 9/11/2018.

### **Findings of Fact**

1. Plaintiff Mike Moeller (“Moeller”) is a resident and taxpayer of St. Louis County, Missouri. Moeller is a registered voter of St. Louis County, Missouri. Moeller has exercised, and intends to exercise, his right to vote in St. Louis County elections, including ballot questions relating to St. Louis County government. (Stipulation of Facts ¶ 1).

2. Defendant St. Louis County Board of Election Commissioners (“Election Board”) is the election authority for St. Louis County, Missouri. (Stipulation of Facts ¶ 2).

3. On or about July 31, 2018, the initiative petition at issue in this case was submitted to the Election Board by which the proponents seek to amend the St. Louis County Charter with a provision to be known as “The St. Louis County Smoke-Free Air Act of 2018” (the “Initiative Petition”). (Stipulation of Facts ¶ 4). Exhibit 1 hereto (marked Jt Exhibit 1 at the hearing) is a true and correct copy of the Initiative Petition. (Stipulation of Facts ¶ 5).

4. The Initiative Petition recites that it will add a section 4.160 to the St. Louis County Charter. There is already a section 4.160 in the St. Louis County Charter.

5. On or about July 31, 2018, Moeller, through his attorneys, notified the Election Board of the Initiative Petition’s failure to comply with the requirements of the County Charter and County Code of Ordinances. (Stipulation of Facts ¶ 9).

6. On or about August 17, 2018, the proponents of the Initiative Petition, through their attorneys, responded to the Moeller correspondence to the Election Board. (Stipulation of Facts ¶ 11).

7. On or about August 28, 2018, the Election Board certified the Initiative Petition proposal for placement on the ballot for the November 6, 2018 general election as Proposition E. (Stipulation of Facts ¶ 13).

8. The Election Board has taken and is taking steps to prepare ballots for the November 6, 2018 ballot that includes the Initiative Petition proposal. (Stipulation of Facts ¶ 19).

9. All parties agree that the wording (or form) of the Initiative Petition is not identical to the form prescribed by section 106.030.1 of the St. Louis County Code of Ordinances, which requires that “Initiative petitions for any ordinance or amendment to the Charter shall be in substantially the following form . . .”

10. Plaintiff alleges that the deviations in wording/form of the Initiative Petition are not “substantially” in the form required by County Code of Ordinances section 106.030.1, rendering it fatally flawed.

11. Plaintiff also alleges that the Initiative Petition does not comply with the requirements for a petition set forth in Section 10.010 of the County Charter and is in violation of Article VI, Section 18(c) of the Missouri Constitution.

12. The Election Board, through its certification process, and Intervenor take the position that the Initiative Petition complies with Section 10.010 of the County Charter and is in substantial compliance with County Code section 106.030.1. The Election Board further answers that it is not required to determine the “sufficiency” of a proposed Charter amendment on Missouri Constitutional grounds.

### **Conclusions of Law**

13. As a threshold matter, the Election Board argues that Plaintiff has not established that he has a statutory right to bring the instant action, which it characterizes as a “pre-election challenge,” citing *Dienoff v. Galkowski*, 426 S.W.3d 633 (Mo. Ct. App. 2014). However, in that case, the issue was whether a Court had the statutory authority to “rename and rewrite a ballot

question,” not whether a plaintiff has the ability to challenge the legality of an initiative petition. 426 S.W.3d at 641. Plaintiff maintains, and this Court agrees, that there is a distinction between a pre-election challenge to a ballot initiative and a request for a declaratory judgment on the propriety of an initiative petition. Indeed, the Court in *Felker v. City of Sikeston*, 334 S.W.2d 754 (Mo. Ct. App. 1960), recognized such a distinction. While the Court in *Felker* held in the first part of its opinion that the election contest claims were not cognizable, it then went on to separately address the merits of the claim that the ballot’s form was incorrect. 334 S.W.2d at 755-57.

14. In *City of Kansas City, Missouri v. Chastain*, 420 S.W.3d 550 (Mo. banc 2014), the City petitioned for a declaratory judgment that a citizen’s proposed ordinance (to be added to the *City Charter*) submitted for ballot inclusion was facially unconstitutional. The trial court entered a final judgment for the City on the grounds that the proposed ordinance was unconstitutional and, therefore, that the City was not obligated to place the facially unconstitutional ordinance before the voters. *Id.* at 554. The citizen appealed, arguing *inter alia* that the City had no basis for a pre-election review of the initiative petition. Notwithstanding the fact that the initiative petition at issue did not involve a statewide ballot measure, the Missouri Supreme Court held that “Missouri law authorizes courts to conduct pre-election review of the facial constitutionality of an initiative petition. The idea underlying this rule is that pre-election review of the facial constitutionality of an initiative petition is warranted given the ‘cost and energy expended relating to elections’ and to avoid the ‘public confusion . . . .’” *Id.* at 554-555. Additionally, the citizen argued that the City had failed to establish it lacked an adequate remedy at law (entitling it to a declaratory judgment) because the ordinance could later be repealed under the *City Charter*. *Id.* at 555. The Missouri Supreme Court explained: “Missouri law not only

permits pre-election review of the facial constitutionality of the initiative petition, but it also expressly allows such a challenge to be raised in an action for declaratory judgment. The circuit court had the authority to enter a declaratory judgment finding that the initiative petition was facially unconstitutional.” *Id.*

15. Here, Plaintiff uses the same legal vehicle and seeks similar relief as the City in *City of Kansas City, Missouri v. Chastain*—seeking a declaratory judgment that a proposed initiative petition violates applicable law (here, County Code and Charter *procedural* requirements and the Missouri Constitution). This Court is not being asked to review the *substance* of the Initiative Petition so as to provide an advisory opinion of the proposition *if enacted* but merely to review whether the procedural mandates (or, in other words, conditions precedent) required under the St. Louis County Charter and Code of Ordinances (and Missouri Constitution) have been followed as it relates to the Initiative Petition. *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 828 (Mo. banc 1990). There is case law to support this limited pre-election review of a non-statewide initiative petition under a declaratory judgment action. *City of Kansas City, Missouri v. Chastain*, 420 S.W.3d 550 (Mo. banc 2014).

16. Under Missouri law, any party seeking an injunction or declaratory relief must establish that she lacks an adequate remedy at law. *See, e.g., Farm Bureau Town & Country Ins. Co. v. Angoff*, 909 S.W.2d 348, 354 (Mo. banc 1995); *Foster v. State*, 352 S.W.3d 357, 359 (Mo. banc 2011). Three elements are required to state a claim for a declaratory judgment: 1) “a justiciable controversy”; 2) “a legally protectible interest”; and 3) “a question ripe for judicial determination.” *Cooper v. State*, 818 S.W.2d 653, 655 (Mo. Ct. App. 1991). Justiciability refers to “a real, substantial, presently existing controversy admitting of specific relief.” *Id.* “A legally protectible interest involves a pecuniary or personal interest directly in issue or jeopardy, which

is subject to some consequential relief, immediate or prospective.” *Id.* “Ripeness requires the declaration sought to present a question appropriate and ready for judicial determination.” *Id.*

17. Additionally, “at the permanent injunction stage, the trial court must finally determine the merits of the claims—not merely the probability of prevailing—and weigh the harm caused by an order that permanently prohibits or requires a particular action. *State ex rel. Koster v. Didion Land Project Association, LLC*, 469 S.W.3d 914 (Mo. Ct. App. 2015).

18. Following the Missouri Supreme Court’s logic in *City of Kansas City* set forth above, this Court finds that Plaintiff may maintain an action for a declaratory judgment for and has no adequate remedy at law related to a review of the *procedural* issues (legality) of the Initiative Petition and whether it *facially* violates the Missouri Constitution.

19. The Court, however, recognizes that it must tread carefully when it comes to pre-election issues. “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.” *Missouri Elec. Cooperatives v. Kander*, 497 S.W.3d 905, 912 (Mo. App. W.D. 2016) (quoting *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990)). Plaintiff cites to the position St. Louis County (not a party here) has taken in similar litigation, explaining that there are also valid reasons for a Court to grant pre-election review under the appropriate circumstances, “such as the necessity of ‘[preventing] a self-serving faction from imposing its will upon the people without their full realization of the effects,’ *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 11-12 (Mo. Banc 1981), thereby ensuring an honest election result.” (Response of St. Louis County dated July 17, 2018, *Grommet v. St. Louis County Board of Election Commissioners*, St. Louis County Cause No. 18SL-CC02241).

20. The parties agree that the controlling section of the County Charter is section 10.010.3, which requires the Election Board to “determine th[e] sufficiency” of all proposed petitions. This determination (or review) is not expressly limited to any particular subject matter. Accordingly, the Election Board is charged with undertaking a sufficiency determination as to all requirements for a petition set forth in any relevant legal authority, including without limitation the County Charter and/or the County Code of Ordinances. The Election Board’s determination of sufficiency requires more than counting the number of “qualified voters” who have signed a petition. Section 10.010 contains mandatory language that a petition “shall be signed by qualified voters . . .” and “shall contain the full text of the proposal and an enacting clause which shall read as follows: . . .” The Code of Ordinances, section 106.030, also provides mandatory direction on initiative petitions: “Initiative petitions for any ordinance or amendment to the Charter shall be in substantially the following form: . . .” When conducting a sufficiency review, one Court explained, election officials must “examine the petition to insure that the threshold requirements . . . have been met.” *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 828 (Mo. Banc 1990); *see also Moore v. Brown*, 165 S.W.2d 657, 663 (Mo. 1942) (procedural sufficiency of initiative petitions to be decided by the election authority “in the first instance”).

21. In order to demonstrate its review of the sufficiency of the Initiative Petition, the Election Board adduced evidence that its representatives (but not Board members), Eric Fey and Rick Stream, are aware of the relevant law on petitions and considered the letter of counsel for Plaintiff *prior to* certifying the Initiative Petition. However, in light of Mr. Fey’s responses during questioning, including that they “chuckled” at certain points of the letter, the Court is not convinced that the representatives of the Board (or the Board itself) took seriously the procedural

issues raised by Plaintiff that the Court agrees the Board is charged with reviewing prior to certification in order to determine a petition's "sufficiency." Nevertheless, there is evidence that the Board (or its representative) undertook some kind of sufficiency review of the Initiative Petition.

22. Intervenor argues that the issues raised by Plaintiff are "minor form issues" that do not violate the "full text" requirement found in section 10.010.3 or are "substantially" compliant with the form found in section 106.030 of the County Code of Ordinances. This Court disagrees. The County Charter and Code requirements exist for very good reasons: to preserve the integrity of the initiative process, to ensure that potential signers of an initiative and voters are not misled, and to prevent confusion on the part of signers of an initiative and voters. While the Court agrees with Intervenor that some "flaws" are minor, other "flaws" in the Initiative Petition frustrate these important purposes.

23. Section 10.010.3 of the County Charter requires, among other things, that a petition include the "full text of the proposal." The full text provision requires the full text of the proposal to be disclosed, including a disclosure of what sections of existing law will be amended or repealed. *Moore v. Brown*, 165 S.W.2d 657, 660 (Mo. banc 1942). The Missouri Supreme Court has extolled the full text requirement as "an essential part of the initiative petition presenting it," and is of the view that an initiative petition cannot be found legally sufficient when compliance with this requirement is lacking. *Moore*, 165 S.W.2d at 660. The full text requirement's purpose is to prevent "a fraud on the signers of an initiative petition to procure their signatures on the inducement that it proposes a constitutional [in this instance, a charter] amendment greatly in their interest, when in fact it makes other undisclosed changes greatly to their detriment." *Id.* at 663.



24. The Initiative Petition purports to create Section 4.160 of the County Charter, but there is already a Section 4.160 in the Charter. By failing to indicate the fate of the existing 4.160, it is unclear what the proponents and/or the initiative signers intended (or understood) to be done with the existing Section—amend the existing 4.160, replace that section, or create a new “second” section 4.160 (as Intervenor argues). If the Initiative Petition signors did not have a clear understanding of what effect the proposal they were signing would have on the existing Section 4.160, the purpose for having the full text requirement has been frustrated. When undertaking the important task of changing the County’s fundamental legal document, initiative proponents must—according to the full-text requirement and precedents enforcing it—speak with clarity and precision, and not sow confusion and doubt. This is not a minor “clerical error.” By failing to indicate what effect the proposal will have on the existing County Charter section 4.160, the Initiative Petition violates the full text requirement of County Charter 10.010.

25. As it relates to the petition form to be “substantially” complied with under section 106.030, the Court finds that while some of the issues with the Initiative Petition raised by Plaintiff are, indeed, minor, others are substantive and substantial and cannot, therefore, be said to be “substantially” compliant with the form. Moreover, the cumulative effect of all of the errors render the Initiative Petition not “substantially” in the form required by the Code.

26. The various requirements in Section 106.030 exist for a reason—to protect the integrity of the lawmaking process—and must be enforced. The Initiative Petition’s failure to include the required attestation set forth in the County Code resulted in a Petition signed only by “registered voters.” However, the County Code requires signatories to be much more than “registered voters.” Signors must attest to the fact that they are “citizens and legal voters” in St. Louis County in order to lawfully be able to sign a petition. This distinction is material—and it

goes to the heart of election integrity. Indeed, a signatory registered to vote in St. Louis County who then moved to another county (but remains “registered” to vote in St. Louis County) might believe he was entitled to sign the Initiative Petition (and therefore sign the Initiative Petition), when in fact, his signature would violate the County Charter, for he is no longer a St. Louis County citizen or a *legal* voter in St. Louis County. The counting and verification of signatures by the Election Board can only confirm “registered” voters and is likely the reason that the Code requires a greater verification by the signor that she or he is not only a registered voter, but a current citizen and legal voter of St. Louis County at the time a petition is signed. The failure to require the signors to verify their status as “citizens and legal voters” of St. Louis County is a serious deviation from the form required under Section 106.030, rendering the Initiative Petition not “substantially” compliant with that prescribed form.

27. Additionally, the Initiative Petition contains a ballot summary on the signature page. Such a ballot summary is not authorized under Section 106.030 of the County Code. There is good reason for not having a ballot summary on a petition, as without such language signers would have to review the full text of the proposal. By allowing the proponents to create their own ballot summary, they are able (in a form that appears to be official) to seek signatures without the need for signers to review the full language and is another material deviation from 106.030.

28. Election officials in many cases have rejected proposals with similar or even less serious errors. *See, e.g.*, Letter from Jeremiah W. Nixon, Mo. Attorney General, to Hon. Rebecca McDowell Cook, Mo. Sec’y of State (Dec. 22, 1995), 1995 WL 771114, at \*1 (rejecting initiative petitions for failure to conform to two wording requirements).

29. Plaintiff also asserts in Count III that the Initiative Petition violates Article VI, Section 18(c) of the Missouri Constitution. Plaintiff argues that the Initiative Petition does not include any statement “setting forth the limits within which the municipalities may exercise the same power collaterally or coextensively” and “the method by which implementation and enforcement of the proposal will be financed.” Pursuant to *City of Kansas City v. Chastain*, cited above, this Court may conduct a facial review of these issues. After arguing that any such review by this Court would be improper and that the Election Board is not required to determine the Constitutionality of the Initiative Petition in the first instance, Defendant and Intervenor respond that the Initiative Petition does not relate to “services and functions of any municipality or political subdivision,” rendering this Constitutional provision inapplicable. Even if applicable, they argue further, the Initiative Petition specifically references municipalities and includes a paragraph that the “provisions of this section shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws.” As it relates to the financial provision, Defendant argues that the Initiative Proposition on its face does not “create any new departments, services or functions that would require funding,” such that it facially complies with Article VI, Section 18(c) of the Missouri Constitution. This Court agrees that from a facial review—all that is permitted of this Court—the Initiative Petition does not violate Article VI, Section 18(c) of the Missouri Constitution.

30. Finally, in weighing the harms of issuing a permanent injunction, the Court is acutely aware of the consequences of restraining the Election Board from acting as it relates to Proposition E. To paraphrase the Missouri Supreme Court in *Moore*, it is fundamental that the people are bound by their own County Charter. “Where they have provided a method for amending it, they must conform to that procedure.” *Moore*, 165 S.W.2d at 659. To preserve the

integrity of that concept and the election system, in this instance, the Court finds that there is greater harm if the improper Initiative Petition is allowed to proceed to a vote of the people.<sup>2</sup>

Accordingly, IT IS ORDERED, ADJUDGED AND DECREED that:

- (a) judgment is entered in favor of Defendant and against Plaintiff on Count I of Plaintiff's Petition as the Election Board (through its representatives) considered the sufficiency of the Initiative Petition;
- (b) judgment is entered in favor of Plaintiff and against Defendant on Count II of Plaintiff's Petition because the Initiative Petition violates section 10.010.3 of the County Charter as set forth above;
- (c) judgment is entered in favor of Defendant and against Plaintiff on Count III of Plaintiff's Petition because the Initiative Petition does not violate Article VI, Section 18(c) of the Missouri Constitution as set forth above;
- (d) judgment is entered in favor of Plaintiff and against Defendant on Count IV of Plaintiff's Petition because the Initiative Petition violates section 106.030 of the County Code of Ordinances as set forth above; and
- (e) Count V is dismissed as moot in light of the rulings on the other Counts.

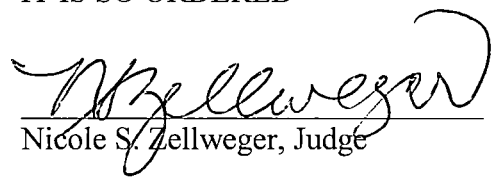
The Court hereby enters a permanent injunction in favor of Plaintiff that Defendant St. Louis County Board of Election Commissioners shall not count any votes cast on the ballot proposition presented by the Initiative Petition (now known as Proposition E per Joint Exhibit 5) and shall

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<sup>2</sup> It is the Court's understanding from the parties that it is too late to have Proposition E physically removed from the ballots. Accordingly, by this Judgment, the Court seeks to effectuate relief that is closest to that requested in the Petition (and which has been suggested by the Election Board in its Trial Brief at page 14).

take reasonable steps (including but not limited to the posting of signs) to advise voters that the Proposition is not properly on the ballot and that votes cast thereon will not be counted.

IT IS SO ORDERED

  
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Nicole S. Zellweger, Judge

September 17, 2018