



To: Senate Committee on Ethics, Elections, and Local Government
From: Michael Koss, League of Kansas Municipalities
Date: March 18, 2013
RE: HB 2162
Opponent

Thank you for allowing the League of Kansas Municipalities to testify on HB 2162. We believe that confusing ballot questions are rare, but we support efforts to clarify language that is difficult for voters to understand. Our opposition to this bill is based on an amendment passed in the House Committee on Elections, which makes the ballot explainer process mandatory rather than permissive.

In our testimony to the House, we pointed out that this bill could possibly cause timing conflicts with municipal bond election deadlines. The Committee resolved that issue, but also made the ballot explainer process mandatory for all municipal ballot questions. HB 2162 was intended to provide county election officers with the *discretion* to initiate a process to help voters understand *confusing* ballot questions, not require multiple levels of state bureaucracy to explain every local ballot question. Because HB 2162 as currently written would create a process that is not proportionate to the problem it seeks to solve, we suggest Section 1 be amended to its original language:

(a) A county election officer ~~shall~~ may request the preparation of a ballot language statement for the purposes of explaining the language of a ballot question of any municipality as defined by K.S.A. 75-6102, and amendments thereto.

Potential litigation is another reason to make the ballot explainer process discretionary. Missouri is one of several states that has seen ballot explanations become tools for politicizing ballot language. Former Secretary of State Robin Carnahan (D) has been sued over several of her ballot explanations, causing substantial legal expenses for the state and in some cases keeping ballot questions off the ballot (article attached). We believe Section 1(d) of HB 2162, which attempts to provide legal immunity, is unenforceable because of the First Amendment right to petition and the Fourth Amendment right to due process. For these reasons, limiting the use of ballot explainers to instances of confusing ballot questions could potentially decrease litigation and political abuse.

We are also concerned about the Office of the Secretary of State being responsible for reviewing the legal sufficiency of ballot language. Although our current Secretary of State is an accomplished attorney and former law professor, there is no requirement that an attorney hold that office. We think it would be inappropriate for a future Secretary of State who is a non-attorney to assess the legal sufficiency of a ballot explanation statement.

If the Committee is not inclined to pass out this bill, we believe our state's city attorneys are fully capable of drafting ballot explainers. City attorneys are non-partisan, unelected personnel who already draft ordinance summaries and are bound by oath to carry out the duties of their office. (K.S.A. 12-3007). We anticipate an Attorney General opinion in the near future that affirms the right of municipalities to provide ballot explainers, and the League has created a model ordinance for cities seeking to help voters understand confusing ballot language (attached).

In conclusion, we respectfully request you amend Section 1 to its original language so the production of ballot explanation statements is discretionary. Thank you for allowing me to testify and I will be happy to stand for questions at the appropriate time.



BALLOTS

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Ballot language issues growing for Missouri secretary of state

OCTOBER 01, 2012 12:10 AM • BY ELIZABETH CRISP • ECRISP@POST-DISPATCH.COM > 573-635-6178

JEFFERSON CITY • When a judge rejected Secretary of State Robin Carnahan's wording of a ballot measure concerning a health insurance exchange last month, it marked the fifth time that a judge has dismissed her ballot language.

Carnahan is Missouri's only secretary of state to have had a ballot summary rewritten by a court, and the trend has become an issue in the campaign to determine Carnahan's successor Nov. 6.

But the discussion obscures the fact that Carnahan has been asked to write and review far more ballot summaries than her predecessors. The number of citizen petitions submitted to the secretary of state's office grew from 16 in 2004 to 143 in 2012. Such an increase poses a growing problem for the secretary of state's office regardless of who is elected to the position.

The ballot summaries appear on the petitions groups circulate and, if they get enough signatures, are printed on the ballot. For measures that start in the Legislature, lawmakers can write their own ballot summaries or leave the task to the secretary of state's office, as they did with the health exchange measure.

Carnahan, a Democrat, is not seeking reelection. The candidates vying for her post, Republican Rep. Shane Schoeller of

Willard and Democrat Rep. Jason Kander of Kansas City, both say they would not have phrased the health exchange summary the way she did.

But no one expects such disputes over ballot language to disappear anytime soon.

Ballot summaries have become a frequent topic of lawsuits, often from opponents or supporters seeking more favorable wording. An expert for the National Conference of State Legislatures recently listed Missouri as one of two states facing a "new flood of technical challenges" to ballot measures.

"I think it is becoming more high-profile, and that's why it's so important that the next secretary of state be someone who voters trust," Kander said. "It makes it that much more important in the coming years that we have a secretary of state who takes a nonpartisan approach and has the courage to stand up to people on both sides of the aisle and do what's right."

Carnahan herself has advocated a reform of the initiative petition process to "ensure that those submitting petitions have a real reason for it," spokeswoman Stacie Temple said.

Some have argued that, rather than the direct democracy ideal of ordinary citizens promoting issues that lawmakers have ignored, the initiative process has been seized upon by well-funded factions and outsiders.

"It has really become a process that is not meeting its original intent," Temple said. "It's very important that people have the right to do that, but there are many ways to improve the process."

A bill before lawmakers in 2008 that Carnahan's office supported would have required petition circulators to be Missouri residents, prohibited anyone convicted of forgery from circulating petitions, outlawed payment for

circulators based on the number of signatures collected and raised the penalty for forging petition signatures. The bill never made it to a vote.

Similar proposals have been made in recent years to no avail, despite the support of advocacy groups, such as the Missouri Farm Bureau, the Missouri Chamber of Commerce and the Missouri School Boards Association.

"The growing number of petitions filed and the associated lawsuits make it increasingly difficult for voters to follow the issues," Missouri Farm Bureau President Blake Hurst said during the legislative session.

The organizations found that 61 of the 143 petitions circulating this year came from three entities and addressed three topics. They alleged the entities were submitting multiple versions of the same measure so they could place the most favorable one on the ballot.

Both Schoeller and Kander said the increase is of concern.

Schoeller, who briefly served as acting House speaker after former Speaker Steve Tilley of Perryville resigned from the post this summer, said it's important that any reform efforts 'strike the right balance."

"What you don't want to do is do anything that would hinder people from putting forth issues on the ballot," he said.

Jefferson City lawyer Marc Ellinger, who has handled litigation on several petitions and is a frequent ally of retired investor Rex Sinquefield of St. Louis, said there are issues that could be addressed.

"There's no question that some reform is called for," Ellinger said. "I think that there are some issues out there that need to be addressed."

Sinquefield, who has contributed at least \$400,000 to Schoeller's campaign, has been involved in several initiative petitions, including more than a dozen versions of a measure that would overhaul the state's tax code.

JUDICIAL REWRITE

The secretary of state's first summary to be overturned involved a petition in 2008 dealing with affirmative action. In that case, a judge ruled that Carnahan's summary incorrectly implied that the amendment would replace one type of preferential treatment with another. He rewrote it, but the measure never made it to the ballot. Experts at the time said the rewording was a first.

A month later, a different judge rewrote ballot language for a proposed constitutional amendment to ban a type of embryonic stem cell research.

Two more summaries were struck down the following year — one dealing with eminent domain and the other dealing with another affirmative action initiative.

Then came the health exchange measure.

The Republican-led Legislature had passed a measure that would put on the Nov. 6 ballot a measure to require a public or legislative vote before the state government could set up a health insurance exchange, as required by the Affordable Care Act.

Carnahan's original summary asked voters whether state law should be amended to "deny individuals, families, and small businesses the ability to access affordable health care plans through a state-based health benefit exchange unless authorized by statute, initiative or referendum or through an exchange operated by the federal government as required by the federal health care act?"

The judge criticized the wording as unfair.

Schoeller, for one, agrees.

"By using terms like 'deny,' she was putting forth an opinion," Schoeller said.

His opponent, Kander, said, "I probably would have written it a little differently, but so would everyone."

But Carnahan also has been successful in defending ballot language in court.

In 2009, a judge upheld her description of a measure barring public funding for abortions and certain kinds of embryonic stem cell research. Both opponents and supporters of the measure had challenged it.

Carnahan also was unsuccessfully challenged over her use of the phrase "puppy mill cruelty" in the summary for a 2010 measure regulating dog breeders.

More recently, the court upheld language that will appear on the November ballot for a proposal to change the process of selecting Missouri's appellate judges.

Still, Schoeller has often mentioned on the campaign trail that Carnahan has been "overturned more times than all previous secretaries of state combined."

He sponsored legislation this year that, if approved by voters, would have created a panel of lawmakers called the "Fair Ballot Commission" to oversee summary disputes.

Kander, a military veteran who has been in the Legislature since 2009, disagreed with the proposal.

"Only someone who has made a career in politics would think that adding more politicians would make it less political," he said, alluding to Schoeller's background of working for elected officials and in governmental affairs. "When I was given a mission in the Army, I didn't pass it off to another soldier."

Schoeller has since changed his proposal, deciding the state should have a bipartisan group of citizens, rather than elected officials, to review complaints over ballot language bias.

"If you have a secretary of state who chooses to inject their own personal bias, it becomes an issue," he said. "It's important, now that we've seen this occur, to create accountability."

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CITY OF _____

ORDINANCE NO. _____

A ORDINANCE BY THE GOVERNING BODY OF THE CITY OF _____ TO
COOPERATE WITH THE COUNTY ELECTION OFFICER TO PRODUCE BALLOT
EXPLANATION STATEMENTS

Section 1. BALLOT EXPLAINER. If the county election officer requests the preparation of a ballot language statement for the purposes of explaining the language of a ballot question concerning the City of _____, the city attorney shall create such statement in compliance with the provisions of this ordinance.

Section 2. SUBSTANCE. The city attorney shall create a ballot language statement that fairly and accurately explains what a vote for and what a vote against the measure represents. Such ballot language statements 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.

Section 3. SUBMISSION. The city attorney shall complete the ballot language explainer statement within ten (10) days of the request by the county election officer. Upon completion, the city attorney shall send such statement to the county election officer.

ADOPTED by the Governing Body this ____ day of _____, 20__.

APPROVED AND SIGNED by the Mayor this ____ day of _____, 20__.

City of _____, Kansas

Mayor,

ATTEST:

City Clerk,

APPROVED AS TO FORM:
