

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

DR. ANNA FITZ-JAMES,

Plaintiff,

v.

JOHN R. ASHCROFT,
MISSOURI SECRETARY OF STATE

Defendant.

Case No.: 23AC-CC03167

MOTION TO DISMISS

Defendant Missouri Secretary of State John R. Ashcroft moves the Court to dismiss Plaintiff's cause of action under Missouri Supreme Court Rule 55.27(a)(6) because Plaintiff has failed to state a claim for which relief can be granted in that Section 116.190, RSMo, does not authorize challenges to an official ballot title until the official ballot title has been certified. Here, an official ballot title for Plaintiff's ballot measure has not yet been certified. For the same reason, the case is not justiciable because it is unripe. In support, Defendant states:

I. Background

On May 27, 2023, Plaintiff filed her Petition Challenging Summary Statement Portion of Official Ballot Title for Initiative Petition. The Secretary of State was served on June 1, 2023, and this motion is timely filed. The Petition alleges that the Secretary of State's official ballot title for the Right to Reproductive Freedom Initiative Petition (later denominated by the Secretary of State as IP No. 2024-077)¹

¹ The Secretary of State has recently learned through public reporting that on June 29, 2023, Plaintiff filed a similar lawsuit challenging the summary statement for a yet-to-be-certified

is unfair and insufficient under Section 116.190, RSMo. Petition, ¶ 1. Plaintiff submitted the Initiative to Defendant on March 8, 2023 *Id.* ¶ 8, and on April 13, 2023, Defendant sent the Attorney General a proposed summary statement for review. *Id.* ¶ 10. On April 24, 2023, the Attorney General approved the legal content and form of the summary statement. *Id.* ¶ 11.

But no official ballot title has been certified for IP No. 2024-077, and Plaintiff has filed separate litigation concerning the Attorney General's rejection of the State Auditor's fiscal note and fiscal note summary. *See Fitz-James v. Bailey*, Case No. 23AC-CC02800. The Circuit Court's decision in that case has since been appealed to the Missouri Supreme Court. *See State ex rel. Fitz-James v. Bailey*, Case No. SC100132. The Auditor's fiscal note and fiscal note summary have not been approved by all state officials.

ballot title for another of her ballot measures, IP No. 2024-078. *See* "ACLU calls ballot summary for Missouri abortion question 'misleading,' sues Ashcroft," St. Louis Post-Dispatch, July 1, 2023, available at https://www.stltoday.com/news/local/government-politics/aclu-calls-ballot-summary-for-missouri-abortion-question-misleading-sues-ashcroft/article_8d6625f6-175c-11ee-970c-bbbac5e3a3ae.html (reporting that "The lawsuit filed Thursday is the second of 11 planned lawsuits challenging ballot summaries proposed for the 11 proposed petitions, said Tom Bastian, spokesman for the ACLU of Missouri."). That case has been assigned Case No. 23AC-CC03953.

The new lawsuit was filed nearly a month after Plaintiff filed this lawsuit. Plaintiff has submitted 11 ballot measures to the Secretary of State, and none presently have a certified official ballot title. Public records available on the Secretary of State's website demonstrate that Plaintiff submitted her ballot measures on or about the same date earlier this year. *See* 2024 Initiative and Referendum Petitions Filed, available at <https://www.sos.mo.gov/elections/petitions/2024>. Plaintiff appears to be filing multiple, virtually identical lawsuits staggered over a period of time, instead of filing one lawsuit or waiting until an official ballot title has been certified for any of them.

II. Standard of Review

Whether dismissal under Missouri Rule 55.27(a)(6) is proper is a test of the adequacy of the petition. *Bromwell v. Nixon*, 361 S.W.3d 393, 398 (Mo. 2012). The Court will review the petition to determine if the alleged facts constitute a cause of action that is recognized. *City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo. 2010). Dismissal under this Rule is appropriate when, on the face of the petition, the Plaintiff is unable to prove that facts exist to support their claim for relief. *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488 (Mo. App. E.D. 1990).

In addition, “Ripeness, like standing, is an element of justiciability.” *Calzone v. Ashcroft*, 559 S.W.3d 32, 35 (Mo. App. W.D. 2018). Ripeness is determined by whether “the parties’ dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character.” *Mo. Health Care Ass’n v. Attorney Gen. of Mo.*, 953 S.W.2d 617, 620 (Mo. banc 1997). Here, Plaintiff’s suit is not ripe because no official ballot title has been certified, and therefore her lawsuit should be dismissed.

III. Argument

A. Dismissal under Rule 55.27(a)(6).

Dismissal is appropriate because the facts alleged in the Petition do not support a recognized cause of action. Official ballot titles are not certified piecemeal.

First, Section 116.180 mandates that the official ballot title be certified after the Secretary of State receives both an approved fiscal note and fiscal note summary *and*

an approved summary statement. Second, Section 116.180 mandates that the official ballot title contain “separate paragraphs with the fiscal note summary immediately following the summary statement of the measure[.]”). Plaintiff has alleged no set of fact that would entitle her to a review of the current summary statement because there is no official title, or to a revised official ballot title. As noted above, the fiscal note summary has not yet been approved by all state officials.

Section 116.190.1 states that “[a]ny citizen who wishes to challenge the official ballot title . . . for a proposed constitutional amendment . . . may bring an action in the circuit court of Cole County. The action must be brought within ten days *after* the official ballot title is certified by the secretary of state[.]” § 116.190.1, RSMo (emphasis added). The statute could not be clearer: the window to bring an official ballot title challenge opens once the official ballot title has been certified, and it closes on the tenth day after.

The Court of Appeals has affirmed this plain text reading, holding that it is proper for a citizen to challenge the ballot title once it has been certified by the Secretary of State. *Knight v. Carnahan*, 282 S.W.3d 9, 20 (Mo. App. W.D. 2009). In *Knight*, the Court held that an official ballot title lawsuit was untimely because it was filed “months after the secretary had certified the ballot title.” *Id.* at 20. The Court stressed that ten-day window, affirming the lower court’s decision that such challenges are “required to be brought *within* ten days *of* the ballot title certification.” *Id.* (emphasis added). The Court rejected the argument that the ten-day period can begin at any other point, such as—as happened in *Knight*—after the

Secretary had already certified the measure for placement on the ballot after signatures had been gathered. *Id.* The same logic applies to premature challenges.

Thus, in order to bring an official-ballot-title challenge, there is a condition precedent of certification by the Secretary of State. Here, Plaintiff filed suit prior to the official certification of the ballot title, which includes the summary statement. § 116.180 (“Within three days after receiving the official summary statement the approved fiscal note summary and the fiscal note relating to any statewide ballot measure, 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[.]”). Because of the lack of certification, this Court cannot resolve claims about the fairness and sufficiency of the summary statement because no official ballot title exists for Plaintiff to challenge.

None of the facts pleaded in Plaintiff’s Petition would entitle her to relief. She has not alleged that there is an official ballot title, instead alleging only that “Ashcroft must include the approved summary statement as a portion of the ballot title.” (Pet. at ¶ 12). Of course, no certification has happened, because there is not yet an approved fiscal note or fiscal note summary. This Court should dismiss the Petition.

B. The case is not justiciable because it is unripe.

For similar reasons, the case is not justiciable because there is no presently existing controversy over which this Court can grant relief of a conclusive character.

See Seay v. Jones, 439 S.W.3d 881, 888 (Mo. App. W.D. 2014) (“citizens are authorized to seek judicial review of the official ballot title... [i]n such an action, the challenger

must ‘state the reason or reasons why the summary statement portion of the official ballot title is insufficient or unfair.’”). Plaintiff cannot assert a presently existing controversy because there is no “summary statement portion” of any “official ballot title.” *Id.* The case would not be ripe until the official ballot title has been certified.

And this Court cannot grant any relief to Plaintiff should she prevail, because Section 116.190.4 authorizes this Court only to “certify summary statement portion of the official ballot title to the secretary of state.” There is no official ballot title for this Court to review and certify back to the Secretary. This dispute is not justiciable because it is not ripe, and therefore this Court should dismiss the case.

IV. Conclusion

For the reasons stated, this Court should dismiss the case because it is not ripe or because Plaintiff has failed to state a claim for relief under Rule 55.27(a)(6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2023, I electronically filed the foregoing on the Court's electronic filing system, which will be served electronically on all counsel of record.

/s/ Jason K. Lewis

