

IN THE SUPREME COURT OF MISSOURI

WES SHOEMYER, *et al.*, Plaintiffs,

vs.

JASON KANDER, Defendant,

MISSOURI FARMERS CARE, TIMOTHY JONES, BILL REIBOLDT, and TOM

DEMPSEY, Intervenors/Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF
PETITION FOR ELECTION CHALLENGE

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JURISDICTIONAL STATEMENT

Section 115.555 of the Missouri Revised Statutes provides that,

All contested elections for the office of governor, lieutenant governor, secretary of state, attorney general, state treasurer and state auditor shall be heard and determined by the supreme court. Likewise, all contests to the results of elections on constitutional amendments, on state statutes submitted or referred to the voters, and on questions relating to the retention of appellate and circuit judges subject to article V, section 25 of the state constitution shall be heard and determined by the supreme court.

This case involves a challenge by Plaintiffs (“Contestants”) to the results of the August 5, 2014, election on HJR 11 regarding Amendment No. 1 to the Missouri Constitution (“Amendment 1”). Thus, Contestants’ challenge to the ballot title as unfair or insufficient is properly brought before this Court as an election contest under § 115.553 RSMo. *Dotson v. Kander*, 435 S.W.3d 643, 645 (Mo. banc 2014).

STATEMENT OF FACTS

On May 14, 2013,¹ the Missouri House of Representatives and Missouri Senate

¹ According to the Journal entries for the Missouri House of Representatives and Senate, HJR 11 was actually passed on May 22, 2013. (Missouri Journal of the House, 97-72, 1st Sess., at 3330 (2013) (app. at 13); Missouri Journal of the Senate, 97.71, 1st Sess., at 2435 (2013) (app. at 16).) Contestants point out this discrepancy as a matter of fact,

each passed House Joint Resolution 11 (hereinafter sometimes referred to as “HJR 11” or “Amendment 1”). (Contestee Kander’s Answer, Aff. Defenses ¶ 1.) HJR 11 proposed to amend Article I of the Missouri Constitution to include the following language:

That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri’s economy. To protect this vital sector of Missouri’s economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.

(Contestants’ Pet., Ex. C.) On May 22, 2013, the Missouri Legislature delivered HJR 11 to Defendant (“Contestee”), Secretary of State Jason Kander. (Missouri Journal of the House, 97-72, 1st Sess., at 3330 (2013) (app. at 13); Missouri Journal of the Senate, 97.71, 1st Sess., at 2435 (2013) (app. at 16).) On or about June 24, 2013, Contestee Kander certified the official ballot title and summary statement contained in HJR 11 and had it placed on the August 5 ballot. (Contestee Kander’s Answer, Aff. Defenses ¶ 3.) The official ballot title for Amendment 1 read:

Shall the Missouri Constitution be amended to ensure that the right of Missouri citizens to engage in agricultural production and ranching practices shall not be infringed?

although we contend that the precise date of such action has no legal effect on the determination of this action.

(Pet., Ex. C.)

On August 5, 2014, an election was held and Amendment 1 passed with an unofficial count of 499,581 votes for and 497,091 votes against. (Contestant Kander's Answer, Aff. Defenses ¶ 5.) The August 5 votes resulted in Amendment 1 passing with an unofficial margin of victory of 0.25 percent. On August 26, due to the tenuous result, Contestant Wes Shoemyer petitioned for a recount of the votes for and against Amendment 1. (Pet. ¶ 10.) Contestant Shoemyer's petition was granted and from approximately September 4, 2014, through September 11, 2014, Contestee Kander conducted a statewide recount. (Pet. ¶ 11.) On September 15, 2014, Contestee Kander certified the results of the recount, with 499,963 votes for and 497,588 votes against. (Contestants' Pet. Ex. B.)

On October 14, 2014, Contestants filed a Petition for Election Contest, contesting the election results which were certified on September 15, 2014. (Contestee Kander's Answer, Aff. Defenses ¶ 7.) On October 17, 2014, Intervenors/Contestees Timothy Jones, Tom Dempsey, and Bill Reiboldt ("Legislative Intervenors") filed an Application to Intervene as Party Defendants, which was granted by this Court on November 21, 2014. On October 28, 2014, Intervenor/Contestee Missouri Farmers Care ("Corporate Lobby Intervenor") filed a Motion to Intervene, which was also granted by this Court on November 21, 2014. On November 5, 2014, Contestee Kander filed his Answer, which was later amended on December 3, 2014. Additionally, on November 25 and December 3, 2014, Legislative Intervenors and Corporate Lobby Intervenor, respectively, filed their Answers.

In their Answers, each Contestee raised a number of affirmative defenses. In particular, each and every answer raised the defenses that Contestants claims are barred by Article XII of the Missouri Constitution and/or untimely or barred by the 30-day statute of limitation in § 115.557 RSMo. Additionally, one or more Contestees raised the defenses of laches and violation of the separation of powers doctrine. Finally, Corporate Lobby Intervenor raised the defense that Contestants failed to file a verified Complaint, which has since been remedied and the Legislative Intervenors asserted the defense that Contestants have requested a remedy which is not provided for under the law.

POINTS RELIED ON

I. THE RESULTS OF THE AUGUST 5 ELECTION ON AMENDMENT 1 SHOULD BE SET ASIDE UNDER § 115.553.2 RSMo BECAUSE THE OFFICIAL BALLOT TITLE FOR AMENDMENT 1 WAS UNFAIR, INSUFFICIENT, DECEPTIVE, AND MISLEADING AND CAUSED IRREGULARITIES IN THE RESULTS, IN THAT THE BALLOT TITLE OMITTED A SIGNIFICANT LIMITATION ON THE RIGHT TO FARM (LEGISLATION BY LOCAL GOVERNMENT) AND INCORRECTLY STATED THE CLASS OF PERSONS WHO BENEFITTED FROM THE NEWLY-CREATED RIGHT.

§ 115.553.2 RSMo

§ 116.155 RSMo

Seay v. Jones, 439 S.W.3d 881 (Mo. App. W.D. 2014)

Dotson v. Kander, 435 S.W.3d 643 (Mo. banc 2014)

Overfelt v. McCaskill, 81 S.W.3d 732 (Mo. App. W.D. 2002)

Cures Without Cloning v. Pund, 259 S.W.3d 76 (Mo. App. W.D.2008)

II. CONTESTANTS' CHALLENGE TO THE RESULTS OF AMENDMENT 1 IS
TIMELY BECAUSE IT WAS BROUGHT WITHIN THIRTY DAYS OF THE
CERTIFICATION OF THE RECOUNTED ELECTION RESULTS IN ACCORDANCE
WITH § 115.557 RSMo.

§ 115.557 RSMo

§ 115.553 RSMo

Dotson v. Kander, 435 S.W.3d 643 (Mo. banc 2014)

United Gamefowl Breeders Ass'n of Mo. v. Nixon, 19 S.W.3d 137 (Mo. banc 2000)

D'Arcy and Associates, Inc. v. K.P.M.G. Peat Marwick, L.L.P., 129 S.W.3d 25 (Mo.
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III. CONTESTANTS' CLAIMS ARE NOT BARRED BY THE EQUITABLE
DOCTRINE OF LACHES BECAUSE ELECTION CHALLENGES ARE NOT
EQUITABLE CLAIMS AND CONTESTANTS' PETITION WAS FILED WITHIN
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§ 115.557 RSMo

Hagely v. Board of Educ. of Webster Groves School Dist., 841 S.W.2d 663 (Mo. banc 1992)

UAW-CIO Local No. 31 Credit Union v. Royal Ins. Co., Ltd., 594 S.W.2d 276 (Mo. banc 1980)

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IV. CONTESTANTS' CLAIMS ARE NOT BARRED BY ARTICLE XII OF THE MISSOURI CONSTITUTION BECAUSE ARTICLE XII SHOULD NOT APPLY TO AN AMENDMENT UNLESS IT WAS PROPERLY PASSED AND BECAUSE ELECTION CHALLENGES ARE AUTHORIZED UNDER § 115.555 RSMo AND ARTICLE VII § 5 OF THE MISSOURI CONSTITUTION.

MO. CONST., Article XII, §1

MO. CONST., Article XII, §2(b)

MO. CONST., Article VII, § 5

§ 115.555 RSMo

Lewellen v. Franklin, 441 S.W.3d 136 (Mo. banc 2014)

State v. Vaughn, 366 S.W.3d 513 (Mo. banc 2012)

ARGUMENT

Pursuant to Section 115.553.2 RSMo, Contestants are entitled to judgment as a matter of law setting aside the results of the August 5 election on Amendment 1 to the Missouri Constitution. The official ballot title submitted to the voters was insufficient, unfair, deceptive, and misleading. The improper nature of the ballot title created irregularities which render the results void. Furthermore, Contestees' affirmative defenses are meritless and fail to provide any basis for denying the relief sought by Contestants.

I. THE RESULTS OF THE AUGUST 5 ELECTION ON AMENDMENT 1 SHOULD BE SET ASIDE UNDER § 115.553.2 RSMo BECAUSE THE OFFICIAL BALLOT TITLE FOR AMENDMENT 1 WAS UNFAIR, INSUFFICIENT, DECEPTIVE, AND MISLEADING AND CAUSED IRREGULARITIES IN THE RESULTS, IN THAT THE BALLOT TITLE OMITTED A SIGNIFICANT LIMITATION ON THE RIGHT TO FARM (LEGISLATION BY LOCAL GOVERNMENT) AND INCORRECTLY STATED THE CLASS OF PERSONS WHO BENEFITTED FROM THE NEWLY-CREATED RIGHT.

A. STANDARD OF REVIEW

Section 115.553.2 states in relevant part that “[t]he result of any election on any question may be contested by one or more registered voters from the area in which the election was held.” Election results may be contested under Chapter 115 where the official ballot title fails to comply with § 116.155.2. *Dotson v. Kander*, 435 S.W.3d 643, 645 (Mo. banc 2014).

Section 116.155 provides that a ballot title “shall be a true and impartial statement of the purposes of the proposed measure in language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.” Put another way, “[t]he language used should fairly and impartially summarize the purpose of the measure so that voters will not be deceived or misled.” *Seay v. Jones*, 439 S.W.3d 881, 889 (Mo. App. W.D. 2014) (quoting *Archev v. Carnahan*, 373 S.W.3d 528, 532 (Mo. App. W.D. 2012)). When challenging the language of a ballot title, “[t]he burden is on the opponents of the language to show that the language was insufficient and unfair.” *Overfelt v. McCaskill*, 81 S.W.3d 732, 738 (Mo. App. W.D. 2002) (quoting *Hancock v. Sec’y of State*, 885 S.W.2d 42, 49 (Mo. App. W.D.1994)).

Insufficient means “inadequate; especially lacking adequate power, capacity, or competence.” The word “unfair” means to be “marked by injustice, partiality, or deception.” Thus, the words “insufficient [or] unfair” ... mean to inadequately [or] with bias, prejudice, deception and/or favoritism state the [consequences of the initiative].

Cures Without Cloning v. Pund, 259 S.W.3d 76, 81 (Mo. App. W.D.2008) (quoting *Hancock v. Sec’y of State*, 885 S.W.2d 42, 49 (Mo. App.1994) (internal citations omitted)).

B. THE BALLOT TITLE FOR AMENDMENT 1 WAS INSUFFICIENT AND UNFAIR BECAUSE IT OMITTED THE EXPRESS LIMITATION OF THE RIGHT SUBJECT TO ARTICLE VI OF THE MISSOURI CONSTITUTION.

The ballot title was insufficient and unfair because it failed to apprise voters of an

explicit limitation on the “right to farm,” which is expressly included in the constitutional amendment. By doing so, the ballot title potentially either misled voters into a false understanding of the extent of the new Constitutional right that Amendment 1 purported to create, or confused voters as to the true extent of the right being created. Because the language failed to accurately describe the limitations of the right being created by the amendment, it was inaccurate.

As stated above, Amendment 1 states in relevant part that the right to farm “shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.” In contrast, the ballot title, which appeared on the August 5, 2014, election ballots, simply asked if the Missouri Constitution should “be amended to ensure that the right of Missouri citizens to engage in agricultural production and ranching practices shall not be infringed.” The ballot language makes absolutely no mention of any exception to the right it creates or to article VI of the Missouri Constitution. Such an omission was insufficient and unfair and described the amendment in a way that made it appear stronger than it actually is.

As the Court of Appeals for the Western District recently held, a summary statement that fails to mention a significant limitation to a newly created right is unfair and insufficient. *Seay*, 439 S.W.3d at 892. In *Seay*, Plaintiffs challenged the sufficiency of ballot language for an amendment to the Missouri Constitution authorizing voting in advance of election day in general elections, if funds are appropriated and disbursed by

the State to pay for the costs of early voting.² *Id.* at 884-85. There, the challenged ballot title read:

Shall the Missouri Constitution be amended to permit voting in person or by mail for a period of six business days prior to and including the Wednesday before the election day in all general elections?

In challenging that summary, the plaintiffs alleged that the ballot title was insufficient because it failed to apprise voters of the fact that early voting would be contingent on the State appropriating funds to cover the increased costs associated with advance voting. *Id.* at 889. The plaintiffs' allegations were based on language contained in the actual amendment which provided that:

[n]o local election authority or other public office shall conduct any activity or incur any expense for the purpose of allowing voting in person or by mail in advance of the general election day **unless a state appropriation is made and disbursed to pay the local election authority or other public office for the increased cost or expense of the activity.**

(Emphasis added). The court of appeals held that the appropriation contingency contained in the amendment “significantly alters the right granted to voters” in the relevant amendment. *Id.* at 891. Furthermore, the court held that omission of any reference to that

² While *Seay* was challenged prior to the election, pursuant to Section 116.190, the standard for sufficiency of a ballot title is identical in this action as in *Seay*, regardless of this difference in procedural posture.

central element of the amendment would mislead voters and therefore the statement is insufficient and unfair. *Id.* at 892-93.

Like in *Seay*, the ballot title at issue here fails to include a significant limitation to the right it purports to grant to voters. Under Amendment 1, the right to farm is expressly limited by the “powers, if any, conferred by article VI.” By not including this limitation in the ballot language, the average voter would reasonably be misled to believe that the right to farm would be protected from any infringement whatsoever, a conclusion which does not accord with the legal reality.

Perhaps as importantly, the language has the capacity to deceive because it refers only to Article VI of the Constitution and not to the powers conferred to local governments under that Article. The amendment does not explain that it completely removes the legislature’s right to legislate in the area of farming and ranching, but deftly permits local governments to do so without any constitutional limitations upon that right. Thus an individual whose farmland or ranch abuts a municipality with zoning would be ill-informed that the amendment does not protect the farmer from the reach of the local government. Nothing in the ballot title or summary statement reveals this. As it is, it has the capacity to deceive and unfairly suggests rights that the amendment does not grant.

C. THE BALLOT TITLE FOR AMENDMENT 1 WAS INSUFFICIENT AND UNFAIR BECAUSE IT STATES THAT AMENDMENT 1 GRANTS RIGHTS TO MISSOURI CITIZENS WHEN IT ACTUALLY PROVIDES RIGHTS ONLY TO “FARMERS AND RANCHERS.”

Additionally, the ballot title for Amendment 1 was insufficient and unfair because it inaccurately identified the beneficiaries of the new right to farm. In the actual

constitutional language of Amendment 1, the objects or recipients of the newly created right to engage in farming and ranching practices without infringement are “farmers and ranchers.” Meanwhile, the ballot title purports to secure the same right to “Missouri citizens.” This difference in terminology is far more significant than it appears and had a serious actual or potential effect on the voters’ understanding or perception of the purpose and consequences of Amendment 1. Because the ballot title failed to properly identify the category of persons entitled to protection under Amendment 1, the results of the election should be voided.

As the vast majority of media coverage for and against Amendment 1 highlighted, exactly who is to benefit from the newly created right to farm was immensely important in determining the purpose and likely consequence of enacting this amendment. *E.g.* https://www.youtube.com/watch?v=_0YhKv_Tv88. In particular, opponents of this measure claim that the terms “farmers and ranchers” are broad enough to include any entity that is engaging in farming or ranching in the state of Missouri regardless of their state or country of residency. Inclusion of the term “Missouri citizens” in the ballot title was patently inaccurate as an identifier of the parties receiving protection under Amendment 1 and must therefore have been a mistake, or intended to mislead and reframe the debate over out-of-state farming interests.³

³ Not only are certain farming operations corporate operations and interests out of state, some of them are out of the country. See, *e.g.*,

<http://dealbook.nytimes.com/2013/05/30/a-mystery-of-smithfields-big-china-deal-what->

No matter the reason for its inclusion, use of the term “Missouri Citizens” to describe the persons protected by Amendment 1 was inaccurate and renders the ballot title insufficient and unfair. Similarly, the grant of these rights to farmers and ranchers would appear to be a grant of rights only to natural persons,⁴ and not to the corporate entities that own or control the farms. Thus a farmer might vote for the amendment believing that it grants him absolution from control by the legislature, only to find that a measure passed by a subsequent legislative session and aimed at corporate entities who practice farming (many of whom operate as LLCs, S, or C corporations, and other corporate forms) divests him of rights he believed he ensured himself by passage of the amendment. The variations between the language of the amendment and the language of the summary statement are significant and have the capacity to mislead or deceive the voting public.

These deficiencies, like the previously identified issues, have a significant impact

continental-grain-will-do/?_r=0 (explaining Smithfield Foods’ purchase by Chinese interests).

⁴ The wording of the amendment extends protections only to farmers and ranchers, and not “persons.” While “persons” may be construed to include “bodies politic and corporate, and to partnerships and other unincorporated associations,” § 1.020 RSMo (2014) nothing permits a Court to construe the amendment to interpret the words “farmers and ranchers” as used in this amendment to include corporate entities, and such a construction would be antagonistic to the clear meaning of the terms.

on the perceived purpose and consequences of Amendment 1 and create significant election irregularities. For these reasons, the results for the election on Amendment 1 should be set aside.

II. CONTESTANTS' CHALLENGE TO THE RESULTS OF AMENDMENT 1 IS TIMELY BECAUSE IT WAS BROUGHT WITHIN THIRTY DAYS OF THE CERTIFICATION OF THE RECOUNTED ELECTION RESULTS IN ACCORDANCE WITH § 115.557 RSMo.

Contestees, in their answers, erroneously assert that Contestants' petition is not timely and therefore should not be considered. Contestants, however, have complied with all time requirements laid out in the relevant statutes and have filed this contest precisely as authorized by law. Furthermore, this Court recently held that the exact procedures Contestants have used to challenge this ballot language are proper in this context. *Dotson*, 435 S.W.3d at 645. Finally, the fact that Contestants could have brought a suit sooner does not make an otherwise timely action untimely.

A. CONTESTANTS TIMELY FILED THEIR PETITION FOR ELECTION CONTEST WITHIN THIRTY DAYS OF CERTIFICATION OF THE VOTES FOR AMENDMENT 1.

Contestees' claim that Contestants' Petition is not timely is patently incorrect. Section 115.557 RSMo lays out the applicable statute of limitation for contesting an election. In particular, § 155.557 states that "[n]ot later than thirty days after the official announcement of the election result by the secretary of state, any person authorized by section 115.553 who wishes to contest the election for any office or on any question provided in section 115.555, shall file a verified petition in the office of the clerk of the supreme court." "The right to contest an election exists solely as established by statute, and one seeking relief under statutory provisions must bring himself strictly within their terms." *State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 232 (Mo. App. 1978).

Contestants properly filed their petition in strict compliance with § 155.557 RSMo and within this 30-day time limit.

As noted above, Contestants filed their petition on October 14, 2014; exactly 30 days after the Secretary of State issued the official results of the Amendment 1 election recount on September 15, 2014. Calculation of the 30-day time limit is properly based on the official results issued on September 15, 2014, because the Secretary of State's announcement on September 15 superseded any previous election results and restarted the clock on Contestants' election challenge.

Additionally, any challenges made prior to the results of the recount would have been premature while the outcome of the election was still in question. *United Gamefowl Breeders Ass'n of Mo. v. Nixon*, 19 S.W.3d 137, 139 (Mo. banc 2000) (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."); *see also, Knight v. Carnahan*, 282 S.W.3d 9 (Mo. App. Ct. W.D. 2009) (dismissal for lack of ripeness affirmed). Commencing the statute of limitations prior to conclusion of the recount would have also been contrary to the general principles of statutes of limitations. As a general rule, "a statute of limitation begins to run when the cause of action has accrued to the person asserting it." *D'Arcy and Associates, Inc. v. K.P.M.G. Peat Marwick, L.L.P.*, 129 S.W.3d 25, 29 (Mo. App. W.D. 2004). The election results were not final pending the recount. Contestees' argument to the contrary would make the recount a nullity and force Contestants to file a petition which necessarily would have a significant potential for being mooted. Because the final official results were not certified

until September 15, 2014, Contestants timely filed their petition within 30 days of those results.

B. CHALLENGES TO A BALLOT TITLE AFTER IT HAS BEEN ADOPTED BY GENERAL ELECTION ARE AUTHORIZED.

As Contestants have noted previously, the issues raised by Contestants are timely raised in an Election Contest. This Court recently held that “judicial review of a claim that a given ballot title is unfair or insufficient (when not previously litigated and finally determined) is available in the context of an election contest should the proposal be adopted.” *Dotson*, 435 S.W.3d at 645. Here, the sufficiency of the ballot title for Amendment 1 has not yet been litigated or finally determined. Therefore, Contestants have the right to raise those issues in an election contest under § 155.555. Furthermore, the mere fact that Contestants could have challenged the ballot language prior to the election does not invalidate the properly authorized remedy sought by Contestants. *See Cook v. DeSoto Fuels, Inc.*, 169 S.W.3d 94, 102 (Mo. App. E.D. 2005) (holding where two causes of action exist, plaintiff may choose which theory to proceed on). For these reasons, Contestees’ argument that Contestants’ claims are not timely should be rejected.

III. CONTESTANTS' CLAIMS ARE NOT BARRED BY THE EQUITABLE DOCTRINE OF LACHES BECAUSE ELECTION CHALLENGES ARE NOT EQUITABLE CLAIMS AND CONTESTANTS' PETITION WAS FILED WITHIN THE STATUTE OF LIMITATIONS IN §115.557 RSMo.

The equitable doctrine of laches is not applicable to this action and, even if it were, Contestees have failed to prove the elements necessary to bar Contestants' claims in this action. "Laches' is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done." *Hagely v. Board of Educ. of Webster Groves School Dist.*, 841 S.W.2d 663, 669 (Mo. banc 1992). The defense of laches is a purely equitable doctrine. *UAW-CIO Local No. 31 Credit Union v. Royal Ins. Co., Ltd.*, 594 S.W.2d 276, 281 (Mo. banc 1980). While no fixed period has been set for when a claim is barred by laches, mere delay itself is not sufficient. *Hagely*, 841 S.W.2d at 669. The delay asserted "must work to the disadvantage and prejudices of the defendant" before a claim will be barred by laches. *Id.*

First, Contestants' claims are not barred by the doctrine of laches because the claims are not based in equity. Laches is a purely equitable doctrine and does not apply except in cases involving equitable claims. *UAW-CIO Local No. 31*, 594 S.W.2d at 281; *Rabius v. Brandon*, 257 S.W.3d 641, 648 (Mo. App. W.D. 2008) (holding laches is an equitable doctrine not applicable to actions at law). Contestants have asserted a claim contesting election results. "The right to contest an election exists by virtue of statute; it is not a common law or equitable right." *Hinesly v. Todd*, 430 S.W.3d 291, 295 (Mo. App. S.D. 2014); *Board of Election Com'rs of St. Louis County v. Knipp*, 784 S.W.2d

797, 798 (Mo. banc 1990). Election contests are purely statutory actions and are limited expressly by statute. *State ex rel. Holland v. Moran*, 865 S.W.2d 827, 830 (Mo. App. W.D. 1993). Because this is not a suit in equity, but is a statutory action, the doctrine of laches does not apply and cannot be asserted as a bar to Contestants' claims.

Even if laches were an applicable doctrine in this case, which Contestants deny, the doctrine would not bar Contestants' claims. A claim is barred by laches where there is unreasonable and unexplained delay in asserting the claim, to the detriment of the opposing party. Section 115.557 RSMo prescribes the statute of limitation for election contest actions. "Generally, the doctrine of laches will not bar a suit before expiration of the period set forth in the applicable statute of limitations in the absence of special facts demanding extraordinary relief." *Vahey v. Vahey*, 120 S.W.3d 288, 292 (Mo. App. E.D. 2003). As noted above, Contestants brought this action within the applicable statute of limitations. Contestees provide no special facts which would demand the extraordinary relief of barring the Contestants' claims. Rather, given that election laws are designed and enacted for the purpose of ascertaining and protecting the will of the electors and this election challenge is being brought to remedy the effects of a deceptive and misleading ballot title, the balance of equities weighs too strongly in favor of allowing this claim to bar the claims based on laches.

IV. CONTESTANTS' CLAIMS ARE NOT BARRED BY ARTICLE XII OF THE MISSOURI CONSTITUTION BECAUSE ARTICLE XII SHOULD NOT APPLY TO AN AMENDMENT UNLESS IT WAS PROPERLY PASSED AND BECAUSE ELECTION CHALLENGES ARE AUTHORIZED UNDER CH. 115 RSMo AND ARTICLE VII § 5 OF THE MISSOURI CONSTITUTION.

Contestees assert, in their answers, two arguments premised on the interpretation and interaction of the election contest provisions of Chapter 115 of the Missouri Revised Statutes and Article XII of the Missouri Constitution, dealing with the adoption and enforcement of Constitutional amendments. Both arguments propose a harsh and unreasonable interpretation of Article XII and create results which are wholly at odds with the foundations of our legal system. No reasonable interpretation of Article XII and Chapter 115 supports Contestees' assertion that Article XII in any way bars this action.

A. CONTESTANTS' CLAIMS ARE NOT MOOTED BY MO. CONST., art., XII § 2(b).

Contestees' arguments that Contestants' current challenge is barred by Article XII § 2(b) is nonsensical and creates internal inconsistency with election challenges and any measures designed to ensure the accuracy and fairness of elections. Article XII § 2(b) reads in relevant part that "If a majority of the votes cast thereon is in favor of any amendment, the same shall take effect at the end of thirty days after the election." Contestees argue that Article XII § 2(b) works to stifle any inquiries into the validity or fairness of an election on a constitutional amendment not resolved within 30 days of such election. This approach makes a nullity out of multiple provisions contained in Chapter

115 of the Missouri Revised Statutes, notably the recount and election contest provisions. Such an interpretation of this sentence is unreasonable and unrealistic.

Contestees' argument creates circular logic wherein a determination of the validity of an election is precluded by the mere fact that the allegedly invalid election took place more than 30 days ago. Such an argument would allow for the circumvention of a fundamental safeguard for fair and free elections to be circumvented by stalling on the part of Contestees.⁵ Furthermore, Article XII § 2(b) also states that "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.**" This language adds the requirement that any election by the voters must be conducted in accordance with general election laws. Thus, Section 2(b), read in its entirety, provides that an amendment only takes effect 30 days after a majority vote by the electors if the election was done by official ballot title and in accordance with election laws. Here Contestants' claims deal solely and entirely with determining whether the vote on Amendment 1 was conducted in accordance with Missouri law. Without first establishing, whether expressly or by waiver or consent, that such election was legal, any possibility of protection based on § 2(b) is premature.

⁵ While Contestants do not allege that such improper tactics have taken place here, Contestees' argument would expressly authorize and potentially encourage such conduct.

B. CONTESTANTS' CLAIMS DO NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE OR Article XII § 1.

Additionally, Legislative Intervenors erroneously argue that allowing Contestants to challenge the validity of the election on Amendment 1 would violate the separation of powers doctrine by giving the Judiciary the ability to amend or affect the Constitution in violation of Article XII § 1. This argument, however, fails because it mischaracterizes the nature of Contestants' Election Challenge. Contestants are not challenging the amendment itself, but are challenging the procedure of adopting the amendment. Article VII § 5 of the Missouri Constitution provides mandates that "The general assembly shall designate by general law the court or judge by whom the several classes of election contests shall be tried and regulate the manner of trial and all matters incident thereto." Pursuant to Article VII § 5, the general assembly § 115.555 RSMo. which states that:

all contests to the results of elections on constitutional amendments, on state statutes submitted or referred to the voters, and on questions relating to the retention of appellate and circuit judges subject to article V, section 25 of the state constitution shall be heard and determined by the supreme court.

(emphasis added). § 115.555 was enacted by the legislature in accordance with Article VII § 5, and with full knowledge of Article XII § 2(b).

Contestees essentially argue that § 115.555 is unconstitutional as it applies to elections on Constitutional Amendments. However, "[a] statute is presumed valid and will be declared unconstitutional only if the challenger proves the statute 'clearly and

undoubtedly violates the constitutional limitations.” *Lewellen v. Franklin*, 441 S.W.3d 136, 143 (Mo. banc 2014). “If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted.” *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012). As noted in the previous section, the most reasonable and constitutionally consistent interpretation of Article XII §§ 1 and 2(b) is that they are premised on the precondition that an election on a constitutional amendment was valid and legal. Thus, if an election is found to be invalid as failing to comply with legislatively enacted election regulations, it would not take effect under § 2(b) .

CONCLUSION

For all of the foregoing reasons, Contestants respectfully request that this Court enter a judgment on the pleadings in favor of Contestants, finding that the ballot title for Amendment 1, which was presented to the voters on August 5, 2014, was insufficient, unfair, deceptive and/or misleading and setting aside the election results on that question, along with any further relief this Court deems just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(b) and, in that the brief contains 5,998 words as directed by Rule 84.06(c). The word count was derived from Microsoft Word.

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