IN THE SUPREME COURT OF MISSOURI

No. SC94482

DOTSON et al.,
Plaintiffs,
v.

KANDER, et al.,
Defendants.

Original Proceeding: Election Contest

JOINT BRIEF OF DEFENDANTS

SENATOR KURT SCHAEFER

and

MISSOURIANS PROTECTING THE 2ND AMENDMENT

Kurt U. Schaefer #45829
201 W Capitol Ave., Rm. 221
Jefferson City, Missouri 65101
(573) 751-3931 FAX: (573) 751-4320
kurt.schaefer@senate.mo.gov

Attorney for Defendant
Senator Kurt Schaefer

David G. Brown Mo. #42559
501 Cherry Street, Suite 100
Columbia, MO 65201
(573) 814-2375 Fax: (800) 906-6199
dbrown@brown-lawoffice.com

Attorney for Defendant
Missourians Protecting the 2nd Amendment

Table of Contents

Table of Authorities

Cases

Statutes

Treatises

STATEMENT OF FACTS

Defendants note that the record in this case contains no evidence and that when the parties were afforded an opportunity to adduce evidence before a special master, Plaintiffs elected not to adduce any evidence.

ARGUMENT

I. THIS COURT SHOULD NOT INVALIDATE THE AUGUST 5, 2014 ELECTION ON CONSTITUTIONAL AMENDMENT NO. 5 BECAUSE (A) PLAINTIFFS ALLEGE NO IRREGULARITY IN THE RETURNS, AND (B) THE RECORD CONTAINS NO EVIDENCE OF ANY IRREGULARITY IN THE RETURNS. (Responds to Plaintiffs' Point I.)

Plaintiffs have chosen to use Mo. Rev. Stat. § 115.553 to challenge the sufficiency of the ballot summary for Constitutional Amendment No. 5. As shown below, the express purpose of § 115.553 is to allow a plaintiff to challenge irregularities in election returns, not to allow a plaintiff to make a post-election challenge to the sufficiency of ballot language. These are very different purposes. Once an election has been completed, the salient question is no longer whether the ballot language *might* mislead a theoretical voter; the salient question is whether the actual election returns were irregular because voters were in fact misled to vote against their true position on the ballot measure. Plaintiffs ignore this distinction and, rather than challenge the validity of the actual election returns, Plaintiffs speculatively argue the hypothetical effect of the ballot summary. As shown below, such arguments state no cause of action under § 115.553.

A. Plaintiffs Have Invoked An Inapplicable Remedy

The right to contest an election exists only as defined by those statutory provisions governing election contests. *See Bd. of Election Comm'rs of St. Louis Cnty. v. Knipp*, 784 S.W.2d 797, 798 (Mo. 1990). In the present case, Plaintiffs invoke subsection 2 of section 115.532:

> 1. Any candidate for election to any office may challenge the correctness of the returns for the office, charging that irregularities occurred in the election.
>
> 2. The 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. The petitioning voter or voters shall be considered the contestant and the officer or election authority responsible for issuing the statement setting forth the result of the election shall be considered the contestee. In any such contest, the proponents and opponents of the ballot question shall have the right to engage counsel to represent and act for them in all matters involved in and pertaining to the contest.

Mo. Rev. Stat. § 115.553.

Subsection 2 does not specify on what grounds a voter may contest the result of an election. Plaintiffs read subsections 1 and 2 *in pari materia* and proceed on the assumption that a voter may challenge any "irregularity," including an alleged insufficiency in the summary statement. *See, e.g.*, Plaintiffs' Point I (Plt. Br. 10). This reading ignores the overarching requirement that a challenge under § 115.553 is available

only to challenge "the correctness of the returns for the office." A plain reading of this language authorizes challenges only to irregularities that altered the "correctness of the returns."

Existing case law has applied § 115.553 to returns that included unqualified voters, *Marre v. Reed*, 775 S.W.2d 951 (Mo. 1989), and returns that included absentee ballots cast for a candidate who was disqualified and removed from the ballot. *State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229 (Mo. App. St.L.D. 1978). On the other hand, case law holds that this statute does not authorize a challenge to a successful candidate's eligibility to hold office because that is an issue that does not concern the correctness of the returns. *See Davenport v. Teeters*, 273 S.W.2d 506 (Mo. App. Spr.D. 1954). As the court held in *Davenport*, "We believe that this ground has no place in an election contest and, as to it, the notice states no cause of action." *Id.* at 513.

Similarly, in the present case, Plaintiffs' challenge to the sufficiency of the summary statement is not authorized by § 115.553 because it does not allege any irregularity in the returns. As such, Plaintiffs state no cause of action under § 115.553. Having invoked no other statutory right to contest the election, Plaintiffs case must be dismissed.

Plaintiffs ask this Court to expand the scope of § 115.553 to encompass all forms of noncompliance with the election statutes (Plt. Br. 19). This does not comport with the statutory language enacted by the legislature, which expressly limits a § 115.553 challenge to "the correctness of the returns." If the legislature had intended to enact a universal remedy for all forms of noncompliance with the election statutes, it could have

done so, but it chose instead to create the limited remedy set forth in § 115.553. As held in *Davenport*, *supra*, there are violations of the election law, including even the election of an ineligible candidate, that cannot be challenged under § 115.553. Furthermore, to the extent that the present contest is outside the scope of § 115.553, this Court has no authority to conduct review. *See Bd. of Election Comm'rs of St. Louis Cnty.*, *supra*.

B. Plaintiffs Proffered No Evidence of Any Irregularity

The essence of the present challenge is Plaintiffs' allegation that "voters have been misled" (Plt. Br. 19). Whether any voter was actually misled to vote against his or her true position is a question of fact, not a question of law. Notably, Plaintiffs do not allege in their Petition that they were misled to vote the wrong way. Instead, Plaintiffs allege that unidentified voters were generally misled. Notably, there was no evidence presented to the special master that any voter was in fact misled or in fact voted against his or her true position. Apparently, Plaintiffs—who themselves were not misled—could not produce a single voter who would testify that he or she was misled by the phrase "unalienable" (*see* Plt.Br. 26) or by the phrase "strict scrutiny" (*see* Plt.Br. 36) and as a result cast a ballot in the wrong direction.

This point is critical to the difference between a pre-election challenge to the sufficiency of a ballot summary and a post-election challenge to the regularity of election returns. In a post-election challenge, the burden on the plaintiff is to prove irregular returns. For example, in *Marre*, the plaintiffs proved that the returns were irregular in that the returns included ballots cast by fourteen people who were not qualified to vote. *Marre*, *supra*, at 952. In *Bushmeyer*, the plaintiffs proved that the returns were irregular

in that the returns included 337 absentee ballots cast for a candidate who was disqualified. *Bushmeyer, supra,* at 232. By contrast, the Plaintiffs in the present case have not proven that the returns were irregular or that any voter was actually misled or would have voted differently if the summary statement had been written as Plaintiffs contend it should have been written. Again, the present case is most similar to *Davenport, supra,* in which there were allegations of violations of election law, but there was no evidence of any irregularity in the actual election returns.

Because there is no allegation or proof that any voter was misled to vote against his or her true position on the ballot measure, Plaintiffs have not proven any irregularity in the election returns, and no relief can be granted in this case.

II. THIS COURT SHOULD NOT INVALIDATE THE AUGUST 5, 2014 ELECTION ON CONSTITUTIONAL AMENDMENT NO. 5, SJR 36, BECAUSE THE SUMMARY STATEMENT FOR SJR 36 FAIRLY AND SUFFICIENTLY SUMMARIZED THE PURPOSE OF THE BALLOT MEASURE, WHICH WAS PRIMARILY TO MAKE A DECLARATION CONCERNING HOW THE EXISTING RIGHT TO KEEP AND BEAR ARMS IS TO BE REGARDED AND SECURED IN MISSOURI IN THE WAKE OF THE LANDMARK U.S. SUPREME COURT DECISIONS *HELLER* AND *MCDONALD*. (Responds to Plaintiffs' Point I.)

In their brief, Plaintiffs repeat the legal arguments from their prior lawsuit challenging the sufficiency of the SJR 36 ballot language. Although, as shown in Point I of this Brief, Plaintiffs' theoretical arguments about hypothetical voters miss the point of a § 115.553, Plaintiffs' arguments are rebutted below.

A. The Disputed Ballot Title

To understand the purpose of the disputed SJR 36 ballot measure, one must first consider the scope and history of the current constitutional right to keep and bear arms.

1. A Brief History of the Right to Keep and Bear Arms and "Well Recognized Exceptions" to the Right

The "right of the people to keep and bear arms" is the subject of the Second Amendment to the U.S. Constitution, which was ratified in 1791. The Second Amendment was not intended to lay down a novel principle but rather codified a right inherited from English common law. *D.C. v. Heller*, 554 U.S. 570, 599, 128 S. Ct. 2783,

2801, 171 L. Ed. 2d 637 (2008). The right is fundamental in the sense that it is neither "granted by the Constitution" nor "in any manner dependent upon that instrument for its existence." *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L. Ed. 588 (1875).

(a) *Bliss v. Commonwealth*

The first significant American legal controversy concerning the right to keep and bear arms was whether the right is absolute, or whether it is subject to exceptions. The first reported case on this issue occurred in Kentucky in 1822 when a man was indicted and convicted for carrying a sword concealed in a cane. *Bliss v. Commonwealth*, 12 Ky. 90, 2 Litt. 90, 91–92, 13 Am. Dec. 251 (1822). The Kentucky Supreme Court overturned the conviction on the theory that any statute that denies to the citizen the right to carry arms, whether openly or concealed, is an infringement of the right to keep and bear arms that is guaranteed by the Kentucky constitution. *Id. Bliss* was later abrogated, and the absolutist view it endorsed is no longer the law anywhere in the United States. *See Posey v. Com.*, 185 S.W.3d 170, 189 (Ky. 2006).

(b) *United States v. Cruikshank*

The U.S. Supreme Court had no occasion to address the right to keep and bear arms until 1875, when it overturned a conviction under the Enforcement Act of 1870, which prohibited two or more people from conspiring to deprive anyone of their constitutional rights. *United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1875). *Cruikshank* held that the right to keep and bear arms is not absolute but is limited to "bearing arms for a lawful purpose." *Cruikshank*, 92 U.S. at 553.

(c) *State v. Wilforth*

This Court first addressed the right to keep and bear arms in 1881 in *State v. Wilforth*, 74 Mo. 528 (1881). Wilforth was convicted of going into a church house where people were assembled for literary purposes while having about his person fire-arms. *Id*. As discussed in the later case of *State v. Shelby*, Wilforth committed the offense simply by carrying a deadly weapon into a place where people were assembled for educational, literary, or social purposes. 90 Mo. 302, 2 S.W. 468, 469 (1886). Concealment was not an element of the offense. *Id.* There was a split among the states at that time: Kentucky and Tennessee held that the right to keep and bear arms was absolute, whereas Georgia, Louisiana, Arkansas, Indiana and Alabama held that concealed weapons could be criminalized. *Wilforth*, 74 Mo. at 530. After surveying the decisions of those states, this Court held that "a law which is merely intended to promote personal security, and to put down lawless aggression and violence. . . does not come in collision with the constitution." *Wilforth*, 74 Mo. at 530-31. The Court reached this conclusion "[f]ollowing the weight of authority as indicated by the state courts." *Id.*

(d) *State v. Shelby*

This Court next considered an exception to the right to keep and bear arms in 1881 when it examined the constitutionality of a statute making it a crime to carrying a weapon concealed or while intoxicated. *State v. Shelby*, 90 Mo. 302, 2 S.W. 468 (1886). The Court summarized its prior decision in *Wilforth* as establishing the principle that "the legislature may regulate the manner in which arms may be born. . . as to time and place" and extended this principle to allow the legislature to "do the same thing with reference to

the condition of the person who carries such weapons." *Id.* at 469. Once again, the Court held that a statute "designed to promote personal security, and to check and put down lawlessness" is "in perfect harmony with the constitution." *Id.* The Court in *Shelby* went even further, holding that, "[W]e are of the opinion the act is but a reasonable regulation of the use of such arms, and to which the citizen must yield, and a valid exercise of the legislative power." *Id.* As to the power of the legislature to prohibit carrying concealed, the Court noted that the right of the legislature to prohibit the wearing of concealed weapons under state constitutions "is now generally conceded." *Shelby*, 2 S.W. at 469.

(e) *Robertson v. Baldwin*

In 1897, the Supreme Court recognized that the fundamental right to keep and bear arms is inherently limited by "well-recognized exceptions" and therefore is not infringed by concealed weapons laws:

> The law is perfectly well settled that the first 10 amendments to the constitution. . . embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus. . . the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons. . . .

Robertson v. Baldwin, 165 U.S. 275, 281-82, 17 S. Ct. 326, 329, 41 L. Ed. 715 (1897).

(f) *State v. Keet*

This Court addressed the issue of concealed weapons in 1916 in *State v. Keet*, 269 Mo. 206, 190 S.W. 573 (1916). The Court expressly rejected the *Bliss* approach from Kentucky and Tennessee and adopted instead the reasoning of the leading case from Alabama, *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44 (1840). The persuasive passage in *Reid*, quoted at length by this Court in *Keet*, holds that the right to bear arms is not absolute, and it reads as follows:

> The right guaranteed to the citizen is not to bear arms upon all occasions and in all places, but merely "in defense of himself and the state." The terms in which this provision is phrased seem to us necessarily to leave with the Legislature the authority to adopt such regulations of police as may be dictated by the safety of the people and the advancement of public morals.

Keet, 190 S.W. at 575, quoting *Reid, supra*. The Court concluded as follows:

> Less than a century ago the arms of the pioneer were carried openly, the rifle on his shoulder, his hunting knife on his belt. Since then deadly weapons have been devised small enough to be carried effectively concealed in the ordinary pocket. The practice of carrying such weapons concealed is appreciated and indulged in mainly by the enemies of social order. Our state has been one of the slowest to act in meeting this

> comparatively new evil, but she has finally spoken in no uncertain language.

Keet, 190 S.W. at 576.

In the present context, the most notable aspect of *Keet* is that this Court upheld the constitutionality of a prohibition against concealed weapons without any reliance whatsoever on the constitution's "shall not justify the wearing of concealed weapons" language.

(g) *State v. White*

In 1923 this Court returned to the generalized question whether the right to keep and bear arms may be restricted. *State v. White* held that the purpose of the Missouri right to keep and bear arms "is to deny to the Legislature the power to take away the right of the citizen to resist aggression, force, and wrong at the hands of another." 299 Mo. 599, 253 S.W. 724, 727 (1923). The Court expressly held, however, that the "right to bear arms may be taken away or limited by reasonable restrictions." *Id.*

(h) *D.C. v. Heller*

Perhaps the most significant case on the right to keep and bear arms is the landmark U.S. Supreme Court decision *D.C. v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). *Heller* struck down certain provisions of the Firearms Control Regulations Act of 1975 based on the holding that the Second Amendment to the U. S. Constitution applies to federal enclaves and protects an individual's right to possess a firearm for traditionally lawful purposes, such as self-defense within the home. In the context of the present case, *Heller* is most notable for its authoritative review of the right

to keep and bear arms, which should illuminate this Court's consideration of the present case, but which Defendant will cite rather than summarize due to its length. *See Heller*, *supra*. Along the way, *Heller* notes that the right to keep and bear arms is "a natural right which the people have reserved to themselves, confirmed by the Bill of Rights" but that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." 554 U.S. at 594, 128 S. Ct. at 2799.

Although *Heller* struck down certain weapons restrictions, the Court affirmed the validity of what it called, "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-27, 128 S. Ct. 2783, 2816-17.

(i) *McDonald v. City of Chicago, Ill.*

The final significant case on the right to keep and bear arms was the landmark U.S. Supreme Court decision in *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). In McDonald, the U.S. Supreme Court held that the Second Amendment right to keep and bear arms "is fully applicable to the States." 130 S. Ct. at 3026. The Court held that the right is "among those fundamental rights necessary to our system of ordered liberty." 130 S. Ct. at 3042. The Court also affirmed, as it did in *Heller*, the validity of "such longstanding regulatory measures as prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of

firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. 130 S. Ct. at 3047.

2. The Purpose of the SJR 36 Ballot Measure

The SJR 36 ballot measure must be interpreted in light of *Heller* and *McDonald* because its purpose is to revise the Missouri constitution in the wake of *Heller* and *McDonald*. When the Missouri Constitution was drafted in 1820 and again in 1845, the post-civil-war Fourteenth Amendment to the U.S. Constitution did not exist. As a result, when those constitutions were adopted, the federal Second Amendment did nothing more than forbid the federal government to infringe the right to keep and bear arms. When this Court decided *Wilforth* in 1881, it was "an open question" whether the federal Second Amendment applied, and the question remained open until *McDonald* was decided in 2010.

Following *McDonald*, the right to keep and bear arms must be recognized among the list of coextensive constitutional rights found both in the Missouri and federal constitutions, which include due process, the protection against unreasonable searches and seizures, the ban on ex post facto laws, and equal protection. *See, e.g.*, *Doughty v. Dir. of Revenue*, 387 S.W.3d 383, 387 (Mo. 2013)(due process); *State v. Jones*, 865 S.W.2d 658, 660 (Mo. banc 1993)(unreasonable search and seizure); *Doe v. Phillips*, 194 S.W.3d 833, 841–42 (Mo. banc 2006)(ex post facto laws); *State v. Young*, 362 S.W.3d 386, 396 (Mo. banc 2012)(equal protection). However, as shown in Plaintiffs' brief, there is no demonstrable history in Missouri of affording the right to keep and bear arms a legal status akin to other fundamental constitutional rights like due process and equal

protection. As argued below, prior to the passage of the ballot measure this Court could conceivably have held the Missouri right to keep and bear arms to be a lesser right to the federal right explicated in *Heller* and *McDonald* (although it would certainly be an adventurous and unlikely speculation to predict that result).

The clear purposes of SJR 36 are to bring the Missouri constitution in line with *Heller* and *McDonald*, to ensure that the Missouri right to keep and bear arms remains coextensive with the federal right explicated in *Heller* and *McDonald*, and to provide a prophylactic against legislative or judicial action that would violate *McDonald*.[1] The method by which SJR 36 accomplishes these purposes is to make a declaration concerning how the existing right to keep and bear arms is to be regarded and secured in Missouri. Because it would be impossible (and fatally confusing) to concisely explain this purpose to voters in the summary statement, the legislature prepared the following summary statement:

> Shall the Missouri Constitution be amended to include a declaration that the right to keep and bear arms is a unalienable right and that the state government is obligated to uphold that right?

As argued more fully below, this is a sufficient and fair summary of the purpose of the ballot measure.

---

[1] The application of the ballot measure, although not relevant to Plaintiffs' claims in the present case, is currently before the Court on the pending case *State v. Merritt*, SC0884096.

B. Rights That Already Exist

Plaintiffs contend that the summary statement suggested that the law was being changed in ways that it was not (Plt.Br. 24). In general, this line of argument ignores that *Heller* and *McDonald* already changed the law and that the primary purpose of the ballot measure was to make a declaration concerning how the right to keep and bear arms, as defined and clarified by *Heller* and *McDonald*, is to be regarded and secured in Missouri.

First, Plaintiffs contend that the Summary statement "tells voters that the right to bear arms is not currently part of the group of rights in the constitution" (Plt.Br. 25). The implication is that voters were being misled to believe that the ballot measure would create, for the first time in Missouri, a right to keep and bear arms. To the contrary, the ballot summary referred to "*the right* to keep and bear arms." This phrase was appropriate to include in the summary because sometimes it is necessary for a summary statement "to provide a context reference that will enable voters to understand the effect of the proposed change." *Brown v. Carnahan*, 370 S.W.3d 637, 654 (Mo. 2012). When the summary statement referenced "the right to keep and bear arms," this phrase appropriately confirmed for the voter that there was a presently existing right to keep and bear arms, a confirmation which was not misleading.

Second, Plaintiffs suggest that because the term "unalienable" appears in the Declaration of Independence[2] but not in the U.S. Constitution, the term "appears to be of no legal significance" (Plt.Br. 27). This shallow analysis does not hold.

---

[2] The final version of the Declaration of Independence uses the word "unalienable," but

As the U.S. Supreme Court has explained, there exist certain rights, including the right to life and the right to liberty, which enjoy the special status that the rights "may not be submitted to vote; they depend on the outcome of no elections." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S. Ct. 1178, 1185-86, 87 L. Ed. 1628 (1943). It is the highest duty of the State of Missouri is to protect these unalienable rights:

> The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator."

United States v. Cruikshank, 92 U.S. 542, 553, 23 L. Ed. 588 (1875).

---

several earlier drafts used the word "inalienable," and there is no reason to believe that the framers of the Declaration intended any distinction between the two forms. CARL LOTUS BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 175 n.1 (1922). In modern parlance, the terms "inalienable" and "unalienable" are interchangeable terms for the same proposition. Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, And Supermajority Rules*, 2 U. Pa. J. Const. L. 609 (2000).

To declare a right to be unalienable, then, is to secure the existence of that right against a vote of the legislature or a decision of the judiciary, and it tasks the State of Missouri to protect the right as its highest duty. Surely this amounted to a legal consequence.

Third, Plaintiffs contend that the summary statement implied that state government was not currently obligated to uphold the right to bear arms, when in fact it was so obligated through the oaths of government officials who can be impeached if they fail to uphold the constitution (Plt.Br. 28). This argument makes no sense because only a few state officials are subject to impeachment, and an impeachment remedy is truly extraordinary. Furthermore, the summary statement was not misleading because it simply stated that the constitution would be amended to include a declaration concerning the obligation of state government, which was an accurate statement.

C. Details Not Included in the Summary Statement

Plaintiffs also complain that various details of the ballot measure were not expressly stated in the summary. The applicable rule is that a ballot title "need not set out the details of the proposal." *United Gamefowl Breeders Ass'n of Missouri v. Nixon*, 19 S.W.3d 137, 141 (Mo. 2000).

First, Plaintiffs contend that the ballot measure repealed language "that has been interpreted to allow the legislature to regulate the carrying of concealed weapons" (Plt.Br. 31). The implication is that the legislature had no authority to regulate concealed weapons absent an enabling phrase in the constitution. This was untrue.

As shown above, the right to keep and bear arms has "from time immemorial, been subject to certain well-recognized exceptions." *Baldwin*, 165 U.S. at 281-82, 17 S. Ct. at 329. In incorporating the right to keep and bear arms into fundamental American law, "there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed." *Id.* It is not surprising, then, that since 1897, the U.S. Supreme Court has expressly held that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Id.* Even *Heller* holds that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." 554 U.S. at 594, 128 S. Ct. at 2799. There is no basis for this Court to hold that the authority of the legislature to regulate concealed weapons required or depended on an express enabling provision in the Missouri constitution.

Historically, Missouri courts have not relied on the constitutional "shall not justify" phrase as support for its concealed weapons laws, which have been consistently upheld since 1916. Instead, Missouri courts have relied on historical precedent, as has the U.S. Supreme Court, as described above. When faced with the issue of criminalizing concealed weapons in 1916, this Court considered the absolutist *Bliss* approach from Kentucky, rejected it, and then focused and relied on the "in defense of himself and the state," language in the Missouri constitution without even partial reliance on the "shall not justify" language that is proposed to be removed by the ballot measure. *Keet*, 190 S.W. at 575.

There is nothing in the history of the right to keep and bear arms, the decisions of the U. S. Supreme Court, or Missouri case law that in any way suggests that the authority of the legislature to regulate concealed weapons derives from, or in any way depends upon, any particular phrase in the state constitution. Now that the ballot measure has passed, Defendant presumes that this Court will follow every other court in the land in holding that the right to keep and bear arms does not prevent the legislature from regulating concealed weapons.

Second, Plaintiffs contend that the summary statement failed to disclose the incorporation of ammunition and accessories typical to the normal function of firearms into the right to keep and bear arms (Plt.Br.32). This argument assumes the false premise that the right to keep and bear arms previously excluded these items, which it did not. Because the historical origin of the right to keep and bear arms was to empower the militia system, the right has always included everything necessary for a militiaman to be put out to service, not merely the right to own an empty or unusable weapon:

> In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence. The possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former. A year later (1632) it was ordered that any single man who had not furnished himself with arms might be put out to

> service, and this became a permanent part of the legislation of the colony (Massachusetts).

United States v. Miller, 307 U.S. 174, 179-80, 59 S. Ct. 816, 818-19, 83 L. Ed. 1206 (1939).

It is absurd to argue that the right to keep and bear arms has not always included the right to keep ammunition and bear arms with those accessories typical to their normal function. As discussed above, the basis of *Heller* is the holding that the right to keep and bear arms has always protected an individual's right to possess a firearm for traditionally lawful purposes, such as self-defense within the home. Without ammunition and accessories typical for normal use, a firearm would be useless for self-defense or any other traditional lawful purpose other than display. And so it follows that the right to keep and bear arms has always encompassed the ammunition and accessories necessary to use a firearm for a purpose such as self-defense.

This issue was recently addressed by the D.C. Court of Appeals, which held that after *Heller*, it is clear that the right to keep and bear arms protects ammunition (and also target practice):

> [F]rom the Court's reasoning [in *Heller*], it logically follows that the right to keep and bear arms extends to the possession of handgun ammunition in the home; for if such possession could be banned (and not simply regulated), that would make it "impossible for citizens to use [their handguns] for the core lawful purpose of self-defense." By the same token, given the obvious connection between handgun ammunition and the right

> protected by the Second Amendment, we are hard-pressed to see how a flat ban on the possession of such ammunition in the home could survive heightened scrutiny of any kind. We therefore conclude that the Second Amendment guarantees a right to possess ammunition in the home that is coextensive with the right to possess a usable handgun there. The government has not taken issue with that conclusion….

Herrington v. United States, 6 A.3d 1237, 1243 (D.C. 2010).

Third, Plaintiffs contend that the summary statement failed to disclose the significant probable effect of making the right to keep and bear arms subject to strict scrutiny (Plt.Br. 36). Strict scrutiny is the highest and most stringent standard used by federal courts to determine the constitutionality of governmental actions. Federal courts apply strict scrutiny in cases involving an impingement upon a fundamental right explicitly or implicitly protected by the Constitution.[3] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31, 93 S. Ct. 1278, 1295, 36 L. Ed. 2d 16 (1973). Missouri courts apply strict scrutiny in an identical manner, including where a classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *Etling v. Westport Heating & Cooling Servs., Inc.*, 92 S.W.3d 771, 774 (Mo. 2003).

[3] Strict scrutiny also applies to inherently suspect classifications like race, but that analysis is not relevant to the present case.

Although the concept of strict scrutiny has its origins in a famous footnote written by Justice Stone in 1938,[4] strict scrutiny was not actually applied to the issue of fundamental rights until the 1942 case of *Skinner v. Oklahoma*, 316 U.S. 535 (1942). Even so, the "modern strict scrutiny formula did not emerge until the 1960s, when it took root simultaneously in a number of doctrinal areas." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267. As a result, it is ridiculous to read the landmark Missouri weapons cases like *Wilforth* (1881), *Shelby* (1886), *Keet* (1916), and *White* (1923), and suggest on that basis that this Court has rejected strict scrutiny in gun cases (*see* Plt.Br. 43). To the contrary, this Court has never expressly determined whether the right to keep and bear arms is a "fundamental right explicitly or implicitly protected by the Constitution," and the question whether strict scrutiny applies to gun laws has never been answered in Missouri.

Defendant can conceive of no sound basis on which this Court could have rejected strict scrutiny for gun laws immediately prior to the passage of the ballot measure.[5] Because the right to keep and bear arms is explicitly protected by the Missouri

---

[4] "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on the face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

[5] *See* footnote 5, *infra*.

constitution, this Court would have had to hold that the right to keep and bear arms, although protected by the constitution, was not a "fundamental" right. Given the history of the right, that would have been an impossible position to justify, and in the wake of *Heller* and *McDonald*, the federal right to keep and bear arms was (i) is "among those fundamental rights necessary to our system of ordered liberty" and (ii) "fully applicable to the States." *McDonald*, 130 S. Ct. at 3042 & 3026. Although it is conceivable that this Court could have held that the state version of the right was lesser than the historical and federal versions, this Court would nonetheless have been obliged to apply strict scrutiny in order to enforce the fundamental federal right recognized by *McDonald*.

To summarize, prior to the passage of the ballot measure, the state of the law in Missouri was that there was a federal constitutional right to keep and bear arms that was fundamental and applied to the states, and there was a state constitutional right to keep and bear arms that appeared to be fundamental. Under those circumstances, a challenge to a gun law would, if the question had been presented to this Court, have had to have been analyzed under the strict scrutiny standard that applies in cases involving an impingement upon a fundamental right explicitly or implicitly protected by the Constitution. Thus the declaration in the ballot measure that "[a]ny restriction on these rights shall be subject to strict scrutiny" was nothing more than a declaration of the law as it clearly stood in the wake of *McDonald.*

IV. CONCLUSION

For the foregoing reasons, this Court should dismiss this action as stating no cause of action under Mo. Rev. Stat. §115.553, and, in any event, this Court should deny all relief sought by Plaintiffs.

Respectfully Submitted Jointly, by:

/s/ Kurt U. Schaefer
Kurt U. Schaefer #45829
201 W Capitol Ave., Rm. 221
Jefferson City, Missouri 65101
(573) 751-3931 FAX: (573) 751-4320
kurt.schaefer@senate.mo.gov

Attorney for Defendant
Senator Kurt Schaefer

/s/ David G. Brown
David G. Brown #42559
501 Cherry Street, Suite 100
Columbia, MO 65201
(573) 814-2375 Fax: (800) 906-6199
dbrown@brown-lawoffice.com

Attorney for Defendant
Missourians Protecting the 2nd Amendment

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

This brief complies with the type-volume limitation of Rule 84.06 because this brief contains less than 6,800 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and type style requirements of Rule 84.06(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13-point Times New Roman. The electronic files filed with the Court and served on opposing counsel have been scanned for viruses and are virus free.

/s/ David G. Brown

CERTIFICATE OF SERVICE

I certify that on November 21, 2014, the forgoing was filed using the Missouri efile system, causing it to be electronically served on all counsel of record.

/s/ David G. Brown