

**IN THE SUPREME COURT
STATE OF MISSOURI**

DONI R. MILLER AND BRUCE C. COHEN)	
APPELLANTS)	
)	CAUSE NO. SC95793
)	ORAL ARGUMENT
VS.)	REQUESTED
)	
)	
GENEVIEVE FRANK,)	
ST. LOUIS COUNTY CLERK)	
RESPONDENT)	

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

Come now Appellants/Contestants, in accordance with Missouri Constitution Art. V, Section 3, and invoke the jurisdiction of the Supreme Court as this case involves a challenge to the validity of Missouri Revised Statutes Sections 115.015 and 115.17 as applied by the Trial Court in granting Respondent/Contestee's Motion to Dismiss, which purport to create a board of election commissioners as the election authority for St. Louis County in violation of Missouri Constitution Art. IV, Section 12, or in contravention of the authority to amend the Constitution vested in the people under Article I, Section 3, by allowing the Legislature to create an executive branch board which is allowed to operate without being assigned to an executive branch department or the office of administration as required by Missouri Constitution Art. IV, Section 12, or alternatively constitutes an amendment to the Constitution by the Legislature creating an exception to Article IV, Section 12 in contravention of Article 1, Section 3 which reserves the right to amend the Constitution solely to the people of Missouri.

STATEMENT OF FACTS

Appellant/Contestant Doni R. Miller (hereinafter referred to as “Miller” or “Appellant”) is a St. Louis County, Missouri resident residing at 925 Edna Avenue, Kirkwood, Missouri 63122. Contestant Miller was a write-in candidate for the office County Executive-St. Louis County. She is also a registered voter at the above address. (Verified Petition, par. 1, Legal File p. 6; hereinafter “LF p. ____”)

Miller has standing to bring the instant verified petition under Missouri Revised Statutes Section 115.577 both as a candidate under Missouri Revised Statutes Section 115.553.1 and as a registered voter under Missouri Revised Statutes Section 115.553.2 on Count I, and as a registered voter on Count 2. (Verified Petition, par. 2; LF p. 6)

Appellant/Contestant Bruce C. Cohen (hereinafter referred to as “Cohen” or “Appellant”) is a St. Louis County, Missouri resident residing at 925 Edna Avenue, Kirkwood, Missouri 63122. Contestant Cohen was a write-in candidate for the office Prosecuting Attorney-St. Louis County. He is also a registered voter at the above address.(Verified Petition, par. 3; LF p. 6)

Cohen has standing to bring the instant verified petition under Missouri Revised Statutes Section 115.577 both as a candidate under Missouri Revised Statutes Section 115.553.1 and as a registered voter under Missouri Revised Statutes Section 115.553.2 on Count 2, and as a registered voter on Count 1. (Verified

Petition, par. 4, LF pp. 6-7)

Respondent/Contestee Ms. Genevieve M. Frank (hereinafter referred to as “Respondent” or “County Clerk” or “Contestee”) is the St. Louis County Clerk, whose office is at 41 S. Central Street, Clayton, Missouri 63105. (Verified Petition, par. 5; LF p. 7)

Appellants contend that Contestee is the election authority for St. Louis County, Missouri in accordance with Missouri Revised Statutes Section 115.015 (Verified Petition, par. 6; LF p. 7)

The county clerk shall be the election authority under Missouri Revised Statutes Section 115.015 unless the county has a board of election commissioners. (Verified Petition, par. 8; LF p. 7)

St. Louis County does not have a constitutionally or statutorily valid board of election commissioners. (Verified Petition, par. 9; LF p. 7)

There is an entity which calls itself the “St. Louis County Election Board” (hereinafter referred to as “Board” or “SLCBEC” or “Agents”). The Board has no constitutional authority to act. (Verified Petition, par. 10; LF p. 7)

Any authority vested in the Board to take any actions with regard to St. Louis County elections is solely in the capacity of agents for Contestee. (Verified Petition, par. 11; LF pp. 7-8)

Missouri Constitution Art. IV, Section 12 provides in relevant part:

Unless discontinued all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by law or by the governor as provided by law to the office of administration or to one of the fifteen administrative departments to which their respective power and duties are germane. (Verified Petition, par. 12; LF p. 8)

Missouri Revised Statutes Appendix B, the Reorganization Act of 1974 further provides:

5. (1) Except as otherwise provided by this act, or the state constitution, all executive and administrative powers, duties and functions, excepting those of the elective offices, previously vested by law or otherwise in the several state departments, commissions, boards, offices, bureaus, divisions or other agencies are vested in the following administrative departments or in the office of administration: department of agriculture; department of conservation; department of elementary and secondary education; department of higher education; department of highways and transportation; department of labor and industrial relations; department of natural resources; department of mental health; department of public safety; department of revenue; department of social services....(Verified Petition, par. 13; LF pp. 8-9)

The *Official Manual State of Missouri 2013-2014*, at page 932, lists the St.

Louis County Board of Election Commissioners as a board “Assigned to the Governor”. (Verified Petition, par. 14; LF p. 9) There is no such thing as a board “Assigned to the Governor” under Missouri Constitution Article IV, Section 12 and/or Missouri Statutes Appendix B, the Reorganization Act of 1974. (Verified Petition, par. 15; LF p. 9)

Missouri Revised Statutes Section 115.017 creates the possibility of a board of election commissioners for St. Louis County, but does not assign the St. Louis County Board of Election Commissioners to the State Office of Administration or to any appropriate executive branch department. (Verified Petition, par. 16; LF p. 9)

There is no Executive Order from any governor pursuant to Missouri Statutes Appendix B, the Reorganization Act of 1974 Section 1.13 or otherwise assigning a St. Louis County Board of Election Commissioners to the Office of Administration or to one of the fifteen executive branch departments. (Verified Petition, par. 17; LF p. 9)

In the absence of a constitutionally and statutorily authorized board of election commissioners, the St. Louis County Clerk is the proper election authority for St. Louis County. (Verified Petition, par. 18; LF p. 9)

The office of the St. Louis County Clerk is the office of the election authority within the meaning of Missouri Revised Statutes Section 115.353(2). (Verified

Petition, par. 19; LF pp. 9-10)

Contestant Miller filed three declarations of intent to be a write-in candidate for the office of County Executive-St. Louis County, one declaration notarized the other two not, with the St. Louis County Clerk as the proper election authority at the office of the election authority at 41 S. Central Street, Clayton, Missouri 63105 before 5:00 p.m. on the second Friday preceding the November 4, 2014 election in accordance with Missouri Revised Statutes Sections 115.353(2) and 115.453(4). (Verified Petition, par. 20; LF p. 10)

Contestant Cohen filed three declarations of intent to be a write-in candidate for the office of Prosecuting Attorney-St. Louis County, one declaration notarized and the other two not, with the St. Louis County Clerk as the proper election authority at the office of the election authority at 41 S. Central Street, Clayton, Missouri, 63105 before 5:00 p.m. on the second Friday preceding the November 4, 2014 election in accordance with Missouri Revised Statutes Sections 115.353(2) and 115.453(4). (Verified Petition, par. 21; LF p. 10)

Contestee notified the Board acting as Election Judges of the write-in candidacies of Appellants in accordance with Missouri Revised Statutes Section 115.453(4). (Verified Petition, par. 22; LF p. 11)

After filing their declarations of candidacy with Contestee, Appellants also delivered copies of their declarations of candidacies to the Board as a courtesy.

(Verified Petition, par. 23; LF p. 11)

Appellants also filed signed “AFFIRMATION OF TAX PAYMENT AND BONDING REQUIREMENTS” with Contestee and the Missouri Department of Revenue in accordance with Missouri Revised Statutes Section 115.342.2.

(Verified Petition, par. 24; LF p. 11)

As Contestee’s agents, the Board sent Appellants copies of “St. Louis County Financial Interest Statement” and Missouri Department of Revenue Form 5120.

(Verified Petition, par. 25; LF p. 11)

Appellants completed copies of their respective “St. Louis County Financial Interest Statement” and Missouri Department of Revenue Form 5120 and filed them with Contestee and the Missouri Department of Revenue. (Verified Petition, par. 26; LF p. 11)

Appellants qualified for their respective write-in candidacies. (Verified Petition, par. 27; LF p. 11)

Contestant Miller received at least 2 votes for the office of County Executive according to the final write-in vote count for the November 4, 2014 election for St. Louis County. A copy of Agents’ “St. Louis County General Election November 4, 2014 Official Write-In Results” document is attached and incorporated into the Verified Petition by reference for all purposes as Attachment A (Verified Petition, par. 28; LF p.11; LF p. 20).

Contestant Cohen received at least 343 votes for the office of Prosecuting Attorney. according to the final write-in vote count for the November 4, 2014 election for St. Louis County. A copy of Agents' "St. Louis County General Election November 4, 2014 Official Write-In Results" document is attached and incorporated herein by reference for all purposes as Attachment A. (Verified Petition, pp. 29; LF pp. 11-12; LF p. 20)

No individual listed on the November 4, 2014 St. Louis County ballot for the offices of County Executive, including Steve Stenger, or Prosecuting Attorney, including Robert McCulloch, filed a required declaration of candidacy with Contestee at Contestee's office in accordance with Missouri Revised Statutes Section 115.353 (2). (Verified Petition, par. 30; LF p. 12)

No individual listed on the November 4, 2014 St. Louis County ballot for the offices of County Executive, including Steve Stenger, or Prosecuting Attorney, including Robert McCulloch, was a candidate for office within the meaning of Missouri Revised Statutes Chapter 115. (Verified Petition, par. 31; LF p. 12)

Steve Stenger failed to file a declaration of candidacy for the office of County Executive-St. Louis County for any election in the 2014 election cycle with Contestee in accordance with Missouri Revised Statutes Section 115.353(2). (Verified Petition, par. 32; LF p. 12)

Steve Stenger failed to, and could not, qualify as a candidate for the office of

County Executive-St. Louis County for the 2014 election cycle. (Verified Petition, par. 33; LF pp. 12-13)

Robert McCulloch failed to file a declaration of candidacy for the office of County Prosecutor-St. Louis County for any election in the 2014 election cycle with Contestee in accordance with Missouri Revised Statutes Section 115.353(2). (Verified Petition, par. 34; LF p. 13)

Robert McCulloch failed to, and could not, qualify as a candidate for the office of County Prosecutor-St. Louis County for the 2014 election cycle. (Verified Petition, par. 35; LF p. 13)

Steve Stenger was certified as the winner of the November 4, 2014 election for County Executive-St. Louis County with 139,211 votes. (Verified Petition, par. 36; LF p. 13)

No vote cast for Steve Stenger for County Executive-St. Louis County was cast for a qualified candidate for the office of County Executive(Verified Petition, par. 37; LF p. 13).

Robert McCulloch was certified as the winner of the November 4, 2014 election for Prosecuting Attorney-St. Louis County with 221,706 votes. (Verified Petition, par. 38; LF p. 13)

No vote cast for Robert McCulloch for County Prosecutor-St. Louis County was cast for a qualified candidate for the office of Prosecuting Attorney. (Verified

Petition, par. 39; LF p. 13)

The Board announced Steve Stenger as the winner of the November 4, 2014 election for County Executive-St. Louis County. This is the final election result accepted by the Secretary of State. (Verified Petition, par. 73; LF p. 14)

Contestee or its agents the Board received one or more ballots cast at the Contestee's office with votes for Contestant Miller for the office of County Executive-St. Louis County, including but not limited to an absentee ballot sent to Contestee by certified mail # 70140510000013534060, received by Contestee on October 30, 2014 at 10:27 a.m. See affidavit of Rachael L. Cohen, St. Louis County an absentee voter, which is attached and incorporated into the Verified Petition by reference for all purposes as Attachment B. (Verified Petition, par. 74; LF p. 14; LF p. 21)

The Board announced Robert McCulloch as the winner of the November 4, 2014 election for County Prosecutor-St. Louis County. This is the final election result accepted by the Secretary of State. (Verified Petition, par. 107; LF p. 16)

Contestee or its agents the Board received one or more ballots cast at the Contestee's office with votes for Contestant Cohen for the office of County Prosecutor-St. Louis County, including but not limited to an absentee ballot sent to Contestee by certified mail # 70140510000013534060, received by Contestee on October 30, 2014 at 10:27 a.m. See affidavit of Rachael L. Cohen, St. Louis

County an absentee voter, which is attached and incorporated into the Verified Petition by reference for all purposes as Petition Attachment B. (Verified Petition, par. 108; LF p. 16; LF p. 21)

Respondent filed her Motion to Dismiss on March 10, 2016.(Minutes, LF p. 3; LF p. 32) The motion sets forth four grounds:

1.Petitioners (referred to in the Verified Petition as “Contestants”) did not file a challenge to contest the election within the 30 day statute of limitations set forth in §115.577 R.S.Mo.

2.Genevieve M. Frank, St. Louis County Clerk, is not a proper party to be named as a contestee in an election contest because by statute, the board of election commissioners shall be the election authority. See §115.015 and §115.017 (4) R. S. Mo.

3.The right to contest an election exists not by common law but by statute; the procedures for doing so are exclusive and must be strictly followed, which Petitioners have not done.

3.(sic) Because of the failure to file within and (sic) the required statutory period, and becauseof the failure to name the proper party, and because of the failure to strictly follow the statutory procedures, this Court does not have

jurisdiction to hear the contest of an election, and does not have jurisdiction over the County Clerk for the contest of an election.

Over Appellants' objections to consideration by a *de facto* judge (Minutes, LF p. 3; LF p. 27) and their motion to disqualify financially interested judges (Minutes, LF p. 3; LF p. 28), the Trial Court granted the Motion to Dismiss on April 22, 2016. (Minutes, LF p. 3; LF p. 34) Appellants filed their Motion to Vacate on May 10, 2016. (Minutes, LF p. 2; LF p.) The trial court denied the Motion to Vacate on May 25, 2016.(Minutes, LF p. 2; LF p. 41) Appellants filed their Notice of Appeal on June 1, 2016.(Minutes, LF p.2; LF p. 42) Although Appellants sought review in the Supreme Court, the circuit clerk sent the appeal to the Eastern District Court of Appeals. The Court of Appeals ordered the case transferred to the Supreme Court on June 29, 2016.

POINTS RELIED ON

**A. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S
MOTION TO DISMISS BECAUSE THE DECISION ESTABLISHES
THE ST. LOUIS COUNTY BOARD OF ELECTION
COMMISSIONERS AS THE PROPER ELECTION AUTHORITY
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Missouri Constitution Art. IV, Section 12

**Missouri Revised Statutes Appendix B, the Omnibus Reorganization
Act of 1974**

***Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999)**

**B. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S
MOTION TO DISMISS ON THE GROUNDS OF FAILURE TO
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***Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999)**

Missouri Revised Statutes Sections 115.577

ARGUMENT

**A. THE TRIAL COURT ERRED IN GRANTING RESPONDENT’S
MOTION TO DISMISS BECAUSE THE DECISION ESTABLISHES
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Appellants bring the instant appeal of the trial court's order (LF p. 34; Appendix, p. A1) granting Respondent's Motion to Dismiss, which results in the establishment of the St. Louis Board of Election Commissioners as the election authority for St. Louis County.

Appellants contend that the trial court erroneously applied the law, and that the proper election authority for St. Louis County is the County Clerk, and further it is not contested that if the SLCBEC is the proper election authority then Appellants have no cause of action. Respondent filed her Motion to Dismiss on March 10, 2016.(LF p. 32).

The motion to dismiss sets forth four grounds:

1.Petitioners (referred to in the Verified Petition as "Contestants") did not file a challenge to contest the election within the 30 day statute of limitations set forth in §115.577 R.S.Mo.

2.Genevieve M. Frank, St. Louis County Clerk, is not a proper party to be named as a contestee in an election contest because by statute, the board of election commissioners shall be the election authority. See §115.015 and §115.017 (4) R. S. Mo.

3.The right to contest an election exists not by common law but by statute; the procedures for doing so are exclusive and must be strictly followed, which Petitioners have not done.

3.(sic) Because of the failure to file within and (sic) the required statutory period, and because of the failure to name the proper party, and because of the failure to strictly follow the statutory procedures, this Court does not have jurisdiction to hear the contest of an election, and does not have jurisdiction over the County Clerk for the contest of an election. (LF p. 32-33)

The Trial Court granted the Motion to Dismiss on April 22, 2016 (LF p. 34), over Appellants' objection to consideration by a *de facto* judge (LF p. 27) and denying *sub silentio* Appellants' motion to disqualify judges with a potential financial interest in the proceedings (LF p. 28).

The Court reviews the trial court's grant of a motion to dismiss *de novo*. ***Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008)**. When reviewing such a grant, this Court "assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom." ***Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001) (quoting *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. banc 1993))**.

In a case such as the instant case, the reviewing court will affirm the decision below unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Lueckenotte v. Lueckenotte*, 34 S.W.3d 387, 393 (Mo. banc 2001); *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). *Blakely v. Blakely*, 83 S.W.3d 537 (Mo. banc 2002). Statutory interpretation is an issue of law that this Court reviews *de novo*. *Delta Air Lines, Inc. v. Dir. of Revenue*, 908 S.W.2d 353, 355 (Mo. banc 1995), *Blakely, supra*. Missouri courts start with the presumption that the statute is constitutional. *Suffian v. Usher*, 19 S.W.3d 130, 134 (Mo. banc 2000). It "will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *Bd. of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 368-69 (Mo. banc 2001), quoting, *Linton v. Missouri Veterinary Medical Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999). "Statutes are presumed to be constitutional and will be held otherwise only if they clearly contravene a constitutional provision. Where feasible to do so, the statute will be interpreted to be consistent with the constitution with all doubts to be resolved in favor of validity." *Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999). Appellants bear the burden to prove the statute is unconstitutional. *Id.*; *Linton*, 988 S.W.2d at 515.

Missouri Constitution Article IV, Section 12 (Appendix, p. A3) provides in relevant part:

Unless discontinued all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by law or by the governor as provided by law to the office of administration or to one of the fifteen administrative departments to which their respective powers and duties are germane.

On its face, this section applies to “all” executive branch boards.

In *Boone Cnty. Court v. State*, 631 S.W.2d 321, 324 (Mo. 1982) (en banc), the Court explained that in determining the meaning of words used in statutory interpretation, “The ordinary, usual and commonly understood meaning is, in turn, derived from the dictionary.” The *Oxford Universal Dictionary* (Oxford at the Clarendon Press, Third Edition, 1955) at page 44, *inter alia*, defines the word “all” as meaning “the entire number of, without exception”. Accordingly, this section applies to the entire number of executive branch boards without exception, including boards of election commissioners, without regard to which executive branch elective officer has authority over the board. The use of the word “shall” demonstrates that it is mandatory that executive branch boards be assigned to the Office of Administration or to an executive branch department. *State ex rel. City of Blue Springs v. Rice* , 853 S.W.2d 918, 920 (Mo. banc 1993). The assignment

language of Art. IV, Section 12 is clear and means what it says. *INEA et al. v. Independence School District*, 223 S.W.3d 131, 141 (Mo. 2007) (en banc).

The legislature understood the mandatory nature of the assignment language in Missouri Constitution Art. IV, Section 12 by enacting effectuating legislation which is found in Missouri Statutes Appendix B, the Omnibus State Reorganization Act of 1974 (hereinafter referred to as the “OSRA”) (Appendix, p. A9). Under this Act, a board may be assigned to the appropriate administrative department or the office of administration by the legislature in the statute creating the board or a reorganization plan, or by the governor in an executive order (OSRA, Section 1.13). In addition, the Act further provides:

5. (1) Except as otherwise provided by this act, or the state constitution, all executive and administrative powers, duties and functions, excepting those of the elective offices, previously vested by law or otherwise in the several state departments, commissions, boards, offices, bureaus, divisions or other agencies are vested in the following administrative departments or in the office of administration: department of agriculture; department of conservation; department of elementary and secondary education; department of higher education; department of highways and transportation; department of labor and industrial relations; department of natural resources;

department of mental health; department of public safety; department of revenue; department of social services.

In short, there is no free standing executive branch authority. If a board is to exercise executive branch authority, it must do so under the ambit of the Office of Administration or an executive branch department.

The statutes creating an election authority are Missouri Revised Statutes sections 115.015 and 115.017. Section 115.015 (Appendix, p. A7) provides:

Election authority established and defined.

115.015. The county clerk shall be the election authority, except that in a city or county having a board of election commissioners, the board of election commissioners shall be the election authority.

On its face, this section does not assign the boards of election commissioners to the Office of Administration or to any executive branch department.

Missouri Revised Statutes Section 115.017 (Appendix, p. A7) provides:

Election commissioners, where.

115.017. There shall be a board of election commissioners:

(1) In each county which has or hereafter has over nine hundred thousand inhabitants;

(2) In each city not situated in a county;

(3) In each city which has over three hundred thousand inhabitants on January 1, 1978, and is situated in more than one county;

(4) In each county of the first classification containing any part of a city which has over three hundred thousand inhabitants; provided that the county commission of a county which becomes a county of the first classification after December 31, 1998, may, prior to such date, adopt an order retaining the county clerk as the election authority. The county may subsequently establish a board of election commissioners as provided in subdivision (5) of this section;

(5) In each county of the first class which elects to have such a board through procedures provided in section 115.019.

Appellants stipulate that St. Louis County falls under the ambit of Section 115.017. However, once again, on its face, this section also does not assign the boards of election commissioners to the Office of Administration or to any executive branch department. Further, there is no other statute assigning the election boards to the Office of Administration or to any executive branch department.

The failure of the legislature to assign the boards of election commissioners

in accordance with Missouri Constitution Art. IV, Section 12 does not, in and of itself, render Missouri Revised Statutes Sections 115.015 and 115.017 unconstitutional. Art. IV, Section 12 provides that the assignment may be made “by the governor as provided by law”. The applicable law is the OSRA, and in particular, Section 1.13. However, no governor has ever assigned the SLCBEC or the other boards of election commissioners to the Office of Administration or to an executive branch department. The *Official Manual State of Missouri 2013-2014*, at page 932 (Appendix, p. A17), lists the St. Louis County Board of Election Commissioners as one of the “Boards Assigned to the Governor”. Similarly, the *Official Manual State of Missouri 2015-2016*, at page 871 (Appendix, p. A17), also lists the SLCBEC as one of the “Boards Assigned to the Governor”. However, there is no such thing under Missouri Constitution Art. IV, Section 12 as a “Board assigned to the Governor”. The governor may assign boards, but boards are assigned to the Office of Administration or an executive branch department, not to the governor.

Accordingly, if as the trial court found, the legislature can create executive branch boards without assigning the board to the Office of Administration or an executive branch department which further do not require an assignment by the governor in order to have authority to operate, then Missouri Revised Statutes Sections 115.015 and 115.017 repeal the OSRA by implication.

Repeals by implication are not favored. *In re Matter of Nocita*, 914 S.W.2d 358,359 (Mo. banc 1996); *Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999), “Repeals by implication are not favored. If by any fair interpretation both statutes may stand, there is no repeal by implication and both statutes must be given their effect.” If, as Appellants contend, the St. Louis County Clerk is the election authority, then Missouri Revised Statutes Sections 115.015 and 115.017 and the OSRA are harmonized and both may be given their effect.

Even more significant than the implicit repeal of the OSRA, if as the trial court found in granting the motion to dismiss, the legislature can create boards that are exempt from the assignment requirements of Missouri Constitution Art. IV, Section 12, then the trial court has granted the legislature the authority to amend the constitution. As noted above, Art. IV, Section 12 applies to all boards without exception. If the SLCBEC is the St. Louis County election authority, then the legislature has created an exception. The legislature has no such authority.

Missouri Constitution Art. 1, Section 3 (Appendix, p. A2) provides:

Powers of the people over internal affairs, constitution and form of government.

Section 3. That the people of this state have the inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and

abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the Constitution of the United States.

Missouri Constitution Article I, Section 3 vests the right to amend the Constitution solely with the people. None of the three branches of government have any authority to amend the Constitution. Accordingly, if the people want an exception to the assignment requirements of Missouri Constitution Article IV, Section 12, it is incumbent on the people to insert any such exception. Indeed, the people have used this authority to carve out an exception to an otherwise totally encompassing constitution provision. See e.g. Missouri Constitution Art. VII, Section 13 (Appendix, p. A6) (no increases in compensation for public officers during their terms of office) and Missouri Constitution Art. VI, Section 11.2 (Appendix, p. A5) (compensation of certain officials elected in 1984 or 1986 may be increased “notwithstanding the provisions of section 13 of article VII of the Constitution of Missouri”). There is no comparable exception anywhere in the Constitution exempting the St. Louis County Board of Election Commissioners from the operation of the assignment requirements of Missouri Constitution Art. IV, Section 12. As applied by the trial court, Missouri Revised Statutes Sections 115.015 and 115.017 create an exception to Missouri Constitution Art. IV, Section

12 for the St. Louis County Board of Election Commissioners and so constitutes an amendment to Art. IV, Section 12 by the legislature.

The linchpin to the trial court's decision granting the Motion to Dismiss is Respondent's second point in its motion:

2. Genevieve M. Frank, St. Louis County Clerk, is not a proper party to be named as a contestee in an election contest because by statute, the board of election commissioners shall be the election authority. See §115.015 and §115.017 (4) R. S. Mo.

For all intents and purposes, this paragraph is a tacit admission that the SLCBEC has no *de jure* existence. There is no suggestion in accordance with Missouri Supreme Court Rule 52 that the SLCBEC is an indispensable party, or that it even has any interest in the subject matter of the action. In short, this *ipse dixit* assertion fails on its face. Missouri Revised Statutes Sections 115.015 and 115.017 plainly establish the St. Louis County Clerk as the election authority for St. Louis County (just as it is in 109 of Missouri's 115 counties that do not have any *de facto* boards of election commissioners) who may be replaced at some indeterminate time by the establishment of a constitutional board of election commissioners. As there was no constitutional board of election commissioners for St. Louis County in

existence at the time of the 2014 elections, the proper election authority was Respondent Frank, the St. Louis County Clerk.

B. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS ON THE GROUNDS OF FAILURE TO FOLLOW THE STATUTORY ELECTION CHALLENGE PROCEDURES OF MISSOURI REVISED STATUTES SECTION 115.577 BECAUSE APPELLANTS' ELECTION CHALLENGE MEETS ALL OF THE STATUTORY REQUIREMENTS IN THAT IT IS TIMELY UNDER SECTION 115.577 SINCE THE ST. LOUIS COUNTY CLERK WHO IS THE ELECTION AUTHORITY FOR ST. LOUIS COUNTY HAS NOT CERTIFIED THE ELECTION RESULTS SO THE STATUTE OF LIMITATIONS HAS NOT STARTED RUNNING; IT NAMES THE ST. LOUIS COUNTY CLERK AS THE CONTESTEE SINCE THE COUNTY CLERK IS THE CONSTITUTIONAL AND STATUTORY ELECTION AUTHORITY FOR ST. LOUIS COUNTY; AND IT WAS PROPERLY FILED WITH THE CLERK OF THE ST. LOUIS COUNTY COURT

The trial court erred in granting Respondent's Motion to Dismiss because Appellants fully complied with the statutory requirements of Missouri Revised Statutes Section 115.577 (Appendix, p. A8). Respondent's motion to dismiss alleges:

1. Petitioners (referred to in the Verified Petition as “Contestants”) did not file a challenge to contest the election within the 30 day statute of limitations set forth in §115.577 R.S.Mo.

2. Genevieve M. Frank, St. Louis County Clerk, is not a proper party to be named as a contestee in an election contest because by statute, the board of election commissioners shall be the election authority. See §115.015 and §115.017 (4) R. S. Mo.

3. The right to contest an election exists not by common law but by statute; the procedures for doing so are exclusive and must be strictly followed, which Petitioners have not done.

3.(sic) Because of the failure to file within and (sic) the required statutory period, and because of the failure to name the proper party, and because of the failure to strictly follow the statutory procedures, this Court does not have jurisdiction to hear the contest of an election, and does not have jurisdiction over the County Clerk for the contest of an election. (LF pp. 32-33)

As set forth in the second paragraph, this motion is premised on the erroneous assumption that the SLCBEC is the election authority for St. Louis County. As amply demonstrated above in Section A, if the SLCBEC is the election authority, then Missouri Revised Statutes Sections 115.015 and 115.017 create an

unconstitutional exception to the assignment provisions of Missouri Constitution Art. IV, Section 12 and also repeal the OSRA by implication. Further, as noted above, if the SLCBEC is the proper election authority then Appellants have no cause of action. However, if as Appellants contend, the county clerk is the proper election authority for St. Louis County, then the underlying basis for Respondent's motion is removed. If the St. Louis County Clerk is the election authority, then there is no constitutional issue and Sections 115.015 and 115.017 are harmonized with the OSRA. Indeed, this is the only interpretation wherein these sections are consistent with the constitution and there are no doubts as their validity. *Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999). Accordingly, Appellants properly named the proper election authority for St. Louis County, namely the Respondent, the St. Louis County Clerk, as the contestee in their election challenge petition (LF p. 6).

Missouri Revised Statutes Section 115.577 (Appendix, p. A8) provides:

Time in which election contest may be filed.

115.577. Not later than thirty days after **the official announcement of the election result by the election authority**, any person authorized by section 115.553 who wishes to contest the election for any office or on any question

provided in section 115.575 shall file a verified petition in the office of the clerk of the appropriate circuit court. (Emphasis added.)

The key language in Section 115.577 is “the official announcement of the election result by the election authority”. To date, there has been no “official announcement of the election result” by the St. Louis County Clerk who is the election authority for St. Louis County. Accordingly, the thirty day limitations period has not even started. Indeed, having argued in the Motion to Dismiss that the procedures for an election challenge “are exclusive and must be strictly followed”, Respondent could hardly argue in good faith that the thirty day statutory challenge period commences before an announcement of the election result by the St. Louis County Clerk, the proper election authority for St. Louis County.

There have been various announcements concerning the 2014 election by the STCBEC such as its tabulation of write-in ballots (LF p. 20). However, since the SLCBEC has no constitutional authority to act in any manner, these tabulations have no more legal force and effect than a declaration by a Wednesday night volleyball league or the liens that were filed against public officials by “Citizens’ Posses” in the late 1980’s and early 1990’s. Until such time as the St. Louis County Clerk issues an “official announcement”, the statute of limitations will not run.

Appellants filed their election challenge petition with the clerk of the St. Louis County Circuit Clerk. (LF p. 6) It is *res ipsa loquitur* that St. Louis County Circuit Court is the appropriate circuit court for St. Louis County election challenges. Accordingly, Appellants filed their election challenge petition in a timely manner, in the proper venue, against the proper party. Appellants fully complied with the necessary procedures for filing the instant election appeal. Therefore, for these reasons and the additional reasons set forth in Section A above, the trial court erred in granting Respondent's Motion to Dismiss.

CONCLUSION

This is a profoundly simple case. If the St. Louis County Clerk is the election authority for St. Louis County under Missouri Revised Statutes Sections 115.015 and 115.017, then these sections are constitutional and fully harmonized with the OSRA. However, if the SLCBEC is the election authority under these sections, then these sections are patently unconstitutional in violation of the clear and unmistakable assignment provisions of Missouri Constitution Art. IV, Section 12 because they contravene the requirements by establishing a functioning executive branch board that is not assigned to the Office of Administration or an executive branch department, and further repeal the OSRA by implication.

Given a clearly constitutional interpretation and an equally clear unconstitutional interpretation of Sections 115.015 and 115.017, there is no contest. “Statutes are presumed to be constitutional and will be held otherwise only if they clearly contravene a constitutional provision. Where feasible to do so, the statute will be interpreted to be consistent with the constitution with all doubts to be resolved in favor of validity.” *Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999).

Until such time as the STCBEC properly is assigned to the Office of Administration or an executive branch department, whether by new legislation, an executive order from the governor, or a new organization plan, the county clerk

must be the election authority for St. Louis County if Sections 115.015 and 115.017 are to interpreted to be consistent with Missouri Constitution Art. IV, Section 12.

Appellants have established that the county clerk must be the election authority for St. Louis County, and therefore Respondent's Motion to Dismiss fails in its entirety. First, the statute of limitations set forth in Missouri Revised Statutes Section 115.577 has not even started yet because the proper election authority has not made an official announcement of the election results. Accordingly, Appellants' election challenge petition is timely filed. Second, Respondent, as the acting county clerk, is the proper party to be named in an election contest of a St. Louis County election. Third, Appellants have followed all of the procedures for a proper election challenge.

The Court should issue a decision declaring that the St. Louis County Clerk (and the five other county clerks in counties currently using a board of election commissioners) is the proper election authority for the challenged 2014 elections in St. Louis County, and will continue to be the election authority for St. Louis County until such time as a constitutionally assigned Board of Election Commissioners in accordance with Missouri Constitution Art. IV, Section 12 is authorized to act. The Court should reverse the decision of the trial court granting Respondent's Motion to Dismiss which establishes the SLCBEC as the St. Louis

County election authority thereby erroneously applying Missouri Revised Statutes Sections 115.015 and 115.017 in violation of Missouri Constitution Art. IV, Section 12 and remand the matter to the trial court with instructions to grant Appellants' motion to disqualify judges with a potential financial interest in the action for cause (LF p. 28). In addition, the Court should award Appellants their costs, and for such other and further relief as to the Court seems meet and proper.

Respectfully submitted,

/s/ Bruce C. Cohen

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CERTIFICATE OF COMPLIANCE

The Appellants' Brief contains 7,497 words and complies with the limitations contained in Rule 84.06(b). The brief includes all information required under Rule 55.03. This document was scanned and is virus free.

/s/ Bruce C. Cohen

CERTIFICATE OF SERVICE

This document and the separate Appendix were filed electronically with the Court's electronic filing system on August 2, 2016. In addition, a printed copy was served on Respondent's counsel by U.S. mail, postage prepaid, addressed as follows:

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