SC94516

IN THE SUPREME COURT OF MISSOURI

WES SHOEMYER, et al.,

Plaintiffs,

vs.

JASON KANDER, Missouri Secretary of State, et al.,

Defendants/Intervenors.

BRIEF OF THE STATE

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RESPONSE TO JURISDICTIONAL STATEMENT

As set forth in the argument below (pp. 5 to 8), this Court is without jurisdiction in this case and should dismiss, or alternatively transfer.

STATEMENT OF FACTS

On May 14, 2013, the Missouri General Assembly passed House Joint Resolution Nos. 11 & 7 (referred to herein as "Amendment 1"). (Petition, Ex. C). Amendment 1 proposed adding a new Section 35 to Article I of the Missouri Constitution. *Id.* The General Assembly also prepared and included a summary statement for the ballot title. *Id.* Amendment 1 was then delivered to the Secretary of State's office for preparation of the ballot title. (Plaintiffs' App. A13-A21).

The Secretary of State, the named Defendant in this action,[1/] forwarded the proposed amendment to the State Auditor's office for preparation of a fiscal note and fiscal note summary. After receiving the fiscal note and fiscal note summary from the State Auditor's office, the Secretary of State certified

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[1/] The Secretary of State is named as a defendant because of his ministerial role in certifying the official ballot title, which includes the ballot summary language prepared by the General Assembly. *See* § 116.155, RSMo. As such, the Secretary of State takes no position regarding the challenge to the ballot summary language. Because this case involves questions as to the validity of a provision of Missouri's Constitution, arguments against Plaintiffs' Petition are presented by counsel on behalf of the State of Missouri.

the official ballot title on June 24, 2013, which included the General Assembly's summary statement as well as the State Auditor's fiscal note summary. (sos.mo.gov/elections/2014ballot).

By proclamation on May 23, 2014, and more than a year after its passage by the General Assembly and certification by the Secretary of State, Governor Nixon placed proposed Amendment 1 on the August 5, 2014, primary election ballot. (governor.mo.gov/news/archive/gov-nixon-sets-election-dates-2014-ballot-measures) The official summary statement for Amendment 1 stated:

> 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?

(Petition, Ex. C).

On August 5, 2014, a majority of Missouri voters voted in favor of Amendment 1. (Petition, ¶ 13). The Secretary of State's office announced the official results on August 25, 2014. (Petition, ¶ 9). Plaintiff Wes Shoemyer petitioned for a recount of the votes cast on Amendment 1. (Petition, ¶ 10). And on September 15, 2014, the Secretary of State's office confirmed in the recount that a majority of votes had been cast in favor of Amendment 1. (Petition, ¶ 12).

Plaintiffs, including Shoemyer, filed the present lawsuit on October 14, 2014, to challenge the fairness and sufficiency of the summary statement for Amendment 1 that was certified more than a year earlier. While couched as an election contest challenging the results of the August 5th election, Plaintiffs argue only that the summary statement was unfair and insufficient. Plaintiffs have offered no evidence to the Court concerning any alleged voter irregularities, and have only referenced the summary statement and requested that the vote of the people be set aside and the constitutional amendment be removed from the Missouri Constitution. (Petition, ¶¶ 15-21).

SUMMARY OF THE ARGUMENT

According to the Plaintiffs, citizens who wish to challenge a summary statement for a ballot measure can simply ignore the mandatory language of a statute requiring a pre-election challenge. *See* § 116.190.1, RSMo (2013 Cumulative Supplement).[2/] They can engage in a political campaign and lose, then a recount and lose, and still – more than a year after they "must" have brought a challenge – bring a post-election challenge to the summary statement. Such a strategy is not only contrary to Missouri law, but it wastes the substantial time, effort, and resources of Missourians, as well as the votes of hundreds of thousands of citizens. Indeed, Plaintiffs admit that they "could have challenged the ballot language prior to the election" but they did not. Plaintiffs' Br. p. 23.

Both historically and currently, the types of remedies available pre-election and post-election are distinct. Beginning in the early 1900s, Missouri law provided that a summary statement should be written for ballot proposals. Simultaneous with the creation of a summary statement was a limited remedy to challenge the summary statement as insufficient or unfair. The summary statement challenge "must" be brought within 10 days of being

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[2/] All references to the Revised Statutes of Missouri are to the 2013 Cumulative Supplement, unless otherwise noted.

certified – pre-election. In contrast, post-election remedies in the form of election contests have been around just as long but have never referenced nor authorized a challenge to a summary statement. As such, Plaintiffs' use of pre-election remedies in this post-election contest must fail.

What is more, this Court does not have original jurisdiction or exclusive appellate jurisdiction in this case. The Missouri Constitution grants this Court jurisdiction over original remedial writs, (Mo. Const. Art. V, § 4), election contests involving certain public officers, (Mo. Const. Art. VII, § 5), and specific types of appeals – *e.g.,* the validity of a statute or constitutional provision, construction of the revenue laws, or title to any state office. (Mo. Const. Art. V, § 3). But this case is not an original remedial writ, it does not involve any public officers, and even if it were an appeal it does not involve any of the matters that are within the exclusive appellate jurisdiction of this Court. Accordingly, the case should be dismissed or transferred.

Finally, if we suppose that the Plaintiffs are permitted to disregard the plain language of the statutes and the Constitution, their claim still fails. There was no irregularity – either alleged or proven – to cast doubt on the validity of the election and the votes of 499,963 voters. And the summary statement prepared by the General Assembly is not unfair or insufficient. Although it may not contain the detail desired by Plaintiffs, it "makes the subject evident with sufficient clearness to give notice of the purpose to those

interested or affected by the proposal." *United Gamefowl Breeders Ass'n of Mo. v. Nixon*, 19 S.W.3d 137, 140 (Mo. banc 2000).

The summary statement provided notice that the proposed amendment would "ensure that the right of Missouri citizens to engage in agricultural production and ranching practices shall not be infringed." This is precisely what the proposal does, and the critical language used in the summary statement was that the Missouri Constitution is amended to ensure that *the right* to engage in these practices shall not be *infringed*. These terms are important because they recognize an existing right, and protect this right against infringement – that is, against encroachment in a way that violates the law or the rights of another.

Plaintiffs' complaints concerning the summary statement boil down to matters of semantics and details, namely the extent of the protection described, and the description of the group so protected. It would have been impossible to address, in the detail required by Plaintiffs, the potential interplay between local zoning laws and Amendment 1, or to tackle the distinction Plaintiffs see between "Missouri citizens" (who ranch or farm), and "ranchers and farmers," within the General Assembly's 50 word limit for the summary statement.

Under any standard, but particularly under the standard that must be applied where the people have demonstrated their will through their vote,

the summary statement in this case was neither unfair nor insufficient, and it did not mislead or deceive hundreds of thousands of voters. *See United Gamefowl Breeders*, 19 S.W.3d at 141. Therefore, the summary statement should be upheld along with the constitutional amendment already enacted by the people.

ARGUMENT

Standard of Review

The Missouri Constitution provides no standards regarding ballot titles, including the summary statement portion of ballot titles. The only standards – as well as the timing and circumstances applicable to ballot title challenges – are found in Chapter 116.

Any citizen who wishes to challenge the official ballot title prepared for a proposed constitutional amendment, including the summary statement submitted by the General Assembly, may bring an action in the Circuit Court of Cole County. § 116.190.1. The action, however, "*must* be brought within ten days after the official ballot title is certified by the secretary of state." § 116.190.1 (emphasis added). The petition shall state the reasons why the summary statement portion of the official ballot title is insufficient or unfair and shall request a different summary statement. § 116.190.3.

Plaintiffs' challenge to the summary statement in this case fails for several reasons, not the least of which is a lack of jurisdiction in this Court. Plaintiffs did not bring the action within the statutory time frame, which they must, and the majority of the people voted in favor of Amendment 1, which is now in effect. Furthermore, there was no irregularity – either alleged or proven – to cast doubt on the validity of the election. As such, the case should be dismissed or, in the alternative, transferred.

I. This Court Should Dismiss the Petition or Transfer for Lack of Jurisdiction or for Want of a Cognizable Claim – Responding to Plaintiffs' Points II, III, and IV.

The Missouri Constitution expressly provides for, and limits, this Court's jurisdiction. *See In re Sizer*, 254 S.W. 82, 83 (Mo. banc 1923) (concluding that the jurisdiction of the court "is derived from and fixed by [the] Constitution"); *Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 910 (Mo. banc 1997) ("This Court is a court of limited appellate jurisdiction.").

Even a statute that purports to confer jurisdiction on the Court is subject to constitutional limitations. *See, e.g., Robinson v. Nick*, 134 S.W.2d 112, 115 (Mo. banc 1939) (rejecting jurisdiction conferred by statute); *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 350 (Mo. banc 2001) ("This Court is a court of limited jurisdiction, and it has a duty to determine the question of its jurisdiction sua sponte.").

For the reasons that follow, this Court lacks jurisdiction in this case and should, therefore, dismiss or, in the alternative, transfer to the circuit court.

A. There is No Original Jurisdiction in this Court to Review Ballot Titles.

Article V of the Missouri Constitution – the article devoted to the judicial department – sets forth various provisions concerning the judicial department, including the jurisdiction of the courts. While Article V specifically provides for the jurisdiction of the Supreme Court, it does not provide original jurisdiction in the Supreme Court for review of ballot titles as sought in this case.

Circuit courts are constitutionally provided "original jurisdiction over all cases and matters, civil and criminal [and] may issue and determine original remedial writs." Mo. Const. Article V, § 14. The Supreme Court, in contrast, is not provided original jurisdiction over all cases and matters, but instead has authority to "determine original remedial writs."[3/] Mo. Const. Article V, § 4. Similarly, the court of appeals has "general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the

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[3/] Plaintiffs do not seek relief in this matter pursuant to any original remedial writ. *See* Petition, ¶ 6 (Plaintiffs "bring this action pursuant to Mo. Rev. Stat. §§ 115.553.2 and 116.190."). They do not argue in their brief for the application of any original remedial writ. And they are not entitled to any original remedial writ.

supreme court." Mo. Const. Article V, § 3. The Supreme Court's exclusive appellate jurisdiction, provided in Article V, § 3, is limited as follows:

> The supreme court shall have exclusive appellate jurisdiction in all cases involving [1] the validity of . . . a statute or provision of the constitution of this state, [2] the construction of the revenue laws of this state, [3] the title to any state office and [4] in all cases where the punishment imposed is death. . . . .

Thus, not only is there no provision in Article V of the Constitution for original jurisdiction in this Court, but even the Court's exclusive appellate jurisdiction does not extend to ballot titles. And, of course, this is not an appellate matter. Instead, original jurisdiction over ballot titles is in the circuit courts.

Unable to find jurisdiction for this Court under Article V, Plaintiffs' jurisdictional statement relies entirely on statutory authority, namely § 115.553 and § 115.555. (Plaintiffs' Br., p. 7). Later in their brief, Plaintiffs turn to Article VII, which relates exclusively to public officers. According to Plaintiffs, § 5 of Article VII supports original jurisdiction in this Court, and § 115.555 is proof of this authority. (Plaintiffs' Br., p. 28). Not so.

Plaintiffs focus on only a portion of Article VII, § 5 in support of their claim, stripping the quoted portion of any meaningful context. *See State v.*

Schleiermacher, 924 S.W.2d 269, 276 (Mo. banc 1996) (requiring a construction of words to give "meaning to the words used in the context") (citing *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. banc 1993)). Article VII, § 5 provides in full as follows:

> Contested elections for governor, lieutenant governor and other executive state officers shall be had before the supreme court in the manner provided by law, and the court may appoint one or more commissioners to hear the testimony. The trial and determination of contested elections of all other public officers in the state, shall be by courts of law, or by one or more of the judges thereof. 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 . . . .

While Plaintiffs focus on a sentence in the middle of this provision, and try to find justification for their reading of § 115.555, reading its full text makes clear that Article VII, § 5 addresses only election contests involving public officers. *See 20th & Main Redevelopment P'ship v. Kelley,* 774 S.W.2d 139, 141 (Mo. banc 1989) ("Ascertaining and implementing the policy of the

General Assembly requires the court to harmonize all provisions of the statute."). There is no reference to, nor mention of, election contests concerning ballot measures in Article VII, § 5. Indeed, every section of Article VII concerns public officers.

Ballot measures concerning initiative petitions and referenda are covered by entirely different articles in the Missouri Constitution. *See, e.g.,* Mo. Const. Art. III, §§ 49-53 & Art. XII §§ 1-2(b). Thus, Plaintiffs' reliance on Article VII, § 5 is misplaced. The matters over which this Court possesses jurisdiction are designated by the Constitution, and cannot be affected by statute. Accordingly, this case should be dismissed or, alternatively, transferred to the circuit court. *See* Mo. Const. Art. V, § 11 ("An original action filed in a court lacking jurisdiction or venue shall be transferred to the appropriate court.").

B. Missouri Law Does Not Provide for a Post-Election Contest of Ballot Titles.

Not only is there no original jurisdiction or exclusive appellate jurisdiction in the Supreme Court for this case, there is no jurisdiction in any court. "Election contests are purely statutory," as Plaintiffs concede, and a post-election contest of a ballot title such as this is not provided for under any constitutional or statutory provision. Plaintiffs' Br. p. 25 (citing *State ex rel. Holland v. Moran*, 865 S.W.2d 827, 830 (Mo. App. W.D. 1993)). The

Constitution provides that "[a]ll 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*." Mo. Const. Art. XII, § 2(b) (emphasis added). The General Assembly did just that in Chapter 116 – providing for ballot titles and the exclusive means to challenge them pre-election.

1. The historical development of ballot titles supports only pre-election challenges.

Before discussing the current statutory language relating to ballot title challenges, it is worth reviewing the historical context from which it springs.

In 1909, Missouri law provided that "a proposed constitutional amendment or other question" could be "submitted to the people of the state for popular vote" by the General Assembly. § 5967, RSMo (1909). The law did not, however, provide for a ballot title to be associated with the proposal – only that if there were more than one constitutional amendment that the proposals would be printed on the ballot as "First constitutional amendment," and "Second constitutional amendment," and so on, followed by the text of the proposal. § 5971, RSMo (1909). With no provision for a ballot title in 1909, there was, logically, no provision for challenging a ballot title.

In the same year (1909), and after being passed in 1908, Missouri law provided for a citizens initiative and referendum. *See* §§ 6747, *et seq.*, RSMo

(1909). It was in these provisions that a "ballot title" (prepared by the Attorney General) was first introduced. § 6751, RSMo (1909). And in the very same provisions that introduced a "ballot title" for a citizens initiative and referendum, a specific and limited remedy was provided:

> Any person who is dissatisfied with the ballot title provided by the attorney-general for any measure may appeal from his decision to the circuit court, as provided by section 6750, by petition, praying for a different title, and setting forth the reasons why the title prepared by the attorney-general is insufficient or unfair.

§ 6751, RSMo (1909). No appeal (or petition) would be allowed, however, "unless the same is taken within ten days after said decision is filed" – *i.e.*, pre-election. § 6751, RSMo (1909).

Apparently taking a cue from the new initiative and referendum laws, Missouri law in 1919 provided that a ballot title would be prepared by the attorney general for constitutional amendments proposed by the General Assembly as well as those proposed by initiative petition. *See* § 4943, § 5910, RSMo (1919). In both instances, a challenge to the ballot title was only allowed if the challenge was filed within ten days. *See* § 4943, § 5910, RSMo (1919). Again, only a pre-election challenge was authorized.

These early changes in Missouri law concerning initiative petitions and ballot titles were all made while separate provisions authorized post-election contests. In contrast to the initiative petition and constitutional amendment provisions, the election contest provisions made absolutely no reference to ballot titles. Indeed, in 1917 a provision was added to the post-election contest statutes providing that "[t]he result of any election or vote upon a proposed constitutional amendment or statute submitted or referred to the voters either by the general assembly, or by petition of the voters under the initiative and referendum . . . may be contested." § 4923, RSMo (1919). Yet, in none of these provisions relating to post-election contests is there any reference to ballot titles or summary statements.

In 1949, this same separation of remedies continued. The election contest provisions authorized a post-election challenge with regard to "[t]he result of any election or vote upon a proposed constitutional amendment or statute submitted or referred to the voters either by the general assembly, or by petition of the voters under the initiative and referendum." § 124.240, RSMo (1949). In contrast, any challenge to a ballot title and summary statement was required to be pre-election. *See* § 125.030, § 126.060, RSMo (1949).

The same was true **in 1969**, *compare* § 124.240, RSMo (1969) (authorizing a post-election contest as to the results with no reference to

ballot titles) *with* § 125.030 and § 126.060, RSMo (1969) (allowing only a pre-election challenge to the ballot title), **in 1989**, *compare* § 115.555, RSMo (1989) (authorizing a post-election contest as to the results with no reference to ballot titles) *with* § 116.190, RSMo (1989) (challenge to ballot "must be brought within ten days after the official ballot title is provided"), and **in 2009** (same). Throughout the entire course of the historical development of election contests and ballot titles, Missouri law has been uniform – challenges to ballot titles, including summary statements, must be pre-election while election contests are post-election. The summary statement of a ballot title was created by statute and any remedies are similarly limited by statute.

2. Today, as it was historically, ballot titles and summary statements must be challenged pre-election.

Currently, § 116.190 provides that "[a]ny citizen who wishes to challenge the official ballot title or the fiscal note prepared for a proposed constitutional amendment submitted by the general assembly . . . may bring an action in the circuit court of Cole County. The action *must be brought within ten days* after the official ballot title is certified by the secretary of state." § 116.190.1 (emphasis added). Here, the ballot title was certified on

June 24, 2013, making July 5, 2013 the deadline for a challenge. (Exhibit A, Answer to Intervenor Missouri Farmers Care).

Plaintiffs admit that they "could have challenged the ballot language prior to the election." Plaintiffs' Br. p. 23. Yet, they brought no challenge until after the election results were announced – 477 days after certification of the official ballot title, which includes the summary statement. In accordance with established canons of construction – *lex specialis derogate legi generali* – "section 116.190.1's specific deadline would control" over any general provision for election contests. *Knight v. Carnahan*, 282 S.W.3d 9, 20-21 (Mo. App. W.D. 2009).

In the *Dotson* decision, we acknowledge, this Court said that "judicial review of a claim that a given ballot title was 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 v. Kander*, 435 S.W.3d 643, 645 (Mo. banc 2014) (citing § 115.555). But there was no further description of what such a claim would look like. Nevertheless, Plaintiffs brought this case seeking to invalidate the vote of the people based solely on the summary statement portion of the ballot title. Plaintiffs' claim is inconsistent with the plain language of the statute and the surrounding statutory provisions.

Section 115.555 provides for a post-election contest as to "*the results* of elections on constitutional amendments," but there is no reference to summary statements anywhere in § 155.555 or the surrounding provisions. Indeed, in all of chapter 115 there is not a single reference to summary statements. In contrast, Chapter 116 – which provides for pre-election challenges – references summary statements repeatedly. *See, e.g.,* § 116.010; § 116.155; § 116.160; § 116.180; § 116.190; § 116.334. What, then, did the General Assembly mean by allowing a post-election contest as to "the results" of an election in Chapter 115? Did it contemplate that one of "the results" that could be contested post-election would be the summary statement? If that were the case, the General Assembly could have easily used the language it uses repeatedly in Chapter 116. But it did not. Nor has it ever, beginning with the earliest passage of these provisions.

Instead, reference to "the results" in § 115.555 is to alleged "irregularities." There must be "irregularities" of "sufficient magnitude to cast doubt on the validity" of the election. § 115.549. The question of what constitutes an irregularity is where the Plaintiffs depart from the plain language of the statute and surrounding statutory provisions. *See Utility Serv. Co., Inc. v. Dep't of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc 2011) ("No portion of a statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions."). The right

to contest an election exists only by virtue of statute and the jurisdiction of the circuit court is confined to those statutory provisions governing election contests. *Landwersiek v. Dunivan*, 147 S.W.3d 141 (Mo. App. S.D. 2004).

The term "irregularity" – which is never used in Chapter 116 but used several times in Chapter 115 – always refers to problems in the process, and not in the substantive provisions under consideration:

- "[W]itness and report to the election authority any failure of duty, fraud or irregularity" § 115.053.3;
- "Watchers are to observe the counting of the votes and present any complaint of irregularity or law violation" § 115.107.2;
- "[E]lection authority responsible for conducting the election in any area where an alleged irregularity occurred" § 115.533.2; § 115.559.2; § 115.567.2; § 115.579.2; § 115.585.1;
- "[A]ll evidence by the [Plaintiff] and [Defendant] bearing on the alleged irregularities" § 115.537;
- "If the court or legislative body hearing a contest finds there is a prima facie showing of irregularities which place the result of any contested election in doubt" § 115.583;

- "[T]here were irregularities of sufficient magnitude to cast doubt on the validity" § 115.593;
- "[I]f the evidence provided demonstrates that the irregularities were sufficient to cast doubt on the outcome of the election" § 115.600.

In each reference to "irregularity" in Chapter 115, the statutes contemplate some observable conduct that occurs at the location of the election, not some static summary statement that is the same regardless of the location.

The ability to contest election results because of an irregularity is not a panacea for all possible claims in the election process. *Cf. Kohrs v. Quick*, 264 S.W.3d 645, 647 (Mo. App. W.D. 2008) (concluding that a plaintiff should not be allowed to circumvent the deadline of § 115.526.2 by alleging that violation of a qualification statute constitutes an irregularity in the election); *Kasten v. Guth*, 395 S.W.2d 433, 437-438 (Mo. 1965) (noting that the general rule is that the eligibility of candidates is not a proper issue in an election contest.). However, Plaintiffs' attempted application of this Court's comment in *Dotson* essentially renders § 116.190 superfluous, particularly if every disputed summary statement may now be crammed within the phrase "irregularities of a sufficient magnitude."

Moreover, the statutory language for post-election contests expressly contemplates *evidence* of irregularities (e.g., voters receiving

the incorrect ballot style for their district, improperly counting or rejecting absentee ballots, disenfranchising eligible voters, ensuring only eligible voters vote, etc.), not a mere legal determination. Plaintiffs are required to set forth the points on which they wish to contest the election and "the facts" they will prove in support of such points. § 115.557. The parties are also given the opportunity to contest the validity of any votes and "the facts" that will be proven in support of such contest. § 115.559.3; *see also Ledbetter v. Hall*, 62 Mo. 422, 1876 WL 9740 (Mo. 1876) (Examining an earlier form of our current election contest statutes, this Court noted that Wagn. Stat., 573, § 54, provided that: "In every contested election, the party contesting shall give . . . the names of all voters objected to, with the objections."). Commissioners are even empowered to compel the attendance and take the testimony of witnesses, to administer oaths, take depositions, and to compel discovery in accordance with the rules of discovery in civil cases. § 115.561.

This evidentiary process is in stark contrast to pre-election summary statement challenges, where courts are instructed only to consider the petition and hear arguments. § 116.190.4. The difference could not be clearer: pre-election ballot summary challenges are matters of legal argument, based on the undisputed facts of the certified ballot. Post-election contests, by contrast, are evidentiary matters in order to determine whether disqualifying irregularities occurred with respect to actual voting. *See, e.g., Marre v. Reed*,

775 S.W.2d 951, 952 (Mo. banc 1989) (involving a detailed examination of 11 specific voters whose qualifications were the subject of controversy); *Royster v. Rizzo*, 326 S.W.3d 104, 109-111 (Mo. App. W.D. 2010) (Challenger failed to make a prima facie case for recount because he did not demonstrate that the validity of a number of votes equal to or greater than the margin of defeat was placed in doubt.).

The Missouri Court of Appeals in *Knight*, while recognizing certain post-election reviews of voter-approved measures, concluded that because § 116.190 already provides a specific deadline for pre-election challenges to the ballot title, a post-election contest must fail. *Id.* at 20-21 ("Here the legislature provided a deadline in 116.190.1 for pre-election challenges to the fiscal note summary; we do not read its language as superfluous."). To conclude otherwise would render the specific deadline in § 116.190 superfluous, despite using the mandatory term "must."

Under Plaintiffs' theory, a party could simply play wait and see, and thereby render specific statutory language in § 116.190 meaningless, as well as hundreds of thousands of votes. Having established no actual voter irregularities, Plaintiffs' claim must fail.

C. The Plaintiffs' Claim is Moot or Untimely.

Plaintiffs' request to set aside the election results and the constitutional amendment on the basis of supposed voting irregularities should also be dismissed because it is moot or untimely. Indeed, more than a year passed from the time that the summary statement and ballot title were certified before Plaintiffs decided to challenge the summary statement. In fact, a significant political campaign was waged to convince voters that they should not vote for this constitutional amendment. *See* Plaintiffs' Br., pp. 18-19. The political effort failed. Plaintiff Shoemyer's recount effort also failed. And only then did Plaintiffs decide to claim that the summary statement in the ballot title was somehow unfair or insufficient for voters.

1. The constitutional amendment is already in effect under Article XII, § 2(b).

The constitutional amendment proposed in Amendment 1 was passed on August 5, 2014. In accordance with Article XII, § 2(b), the amendment took effect at the end of thirty days after the election – September 5, 2014. *See Knight*, 282 S.W.3d at 17, n.5. This action was filed on October 14, 2014, nearly six weeks after the constitutional amendment became effective. Plaintiffs point to Plaintiff Shoemyer's recount effort in an attempt to toll Amendment 1's effectiveness, or to restart the clock. But such actions are unsupported by the Constitution. Rather, successful amendments take effect

at the end of thirty days after *the election*. This timeframe is not changed by a failed recount.

While Plaintiffs may find this outcome "harsh and unreasonable," a plain reading of the text of Article XII, § 2(b) leaves no room for debate on this point. And the recount was entirely unrelated to the claim in this case in any event. Although Plaintiffs would prefer that Article XII, § 2(b) say that it applies only in situations where no one decides to ask for a recount or to challenge a summary statement after an election has occurred, it does not. Plaintiffs' preferred reading of applicable statutory authorities conflicts with the constitutional provision, but that is not a fault to be laid at the feet of Article XII, § 2(b). Rather, Plaintiffs should remember that statutory provisions are required to comply with constitutional ones, and not the other way around. Indeed, Plaintiffs' brief is interesting in that it argues strenuously that statutory provisions must be respected (at the expense of a plain reading of the Constitution), while their entire challenge is premised on completely ignoring Chapter 116. Such inconsistency cannot be sustained.

Furthermore, Plaintiffs' only request for relief is to set aside the entire election and to void the constitutional amendment. As set forth below, and in accordance with Article XII, § 2(b) of the Missouri Constitution, this remedy is not available for cases involving alleged voter irregularities. The constitutional amendment at issue became effective before any challenge was

made. Therefore, the Plaintiffs' claim is moot or untimely, and should therefore be dismissed.

2. Laches precludes any equitable relief or tolling.

"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. *Metro. St. Louis Sewer Dist. v. Zykan*, 495 S.W.2d 643, 656-657 (Mo. 1973). Laches will be applied only where enforcement of the right asserted would work an injustice. *Id.* The analysis, of course, is of the delay between the occurrence of the acts complained of and Plaintiffs' initiation of their summary statement challenge. *Hagely v. Bd. of Educ. of Webster Groves Sch. Dist.*, 841 S.W.2d 663, 669 (Mo. banc 1992). The delay must work to the disadvantage and prejudice of the defendant before a claim will be barred by laches. *Id.* Where no one has been harmed in any legal sense, and the situation has not materially changed, the delay is not fatal. *Id.*

In this case, Plaintiffs waited more than a year – 477 days to be precise – after certification of the ballot title language, to file their challenge. Plaintiffs have provided absolutely no explanation or excuse for this delay. They disregarded time constraints applicable in this situation time and time again. Their extreme delay has resulted in a situation in which, if they are successful, campaigns on both sides will have been a complete waste, the votes of half-a-million Missouri voters will be summarily disregarded, and

Missouri's Constitution will be stripped of a provision. All because of a perceived defect that could have been (and, according to statute, *must* have been) addressed pre-election, where the opportunity to remedy any defect pre-election still existed. It is hard to imagine what more disadvantage or prejudice one party may work against another (and against the public in this case), what greater injustice may be worked, and how a situation may be materially changed more severely.

It is certainly true, as Plaintiffs argue, that the right to challenge a ballot title exists by virtue of statute. This much alone should be fatal to Plaintiffs' claim, as they failed at every turn to abide by explicitly applicable statutory provisions. However, even Plaintiffs must acknowledge that equitable notions would have to play a sizeable role in forgiving their extended, repeated acts of neglect and filing failures, and allowing their challenge to go forward. As a result, and to the extent that equitable principles may apply in this case, this Court should find Plaintiffs' claim barred by laches.

II. The General Assembly's Summary Statement was Fair and Sufficient – Responding to Plaintiffs' Point I.

Even if Plaintiffs had a cognizable claim and this Court had jurisdiction to review the summary statement post-election, the claim in this case would still fail because the summary statement was, in fact, fair and sufficient.

A summary statement "is sufficient and fair if it 'makes the subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal.'" *Overfelt v. McCaskill*, 81 S.W.3d 732, 738 (Mo. App. W.D. 2002) (quoting *United Gamefowl Breeders Ass'n of Mo. v. Nixon*, 19 S.W.3d 137, 140 (Mo. banc 2000)). "Additionally, where the people have demonstrated their will through their vote, [the Court's] duty is to seek to uphold that decision." *Knight*, 282 S.W.3d at 15 (citing *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 12 (Mo. banc 1981)).

In this case, the General Assembly's summary statement provided as follows:

> 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?

The critical language used in the summary statement was that the Missouri Constitution is amended to ensure that *the right* to engage in

these practices shall not be *infringed*. These terms are important because they recognize an existing right, and protect this right against infringement – that is, against encroachment in a way that violates law or the rights of another. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1161 (1993). Protection against "infringement" is not license to act in any way one chooses, but explicitly protects against encroachments that violate the law, meaning that these rights remain subject to existing applicable laws. This is a fair and sufficient summary of the amendment.

Plaintiffs' complaints concerning the summary statement boil down to matters of semantics and details, namely the extent of the protection described, and the description of the group of people so protected. It would have been impossible to address, in the detail required by Plaintiffs, the interplay between local zoning laws and Amendment 1, or to tackle the distinction Plaintiffs see between "Missouri citizens" (who ranch or farm), and "ranchers and farmers," within the General Assembly's 50 word limit for the summary statement.

Under any standard, but particularly under the standard that must be applied where the people have demonstrated their will through their vote, the summary statement in this case was fair and sufficient and should be upheld. *See United Gamefowl Breeders*, 19 S.W.3d at 141.

A. If a Post-Election Contest is Permitted, a Heightened Burden Should Apply.

There is no ballot title standard specific to post-election contests. The right to contest an election exists only by virtue of statute. An election contest challenges the validity of the very process by which we govern ourselves; it alleges that through an irregularity in the conduct of an election, the officially announced winner did not receive the votes of a majority of the electorate. *Landwersiek v. Dunivan*, 147 S.W.3d 141 (Mo. App. S.D. 2004).

"Irregularity," as it appears in § 115.593, is not defined in the statute and the courts have not given a definitive interpretation to this term. But the rules of statutory construction and existing precedent indicate that the violation of an election statute is an irregularity, which means "the state of being irregular." *Gerrard v. Bd. of Election Comm'rs*, 913 S.W.2d 88, 89-90 (Mo. App. E.D. 1995). Irregular is defined as "behaving without regard to established laws, morals or customs." *Id.*

Not every irregularity warrants a new election, though. The election statutes provide that a court may order a new election if it finds irregularities of sufficient magnitude to cast doubt on the validity of the election. *Id.* Irregularities have traditionally involved qualified voters being disenfranchised, unqualified voters being permitted to vote, design defects in ballots, absentee voting procedure, and an examination of evidence

supporting or refuting the allegations. *See Landwersiek*, 147 S.W.3d at 144; *Gasconade R-III Sch. Dist. v. Williams*, 641 S.W.2d 444 (Mo. App. E.D. 1982).

All applicable authority makes clear that election contests involve matters of irregularities in the conduct of an election, such as voters receiving the incorrect ballot style for their district, improperly counting or rejecting absentee ballots, disenfranchising eligible voters, or ensuring only eligible voters vote. Election contests are meant to examine external actions related to the election, not to provide a second look at a successful measure's summary statement.

The standard applied in pre-election challenges cannot, and should not, apply in post-election election contests. Otherwise, there would be no incentive for opponents of a proposal to challenge a measure before the election, which would not only run counter to Chapter 116, but would in fact render it superfluous.

If the Court is willing to entertain Plaintiffs' pre-election ballot title summary challenge in this post-election contest setting, the State suggests that the Court apply a heightened standard. Application of such a standard must result in this Court ruling against Plaintiffs' claim. As set forth below, not only does the Plaintiffs' challenge fail to satisfy the pre-election standards of Chapter 116, there exists no colorable argument or evidence that flaws

existed within the summary statement that amount to irregularities of a sufficient magnitude to cast doubt on the validity of the entire election.

B. The Summary Statement was Fair and Sufficient Under the Requirements of Chapter 116.

Plaintiffs' claim fails under the requirements of Chapter 116. In pre-election challenges, summary statements must meet the following standard: They cannot be insufficient or unfair, which is to say it cannot "with bias, prejudice, deception and/or favoritism state the consequences of the initiative." *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006).

Under § 116.190, the summary statement portion of an official ballot title should be upheld unless it is "insufficient" or "unfair." "[T]his Court considers that 'insufficient means inadequate; especially lacking adequate power, capacity, or competence' and 'unfair means to be marked by injustice, partiality, or deception.' " *Brown v. Carnahan*, 370 S.W.3d 637, 653-54 (Mo. banc 2012) (quoting *State ex rel. Humane Soc'y of Mo. v. Beetem,* 317 S.W.3d 669, 673 (Mo. App. W.D. 2010)); "Thus, the words insufficient and unfair . . . mean to inadequately and with bias, prejudice, deception and/or favoritism state the consequences of the initiative." *Missourians Against Human Cloning*, 190 S.W.3d at 456.

A "ballot title is sufficient and fair if it 'makes the subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal.' " *Overfelt*, 81 S.W.3d at 738 (quoting *United Gamefowl Breeders*, 19 S.W.3d at 140). After all, both the full text of the measure and the Secretary of State's "Fair Ballot Language" were available for review at every voting site. The important test, and the only test pre-election, "is whether the language fairly and impartially summarizes the purposes of the measure, so that the voters will not be deceived or misled." *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999). "[E]ven if the language proposed by [the opponents] is more specific, and even if that level of specificity might be preferable," that does not establish that the existing title is unfair or insufficient. *Id.*

The General Assembly's summary statements are limited to 50 words, excluding articles. § 116.155. This Court has noted that summary statements prepared by the Secretary of State are limited to 100 words, and that "[w]ithin these confines, the title need not set out the details of the proposal." *United Gamefowl Breeders*, 19 S.W.3d at 141. Deference is therefore given to the elected official responsible for preparing the summary statements – in this case the General Assembly – to decide what details should be included. This deference is especially important given the General Assembly's unique role.

The General Assembly should prepare a summary statement that endeavors to promote an informed understanding of the probable effect of a proposed amendment. *See Cures Without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. App. W.D. 2008) (applying this rule to the Secretary of State). "[W]hether the summary statement prepared by the [General Assembly] is the best language for describing the [initiative] is not the test." *Bergman*, 988 S.W.2d at 92. Rather, "[t]he burden is on the opponents of the language to show that the language was insufficient and unfair." *Id*.

As the Missouri Court of Appeals, Western District, has noted, "[i]f charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions," and "there are many appropriate and adequate ways of writing the summary ballot language." *Asher v. Carnahan*, 268 S.W.3d 427, 431 (Mo. App. W.D. 2008). Indeed, the "role [of the court] is not to act as a political arbiter between opposing viewpoints in the initiative process: When courts are called upon to intervene in the initiative process, they must act with restraint [and] trepidation . . . . Courts are understandably reluctant to become involved in pre-election debates over initiative proposals." *Missourians Against Human Cloning*, 190 S.W.3d at 456 (citing *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990)). Thus, courts "must act with restraint, trepidation, and a healthy suspicion of the partisan who

would use the judiciary to prevent the initiative process from taking its course." *Id*.

The summary statement in this case satisfies all applicable standards. It makes the subject of the proposal – protection of the right to farm and ranch – evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal.

1. The summary statement does not need to provide every detail.

After waiting for more than a year to complain about the summary statement in this case, Plaintiffs now argue that the summary statement failed to tell voters that the rights guaranteed by Amendment 1 would still be limited by Article VI of Missouri's Constitution, and that this failure potentially misled and/or confused voters. Plaintiffs' contention, however, ignores the plain meaning of words.

The proposal states that it is "subject to duly authorized powers, *if any*, conferred by article VI of the Constitution of Missouri." (Emphasis added). Article VI of the Constitution contains numerous sections, and it is unclear that any would apply. Indeed, Plaintiffs do not point to a single provision that would apply, nor do they suggest alternative language or request a new summary statement. *See* § 116.190.3. It is not necessary to point out a detail, much less one so uncertain that neither the legislature nor the Plaintiffs in

this case could conceive of one and fairly and sufficiently describe it in 50 words or less.

Furthermore, their complaint that "the ballot language makes absolutely no mention of any exception to the right it creates or to Article VI of the Missouri Constitution" ignores that the term "infringement" – which is included in the summary statement – by definition, allows for encroachments called for by law. (Plaintiffs' Br., p. 15). It is not necessary to point out the obvious fact that all provisions are potentially subject to other constitutional provisions.

Plaintiffs' reference to the Western District's decision in *Seay v. Jones* is unhelpful to their cause, and instead confirms that the summary statement in this case is perfectly accurate, sufficient, and fair. In *Seay*, the Western District found that the proposal's early voting funding language could potentially result in no early voting at all, and that voters should be told in the summary statement that early voting would be available only in years where the General Assembly had appropriated funds for it.[4/] 439 S.W.3d 881

[4/] In *Seay*, the Western District ordered ballot language changes before the election occurred, ensuring that voters were presented with language the Court found appropriate – an option rendered impossible in this case by Plaintiffs' election to wait an extra 467 days after certification of the official

(Mo. App. W.D. 2014). In this case, however, the General Assembly used a precisely accurate word – infringe – to describe a right that would be "forever guaranteed," though still subject to Constitutional limits. Plaintiffs' attempt to turn an accurately described detail into an absent "significant limitation" must fail. Further, every detail of the proposal was presented to voters at their polling places in the full text of the measure, in addition to the Secretary of State's fair ballot language.

2. The summary statement accurately describes the proposal.

Plaintiffs' second complaint is that the summary statement inaccurately identified all of the beneficiaries of Amendment 1. Plaintiffs argue that the phrase "Missouri citizens" (presumably who engage in farming and ranching) in the summary statement carries a significantly different meaning than just "farmers and ranchers." Although Plaintiffs are concerned with out-of-state, or international agriculture interests (which was expressed in the political campaign against Amendment 1), it does not render the summary statement an unfair or insufficient summary of Amendment 1,

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ballot title, and after Amendment 1 was approved by voters, to challenge the summary statement.

which, by its terms, focuses on the importance of agriculture in Missouri, and seeks to defend this sector of our economy and the Missourians engaged in it.

Other persons may also be protected by Amendment 1, but the purpose of the amendment, and its intended beneficiaries, were accurately described in the summary statement. Further, even if the summary statement had said "farmers and ranchers" rather than "Missouri citizens," Plaintiffs have failed to demonstrate that voters would have voted differently, or that a different meaning would have been communicated absent Plaintiffs' extensive, partisan conjecture. The summary statement fairly and sufficiently communicated the purpose of the measure, and Plaintiffs' second complaint must fail as well.

As the summary statement in this case was fair and sufficient under even the pre-election standard, this Court should deny the relief requested by Plaintiffs and dismiss their Petition.

III. The Petition Should Be Dismissed Because the Only Remedy Plaintiffs Seek is Not Permitted.

The applicable statutes make clear, and the available remedies demonstrate, that the focus of election contests concerning "irregularities" is to ensure that only qualified voters are allowed to vote, and that election officials act in a proper manner. The relief a court may grant is limited to that specifically authorized by statute. *Bd. of Election Comm'rs of St. Louis*

Co. v. Knipp, 784 S.W.2d 797, 798 (Mo. banc 1990) (citing *Hockemeier v. Berra,* 641 S.W.2d 67, 68 (Mo. banc 1982)).

The election laws provide two remedies in an election contest when irregularities are shown: § 115.583 permits a recount, and § 115.593 authorizes a new election. Section 115.583 provides for a recount where there is "a prima facie showing of irregularities which place the result of any contested election in doubt." While the conduct of an election obviously affects its outcome, the "result" of an election is the official announcement of the winning candidate. *Bd. of Election Comm'rs of St. Louis Co.*, 784 S.W.2d at 798.

A new election, however, is a more drastic remedy, reserved for those situations in which the court finds "there were irregularities of sufficient magnitude to cast doubt on the validity of the initial election." *Id.*; *see Gerrard*, 913 S.W.2d at 89-90. A new election tosses aside the aggregate of the citizens' votes, both those properly and improperly cast, and for that reason, a new election remedy is only appropriate where the validity of the entire election is under suspicion, not simply the result of the election. *Id.* at 799 (citing *Nichols v. Reorganized Sch. Dist. No. 1 of Laclede Co.,* 364 S.W.2d 9, 13 (Mo. banc 1963) (distinguishing between the validity of an election as a whole and the legality of individual ballots or category of votes)).

The "new election" statute provides that a new election may be ordered when "there were irregularities of sufficient magnitude to cast doubt on the validity of the initial election." § 115.593. "Where the issue is drawn over the validity of certain votes cast, a prima facie case is made if the validity of a number of votes equal to or greater than the margin of defeat is placed in doubt." *Marre*, 775 S.W.2d at 952. Such fatal violations are rare because they "would permit the disfranchisement of large bodies of voters, because of an error of a single official." *Id*. (citing *Kasten,* 395 S.W.2d at 435).

While recounts and new elections are statutorily permitted remedies, Plaintiffs' prayer that the results of the election be "set aside" or that the provision be removed from the Constitution, are not. No authority cited by Plaintiffs allows for any remedy beyond ordering a re-count or a new election. No authority authorizes the remedy Plaintiffs seek. Plaintiffs ask this Court to take the unprecedented action of removing a provision from the Missouri Constitution that has been in effect for many months, because they did not approve of its summary statement, in the absence of any constitutional, statutory, jurisprudential, jurisdictional, or evidentiary basis. Plaintiffs' requested relief should, therefore, be rejected and their claim dismissed.

Moreover, Plaintiffs' requested relief would violate separation of powers principles and Article XII, § 1 of the Missouri Constitution. For the Court, at this late date, and without jurisdiction, to strip Missouri's Constitution of a

provision proposed by the General Assembly and passed by a majority of Missouri voters, based on Plaintiffs' unsupported belief that some voters, somewhere, were misled by the summary statement, would violate basic principles of separation of powers.

Article XII, § 1 of Missouri's Constitution states that "this constitution may be revised or amended only as therein provided." No provision within the Constitution permits this Court to remove a provision once it becomes effective following passage at a popular election, and certainly not when the reason for removal is a post-election conclusion that the summary statement could have misled voters. As noted above, Amendment 1 became effective as Article I, § 35 on September 5, 2014, pursuant to Article XII, § 2(b). The limitation on the application of Article XII, § 2(b) urged by Plaintiffs is wholly unsupported by any authority, though it conveniently works to forgive their failures to challenge summary statement language until 477 after its certification. The remedy sought by Plaintiffs is forbidden by our Constitution, and this Court should accordingly decline to grant it.

CONCLUSION

For the foregoing reasons, the State of Missouri requests that the Plaintiffs' claim be denied and the Petition dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri CaseNet e-filing system on the 3rd day of February, 2015, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 9,606 words.

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