IN THE SUPREME COURT OF MISSOURI

No. SC94482

D. SAMUEL DOTSON III and REBECCA MORGAN,

Plaintiffs,

v.

MISSOURI SECRETARY OF STATE JASON KANDER, et al.

Defendants.

Original Proceeding: Election Contest

BRIEF OF INTERVENORS

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JURISDICTIONAL STATEMENT

This Court has original jurisdiction over this election contest pursuant to Section 115.555, RSMo.

STATEMENT OF FACTS

Senate Joint Resolution 36 (SJR 36), proposing a constitutional amendment to the Missouri Constitution, was truly agreed to and finally passed in the 2014 legislative session. Joint Stipulation ("Jt. Stip.") ¶ 6, Joint Exhibit ("Jt. Ex") 2. On May 23, 2014, the Governor issued a proclamation setting the vote on SJR 36 for the August 5, 2014 election. Jt. Stip. ¶ 7. Defendant Kander certified the Official Ballot Title for SJR 36, using the ballot title drafted and approved by the general assembly, on June 13, 2014. Jt. Stip. ¶ 8, Jt. Ex. 3.

Plaintiffs filed a lawsuit on June 13, 2014, in Cole County Circuit Court challenging the summary statement of the official ballot title. Jt. Stip. ¶ 9. On July 1, 2014, the trial court, after consolidating Plaintiffs' case with another, issued its judgment. Jt. Stip. ¶ 10-11; *Dotson v. Kander,* 435 S.W.3d 643, 644 (Mo. banc 2014) (*Dotson I*). The trial court found the case moot under Section 115.125.2, RSMo, and alternatively, found that the summary statement was both sufficient and fair. *Id.* Plaintiffs appealed, and on July 18, 2014, this Court issued its decision (*Dotson I*) finding the case moot. *Id.* at 643.

On August 5, 2014, Constitutional Amendment No. 5 was submitted to and approved by Missouri voters, on a vote of 602,863 "yes" and 386,308 "no." Jt. Stip. ¶ 16. Secretary of State Kander certified the results of the election on August 25, 2014. Jt. Stip. ¶ 4. Pursuant to Article XII, Section 2(b), the amendment

became effective on September 4, 2014. Plaintiffs did not file their Petition for an Election Contest until September 24, 2014.

Plaintiffs filed an election contest in both this Court and in the Cole County Circuit Court. On October 3, 2014, this Court appointed Judge Daniel R. Green of the Cole County Circuit Court as a "Commissioner" pursuant to Section 115.561, RSMo, and entered a briefing schedule. On October 8, 2014, counsel for all parties appeared before Judge Green. Appendix of Plaintiffs, A01. All parties were given the opportunity to present evidence related to the election contest. *Id.*

On October 8, 2014, Judge Green, pursuant to this Court's Order of October 3, 2014, entered a "Commissioner's Report" wherein he reported that counsel for all parties had submitted a "Joint Stipulation of Facts and Exhibits." *Id*. The Report also stated "No other evidence was offered by any party." *Id.*

POINTS RELIED ON

I.

THIS COURT SHOULD NOT INVALIDATE AMENDMENT 5 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE PLAINTIFFS' PETITION IS OUT OF TIME, PLAINTIFFS' CLAIMS ARE MOOT, AND PLAINTIFFS' CLAIMS ARE BARRED BY THE DOCTRINE OF LACHES IN THAT PURSUANT TO ARTICLE XII, SECTION 2(B), AMENDMENT 5 BECAME FINAL AND IN FORCE THIRTY DAYS AFTER THE ELECTION, ON SEPTEMBER 4, 2014, AND PLAINTIFFS' SUIT WAS NOT FILED PRIOR TO SUCH EFFECTIVE DATE.

Mo. Const. Article XII, Section 2(b)

Rentschler v. Nixon, 311 S.W.3d 783 (Mo. banc 2010)

II.

THIS COURT SHOULD NOT INVALIDATE AMENDMENT 5 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE PLAINTIFFS FAILED TO MEET THEIR BURDEN OF PROOF IN AN ELECTION CONTEST IN THAT THEY FAILED TO PUT ON ANY EVIDENCE TO SHOW AN ELECTION IRREGULARITY OF SUCH CONSEQUENCE AS TO CALL THE VALIDITY OF THE ELECTION INTO QUESTION.

Royster v. Rizzo, 326 S.W.3d 104 (Mo. App. W.D. 2010)

Gerrard v. Board of Election Commissioners, 913 S.W.2d 88

(Mo. App. E.D. 1995)

III.

THIS COURT SHOULD NOT INVALIDATE AMENDMENT 5 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE THE BALLOT TITLE OF AMENDMENT 5 IS NOT INSUFFICIENT OR UNFAIR, MUCH LESS FALSE OR FRAUDULENT.

Kasten v. Guth, 395 S.W.2d 433 (Mo. 1965)

Knight v. Carnahan, 282 S.W.3d 9 (Mo. App. W.D. 2009)

Brown v. Carnahan, 370 S.W.3d 637 (Mo. banc 2012)

Archey v. Carnahan , 373 S.W.3d 528 (Mo. App. W.D. 2012)

Mo. Const., Article XII, Section 2(b)

SUMMARY OF THE ARGUMENT

Plaintiffs' Petition is out of time, Plaintiffs' claims are moot and Plaintiffs' claims are barred by the doctrine of laches because, pursuant to Article XII, Section 2(b) of the Missouri Constitution, Amendment 5 became effective on September 4, 2014. Plaintiffs unreasonably and inexplicably waited twenty days after the Amendment became effective and forty-nine (49) days after the results of the election were known to bring their claims. The doctrine of laches bars unreasonably tardy claims. *Rentschler v. Nixon*, 311 S.W.3d 783, 787 (Mo. banc 2010).

In addition, Plaintiffs' Petition should be dismissed because Plaintiffs provided absolutely no proof that the outcome of the election would be different based on the alleged irregularity (an unfair and insufficient ballot title). In order to grant Plaintiffs' requested relief, this court must find that there "were irregularities of sufficient magnitude to cast doubt on the validity of the initial election." Section 115.593, RSMo. To grant the requested relief, this court must be "firmly convinced" that irregularities affected the outcome of the election. *Gerrard v. Board of Election Commissioners*, 913 S.W.2d 88, 90 (Mo. App. E.D. 1995). Plaintiffs have failed to provide any proof that would cast doubt on a single vote, let alone proof that would cast doubt on the election outcome. Plaintiffs' utter failure to meet their burden of proof precludes this court from finding in their

favor. Not even the Plaintiffs have alleged, let alone offered proof, that they, or any other voter, were in any way misled by any alleged irregularity.

Finally, Plaintiffs' Petition should be dismissed as the ballot title for Amendment 5, which was approved by more than 600,000 Missouri voters, was not false, fraudulent, insufficient or unfair. This is a post-election challenge, and as such the standard is much higher than in a pre-election challenge. *Knight v.* Carnahan, 282 S.W.3d 9, 16 (Mo. App. W.D. 2009) (citing *Buchanan v.* Kirkpatrick, 615 S.W.2d 6, 12 (Mo. banc 1981)) in a pre-election challenge, the test "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). In a post-election contest, the standard to overturn an election requires a much higher showing, e.g., falsity or fraudulence in the title, none of which are alleged by Plaintiffs. See, e.g., *Royster v. Rizzo,* 326 S.W.3d 104, 115 (Mo. App. W.D. 2010).

Limited to only fifty words, the ballot title properly summarized the purposes of the measure. Again, Plaintiffs have offered no proof that any voter was deceived or misled. Missouri courts have explained, "If charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions…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). It is clear Plaintiffs might have desired one of the other nine (or more) acceptable versions of the summary statement, but this desire falls far short of the test for insufficiency or unfairness, much less falsity or fraudulence.

Plaintiffs' Petition should be dismissed for being out of time (being moot or barred by laches), for not meeting the burden of proof in an election contest case, and because Plaintiffs' claims fail on the merits.

ARGUMENT

Introduction

This court should not invalidate Constitutional Amendment 5, after it was approved by more than 600,000 Missouri voters because (1) Plaintiffs unreasonably delayed in bringing their claims and as such their claims are out of time, moot, and barred by the doctrine of laches; (2) Plaintiffs failed to meet their burden of proof required in an election contest; and (3) the ballot title for Amendment 5 sufficiently summarized the main points of amendment in terms that were not unfair or insufficient, much less the requisite standard of falsity or fraudulence.

Standard of Review

(Applicable to Points I, II, & III)

Plaintiffs have asked this court to "invalidate" the election results of August 5, 2014, for Amendment 5. With this request, Plaintiffs are asking this court to

"invalidate" the votes of more than 600,000 Missourians who voted "yes" on August 5, 2014. A declaration that an election is invalid is a "drastic remedy because it amounts to disenfranchisement of the voters." *State ex rel. Bonzon v. Weinstein*, 514 S.W.2d 357, 362 (Mo. App. 1974). The provisions of Chapter 115, RSMo, make clear that the standard of review for ordering a new election is unique. Not just any irregularity in an election will give rise to a declaration of a new election. See, e.g., *Royster v. Rizzo*, 326 S.W.3d 104, 115 (Mo. App. W.D. 2010) ("[T]he general rule is that an election will not be annulled in the absence of fraud, even if some technical provisions of the law are not strictly followed."). Rather, this court must find that there "were irregularities of sufficient magnitude to cast doubt on the validity of the initial election." Section 115.593, RSMo. To invalidate or "set aside" election results, a court must be "firmly convinced" that irregularities affected the outcome of the election. *Gerrard v. Board of Election Commissioners*, 913 S.W.2d 88, 90 (Mo. App. E.D. 1995).

The burden of proof and persuasion is a heavy burden which falls solely and exclusively on the party challenging the election. *Royster v. Rizzo*, 326 S.W.3d 104, n. 3 (Mo. App. W.D. 2010) ("While the burden placed upon the party contesting the election to 'firmly convince' the trial court that 'irregularities affected the outcome of the election' is a heavy burden, it is so because of the 'drastic remedy' that is sought in election cases.").

I.

THIS COURT SHOULD NOT INVALIDATE AMENDMENT 5 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE PLAINTIFFS' PETITION IS OUT OF TIME, PLAINTIFFS' CLAIMS ARE MOOT, AND PLAINTIFFS CLAIMS ARE BARRED BY THE DOCTRINE OF LACHES IN THAT PURSUANT TO ARTICLE XII, SECTION 2(B), AMENDMENT 5 BECAME FINAL AND IN FORCE THIRTY DAYS AFTER THE ELECTION, ON SEPTEMBER 4, 2014, AND PLAINTIFFS' SUIT WAS NOT FILED PRIOR TO SUCH EFFECTIVE DATE.

Plaintiffs' Petition is out of time and Plaintiffs' claims are moot because Amendment 5 has already taken effect. Article XII, Section 2(b) of the Missouri Constitution, provides, in part:

> If a majority of the votes cast thereon is in favor of any amendment, the same shall take effect at the end of thirty days after the election.

The election on Amendment 5 occurred on August 5, 2014. By August 6, 2014, it was known that more than 600,000 Missourians voted in favor of the amendment,

and the amendment passed with more than 60% of the vote. Pursuant to Article XII, Section 2(b), the amendment became effective on September 4, 2014.

Plaintiffs were made aware that an election contest was a possible option in *Dotson v. Kander*, 435 S.W.3d 643 (Mo. banc 2014) on July 18, 2014. Still, Plaintiffs waited until September 24, 2014 to file their Petition for an Election Contest. Plaintiffs waited forty-nine days after the results of the election were known (and twenty days after the amendment became effective) to bring their claims. Plaintiffs should have brought their election contest prior to the amendment becoming effective pursuant to the Missouri Constitution. It is the result of Plaintiffs' own unreasonable delay that Amendment 5 is already in full force and effect without their claims being heard, as a result, their claims are barred by laches.

In *Rentschler v. Nixon*, 311 S.W.3d 783, 787 (Mo. banc 2010), the Plaintiff complained about a legislative enactment, outside the ten year window for bringing such claims. *Id.* Because the state failed to plead statute of limitations as an affirmative defense, the court could not make a determination based on such limitation. *Id.* at n.3. Still, the court noted the doctrine of laches would preclude Plaintiff's claims:

> Although the legal bar of the statute may not be raised procedurally, the doctrine of laches may still operate to bar such

> unreasonable tardy claims as is the case presently. " 'Laches' is neglect for unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done."

Id. at n.3 (quoting *Tokash v. Workmen's Compensation Com'n*, 139 S.W.2d 978, 984 (Mo. 1940).

In the current matter, Plaintiffs had a thirty day window to bring their suit pursuant to Article XII, Section 2(b). Even after the results were certified on August 25, 2014, Plaintiffs still had a ten day window between certification and the date when the amendment became effective to bring their election contest or attempt to bring an injunction action seeking to prevent the amendment from becoming effective. They did not bring their claims within any of these available windows. Instead, Plaintiffs now seek to remove an existing, operative provision of the Missouri Constitution through an election contest. Nothing in Article XII, Section 2(b) provides for the "invalidation" or removal of an existing constitutional provision. Plaintiffs have not offered any explanation for their unreasonable delay. To the extent Plaintiffs claim they are not out of time under Section 115.557, RSMo, Article XII, Section 2(b) supersedes the language in such statute.

Likewise, Plaintiffs cannot seek to invalidate an effective constitutional provision on the basis of a summary statement challenge. The provision is already

in operation and being enforced. If there were any "irregularities of sufficient magnitude to cast doubt on the validity of the initial election" such irregularities must be addressed prior to the amendment going into effect. To allow such a challenge would be to render Section 116.190, RSMo meaningless.

As a result of Plaintiffs' decisions to delay filing their Petition until well after the Amendment became effective, their Petition is out of time and any relief is now barred. This Court should find that the Petition fails to state a claim and thus should be dismissed.

II.

THIS COURT SHOULD NOT INVALIDATE AMENDMENT 5 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE PLAINTIFFS FAILED TO MEET THEIR BURDEN OF PROOF IN AN ELECTION CONTEST IN THAT THEY FAILED TO PUT ON ANY EVIDENCE TO SHOW AN ELECTION IRREGULARITY OF SUCH CONSEQUENCE AS TO CALL THE VALIDITY OF THE ELECTION INTO QUESTION.

Not just any irregularity in an election will give rise to a declaration of invalidity or new election. See, e.g., *Royster v. Rizzo*, 326 S.W.3d 104, 115 (Mo. App. W.D. 2010) ("[T]he general rule is that an election will not be annulled in the absence of fraud, even if some technical provisions of the law are not strictly followed.). Rather, this court must find that there "were irregularities of sufficient magnitude to cast doubt on the validity of the initial election." Section 115.593, RSMo. To invalidate or "set aside" election results, a court must be "firmly convinced" that irregularities affected the outcome of the election. *Gerrard v. Board of Election Commissioners*, 913 S.W.2d 88, 90 (Mo. App. E.D. 1995). That standard requires proof, in the form of evidence, to demonstrate that the outcome of the election would be different.

In *Gasconade R-III School District v. Williams*, 641 S.W.2d 444 (Mo. App. E.D. 1982), the court ordered a new election where there were irregularities in absentee voting in a school tax proposition election. The proposition passed by two votes. *Id.* In that case, plaintiffs put forth evidence of seventeen absentee ballots (fifteen "Yes" ballots, two "No" ballots), of which eleven were questioned for failure to fill in the required ballot envelope affidavit. *Id.* at 445. The court noted that Section 115.295.2, RSMo, requires rejection of an absentee ballot where the affidavit was not completed. With a two vote margin, plaintiffs' evidence that eleven ballots were in question was enough for the court to order a new election. *Id.*

A new election was also ordered in *Barks v. Turnbeau*, 573 S.W.2d 677 (Mo. App. 1978), where a school tax levy passed by a margin of six votes. In that case, the Plaintiff was able to show that sixty-six absentee voters made no application in writing, were not compiled into a list (or marked received) by the election authority, the affidavits associated with such ballots did not conform to the statutory requirements, forty-eight voters failed to fill out the affidavit, two voters attempted to use the same affidavit, and sixty-six voters did not return ballots by an authorized method. *Id.* at 680-681. The court concluded that these were irregularities "**of sufficient magnitude to cast doubt on the validity of the initial election."** *Id.* at 682.

A new election was also ordered in *Marre v. Reed*, 775 S.W.2d 941 (Mo. banc 1989), where a candidate won by a margin of eleven votes. In that case, the Plaintiff alleged fourteen people were allowed to vote who were not qualified. *Id.* at 954. The Missouri Supreme Court examined the evidence proffered by the plaintiff and found at least eleven voters should have been disqualified. *Id.* at 955.

In *Gerrard v. Board of Election Commissioners*, 913 S.W.2d 88, 90 (Mo. App. E.D. 1995), the trial court found that the facts pled did not state a cause of action. The Court of Appeals affirmed, explaining: "The facts asserted in the petition were not sufficient to demonstrate how the alleged violation **affected the outcome of the election,** and therefore, the petition did not state a cause of action." *Id.* at 90. Noting that the "statute has been construed to require conduct sufficient to affect the outcome of the election" the court pointed out that the petition did not allege that the "**vote would have been different**." *Id.*

Similarly, in *Royster v. Rizzo*, 326 S.W.3d 104, 110 (Mo. App. W.D. 2010), the only evidence before the court showed that only registered voters voted, that there was no misconduct or voter fraud, and that the Plaintiff lost by one vote. In denying the appeal, the court stated: "Royster has failed to make any showing that would demonstrate that among the votes cast, any specific vote was cast or failed to be cast by some specific wrongdoing." *Id.* The court did provide helpful advice to those bringing election contests: "[I]n a case such as this with a margin of

victory of only one vote, had Royster presented evidence…that one specific non-registered voter was allowed to vote or one registered voter was denied the right to vote, we would be more persuaded that Royster had made the requisite showing[.]" *Id.*

As in *Gerrard and Royster*, Plaintiffs have failed to produce **any evidence** that would cast doubt on the validity of the election. This Court's order of October 3, 2014, required the Circuit Court of Cole County to "take whatever evidence would be relevant to the contest." The parties stipulated to a non-exclusive set of facts. At the hearing before the Commissioner, Plaintiffs offered **no** additional evidence.

Plaintiffs have made an "impossibility" claim. They complain "it is impossible to know what the election results would have been had the voters been confronted with a fair and sufficient summary of the matter on which they were asked to vote." Plaintiffs' Brief at 18-19. First, as authority for this claim, Plaintiffs cite language from a 1912 case,[1] *State ex rel. Rainwater v. Ross*, 143

[1] Plaintiffs' quotation from that case conveniently replaced the following language with an ellipsis:

> Where the result of an election has been declared by the proper authority, that result must stand **until proof is offered** to overthrow it. It is not sufficient to show a state of facts from which **it might be** inferred that there

S.W. 510, 511 (Mo. App. 1912), wherein the court concluded "There was **no evidence that anybody's vote was affected by the alleged irregularities** or improper conduct, and there can be no question under this evidence that there was an entire failure to impeach the correctness of the returns as made." Where there is **no evidence** that votes were actually affected by the alleged irregularity (here, the ballot title), then Plaintiffs' election contest must fail.

Second, no "impossibility" exists here. Plaintiffs could have offered the testimony of voters -- how they voted under initial ballot language and that they would have voted differently if the alleged insufficiencies in the ballot title were corrected. Plaintiffs could have conducted some type of polling based on various proposed ballot titles for this measure showing that ballot titles have the ability to influence the outcome of the election. Plaintiffs could have provided expert testimony by an election or polling expert to offer data about how the words used in the ballot itself affects election outcomes. We cannot know if any such evidence would be sufficient for this Court to determine that an alleged insufficient ballot

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> was a possibility that the returns did not correctly express the will of the voters…

State ex rel. Rainwater v. Ross, 143 S.W. 510, 511 (Mo. App. 1912) (emphasis added).

title casts doubt on the election itself, because such evidence is not before this Court. **Indeed, no evidence about any votes is before this Court**.

While Intervenors agree that it would be an extremely tall order for Plaintiffs to show that a minimum of 108,278 voters would have changed their vote from "yes" to "no" or that 216,555 voters would have **not** voted "yes," and thus the election outcome would have changed, the fact remains Plaintiffs failed to show even **one** vote would be different with different ballot language.[2] Even assuming *arguendo* that the ballot title was insufficient or unfair, and that such insufficiency or unfairness constituted an "election irregularity," Plaintiffs have failed to meet their burden of proof showing that such alleged irregularity was of sufficient magnitude to cast doubt on the validity of the election. There is not one scintilla of evidence that any alleged irregularity affected the outcome of the election.

[2] The only thing Plaintiffs **have** shown is that at least two potential voters were most certainly not misled: Plaintiffs themselves. Even if the language was unfair or insufficient as Plaintiffs allege, it is clear that neither of the Plaintiffs were misled as they made the same claims prior to the election (in *Dotson I*) as they do now. Although it should be noted that there is no evidence in the record whether or not the Plaintiffs actually voted, much less how they voted. This actually calls into question whether Plaintiffs even have standing to maintain an election contest under Chapter 115, RSMo.

Plaintiffs' absolute failure to introduce **any** evidence of an actual irregularity dooms their petition. This Court should deny the relief requested and dismiss Plaintiffs' Petition accordingly.

III.

THIS COURT SHOULD NOT INVALIDATE AMENDMENT 5 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE THE BALLOT TITLE OF AMENDMENT 5 IS NOT INSUFFICIENT OR UNFAIR, MUCH LESS FALSE OR FRAUDULENT.

Plaintiffs have failed to properly preserve and present their claims in this matter, as is addressed in Points I and II. However, out of an abundance of caution, Intervenors herein address the claims on the merits, without waiving any of the defects set forth above. Even in addressing the merits, Plaintiffs' Petition fails to state a claim for relief.

Plaintiffs' Petition is titled "Election Contest," but the crux of Plaintiffs' Petition is a challenge to the summary statement portion of the official ballot title of Constitutional Amendment 5 passed by the General Assembly in Senate Committee Substitute for Senate Joint Resolution 36 (SJR 36). There is a significant question whether a ballot title can be challenged in a post-election case. In *Cole v. Carnahan*, 272 S.W.3d 392, 393-95 (Mo. App. W.D. 2008), the court rejected the Plaintiffs' request on the basis that Section 116.190, RSMo, "did not authorize remedies other than the certification of a corrected ballot title[.]" Judge Holliger, who wrote separately in *Cole*, pointed out it was an "open

question…whether a successful proposition at an election can be challenged post-election because of an improper ballot summary." *Knight v. Carnahan*, 282 S.W.3d 9, 16 (Mo. App. W.D. 2009) (citing *Cole*, 272 S.W.3d at 396). Even if this court were to determine that a post-election challenge of a ballot title is permitted, the Court must seek to uphold the decision of the people. "[W]here the people have demonstrated their will through their vote, our duty is to seek to uphold that decision." *Knight*, 282 S.W.3d at 16 (citing *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 12 (Mo. banc 1981)).

The pre-election test

The summary statement portion of an official ballot title cannot be set aside unless it is "insufficient" or "unfair." Section 116.190, RSMo. "[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 Missouri 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 v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006).

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 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)). The test "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… 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*. Deference is given to the elected official responsible for preparing the summary statements (in this case, the General Assembly) to decide what details should be included.

"[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*.

The Post-Election Test

After voters have approved a constitutional amendment, the test to overturn that election rises to a much higher standard. Sufficiency and fairness is not the standard but instead falsity and/or fraudulence must be proven. In *Royster*, the

Western District held that showing fraud is a requisite to sustain an election contest. *Royster v. Rizzo*, 326 S.W.3d 104, 115 (Mo. App. W.D. 2010). This Court has also required fraud be shown to "deprive the voters of their votes." *Kasten v. Guth*, 395 S.W.2d 433, 436 (Mo. 1965). In *Kasten*, this Court looked to a number of claims of irregularities. In affirming the election, this Court stated:

> While the irregularities referred to should not be encouraged, they were not sufficient to constitute fraud, and in the absence of fraud we will not deprive the voters of their votes.

Id. This is the standard upon which this election contest is to be judged.

The Summary Statement

The summary statement which was prepared and approved by the General Assembly summarizes the provisions of Constitutional Amendment 5 as follows:

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

The Summary Statement Does Not Restate Existing Provisions of Law

Plaintiffs contend that the summary statement led voters to believe the Constitution was being changed in ways that it is not. Plaintiffs' Brief at 24. First, Plaintiffs contend that the Summary statement "misled voters to believe that there

was not already a right to keep and bear arms in the Missouri Constitution" (Plaintiffs' Brief at 24).[3] The implication is that voters were misled to believe that the ballot measure would create, for the first time in Missouri, a right to keep and bear arms. Instead, the phrase actually confirms for the voter that there already is a presently existing right to keep and bear arms in the State. Sometimes it is necessary for a summary statement "to provide a context reference that will enable voters to understand the effect of the proposed change." *Brown v. Carnahan*, 370 S.W.3d 637, 654 (Mo. 2012). Here, to provide context, the summary statement appropriately references "the right to keep and bear arms." Plaintiffs ignore the words "a **declaration** that the right" and read the summary as if it says, "shall the constitution be amended to declare a right," which is against the plain language of the amendment.

Second, Plaintiffs suggest that the inclusion of the word "unalienable" in the summary statement is not a main point that should be included in a fair summary. Plaintiffs' Brief at 26. Plaintiffs ignore the fact that the amendment itself states "The rights guaranteed by this section should be unalienable." The summary lifts the language directly from the text of the Amendment, a practice which the Secretary regularly employs in drafting ballot titles. See e.g., *State ex rel. Humane*

[3] Again, Plaintiffs fail to offer **any** evidence of **any** voters actually being misled, for this reason their claims must fail. See Point II, *supra*.

Society of Mo. v. Beetem, 317 SW.3d 669 (Mo. App. W.D. 2010). Plaintiffs concede the Missouri Constitution, prior to the adoption of the amendments, did not include any declaration that the right to keep and bear arms is unalienable. (Plaintiffs' Brief at 27-28). This addition by the amendment was properly included in the Summary Statement. Plaintiffs are attempting to parse the words of the summary statement to create an issue where none exists. Voters read the entire summary statement as it appeared on the ballot, and from that reading it is clear that it does not restate existing provisions of law.

Finally, Plaintiffs contend that the summary statement implies that state government is not currently obligated to uphold the right to bear arms, when in fact it is so obligated through the oaths of government officials who can be impeached if they fail to uphold the constitution. Plaintiffs' Brief at 28. The fiscal note information prepared by the Attorney General is substantial evidence that the ballot measure would create new legal obligations for the state to act to uphold the right to keep and bear arms. Indeed, the official ballot title included the statement that "the proposal's passage will likely lead to increased litigation and criminal justice related costs." The summary statement is not misleading because it simply states that the Missouri Constitution will be amended to include a declaration concerning the obligation of state government, which is an accurate statement.

The Summary Statement Need Not List All Peripheral Details

Plaintiffs also complain that various details of the ballot measure are not expressly stated in the summary. The applicable test is that a ballot title "need not set out the details of the proposal." *United Gamefowl Breeders Ass'n of Missouri v. Nixon*, 19 S.W.3d 137, 141 (Mo. 2000). Plaintiffs attempt to characterize these details as "major changes" but a review of such details reveals their true nature.

First, Plaintiffs contend that the ballot measure would repeal language that allows the legislature to regulate the carrying of concealed weapons. Plaintiffs' Brief at 31. The implication is that the legislature has no authority to regulate concealed weapons absent an enabling phrase in the constitution. This is untrue.

The right to keep and bear arms includes "certain well-recognized exceptions." *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). The United States Supreme Court stated in 1897 that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Id.* The United States Supreme Court found that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008). Plaintiffs offer no support for their speculation that the legislature cannot regulate concealed weapons absent an express grant of authority in the Missouri constitution.

Intervenors presume that now that the Amendment has passed, this Court would follow every other court in holding that the right to keep and bear arms does not prevent the legislature from regulating concealed weapons. Not only is the repeal of this language a mere detail, but a probable effect of such repeal is not a change to Missouri's conceal carry laws. A summary statement need only state the "probable effects" of the proposed measure, and not proposed interpretations of the law or speculative inferences. *Archey v. Carnahan* , 373 S.W.3d 528, 532-33 (Mo. App. W.D. 2012).

Second, Plaintiffs suggest that the summary statement failed to inform voters that ammunition and accessories were being added to the right to keep and bear arms. (Plaintiffs' Brief at 32). Plaintiffs make much of the fact a summary statement for a different joint resolution included details about ammunition and accessories. This argument fails. Missouri Courts have made very clear: "If charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions…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). Evidence that a summary statement could have been drafted differently is not evidence that this summary statement is insufficient or unfair. The fact that the summary statement did not make specific reference to "ammunition and accessories" does not make the summary either

insufficient or unfair.

Third, Plaintiffs contend that the summary statement fails to disclose the significant probable effect of making the right to keep and bear arms subject to strict scrutiny. Plaintiffs' Brief at 36. Strict scrutiny is the highest and most stringent standard used by federal courts to determine the constitutionality of governmental actions. Federal courts apply strict scrutiny in cases involving an impingement upon a fundamental right explicitly or implicitly protected by the Constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Missouri courts apply strict scrutiny in an identical manner, including where a classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *Etling v. Westport Heating & Cooling Servs., Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003). This Court has never expressly determined whether the right to keep and bear arms is a "fundamental right explicitly or implicitly protected by the Constitution," and the question whether strict scrutiny applies to gun laws has never been asked or answered in Missouri.

There is no reason why this Court wouldn't use strict scrutiny in reviewing laws regarding the right to keep and bear arms. That right is explicitly enshrined in the Missouri Constitution. This Court, to avoid strict scrutiny, would have to hold that the right to keep and bear arms is not a fundamental right. Such a holding would fly in the face of modern precedent. See, e.g., *District of Columbia v.*

Heller, 554 U.S. 570 (2008) and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010).

Again, not only is this a detail of the Amendment, it is not clear that the probable effect is to a **change** to the existing standard of review. A summary statement need only state the "probable effects" of the proposed measure, and not proposed interpretations of the law or speculative inferences. *Archey v. Carnahan*, 373 S.W.3d 528, 532-33 (Mo. App. W.D. 2012).

Finally, Plaintiffs have articulated an impractical standard for summary statements. Plaintiffs have argued that the ballot title failed to inform voters that it was making **three** "fundamental changes to the Constitutional treatment of gun laws." Plaintiffs' Brief at 30. Plaintiffs argue: "**All** of these changes were substantial, material changes to Missouri Law. The ballot title needed to disclose these changes to the voters in order to be fair and sufficient." *Id.*

Plaintiffs ignore the fact that the standard which they have articulated is impossible. The General Assembly, in drafting a summary statement, is limited to fifty words. Section 116.155, RSMo.

Plaintiffs suggest very **specific** language to this Court. With respect to the detail about ammunition and accessories Plaintiffs suggest the addition of the phrase: "and that every citizen is guaranteed the right to possess, purchase, and manufacture firearms, parts and ammunition?" (16 words) Plaintiffs' Brief at

34. With respect to the detail about a potential strict scrutiny analysis, Plaintiffs suggest language from Louisiana: "and any restriction on that right requires the highest standard of review by a court." (13 words). Plaintiffs' Brief at 39. While Plaintiffs do not suggest specific language with respect to the concealed weapons detail, Plaintiffs did state that the statement failed to advise voters that the measure would "[repeal the] language...specifying that nothing in that section 'shall justify the wearing of concealed weapons'." (14 words). Plaintiffs' Brief at 32. And with that, there remains room for just **seven** additional words. Which, fortunately, is just enough words to include the required "Shall the Missouri Constitution be amended." Unfortunately, it leaves only two additional words to describe the measure's main points -- a declaration that the right to keep and bear arms is an unalienable right and that state government is obligated to uphold the right. In fact, there would not be enough words left to even give a passing reference to "the right to keep and bear arms."

It would have been and is impossible for the general assembly (Plaintiffs, or this Court) to include the main points of the measure and all the details which the Plaintiffs desire to be included. If the court were to maintain the current language and just add these additional phrases, as Plaintiffs seem to suggest (Plaintiffs' Brief at 34), then there would only be room to include one of the three details. So which of these three details should the general assembly have included? Plaintiffs refer to

concealed carry detail as a "significant legal issue" (Plaintiffs' Brief at 31), the ammunition and parts detail as a "main point" of the measure (Plaintiffs' Brief at 35), and exclusion of the strict scrutiny detail as the "worst of all" (Plaintiffs' Brief at 36). Not even Plaintiffs can decide which of these details should be elevated over the other for inclusion. This is precisely why the test is to summarize the main points and probable effects – so courts would not be plagued with having to choose which one of the three, five, or twenty possible details to include or in having to determine which speculations about the amendments effects are true (as such would be an advisory opinion).

Deference should be given to the General Assembly

Finally, the General Assembly is required to submit a fair and sufficient ballot title. Section 116.155, RSMo, provides, in part:

> The general assembly may include the official summary statement and a fiscal note summary…
>
> 2. The title shall be a true and impartial statement of the purposes of the proposed measure in language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.

A majority of both the Senate and House of Representatives voted in favor of SJR 36 and, in doing so, adopted the ballot title as contained therein. Article II, Section

1 of the Missouri Constitution states that "No persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted." See also *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997). As a co-equal branch of government, the judgment of the members of the General Assembly regarding the fairness and sufficiency of the ballot language should be given a high degree of deference by this Court.

Plaintiffs' Requested Remedy Is Not Authorized

Plaintiffs argue that this court can only "invalidate" the election, rather than rewrite the summary statement and order a new election. Plaintiffs' Brief at 17. Plaintiffs are incorrect. If this court were to find the summary statement was such a significant irregularity to invalidate the election, this court's only option is to correct the irregularity by rewriting the summary statement and calling a new election. Missouri Courts of Appeals have previously determined the courts have the authority to rewrite ballot titles. See *Seay v. Jones*, 439 S.W.3d 881 (Mo. App. W.D. 2014). Article XII, Section 2(b) requires that the **initial** election be at the next general election or at a special election thereto, but places no restriction on a court-ordered **new** election. In addition, Section 115.593, RSMo, dictates the procedure for calling another special election if, and only if, Plaintiffs are able to

show election irregularities of a sufficient magnitude to cast doubt on the initial election. The remedy requested by Plaintiffs is not authorized by the Missouri Constitution or by state statute. Plaintiffs seek relief which is not authorized and therefore their claims must be denied.

Plaintiffs also appear to argue that Article XII, Section 2(b) renders Section 115.593, RSMo, unconstitutional. *See* Plaintiffs Brief at 17 ("thi[s] Court cannot set a new election as envisioned in § 115.593, RSMo" based on language in Article XII, Section 2(b)). Plaintiffs are asking this Court to find that the procedure for a new election in Section 115.593, RSMo, as applied to constitutional amendments is unconstitutional (in contravention of Article XII, Section 2(b)). Plaintiffs are also asking this Court to sever the offending provisions in Section 115.593, RSMo, from the rest of the election contest procedures. Plaintiffs ask the court to simply "invalidate" the election, and notify election authorities pursuant to Section 115.589, RSMo.

If this court were to find Section 115.593, RSMo (relating to a "new election") is unconstitutional because of Article XII, Section 2(b), then it must find the rest of the election contest provisions related to constitutional amendments unconstitutional as well. Section 115.593, RSMo, allowing this court to order a new election cannot be severed from the rest of the election contest provisions

contained in House Bill 101 (1977). Section 1.140, RSMo, provides that statutory provisions cannot be severed when:

> the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one.

In *State ex rel. Transport Manufacturing & Equipment Co. v. Bates*, 224 S.W.2d 996 (Mo. banc 1949), Plaintiffs sought determination of the constitutionality of a statute imposing a motor vehicle use tax. Respondents argued that even if the exemption was found invalid, it should be severed and the remainder of the act should stand. The court rejected this argument, stating:

> If the invalid portion is so connected with the residue of the statute as to furnish the consideration for the enactment of the residue and as to warrant the belief that they were intended as a whole and that the Legislature would not have passed the part remaining had it known the other part would be held invalid, then the entire act must fall.

Id. at 1002.

Here, the general assembly would not have enacted procedures for election contests for legislatively referred constitutional amendments, without the provision that allowed for a new election. The general assembly would not have provided for election contests for legislative referred constitutional amendments if it meant that as a result of an election contest, voters would be completely disenfranchised, rather than be allowed another opportunity to decide a question that was appropriately before them. The general assembly would not have provided for election contests on legislatively referred constitutional amendments, if it meant that the end result of an election contest would be the complete invalidation of the measure they wished to put before the voters, rather than simply a new election on such measure.

The statute allowing for a "new election" was essential to the election contest framework for legislatively referred measures that the general assembly sought to establish through the enactment of House Bill 101. The rest of the provisions of House Bill 101 relating to election contests for constitutional amendments are dependent upon the option for the court to grant a new election, rather than simply disenfranchise voters. The "new election" provision was a part of the inducement for the passage of the election contest framework itself.

Plaintiffs suggest the general assembly can just "start over" in the next legislative session. This was not the intent of the election contest procedures of

HB 101. Not only is the passage of another joint resolution not a guarantee, but the next opportunity for the measure to go before the voters would not be for an additional two years. To suggest that this court interpret the provisions of Chapter 115, RSMo, in that manner is to suggest this court write a new law, rather than construe the provisions as they were written.

As such, the provision for a new election for constitutional amendments cannot be severed from the provisions relating to election contests for constitutional amendments. If a new election cannot be ordered because Section 115.593, RSMo, contravenes Article XII, Section 2(b), then the entirety of the election contest framework for constitutional amendments falls, and Plaintiffs' Petition fails to state a cause of action.

CONCLUSION

This court should dismiss Plaintiffs' claims on the grounds that they are out of time, moot, and barred by laches. Even if the court could get past Plaintiffs' unreasonable delay in bringing their claims, this court should dismiss Plaintiffs' Petition for failure to provide any shred of evidence necessary for an election contest claim. Finally, in the unlikely event this court would reach the merits of Plaintiffs claims, this Court should deny Plaintiffs' Point I and find that the summary statement for Constitutional Amendment 5 was sufficient and fair.

WHEREFORE, Intervenors request that this court (a) declare that this Petition is out of time or that Plaintiffs' claims are moot; or (b) declare that Plaintiffs failed to meet their burden; or (c) declare that the summary statement for Constitutional Amendment No. 5 was sufficient and fair; and (d) order such other relief as necessary and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned counsel certifies that on this 21st day of November, 2014, a true and correct copy of the foregoing brief was served on the following by eService of the eFiling System and a Microsoft® Office Word 2010 version was e-mailed to:

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The undersigned counsel further certifies that pursuant to Rule 84.06(c), this brief:

(1) contains the information required by Rule 55.03;

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