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 PLAINTIFFS DOTSON AND MORGAN

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JURISDICTIONAL STATEMENT

This Court has original jurisdiction over this election contest. Section 115.555, RSMo 2000, and Article VII, section 5 of the Missouri Constitution. "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. *See* section 115.555, RSMo 2000." *Dotson v. Kander*, 455 S.W.3d 643 (Mo. banc 2014).

Although this Court's jurisdiction is normally limited to writs and appeals, the Missouri Constitution makes a special exception for election contests, specifically allowing the General Assembly to designate a court to hear such challenges. "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." Article VII, section 5.

The General Assembly has followed the directives of Article VII, section 5 and designated *this* Court as the proper forum for statewide general election contests:

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

(Emphasis added). Section 115.555, RSMo 2000.

Section 115.557, RSMo 2000, adds, "The supreme court shall have exclusive jurisdiction over all matters relating to the contest and may issue appropriate orders to all election authorities in the area in which the contested election was held." Procedures for such actions, including the appointment of a Commissioner to take evidence are provided for in sections 115.559, RSMo 2000, and 115.561, RSMo 2000. Section 115.597, RSMo 2000, provides that no appeal may be taken from an election contest heard by this Court.

The general assembly's directive that election contests regarding constitutional amendments be tried in this Court is consistent with and authorized by Article VII, section 5 and therefore original jurisdiction lies here. In the event this Court determines that it lacks jurisdiction, the matter should not be dismissed, but rather transferred to the Circuit Court of Cole County. Art. V, Section 11. ("An original action filed in a court lacking jurisdiction or venue shall be transferred to the appropriate court.")

To the extent there is any doubt about this Court's jurisdiction, the Court should exercise its discretion in favor of resolving this matter efficiently. The issues presented are of great import and there is substantial confusion about the validity and effect of Constitutional Amendment 5. *See*:

- Susan Weich, *2 Wentzville Men charged after fatally shooting family pet they mistook for a wolf*. St. Louis Post-Dispatch, September 18, 2014 (http://www.stltoday.com/news/local/crime-and-courts/wentzville-men-charged-after-shooting-family-pet-they-mistook-for/article_abcb3de6-24ca-5921-88bc-24720a41fad9.html);

- Stephen Herzog, *Felon facing gun charge cites new gun law in defense*, Springfield News-Leader, September 22, 2014 (http://www.news-leader.com/story/news/local/ozarks/2014/09/19/felon-facing-gun-charge-cites-new-gun-law-defense/15923663/);
- Editorial, *Gun Amendment brings new type of Lunacy to Missouri*, St. Louis Post-Dispatch, September 25, 2014 (http://m.stltoday.com/news/opinion/columns/the-platform/editorial-gun-amendment-brings-a-new-type-of-lunacy-to/article_3a3f360e-1cbf-5c97-a350-80632209bf06.html?mobile_touch=true);
- Jess Rollins, Opinion, *Did your vote help a man accused of murder?*, Springfield News-Leader, October 19, 2014 (http://www.news-leader.com/story/news/crime/2014/10/17/rollins-vote-help-man-accused-murder/17432899/); and
- Jess Rollins, Opinion, *Did voters kill conceal and carry?*, Springfield News-Leader, October 20, 2014 (http://www.news-leader.com/story/news/local/ozarks/2014/10/19/rollins-amendment-five-raises-difficult-questions/17591039/).

Additionally, the first case involving the application of Amendment 5 is already before this Court. *State v. Merritt*, SC94096, is a challenge to the felon in possession statute, transferred here from the Court of Appeals. The State and the Public Defender both filed briefs addressing the case under the standard that existed prior to Amendment

5's passage—whether the statute was a proper exercise of police power.[1] After the passage of Amendment 5, the State filed an Amended Brief. The State advances arguments under an assumption that Amendment 5's strict scrutiny standard for gun laws may apply.[2] The State argues in the alternative that if the constitution in effect at the time of the criminal conduct applies, then the test is whether it is a proper exercise of the State's police power.[3] The outcome of this election challenge may affect *Merritt,* which may in turn establish the level of review for all of the state's gun laws.

STATEMENT OF FACTS

Senate Joint Resolution 36 was a proposed amendment to Section 23 of the Bill of Rights of the Missouri Constitution, regarding the right to keep and bear arms. As originally introduced, SJR 36 proposed the following changes to the Constitution (new language in ***bold italics***, deleted language ~~struck through~~):[4]

> Section 23. That the right of every citizen to keep and bear arms in defense of his home, person***, family*** and property, or when lawfully summoned in

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[1] *State v. Merritt*, SC94096, Appellant State of Missouri's Brief and Reply Brief, filed April 1, 2014 and June 27, 2014, respectively. Respondent's Brief filed May 30, 2014.

[2] *Id.*, Appellant State of Missouri's Amended Brief, filed October 24, 2014.

[3] *Id.*

[4] Jt. Ex. 1.

aid of the civil power, shall not be questioned~~; but this shall not justify the wearing of concealed weapons~~. ***The rights guaranteed by this section shall be unalienable. The state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement.***

That originally introduced version of SJR 36 set forth the following proposed summary statement:[5]

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

Amendments through the legislative process modified and added to the original bill to produce the following proposal (new language in ***bold italics***, deleted language ~~struck through~~):[6]

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[5] The language states "the official ballot title of this act shall be as follows:" (emphasis added). Jt. Ex. 1. An official ballot title is comprised of a summary statement and a fiscal note summary. § 116.010(4), RSMo 2000. Nevertheless, the Legislature's "official ballot title" lacked a fiscal note summary. That fiscal note summary was later added pursuant to the requirements of Chapter 116.

[6] See Jt. Ex. 2.

Section 23. That the right of every citizen to keep and bear arms**,** ***ammunition, and accessories typical to the normal function of such arms,*** in defense of his home, person***, family*** and property, or when lawfully summoned in aid of the civil power, shall not be questioned~~; but this shall not justify the wearing of concealed weapons~~. ***The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as [sic] result of a mental disorder or mental infirmity.***

The General Assembly passed Senate Committee Substitute for Senate Joint Resolution 36 ("SJR 36"[7]) on May 7, 2014, and the Governor placed it on the August 5 primary election ballot.[8] The Senate President Pro Tem and the Speaker of the House of Representatives signed and delivered SJR 36 to Defendant Secretary of State Kander on

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[7] SJR 36 as used in this Brief refers to the TAFP SCS SJR 36 (Jt. Ex. 2). Any other version of the resolution will be so indicated, e.g., "introduced version."

[8] Jt. Ex. 2; Jt. Stip. ¶ 7; *Dotson v. Kander*, 455 S.W.3d 643, 644 (Mo. banc 2014).

May 30.[9] The Secretary certified the official ballot title for SJR 36 on June 13, 2014.[10] The official ballot title included the General Assembly's summary statement.[11]

The official ballot title for SJR 36 remained the same as in the introduced version of the Resolution:

> 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?

On the same day the ballot title was certified, Plaintiffs Dotson and Morgan filed suit in Cole County Circuit Court challenging the sufficiency and fairness of the summary statement pursuant to section 116.190, RSMo Supp. 2013.[12] The trial court consolidated Plaintiffs' case with a different case also challenging SJR 36.[13] The trial court issued its judgment on July 1 determining the cases were moot under § 115.125.2, RSMo Supp. 2013, and in the alternative, that the summary statement was sufficient and fair.[14]

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[9] *Dotson*, 455 S.W.3d at 644.

[10] Jt. Stip. 8; Jt. Ex. 3; *Dotson*, 455 S.W.3d at 644.

[11] Jt. Exs. 2 and 3.

[12] Jt. Stip. ¶ 9; *Dotson*, 455 S.W.3d at 644.

[13] Jt. Stip. ¶ 10; *Dotson*, 455 S.W.3d at 644.

[14] Jt. Stip. ¶ 11; *Dotson*, 455 S.W.3d at 644.

Plaintiffs in the consolidated cases appealed the judgment to this Court, which dismissed the appeal as moot due to section 115.125.2, RSMo Supp. 2013.[15] This Court stated:

> Appellants argue that this interpretation of section 115.125.2 would foreclose full judicial review of ballot titles under section 116.190 each time the General Assembly drafts a summary statement for a proposed constitutional amendment and the governor calls a special election for that question on the August primary election day. This concern does not justify abandoning a settled construction of this provision, particularly in light of the fact 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. *See* section 115.555, RSMo 2000.[16]

SJR 36 was proposed Constitutional Amendment No. 5 on the primary election ballot.[17] The summary statement portion of the official ballot appearing on all ballots for that election contained the following language:

> Shall the Missouri Constitution be amended to include a declaration that the

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[15] Jt. Stip. ¶¶ 12, 13; *Dotson*, 455 S.W.3d 643.

[16] *Dotson*, 455 S.W.3d at 645 (emphasis added).

[17] Jt. Stip. ¶ 8, 14.

right to keep and bear arms is a unalienable right and that the state government is obligated to uphold that right?[18]

No other language appeared on the ballots regarding Constitutional Amendment No. 5 except for the fiscal note summary portion of the official ballot title.[19] Constitutional Amendment No. 5 received a majority of the votes in the August election.[20]

Plaintiffs contest the August 5 election with regard to SJR 36. Dotson is a registered voter of the state and St. Louis City and Morgan is a registered voter of the state and St. Louis County.[21] Amendment 5 was on the August 5 ballot in St. Louis City and St. Louis County.[22]

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[18] Jt. Stip. ¶ 14.

[19] Jt. Ex. 3.

[20] Jt. Stip. ¶ 16.

[21] Jt. Stip. ¶¶ 1–2.

[22] Jt. Stip. 15.

POINT RELIED ON

I. THIS COURT SHOULD INVALIDATE THE AUGUST 5, 2014 ELECTION ON CONSTITUTIONAL AMENDMENT NO. 5, SJR 36, AMENDING ARTICLE I, SECTION 23 OF THE MISSOURI CONSTITUTION BECAUSE THERE WERE ELECTION IRREGULARITIES OF SUFFICIENT MAGNITUDE TO CAST DOUBT ON THE VALIDITY OF THE ELECTION ON CONSTITUTIONAL AMENDMENT NO. 5 IN THAT EVERY VOTER HAD BEFORE HIM OR HER AN INSUFFICIENT AND UNFAIR BALLOT TITLE AND THE BALLOT TITLE DID NOT MEET THE STATUTORY REQUIREMENT IN SECTION 116.155, RSMO, THAT IT 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. [23]

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

Missouri Mun. League v. Carnahan, 303 S.W.3d 573 (Mo. App. 2010)

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[23] Plaintiffs provide this single Point Relied On in the spirit of complying with Rule 84.04(a)(4) and (d), as the precise language of the points relied on in Rule 84.04(d) are inapplicable in this case as it is neither an appeal nor an original writ proceeding.

Gerrard v. Board of Election Comm'rs, 913 S.W.2d 88 (Mo. App. 1995)

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

Section 115.593, RSMo 2000

Section 116.155, RSMo 2000

ARGUMENT

I. THIS COURT SHOULD INVALIDATE THE AUGUST 5, 2014 ELECTION ON CONSTITUTIONAL AMENDMENT NO. 5, SJR 36, AMENDING ARTICLE I, SECTION 23 OF THE MISSOURI CONSTITUTION BECAUSE THERE WERE ELECTION IRREGULARITIES OF SUFFICIENT MAGNITUDE TO CAST DOUBT ON THE VALIDITY OF THE ELECTION ON CONSTITUTIONAL AMENDMENT NO. 5 IN THAT EVERY VOTER HAD BEFORE HIM OR HER AN INSUFFICIENT AND UNFAIR BALLOT TITLE AND THE BALLOT TITLE DID NOT MEET THE STATUTORY REQUIREMENT IN SECTION 116.155, RSMO, THAT IT 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. Introduction

There are two ways to amend the Missouri Constitution—by Constitutional Convention or by a vote of the people. MO. CONST. art. XII. The people may vote on Amendments presented to them by either an initiative petition process or by the General Assembly. MO. CONST. art. III, § 50; MO. CONST. art. XII, § 2(a). Regardless of the processing to bring a proposed Constitutional Amendment to the people, the voters see

and vote on an "official ballot title as may be provided by law" on election day. MO. CONST. art. XII, § 2(b).

This Court has long recognized that procedural safeguards—both those in the Constitution and those created by the legislature—are important and necessary in the [initiative petition] process for two reasons "(1) to promote an informed understanding by the people of the probable effects of the proposed amendment; or (2) to prevent a self-serving faction from imposing its will upon the people without their full realization of the effects." *Buchanan v. Kirkpatrick,* 615 S.W.2d 6, 11 (Mo. banc 1981). The legislature is not exempt from these requirements and, when writing a ballot title, is required to "promote an informed understanding of the probable effect" of a proposed amendment. *Coburn v. Mayer,* 368 S.W.3d 320, 324 (Mo. App. 2012) (citing *Cures Without Cloning v. Pund,* 259 S.W.3d 76, 82 (Mo. App. 2008)).

To that end, the legislature has itself imposed a requirement that the ballot summary "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." § 116.155.2, RSMo 2000. Unlike the initiative petition process, where the Secretary of State summarize a measure put forward by its proponents, the legislative proponents of a Constitutional Amendment are allowed to write their own summary statement for the voters to vote on.

The Governor has no veto power on a constitutional amendment proposed by the general assembly. Art. III, § 52(b) ("The veto power of the governor shall not extend to

measures referred to the people.") And the Secretary of State reports that he had no authority to ascertain whether the summary statement complied with Chapter 116 or the Missouri Constitution—his role was simply to certify for the ballot what he was given by the general assembly and the state auditor.[24] *Cf.* § 116.120.1, RSMo 2000 ("When an initiative or referendum petition is submitted to the secretary of state, he or she shall examine the petition to determine whether it complies with the Constitution of Missouri and with this chapter.") Apparently the Secretary has no such duty except when an initiative or referendum petition is at issue. As such, there is less review of general assembly-proposed measures than for measures proposed by the people themselves.

As compared to initiative petitions proposing constitutional amendments then, where the Secretary of State independently summarizes the measure proposed by the people and the Secretary's decision is subject to judicial review, there is only one pre-election check on a legislature-written summary statement—a citizen lawsuit to determine if the summary "is insufficient or unfair." § 116.190, RSMo Supp. 2013.

The summary statement drafted by the proponents of SJR 36 also evaded pre-election judicial review under § 116.190. *Dotson v. Kander*, 455 S.W.3d 643 (Mo. banc 2014). And as set forth in Appellants' Brief in that case, pre-election review will

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[24] Defendant's Answer to Petition for Election Contest, filed October 21, 2014, footnote 1.

essentially always be evaded when a measure is set for a special election prior to the general election (such as the primary election).

Because the General Assembly has given itself this power to write summary statements for measures it proposes to the people, declined to give the Secretary any power beyond rubber stamping such summary statements and enacted a law prohibiting changes to a ballot less than six weeks prior to election thereby evading pre-election judicial review on most measures voted on at a primary election, an election contest is the *only* option available to challenge the summary statement. An election contest in a situation such as this is the *only* safeguard to ensure the people had an informed understanding of the constitutional amendment and that a self-serving faction (in this case the legislature) did not impose its will upon the people without their full realization of the effects of the constitutional amendment. *Buchanan,* 615 S.W.2d at 11.

In this case the legislature failed to meet its important responsibility to promote an informed understanding of the probable effects of a Constitutional Amendment. The legislature's ballot summary misled the voters because: 1) it led the voters to believe it was adding a right to bear arms to the Constitution, when that right has existed since the State was formed;[25] 2) it led the voters to believe the state was not required to uphold the right to bear arms unless the amendment was adopted; 3) it failed to inform the voters of

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[25] MO. CONST. of 1820, art. XIII, § 3; MO. CONST. of 1865, art. I, § 8; MO. CONST. of 1875, art. II, § 17.

the real probable effects of the amendment—a sea change in the carry and conceal laws of this state and a heightened level of constitutional scrutiny for every gun law; and 4) it failed to advise voters of changes regarding ammunition and accessories.

As a result, the ballot title was unfair and misleading. It prejudiced voters to vote for the measure without a full understanding of the ways in which they were changing the fundamental document of state governance.

B. Election Contests

> The result of any election on any question may be contested by one or more registered voters from the area in which the election was held. The petitioning voter or voters shall be considered the contestant and the officer or election authority responsible for issuing the statement setting forth the result of the election shall be considered the contestee.

Section 115.553.2, RSMo 2000. In contests to the results of elections on constitutional amendments, the Secretary of State is the contestee. *Id*.[26]

If this Court "determines there were irregularities of sufficient magnitude to cast doubt on the validity of the [August 5] election" on Constitutional Amendment No. 5, it can invalidate the election. See §§ 115.589, 115.593, RSMo 2000. Although another

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[26] Although he certified the election results, and is the Defendant, Secretary Kander "takes no position on the challenge to the ballot summary language." Defendant's Answer to Petition for Election Contest, filed October 21, 2014, footnote 1.

election could take place, in this particular case, this Court cannot set a new election as envisioned in § 115.593, RSMo 2000. The Missouri Constitution requires that when a constitutional amendment is proposed by the general assembly, it must be at the next general election or at a special election called by the governor prior thereto. Art. XII, § 2(b).

Should the summary statement be found insufficient and unfair, the Court would invalidate the election with regard to Amendment No. 5, rather than rewrite the summary statement. It would be up to the general assembly to follow the constitutional requirements and propose a new joint resolution, with, if it chooses, a summary statement that is not insufficient and unfair. Alternatively, a proposed amendment to Section 23 could be proposed by initiative petition. If this Court determines that the summary statement was insufficient and unfair, it should find the election results of August 5 on Constitutional Amendment No. 5 invalid and cause a certified copy of its judgment to be transmitted to each affected election authority and to the secretary of state. § 115.589, RSMo 2000.

1. A violation of election requirements statutes is an election irregularity.

The Court may set aside the election if it finds an irregularity. "Irregularity" is not defined in section 115.593, RSMo 2000, "but the rules of statutory construction and existing precedent clearly indicate violation of an election statute is an irregularity." *Gerrard v. Board of Election Comm'rs*, 913 S.W.2d 88, 89 (Mo. App. 1995). The

dictionary definition of irregularity includes "behaving without regard to established laws, morals or customs." *Id.* at 90. "Clearly, following the legislature's dictates would be regular and deviation irregular." *Id.*

Section 116.155, RSMo 2000, allowed the general assembly to write the summary statement for SJR 36. But the legislature dictates "[t]he 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." Section 116.190, RSMo Supp. 2013, authorizes a pre-election challenge to the ballot title as being insufficient and unfair, and allows it to be rewritten to bring it into compliance with statutory mandates. Therefore a summary statement that fails to meet the "legislative dictates" of section 116.155 and 116.190 because it is insufficient or unfair does not is by definition an election irregularity.

2. An insufficient and unfair summary statement is an irregularity of sufficient magnitude to invalidate the election.

> "Irregularities, fraud, or crime may avoid an election, but to do so they must be of such a character as to at least throw doubt on the question whether the result of the election as declared is in fact the correct result . . . [T]he matters complained of, whether they be mere irregularities or actual fraud or crime, must be of such a character that by reason of them it is prima facie shown that the result as declared is incorrect, or that it is

impossible to determine what the correct result is. In other words, that the election contemplated by the law was not in fact held."

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

If a summary statement is insufficient or unfair, then the voters have been misled. A summary statement is to ensure an informed understanding by the voters of the probable effects of the measure before them. *Brown v. Carnahan*, 370 S.W.3d 637, 654 (Mo. banc 2012). That goal is carried out by full compliance with the statutory mandates in Chapter 116. If a summary statement does not meet the requirements of sections 116.155 and 116.190, 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' claim questions the validity of the entire election on Constitutional Amendment No. 5, not of individual ballots or a category of votes. Although this is a case of first impression, this Court should find that when there is an insufficient and unfair summary statement, the election that was contemplated, and actually required by law, was not properly conducted, and may be invalidated.

C. The Summary Statement for SJR 36 is insufficient and unfair

1. The summary statement was unfair because it misrepresented the probable effects of the measure to the voters.

In August, Missouri voters were asked to vote yes or no on the following summary statement:

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

The question before the Court is whether this description unfairly and insufficiently described the actual changes to the Constitution such that "throw[s] doubt on the question whether the result of the election as declared is in fact the correct result." *Rainwater,* 143 S.W. at 511.

A "yes" vote on the above summary was in fact a vote to change the Constitution in the following ways (new language in ***bold italics***, deleted language ~~struck through~~):

> That the right of every citizen to keep and bear arms**,** ***ammunition, and accessories typical to the normal function of such arms*****,** in defense of his home, person**, family** and property, or when lawfully summoned in aid of the civil power, shall not be questioned~~; but this shall not justify the wearing of concealed weapons~~. ***The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.***

The summary statement did not sufficiently and fairly summarize the substantial changes that would be enacted by a "yes" vote. Rather the summary materially misled voters about the effect of a "yes" vote. The ballot title suggested that current law does not include the right to bear arms and further suggested that the state has no current obligation to uphold that right. At the same time, the ballot summary omitted to alert voters of *material* changes to the Constitution. The title made no reference to the deletion of language on carrying concealed weapons, did not advise voters that the right to bear arms is now being extended to all types of ammunition and failed to disclose that gun laws will now be subjected to strict scrutiny review.

To entice the "yes" vote, the summary offered the red-caped promise of a new right to bear arms but, like a skilled matador in the bull fighting ring, concealed the sword of strict scrutiny that will strike at the heart of Missouri's existing gun laws, as well as other substantial changes should the voters take the bait. Missouri law is clear that the cape may not be used to bait the voters and the sword must be openly displayed.

2. Standard for review of a summary statement

The legislature dictates that a summary statement shown to the voters must be neither insufficient nor unfair. Section 116.190, RSMo Supp. 2013.

> Insufficient means "inadequate; especially lacking adequate power, capacity, or competence." The word "unfair" means to be "marked by injustice, partiality, or deception." Thus, the words insufficient and unfair

> ... mean to inadequately and with bias, prejudice, deception and/or favoritism state the [consequences of the proposed amendment].

Cures without Cloning v. Pund, 259 S.W.3d 76, 81 (Mo. App. 2008) (quoting *Hancock v. Sec'y of State*, 885 S.W.2d 42, 49 (Mo. App. 1994)).

A summary statement must accurately reflect the legal and probable effects of the proposed measure. *Brown*, 370 S.W.3d at 654 (citing *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573, 584 (Mo. App. 2010)). The purpose of these laws is "(1) to promote an informed understanding by the people of the probable effects of the proposed amendment, [and] (2) to prevent a self-serving faction from imposing its will upon the people without their full realization of the effects of the amendment." *Id.* (quoting *Buchanan*, 615 S.W.2d at 11–12). An informed understanding of the effects of the law may require, and indeed might demand, an explanation of existing law to give appropriate context. *Id.* and *Coburn,* 368 S.W.3d at 324 (both citing *Missouri Mun. League v. Carnahan*, 364 S.W.3d 548, 553 (Mo. App. 2011)).

The text of the laws governing ballot titles supports these purposes. Article XII, Section 2(b) requires that constitutional amendments be submitted to the people through a ballot title, "as may be provided by law." The official ballot title is mandated to be a "summary statement" together with the "fiscal note summary." § 116.010(4), RSMo 2000.

The short word "summary" speaks volumes. Undefined words in a statute are, of course, construed using their plain and ordinary meaning as found in a dictionary.

Howard v. City of Kansas City, 332 S.W.3d 772, 780 (Mo. banc 2011). A "summary" statement therefore must be a "short restatement of the main points." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2289 (2002). A summary that does not summarize the "main points" is insufficient as a matter of dictionary definitions and statutory construction. The law requires that the voters see a short restatement of the *main* points of the underlying proposal.

Recently, in *Seay v. Jones*, 439 S.W.3d 881 (Mo. App. 2014), the Court of Appeals applied this principle. It found that the ballot summary for an early voting measure was insufficient and unfair because it failed to include an important point from the underlying measure. *Id.* at 892. In that case, the legislature proposed a measure that would allow early voting, but *only if the legislature appropriated funds for early voting.* The legislature's proposed ballot summary, however, failed to disclose this funding contingency, which would mislead voters as to the effects of the passage of the measure.

"Clearly, a voter reading the summary statement would expect that, if the proposal passes, advance voting will be an available option for voters 'in all general elections.'" *Id.* at 890. The Court of Appeals modified the summary statement to include this main point of the underlying measure, the funding contingency. *Id.* at 895. The measure was on the November 4 ballot with the modified summary statement, and, although the results will not be certified for about a month, it appears from unofficial reports that it failed. *Id.* at 896; see unofficial results for Constitutional Amendment 6 at http://enr.sos.mo.gov/EnrNet/.

3. SJR 36's Ballot Title Unfairly and with Partiality Led Voters to Believe the Constitution was Being Changed in Ways it was Not.

In this case the voters saw a ballot title that asked whether the Constitution should be amended to include a statement that the right to keep and bear arms is unalienable and that the State must enforce that right. This statement was not a summary of the main points of the underlying measure. A reasonable voter reviewing that summary statement would think that the "main point" of the measure was to add to the Constitution a previously not included right to bear arms, make it inalienable and require the state to uphold it. But a "yes" vote did not create the right to keep and bear arms, its inalienability or the state's obligation to uphold the right. More important, this was not the main point of the measure.

The problem with what the voters *saw*—an implication that the law does not currently protect the right to bear arms—was squarely addressed in *MML I.* There, the summary statement for a proposed amendment to the constitution regarding eminent domain told voters that the proposal would require that landowners receive just compensation for the taking of land. *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573, 586–89 (Mo. App. 2010)("*MML I*").

The Court of Appeals found that such language in the ballot title suggested that the proposed amendment would add just compensation to the constitution when that requirement was already part of the constitution. *Id.* at 589. The Court struck the portion of the summary statement regarding just compensation, noting that its inclusion made the

summary statement unfair. In so doing, the Court endorsed the trial court's reasoning that it is unfair and insufficient for a summary statement to suggest that something would be added to the Constitution that is already part of the Constitution. *Id.* at 586–87.

In a second *Missouri Municipal League* case, the Court of Appeals was confronted with a similar measure, the summary for which included the phrase "while continuing to provide just compensation." *MML v. Carnahan*, 364 S.W.3d 548, 553 (Mo. App. 2011) ("*MML II*"). The Court endorsed the idea that a summary of this nature "makes clear that the Missouri Constitution currently provides for 'just compensation." The Court went on to acknowledge that "in some instances, context *demands* a reference to what is currently present to understand the effect of the proposed change (emphasis supplied)." *MML II*, 364 S.W.3d at 553.

The ballot title of SJR 36 advised voters that the Constitution would 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 word "include" means "to put into a group." WEBSTER'S II NEW COLLEGE DICTIONARY 560 (Margery S. Berube ed. 1999). By using the word "include," the ballot title told voters that the right to bear arms was not currently part of the declaration of rights asserted by the people in Article I's Bill of Rights. As previously noted, the right of citizens to keep and bear arms in defense of home, person and property has been in Missouri's Constitution since Missouri became a state. MO. CONST. of 1820, art. XIII, § 3; MO. CONST. of 1865, art. I, § 8; MO. CONST. of 1875, art. II, § 17.

Given the existing protections of the Constitution, the addition of this declaration is not a main point that would be included in a fair summary. Nor was including the word "inalienable" a main point of the underlying measure. The *existing* language of the Constitution (before the listing of the rights, which includes Section 23) stated, "In order to assert our rights . . . we declare [t]hat the right of every citizen to keep and bear arms in defense of his home, person and property . . . *shall not be questioned*." It is truly difficult to understand what effect, if any, the sentence, "The rights guaranteed by this section shall be unalienable" has when the Constitution had already declared the right and mandated that it not be questioned.

Black's Law Dictionary defines inalienable rights as "Rights which are not capable of being surrendered or transferred without the consent of the one possessing such rights." *Id.* 521 (6th ed. 1991). Plaintiffs find only one Missouri case that uses the phrase "unalienable right." *City of Pleasant Valley v. Baker,* 991 S.W.2d 725, 729 (Mo. App. 1999). That case acknowledges that the Declaration of Independence uses the phrase "unalienable" rights in reference to life, liberty and the pursuit of happiness,[27]

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[27] Although the Court of Appeals references the United States Constitution rather than the Declaration of Independence, it does not appear that the Constitution specifically identifies rights that are "unalienable." The Declaration of Independence, while an important historical document, is not binding legal precedent on this State or any state as it was adopted by the Continental Congress prior to the Revolutionary War.

those rights are not absolute as suggested by the dictionary definition, as they may be curtailed under appropriate circumstances.

Of course, several Missouri cases use the phrase "inalienable" rights. Those cases are mostly older, but all acknowledge that "inalienable rights" are not subject to any particular level of scrutiny or legal status (other than that they cannot be taken away without justification). *See, e.g., State ex rel. Burrell-El v. Autrey,* 752 S.W.2d 895, 900–01 (Mo. App. 1988) (discussing the balance between the free exercise of religion and the authority of a trial judge to order the defendant to remove his head covering while in court).

Statements that rights are unalienable or inalienable are "taken as widely accepted statements of political principle," and "not as enforceable limits to government power." Thomas B. McAffee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty over Law and the Court over the Constitution*, 75 U. CIN. L. REV. 1499, 1504–05 & nn.18–19 (2007); Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, 2 U. PA. J. CONST. L. 609, 632-34 (2000) ("The use of the term 'inalienable' in American political and legal history is inconsistent at best, and often incoherent and inaccurate.").

The phrase "unalienable" appears is, at best, of no legal significance at all. At worst, it is incoherent and inaccurate. Either way it does nothing to promote an informed understanding of the underlying measure or to summarize its main points. Because the Missouri Constitution already declares the right of citizens to keep and bear arms and

commands that right not be questioned, a declaration of unalienability is no change in the law at all. To imply otherwise was unfair and misleading.

Next, the summary statement told voters that "state government is obligated to uphold that right." The phrase "that right" refers to the right to keep and bear arms. The implication of the ballot title was that state government was not currently obligated to uphold the right to bear arms and a "yes" vote on SJR 36 imposed that obligation. But it is simply not the case. The inclusion of this phrase did nothing to promote an informed understanding of the probable effects of the underlying measure. Nor did the inclusion of this phrase summarize the main points. In his *Amicus* Brief in *Merritt*, the co-sponsor of SJR 36 identified the three major changes the underlying measure made to Section 23.[28] None of them included that the state government is obligated to uphold the right to keep and bear arms.

And it was not a change at all. The Constitution directs that the right to keep and bear arms shall not be questioned. Every officeholder in Missouri must take an oath to uphold the Constitution and to faithfully execute the law. MO. CONST. art. VII, § 11. The Governor, as chief executive officer of the State, is obligated faithfully execute the mandates of the Constitution. MO. CONST. art. IV, § 2. Moreover, any elected official who willfully neglects their duty to uphold the right to bear arms is subject to

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[28] *State v. Merritt*, SC94096, Brief of *Amicus Curiae* Senator Schafer, pp. 9, 12 and 15 (filed October 24, 2014).

impeachment. MO. CONST. art. VII, § 2. And the obligation extends to all state officers and employees. Impeachment extends to situations where state officers allow those under their supervision to disregard the law. *Impeachment of Moriarty*, 902 S.W.2d 273, 276–77 (Mo. banc 1994).

As discussed above, a statement that the government must enforce the law, without reference to existing law on the matter, is misleading. Because of existing law, the ballot title's discussion of state government's duty to uphold the right was pure redundancy— not a main point—while unfairly suggesting that a change was being made to existing law. It improperly baited the voters into voting "yes" without the proper context.

The Court needs no evidence to conclude that a great majority of Missourians support the right to keep and bear arms. Asking them whether that right should be included in the Constitution was like asking them whether freedom of speech or the right to a public education should be included in the Constitution. Those rights are such a fundamental fabric of the American experience that there is universal consensus on them. As discussed in detail in section 4.c, below, the Louisiana and Alabama legislatures were proposing similar constitutional amendments in their states. The General Assembly knew of this consensus and what those states were doing, and intentionally included the sentence, using not a legal term, as Louisiana and Alabama did—"fundamental right"—but instead using a political term—"unalienable."

But, as the sponsor has admitted and an average reader of the underlying measure

would see, this was not the main point of the underlying measure. This "unalienable right" verbiage enticed voters to support the measure even though the main point of the measure was *greatly expanding* the right to bear arms rather than simply *including* that right in the Missouri Constitution. By using the phrase "including," the legislature unfairly played on those voters who may not know that the right to keep and bear arms was already in the Missouri Constitution. This deception casts serious doubt on whether the voters intended to adopt Amendment 5.

4. SJR 36's Ballot Title was also Unfair and Prejudicial because it Failed to Summarize the Major Changes to the State's Gun Laws.

A "summary" statement must be a "short restatement of the main points." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2289 (2002). When crafting the ballot title, the legislature has an obligation to promote an informed understanding of the probable effects of the amendment. *Coburn*, 368 S.W.3d at 324. SJR 36 made grievous material omissions as to the legal effect of the proposed measure. The ballot title failed to inform voters that it was making fundamental changes to the Constitutional treatment of gun laws. First, it repealed language that allowed the legislature to regulate the carrying of concealed weapons. Next, it added a right to keep and bear ammunition and accessories. Finally, it subjected all gun regulation (including regulation of ammunition and accessories) to a strict scrutiny analysis. 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.

a. The summary statement failed to inform voters that it deleted language which has been interpreted to allow the legislature to regulate the carrying of concealed weapons.

Amendment 5 repealed language in Article I, Section 23 specifying that nothing in that section "shall justify the wearing of concealed weapons." The existence of that language was very significant because it gave the Missouri General Assembly "the final say in the use and regulation of concealed weapons." *Brooks v. Nixon*, 128 S.W.3d 844, 848 (Mo. banc 2004). Such language has been in our constitution for over a century. MO. CONST. of 1875, art II, § 17. As stated in *Brook*s, "There is no constitutional prohibition against the wearing of concealed weapons; there is only a prohibition against invoking the right to keep and bear arms to justify the wearing of concealed weapons." The repeal of the language in Section 23, "but this shall not justify the wearing of concealed weapons" was a repeal of the "prohibition on invoking the right to keep and bear arms to justify the wearing of concealed weapons." *Id*. A "yes" vote meant that citizens *may* now invoke the right to bear arms to justify carrying concealed weapons. SJR 36 makes this change crystal clear by specifying that all gun laws will now be subject to strict scrutiny (as discussed below). Yet voters were not advised of this legal effect.

Changing the law on carrying concealed weapons is a significant legal issue, but it is also a significant and substantial public policy decision, which has historically been highly contentious. Prior to 1999, Missouri law did not allow the wearing of concealed

weapons. In 1999, the General Assembly submitted statutory changes to the people, proposing a change that would allow the granting of such permits. House Bill 1891, 89th General Assembly. That measure was defeated by the people in a very close vote at a special election.[29] In 2003, the General Assembly again passed legislation to allow citizens to carry concealed weapons. The Governor vetoed the bill and the legislature overrode that veto. *Brooks,* 128 S.W. 3d at 845. Before Amendment 5, the people had the option of obtaining a permit to carry concealed weapons, but did not have any right to carry concealed weapons under the Missouri Constitution.

In spite of the legal importance of removing the language and in spite of the long-standing controversy over this issue, the ballot title failed to advise voters that a "yes" vote would change the law on regulation of concealed weapons. As a result, the ballot title did not meet the statutory requirement that it "summarize" the measure, much less the responsibility to promote an understanding of the probable effect of the measure.

b. The summary statement failed to inform voters that ammunition and accessories were being added to the right to keep and bear arms.

Similarly, the summary statement made no mention of new language to be inserted in the Constitution guaranteeing the right to keep "ammunition, and accessories typical to the normal function of such arms." The ballot title failed to inform voters that

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[29] http://www.sos.mo.gov/enrweb/allresults.asp?arc=1&eid=8.

"ammunition" and "accessories" were being added to the right to keep and bear arms and that their regulation would now be subject to strict scrutiny.

In 2013, the co-sponsor of SJR 36 sponsored Senate Joint Resolution 14.[30] As introduced, SJR 14's proposed changes to the language of Section 23 were identical to SJR 36 as introduced.[31] The Senate Committee Substitute for SJR 14 made no changes to the proposed amendment, but it did add a summary statement, which is identical to the summary statement at issue in Constitutional Amendment No. 5.[32] SCS SJR 14 was amended on the House floor to changes both the substance of the proposed constitutional amendment and the summary statement language.[33]

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[30] *Journal of the Senate*, 97th General Assembly, First Regular Session at 99-100 (6th Day, January 17, 2013). Courts may take judicial notice of the records of the General Assembly. *State ex rel. Dept. of Social Services v. K.L.D.*, 118 S.W.3d 283, 288 n.8 (Mo. App. 2003)(citing *State v. Massey*, 219 S.W.2d 326, 328 (Mo. 1949)).

[31] *Cf.* Senate Joint Resolution 14 (2013), and Jt. Ex. 1.

[32] *Cf.* Senate Committee Substitute for Senate Joint Resolution 14 (2013) and Jt. Exs. 2 and 3.

[33] *Journal of the House*, 97th General Assembly, First Regular Session at 3279-3282 (71st Day, May 17, 2013).

When SJR 14 was amended on the floor of the House, one part of the amendment added the following to Section 23:[34]

> ***The right of every citizen to possess, purchase, reload, or manufacture ammunition and to possess, purchase, or manufacture mechanical parts or other articles essential to the proper functioning of arms shall not be infringed or the amounts limited.***

The same amendment changed the summary statement:[35]

> 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***, and that every citizen is guaranteed the right to possess, purchase, and manufacture firearms, parts, and ammunition***?

In 2013 then, when the General Assembly added ammunition and parts to the protection afforded by Section 23, it also added that to the summary statement, to inform the voters of that change.[36] In 2013 the General Assembly apparently thought that a summary of the main points of that measure should include a reference to parts and

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[34] *Id.*

[35] *Id.*

[36] The General Assembly did not enact SJR 14. *Journal of the Senate*, 97th General Assembly, First Regular Session at 2416-17 (70th Day, May 17, 2013).

ammunition. In 2014, when the General Assembly added ammunition and accessories to the protection of Section 23, they included nothing in the summary statement to inform the voters of that addition.

This was a mistake, because the addition of ammunition and parts was a main point of the underlying measure and it should have been included in a fair and sufficient summary. Ammunition and "accessories typical to the normal function of such arms" are not without controversy. Failing to inform the voters that these would be afforded the same protection (under strict scrutiny no less) as guns themselves, made the summary statement insufficient and unfair. Many governments have found it important to regulate ammunition and accessories. Armor-piercing pistol ammunition is illegal under federal law. 18 U.S.C. 921(a)(17). Oklahoma has criminalized possession of a handgun loaded with bullets larger than .45 caliber and has criminalized possession of armor-piercing ammunition. OKLA. STAT. §§ 21-1290.6, 21-1289.19, 21-1289.21. In Iowa it is illegal to possess silencers or suppressors. IOWA CODE §§ 724.1, 724.3. Iowa legislation to legalize gun suppressors failed in 2014. House File 384, House File 2381, 85th General Assembly. Colorado has large-capacity magazine limits. COLO. REV. STAT. §§ 18-12-301, 18-12-303.

Missouri prohibits possession of silencers to the extent it violates federal law (Class A misdemeanor). § 571.020.1(6)(c), RSMo Supp. 2013. Missouri also prohibits possession of ammunition in the form of exploding bullets (Class A misdemeanor).

§ 571.020.1(4), RSMo Supp. 2013. Missouri also prohibits the use or possession of metal penetrating bullets during the commission of a crime. § 571.150, RSMo 2000.

Not advising people that ammunition and accessories would be pulled within Missouri's right to keep and bear arms, and restrictions on the same be subject to strict scrutiny, was misleading to Missouri voters. The General Assembly thought so in 2013, but changed its mind in 2014. They were right the first time. This is important information for voters that should have been included in a fair and sufficient summary statement.

c. The summary statement failed to inform voters that the measure will constitutionally mandate strict scrutiny of all gun laws.

Perhaps worst of all, the summary statement did not advise voters that Amendment 5 would enshrine strict scrutiny review of all gun laws (and all laws governing ammunition and accessories) directly in the Missouri Constitution. Although strict scrutiny was not part of the SJR as introduced, it was added during the process without updating the ballot title to advise the voters of this significant change. The failure to mention that the amendment would require that the strict scrutiny standard be applied to any restriction on the right to keep and bear arms is insufficient and misleading. It is insufficient because it fails to disclose an important part of the underlying change—a main point—and the ballot title is misleading because it implies (by omission) that no such change is being made. Failing to include the strict scrutiny requirement in something

that is supposed to be a "summary" tells the voters that there is no significant change being made, rather a statement about the unalienability of the right to bear arms is simply being added to the Constitution.

In ascertaining legislative intent with regard to the summary statement in SJR 36, this Court presumes that the legislature: (1) is aware of the state of the law at the time it enacts the joint resolution, *Robertson v. State*, 392 S.W.3d 1, 6 (Mo. App. 2012); and (2) acted with full knowledge of the subject matter, relevant facts and existing conditions. *Wilson v. McNeal*, 575 S.W.2d 802, 810 (Mo. App. 1978). A court should trace historical development of the legislation, considering all changes and modifications of legislative policy, and the problem that the statute was enacted to remedy. *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 519 (Mo. banc 2009); *State ex rel. LeBeau v. Kelly*, 697 S.W.2d 312, 314 (Mo. App. 1985).

It should be presumed that Missouri's General Assembly knew that the U.S. Supreme Court had not yet determined what level of scrutiny to be applied in challenges brought under the Second Amendment. *Robertson*, 392 S.W.3d at 6. In *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), a 5–4 court found the Second Amendment right to bear arms was an individual right, striking down handgun restrictions in the District of Columbia. The Supreme Court did not decide what standard of scrutiny applied to Second Amendment rights; it simply stated, "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, [this law] would fail constitutional muster." *Id.* at 2817–18.

The five justices in the majority opinion admitted they were not establishing a level of scrutiny to be applied, noting the case "should not be expected to clarify the entire field." *Id*. at 2821. *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), was another 5–4 decision. Before the court were handgun restrictions similar to those in *Heller*, but imposed by municipalities. *Id.* at 3026. The majority found the Second Amendment applied to the states and municipalities through the Fourteenth Amendment, but disagreed as to which clause of the Fourteenth Amendment was applicable—three justices found it was the due process clause, while Justice Thomas found it to be the privileges and immunities clause. *Id.* at 3059. The Court remanded the case to the lower court for further proceedings, and again, did not set forth a standard of scrutiny. *Id.* at 3050; *see* Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 NW. U. L. REV. 437, 439 (2011); *see* Tina Mehr and Adam Winkler, *The Standardless Second Amendment*, AM. CONST. SOC'Y FOR L. & POL'Y, Issue Brief (October 2010).[37]

While the Missouri General Assembly was working to propose an amendment to Section 23, two other states had passed or were proposing amendments to their own constitutional right to keep and bear arms. In November 2012, Louisiana adopted a

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[37] Available at https://www.acslaw.org/publications/issue-briefs/the-standardless-second-amendment.

legislatively-referred constitutional amendment regarding the right to bear arms.[38] The change to the previously-existing constitution is as follows (new language in ***bold italics***, deleted language ~~struck through~~):[39]

> §11. Right to Keep and Bear Arms
>
> The right of each citizen to keep and bear arms **is fundamental and** shall not be ~~abridged,~~ **infringed.** ~~but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.~~ **Any restriction on this right shall be subject to strict scrutiny**.

The official ballot title, adopted by the Louisiana General Assembly and submitted to the voters of Louisiana fully disclosed that the standard of review for gun laws was changing:[40]

> Do you support an amendment to the Constitution of the State of Louisiana to provide that the right to keep and bear arms is a fundamental right and any restriction of that right requires the highest standard of review by a court? (Amends Article I, Section 11)

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[38] *State v. Draughter*, 130 So.3d 855, 861 (La. 2013); 2012 Louisiana Acts, Act No. 874, Senate Bill No. 303.

[39] *Draughter*, 130 So.3d 855, 860, 861-62.

[40] *Id.* at 863.

Louisiana requires the ballot summary to be in "simple, unbiased, concise, and easily understood language." LA. REV. STAT. § 18:1299.1. Accordingly, Louisiana included the strict scrutiny standard in the summary statement, but described it to the voters in a simple manner—that any restriction of that right requires "the highest standard of review by a court."

During this same time, Alabama also legislatively referred a constitutional amendment regarding the right to bear arms.[41] Although adopted by the legislature in 2013, the measure was Amendment 3 on Alabama's November 2014 ballot.[42] Amendment 3 makes the following changes to ALA. CONST. art I, § 26:

> (a) ~~That every~~ Every citizen has a fundamental right to bear arms in defense of himself or herself and the state. Any restriction on this right shall be subject to strict scrutiny.
>
> (b) No citizen shall be compelled by any international treaty or international law to take an action that prohibits, limits, or otherwise

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[41] Act 2013-267, HB 8 (2013).

[42] http://alabamavotes.gov/ElectionInfo/2014SampleBallots.aspx?a=voters (any county contains the statewide measures); http://www.sos.state.al.us/elections/2014/ElectionInfo2014.aspx (Certification of Proposed Constitutional Amendments (certified to counties 8/22/2014)). According to media reports, it was adopted.

> interferes with his or her fundamental right to keep and bear arms in defense of himself or herself and the state, if such treaty or law, or its adoption, violates the United States Constitution.[43]

The Alabama legislature adopted the following ballot language, specifically alerting the voters of Alabama that a "yes" vote would subject gun laws to strict scrutiny:[44]

> Proposing an amendment to the Constitution of Alabama of 1901, to provide that every citizen has a fundamental right to bear arms and that any restriction on this right would be subject to strict scrutiny; and to provide that no international treaty or law shall prohibit, limit, or otherwise interfere with a citizen's fundamental right to bear arms. (Proposed by Act 2013-267)

Alabama's constitution requires that "the substance or subject matter of each proposed [constitutional] amendment shall be so printed that the nature thereof shall be clearly indicated." ALA. CONST. § 285; accord ALA. CODE § 17-6-41. The Alabama legislature, like Louisiana's, presumably determined that including the new strict scrutiny standard in the summary statement informed the voters of a significant purpose of the respective measures.

It is presumed that the General Assembly acted with full knowledge of what was

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[43] Act 2013-267, HB 8 (2013).

[44] *Supra*, footnotes 42 and 43.

happening in these other two states, as they were the first three in the country to add strict scrutiny to their state constitutional right to keep and bear arms. *Wilson*, 575 S.W.2d at 810. And, as noted, the Louisiana and Alabama legislatures, had determined, under requirements similar to Missouri's to promote full voter understanding, that the addition to their constitutions of strict scrutiny, or at least a description of it, should be in the ballot summaries.

The imposition of a strict scrutiny was a main point of Missouri's proposal Amendment as well. In his Amicus Brief in *Merritt*, the co-sponsor of SJR 36 explains, "The first major provision of SJR 36" is the adoption of strict scrutiny and that it is an addition to the Constitution.[45] The sponsor's subjective opinion on the matter is consistent with a simple reading and a rudimentary understanding of the law. The omission from the ballot title of the addition of the strict scrutiny standard to Section 23 is unacceptable. In order to provide a fair and sufficient summary of the main points, Missouri voters should have been given the same information Louisiana and Alabama voters had.

SJR 36 made a material change to the Constitution. Missouri has many statutes dealing with weapons. Those statutes are currently presumed constitutional unless they "clearly and undoubtedly" violate the Constitution and "palpably affront some fundamental law embodied in the constitution." *State v. Richard*, 298 S.W.3d 529, 530

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[45] *State v. Merritt*, SC94096, Brief of *Amicus Curiae* Sen. Schafer, p. 9.

(Mo. banc 2009). Under current law, the state has the "inherent right to regulate the carrying of firearms as a proper exercise of police power." *Id.* at 532.

Strict scrutiny is a horse of a different color. Neither this Court, nor the U.S. Supreme Court, has ever said that strict scrutiny should apply to gun laws. *See e.g., Heller,* 128 S.Ct. at 2817–18 (2008) (striking District of Columbia total ban on handgun possession in the home because it fails constitutional analysis "under any of the standards of scrutiny that we have applied"). *See also,* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: an Analytical Framework and Research Agenda*, 56 UCLA L. REV. 1443 (2009). Therefore the amendment announces a new level of scrutiny that has never been applied before. Nor has the Missouri Constitution required such scrutiny during the 150 plus years Missouri has been a State. If the voters wish to apply strict scrutiny to gun laws, they certainly have the right to do that, but all voters must be told of this important change to the Missouri Constitution on the ballot summary in order for them to make an informed decision.

Strict scrutiny is normally reserved for certain types of First Amendment restrictions and laws that impact a protected class. As this Court well knows, strict scrutiny review requires that a restriction "serve compelling state interests and be narrowly tailored to meet those interests." *Weinschenk v. State,* 203 S.W.3d 201, 211 (Mo. banc 2006). If upheld by this Court, Amendment 5 would abandon the current analytical framework in *Richard* for the strict scrutiny standard of review. The voters deserved to know that changing the analysis was a "probable effect" of a "yes" vote.

Because they were not so informed, there are serious doubts about the true result of the August election on this issue.

D. Conclusion

The summary statement unfairly lured voters in with a suggestion that Missouri law did not protect the right to bear arms and that state government was not required to enforce the right. But this was not the main point of the underlying measure. The summary was no summary at all because it failed to alert voters, even in the most oblique way, that strict scrutiny would now apply to all restrictions on the right to keep and bear arms, that carrying concealed weapons, previously only a privilege granted by statute, will become part of the right to keep and bear arms or that the state legislature would no longer be allowed to regulate ammunition and accessories absent compelling interest. The summary statement was insufficient and unfair. Because the voters saw an insufficient and unfair statement, there was an election irregularity of sufficient magnitude to throw serious doubt on the results. The election must be set aside.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request this Court invalidate the August 5, 2014 election on Constitutional Amendment No. 5, SJR 36, amending Article I, Section 23 of the Missouri Constitution, and cause a certified copy of its judgment to be transmitted to each affected election authority and to the Secretary of State.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned counsel certifies that on this 7th day of November 2014, a true and correct copy of the foregoing brief was served on the following by electronic service of the Case.net e-filing system:

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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;

(2) complies with the limitations in Rule 84.06;

(3) contains 11,742 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2010; and

(4) the brief was scanned and found to be virus-free.

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