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

REPLY BRIEF OF PLAINTIFFS DOTSON AND MORGAN

STINSON LEONARD STREET LLP
Charles W. Hatfield, No. 40363
Khristine A. Heisinger, No. 42584
230 W. McCarty Street
Jefferson City, Missouri 65101
573.636.6263
573.636.6231 (fax)
chuck.hatfield@stinsonleonard.com
khristine.heisinger@stinsonleonard.com

Attorneys for Plaintiffs D. Samuel Dotson III and Rebecca Morgan

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JURISDICTIONAL STATEMENT

Section 115.555[1] is unambiguous:

> All contested elections for the office of governor, lieutenant governor, secretary of state, attorney general, state treasurer and state auditor shall be heard and determined by the supreme court. Likewise, all 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). The State of Missouri[2] appears to argue that section 115.555 is unconstitutional.[3]

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[1] All statutory references are to the Revised Statutes of Missouri (2000) unless otherwise indicated.

[2] Although only Secretary of State Kander is a Defendant in this case, the Brief of the State ("State's Brief") represents that the Secretary has no position about this case, and that the arguments presented in the brief are presented one behalf of the State of Missouri because this case involves questions as to the validity of a provision of Missouri's Constitution. State's Br., p. 2 n.1.

Section 115.555 is presumed constitutional and can be found unconstitutional only if it clearly and undoubtedly violates a constitutional provision. *State v. Vaugh*n, 366 S.W.3d 513, 517 (Mo. banc. 2012). Article V, section 14(a) states, "The circuit courts shall have original jurisdiction over all cases and matters, civil and criminal." This is general language. But Missouri Constitution article VII, section 5 specifically sets out how this Court's jurisdiction shall be determined in the narrow area of election contests:

> Contested elections for governor, lieutenant governor and other executive state officers shall be had before the supreme court in the manner provided by law, and the court may appoint one or more commissioners to hear the testimony. The trial and determination of contested elections of all other public officers in the state, shall be by courts of law, or by one or more of the judges thereof. The general assembly shall designate by general law the court or judge by whom the several classes of election contests shall be tried and regulate the manner of trial and all matters incident thereto; but no law assigning jurisdiction or regulating its exercise shall apply to the contest of any election held before the law takes effect.

Constitutional provisions are subject to the same rules of construction as statutes, except they are given a broader construction due to their more permanent character.

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[3] Intervenors Dempsey, Jones and Richard recognize this Court has jurisdiction, Intervenors' Br., p. 5. The Joint Brief of Schaefer and Missourians Protecting the 2nd Amendment omitted any discussion of this Court's jurisdiction. ("Joint Brief").

Brown v. Carnahan, 370 S.W.3d 637, 647 (Mo. banc 2012). "This Court must assume that every word contained in a constitutional provision has effect, meaning, and is not mere surplusage." *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 206 (Mo. banc 2008). The first sentence is clear. The people require that election contests of statewide elected officials be heard in the Supreme Court, and could not be heard by some other court or tribunal via legislative action (but the Court can appoint a commissioner). In the second sentence, the people give the legislature the authority to decide jurisdiction of election contests of "other public officers" so long as they are in "courts of law, or by one or more of the judges thereof." The third sentence of Article VII, section 5 does not use the term "public officer" and this must be accorded significance. The significance is that it covers election contests of all kinds, not just of public officers. As such, the people gave authority to the General Assembly to determine, by statute, what court would have original jurisdiction of "all the classes of election contests" (except as specified in the first sentence). Under this authority, the General Assembly determined that election contests on state constitutional amendments shall be decided by the Supreme Court. § 115.555.

Additionally, jurisdiction of election contests in article VII, section 5 is a specific provision, narrower in applicability than the jurisdiction addressed in article V, section 14. Two constitutional provisions relating to original jurisdiction of lawsuits "should be read together, but where one [section] deals with the subject in general terms and the other deals in a specific way, to the extent they conflict, the specific [section] prevails over the general [section]." *Turner v. School Dist. of Clay*ton, 318 S.W.3d 660, 668 (Mo.

banc 2010). If the General Assembly had not adopted a statute vesting jurisdiction over this election contest in the Supreme Court, then the general provision of the constitution, article V, section 14, would be controlling. But this Court should not lightly throw aside a statute specifically authorized and envisioned by the Constitution. This Court should apply the same rules of constitutional law to a statute involving its own jurisdiction as it does to every other statute. Because the statute in question does not clearly violate the Constitution, it must stand.

ARGUMENT

A. Introduction

Defendants ask this Court to allow the Constitution of Missouri to be amended by way of an unreviewed summary statement. The voters have approved a significant change to Missouri law—requiring, for the first time in our history, strict scrutiny review of all gun laws and taking away the right of the General Assembly to regulate concealed weapons. The legislature wrote a commercial for this amendment and submitted it to the voters. The Governor had no authority to review this summary statement, although he can review other legislative enactments. The Secretary of State had no opportunity to review the summary statement although he would review every summary statement placed on the ballot by the people. The Courts could not review the summary statement before it went on the ballot—even though Plaintiffs sought review at the first opportunity.

Now, Defendants attempt the perfect crime by arguing that, in spite of this Court's express holding in *Dotson I*,[4] there is no opportunity for review here either. If this Court follows Defendants' logic the Constitution will have been amended via a summary statement that was not reviewed by any other branch of government. Nothing is more core to our system than the checks and balances afforded by judicial review. That review is contemplated by both the Constitution and the statutes. It should not be abandoned

[4] *Dotson v. Kander*, 435 S.W.3d 643 (Mo. banc 2014).

here. This Court must ensure the integrity of the process to amend our Constitution by reviewing the summary statement here and finding it insufficient and unfair.

B. This case is not time barred

Section 115.557 authorizes an election contest to be filed no later than 30 days "after the official announcement of the election result by the secretary of state." This election contest was filed within that time period. No party disputes that fact. The State and Intervenors Dempsey, Jones and Richard, however, urge this Court to ignore section 115.557, find that it conflicts with the effective date provision of the constitution, or apply a laches bar that is shorter than the statute of limitations. This case is not time barred in any manner.

1. Missouri Constitution article XII, section 2(b) is an effective date, not a limitations period on lawsuits challenging constitutional provisions.

Without directly stating it, the State and Intervenors argue that section 115.557's specific limitations period conflicts with article XII, section 2(b) such that the latter controls and the claim is time barred. The statute is presumed constitutional and neither the State nor Intervenors have met the burden of showing that the statute clearly and undoubtedly violates a constitutional provision. They essentially argue that article XII, section 2(b), making amendments effective 30 days after the election, also operates as a limitations period on lawsuits challenging the amendments. Accordingly, the argument

goes, although Plaintiffs filed within the time period in section 115.557, Plaintiffs filed too late as it was after the effective date of the amendment.

An effective date operating as a time limitation is a novel, but misguided, argument. Section 2(b) also requires that proposed amendment to the constitution must be submitted to the voters "as required by law," and the law requires that the summary statement prepared by the General Assembly "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. Section 115.557 and all provisions of article XII, section 2(b) can be given meaning. There is no authority cited by the State or Intervenors that an effective date acts as a bar to a legal challenge. There is no conflict between section 115.557 and the Constitution. This case was timely filed.

2. Missouri Constitutional Amendments are successfully challenged more than 30 days after adoption of the amendment, and this defense has apparently not been raised by the State in those cases.

In August 2004, the citizens of Missouri approved an Amendment to the Missouri Constitution declaring "[t]hat to be valid and recognized in this state, a marriage shall exist only between a man and a woman." MO. CONST. art. I, § 33. But this constitutional provision is challenged in recent marriage equality cases as violating the Due Process and

Equal Protection Clauses of the U.S. Constitution.[5] And section 33 has been found to conflict with the U.S. Constitution, and in such a case, the U.S. Constitution controls.[6] Following the reasoning in the State's Brief as well as Intervenors' Brief, these cases should have been time-barred because they were not brought within 30 days of when Missourians adopted article I, section 33. Evidently, if the State even raised the claim it raises in this case in the marriage equality cases, the Courts did not see fit to address such a hollow argument in the orders and judgments issued.[7] The State's inclusion of the argument in this case, but not others, demonstrates its insincerity.

3. Intervenors' citation to *Rentschler* is of no assistance to this Court. Laches does not bar what a statute of limitations allows.

It is not clear why Intervenors cite *Rentschler v. Nixon*, 311 S.W.3d 783 (Mo. banc 2010). *Rentschler* is a procedural defect (original purpose and multiple subject challenges) challenge to a 20 year old statute where the court resorted to laches because the State failed to raise the statute of limitations as defense. The statute of limitations

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[5] *E.g.*, *Lawson v. Kelly*, Case No. 14-0622-CV-W-ODS (W.D. Mo.); *State of Missouri v. Florida*, Case No. 1422-CC09027 (22nd Circuit, City of St. Louis, Div. 10)

[6] *E.g.*, *Lawson*, November 7, 2014 Order and Opinion of Judge Smith; *Florida*, November 5, 2014 Order and Judgment, Judge Burlison.

[7] *Id.*

would have clearly barred the claim. § 516.500 or § 516.110(3). The facts of this case are far different. Here, Plaintiffs filed this case within the statutory time period. § 115.557. There is no reason for the court to apply laches in this case based on *Rentschler*. That case does not support Intervenors' argument.

More importantly, this Court has held that "the doctrine of laches will not bar a suit before expiration of the period set forth in the applicable statute of limitations in the absence of special facts demanding extraordinary relief." *Lane v. Non-Teacher Sch. Employee Ret. Sys. of Mo.*, 174 S.W.3d 626, 640 (Mo. App. 2005)(quoting *State ex rel. General Elec. Co. v. Gaertner*, 666 S.W.2d 764, 767 (Mo. banc 1984)). Intervenors have failed to set forth special facts demanding extraordinary relief. Laches does not bar what section 115.557 allows. This case was timely filed.

C. This Court can review a summary statement post-election through an election contest.

1. The ability to raise a challenge to the summary statement through an election contest was specifically identified by this Court as a protection against foreclosure of judicial review of summary statements for constitutional amendments.

In *Dotson v. Kander*, 435 S.W.3d 643 (Mo. banc 2014) ("*Dotson I*"), the identical Plaintiffs in this suit challenged the summary statement for Constitutional Amendment 5 under section 116.190, RSMo Supp. 2013, as unfair and insufficient. They filed the

lawsuit the same day the official ballot title was certified. This Court found that a statute prohibited modifications to the summary statement once the election was less than six weeks away and therefore the relief sought could not be granted and the case was moot. This Court addressed a specific concern of Plaintiffs as follows:

> 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.

Dotson I. The State and all Intervenors are now telling this Court it was wrong. The State and Intervenors argue that the judiciary can do nothing to protect the voters from an unfair and insufficient summary statement written by the General Assembly. They are wrong. This Court should not abandon its opinion in *Dotson I*. That decision was well-reasoned. Accepting the State's invitation to reverse *Dotson I* just a few short months after it was issued would prevent judicial review of summary statements—a wholly unjust result.

This Court's opinion in *Dotson I* is consistent with Florida cases discussed at greater length in Section F.1, below. Defendants in the Florida cases argued that once the election occurred, there could be no challenge to the ballot measures based on Florida's summary statement requirement. *Armstrong v. Harris*, 773 So.2d 7, 20 (Fla. 2000); *Wadhams v. Board of Cnty. Comm'rs of Sarasota Cnty.*, 567 So.2d 414, 417 (Fla. 1990). The Florida Supreme Court rejected that argument noting, "The Board in effect argues that hoodwinking the voting public is permissible unless the action is challenged prior to the election." *Wadhams*, 567 So.2d at 417 (quoted with approval in *Armstrong*, 773 So.2d at 20). This Court's opinion in *Dotson I* with regard to an election contest is sound. This Court should not effectively sanction the misleading of voters by barring a post-election review under the facts of this case.

2. This election contest does not make section 116.190, RSMo Supp. 2013, meaningless.

The State argues that allowing a review of the summary statement in an election contest would render section 116.190, RSMo Supp. 2013, meaningless. State's Br., p. 25; Intervenors' Br., p. 18. Conducting a summary statement review in this election contest would not render section 116.190 meaningless because the Plaintiffs in this case did bring an action under section 116.190. A decision in this case is limited to the facts before this Court—a summary statement written by the General Assembly, Plaintiffs brought an action under section 116.190 the same day the ballot title was certified, the case moved very rapidly, but the trial court decision was issued within six weeks of the election.

But for these facts, Intervenors' argument for the application of laches (albeit based on different and unique facts), might be one way to discourage a "wait and see" approach, if the Court finds that to be a policy of section 116.190 review when dealing with a summary statement written by the general assembly. Post-election review of the summary statement in this case does not render section 116.190 meaningless.

3. An unfair and insufficient ballot title is an election irregularity.

The State argues that "irregularities" are limited to problems in the process and are limited to observable conduct at an election location. State's Br., pp. 15-17. It is unclear how that would exclude an unfair and insufficient ballot title. If there are errors on a ballot, are those not irregularities? If the ballot misprinted a candidate's name or omitted a name is that not an irregularity? If numerous ballots had omitted the fiscal note summary portion of an official ballot title, is that not an irregularity? The evidence in this case is that an unfair and insufficient summary statement was on every ballot in the state and that every voter in the August 5 election had in front of him or her that unfair and insufficient summary statement when voting. The State's argument that an unfair and insufficient summary statement is not an election irregularity is inconsistent with its argument that "voters receiving an incorrect ballot style for their district"[8] is an

[8] State's Brief, p. 16.

irregularity. The State does not explain how that can be an irregularity, but an insufficient and unfair summary statement cannot be an irregularity.

Intervenors argue that in an election contest, the only thing that can be challenged is "the correctness of the returns." Jt. Br., p. 3. They cite to section 115.553, which under subsection one states, "Any candidate for election to any office may challenge the correctness of the returns for the office, charging that irregularities occurred in the election." Plaintiffs' position is that the returns on Constitutional Amendment 5 are wrong because every single voter on that amendment had before them a prejudicial, unfair and insufficient summary statement. That taint clouded the outcome of the entire election and is therefore an irregularity of such magnitude that doubt is cast upon whether the election, the results of which are in the returns, was valid.

4. The *Knight* case does not prohibit review of a summary statement via an election contest.

The State claims that *Knight v. Carnahan*, 282 S.W.3d 9 (Mo. App. 2009), prohibits this action. State's Br., p. 18-19. *Knight* is not an election contest case. *Knight* is a pre-election challenge to a fiscal note summary. The *Knight* plaintiffs did not file a challenge within 10 days of certification of the official ballot title under section 116.190, RSMo. Instead, they filed suit within 10 days after certification of sufficiency of the petition by the Secretary of State, under section 116.200. The Court of Appeals held that a section 116.190 claim could not be bootstrapped under a section 116.200 lawsuit. The Court held that a pre-election challenge to the fiscal note summary must be brought

within the time limit set forth in section 116.190, RSMo Supp. 2013. That is all that *Knight* states about this issue. It says nothing about an election contest. Further, in this case, Plaintiffs did timely file a challenge to the summary statement under section 116.190. *Knight* is inapplicable to this case.

D. There is no higher standard for post-election review of an insufficient and unfair summary statement.

The State argues for different standards pre- and post-election, but does not suggest what the post-election standard might be. State's Br., pp. 23-25. The State discusses whether there is an irregularity of a sufficient magnitude, which is a different issue. It then suggests that absent a different standard, election contests will be used to provide a "second look" at a summary statement, and that there will be no incentive for opponents to bring challenges before the election, under section 116.190, RSMo Supp. 2013, again arguing that the statute would be rendered superfluous.

Of course there would be no second bite at the apple in election contests. Issue and claim preclusion will prevent that. And this Court specifically noted that fact in a parenthetical in *Dotson I*: "[J]udicial 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." *Id.* at 645 (emphasis added). The issue of rendering section 116.190 meaningless was addressed in Section C.2, above.

Intervenors argue that the post-election standard is falsity or fraudulence. Intervenors' Br., pp. 28-29. It is unclear how they arrived at falsity being a requirement, as they cite no case even mentioning falsity. The result of imposing a "falsity" requirement would mean that a summary statement that is not untrue, even if it woefully fails to inform the voters of anything, even if it is prejudicial, cannot be successfully challenged post-election. Such a standard is repugnant to the reasons for summary statement standards and judicial review of same: "(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." *Buchanan v. Kirkpatrick,* 615 S.W.2d 6, 11 (Mo. banc 1981).

As for a fraud requirement, Intervenors are misrepresenting case law. In *Royster v. Rizzo*, 326 S.W.3d 104 (Mo. App. 2010), the court recognized that not every violation of the law (election irregularity) should require a new election, and the judiciary's role is to determine whether:

> [T]he deviation from the prescribed forms of law had or had not such a vital bearing on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is deemed fatal; otherwise it is not. . . . Courts justly consider the main purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end; and, in order not to defeat the general design, are frequently led to ignore such innocent irregularities of election officers as are free of

fraud, and have not interfered with a full and fair expression of the voters' choice.

Id. at 111 (quoting *Bowers v. Smith,* 17 S.W. 761, 762-63 (Mo.1891)). The *Royster* court found the irregularities complained of in that case to be "innocent irregularities of election officers" that did not rise to the level of fraud. *Royster* does not support Intervenors' argument that fraud is required to be shown in all successful election contests. *Royster* is actually an example of a court determining whether certain irregularities are "irregularities of a sufficient magnitude" to cast doubt on the validity of the election." § 115.549 (in primary election contests); *Royster*, 326 S.W.3d at 115. The same language is found in section 115.593, applicable to the election contest in this case. Plaintiffs are not alleging minor irregularities, as was the case in *Royster* (and in *Kasten v. Guth*, 395 S.W.2d 433 (Mo. 1965)).

Plaintiffs' claim is that the summary statement was unfair and insufficient, that it did not comply with section 116.155, and it failed to provide an informed understanding of the probable effect of a proposed constitutional amendment. Accordingly, the claim is that the election irregularity had "such a vital bearing on the proceedings as probably prevented a free and full expression of the popular will" and there was not a fair or valid election. Plaintiffs are not alleging that an election authority or two made some minor errors. Instead, Plaintiffs here allege the worst kind of election irregularity—an unfair and insufficient ballot title which deceived the voters. Plaintiffs do not need to show falsity or fraud.

E. The Summary Statement for SJR 36 is insufficient and unfair. A sufficient and fair summary statement for SJR 36 is neither impossible nor challenging to draft.

Plaintiffs see no benefit to reiterating their argument from the opening brief regarding the ways in which the summary statement is insufficient and unfair. There is but one claim in each response brief that Plaintiffs are compelled to address. Each of the response briefs tells this Court that a summary statement simply cannot be written that addresses Plaintiffs' concerns.[9] But it can.

The General Assembly has Senate Research, House Research and Legislative Research at their disposal, with staff that essentially writes for a living. A fair summary statement is not only required, it can be done and it is neither time-consuming nor particularly challenging.

Here is a 49 word statement, excluding articles ("the" and "a"), that covers not only what Defendant and Intervenors argue are the main points, but also what Plaintiffs argue are the main points but were unlawfully omitted in what was before every voter:

> Shall the Missouri Constitution be amended to declare that the existing right to keep and bear arms is unalienable, include ammunition in that right, subject restrictions of that right to the highest standard of review by a court, require state government to uphold that right, and remove the legislature's authority to ban concealed weapons?

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[9] State's Br., pp. 21-22; Intervenors' Br. pp. 35-37; Joint Br., p. 14.

Here is a 50 word (excluding articles) version that leaves out what the redundant statement that "state government is obligated to uphold the right":

> Shall the Missouri Constitution be amended to declare that the existing right to keep and bear arms is unalienable, add ammunition and accessories to the right to keep and bear arms, provide that any restriction of that right requires the highest standard of review by a court, and remove the legislature's authority to ban concealed weapons?

And here is a 40 word version (excluding articles) that informs the voters of the truly substantial changes to Section 23:

> Shall the Missouri Constitution be amended to remove the legislature's authority to ban concealed weapons, add ammunition and accessories to the right to keep and bear arms, and provide that any restriction of that right requires the highest standard of review by a court?

Clearly, the General Assembly either didn't even consider changing the summary statement of SJR 36 as introduced after it was amended, or it consciously decided not to. Because it could have been done. The voters could and should have been informed.

F. No additional evidence is needed in this case for the Court to invalidate the election on Constitutional Amendment 5.

1. The crucial evidence in this case is that irregularities of a sufficient magnitude occurred to cast doubt on the validity of the August 5 election on Constitutional Amendment 5.

This Court has before it all that it needs to decide this case. It has the summary statement and the changes to article I section 23. The evidence is that every person voting on Amendment 5—989,171 voters— had before them the summary statement, not the actual proposed changes to section 23. This Court needs nothing more to determine if the summary statement is insufficient and unfair, if it failed to promote an informed understanding of the probable effect of a proposed amendment. This Court need only look at the measure and at the words of the summary statement. This analysis has always been a question of law in challenges to summary statement under section 116.190, RSMo Supp. 2013; it should be no different here—no additional facts are needed.

It bears repeating: statute requires that the summary statement 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. The reason for this 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." *Buchanan,* 615 S.W.2d at 11.

The existence of the statutory requirement and the provision for judicial review of whether the summary statement meets this requirement is proof that a fair and sufficient summary statement that informs the voters of the probable effects of voting "yes" is a crucial component of having a fair election. And if a summary statement is found to be insufficient, unfair or prejudicial, that certainly should cast doubt on the outcome of the election. The evidentiary record is that the summary statement is the only thing the voters had in front of them when they voted "yes" or "no." The evidence is that the actual language of the measure was not before them when they voted. Defendants have put on no evidence to the contrary and no evidence that voters did anything else but read that summary statement and then vote "yes" or "no." There is evidence of an election irregularity of a sufficient magnitude to cast doubt on the validity of the August 5 election on Constitutional Amendment 5.

The Florida Supreme Court has decided cases similar to this one. *Armstrong v. Harris*, 773 So.2d 7 (Fla. 2000); *Wadhams v. Board of Cnty. Comm'rs of Sarasota Cnty.*, 567 So.2d 414 (Fla. 1990). Florida has a statutory requirement similar the Missouri's summary statement requirement:

> Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot.... The substance of the amendment or other public measure shall be an

explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.

Armstrong, 773 So.2d at 12; *Wadhams*, 567 So.2d at 416. In *Armstong*, the issue was a legislatively proposed statewide constitutional amendment regarding the death penalty. In *Wadhams*, an amendment to a county charter was at issue.

The ballot in *Wadhams* actually contained the language of the charter provisions as they would read if the measure was adopted, but no explanatory statement of the changes. The court determined that state statute required that the ballot contain a summary of the proposed changes in order to state the chief purpose of the measure. The Florida Supreme Court found the ballot deceptive, because it failed to inform voters of how the sections would be changed. *Id.* at 416. In *Armstrong*, there was an explanatory statement, but the court found it deficient. *Id.* at 16-19. While not controlling, the Florida Supreme Court's analysis of whether a violation of the statutory requirement regarding the required explanatory statement is grounds for invalidating the elections, is spot-on.

The defendants in the Florida cases argued that even though the ballots violated the statutory requirement for the explanatory statement, the elections should not be invalidated. They claimed "there was no reason to invalidate the amendments based on voter confusion because the voters were afforded ample opportunity to become informed on the issue before the election by public hearings, advance publication of the proposal, and media publicity." *Wadhams*, 567 So.2d at 417. The Florida Supreme Court rejected the argument, stating, "[t]he burden of informing the public should not fall only on the press and opponents of the measure—the ballot ... summary must do this." *Id.* The court

also rejected the argument that a favorable vote cured any defects in the form of the submission, stating:

> This defect was more than form; it went to the very heart of what [the statute requiring an explanatory statement] seeks to preclude. Moreover, it is untenable to state that the defect was cured because a majority of the voters voted in the affirmative on a proposed amendment when the defect is that the ballot did not adequately inform the electorate of the purpose and effect of the measure upon which they were casting their votes. No one can say with any certainty what the vote of the electorate would have been if the voting public had been given the whole truth, as mandated by the statute, and had been told "the chief purpose of the measure." As this Court has previously stated: "[T]he voter should not be misled and ... [should] have an opportunity to know and be on notice as to the proposition on which he is to cast his vote.... What the law requires is that the *ballot* be fair and advise the voter sufficiently to enable him *intelligently* to cast his ballot."

Id. at 417 (emphasis original) (quoting *Hill v. Milander*, 72 So.2d 796, 798 (Fla.1954)). In striking the county charter amendment, the court stated, "Deception of the voting public is intolerable and should not be countenanced." *Id.* at 418. In the *Armstrong* case the court reviewed the foregoing analysis from *Wadhams* and reaffirmed it, striking the constitutional amendment after it had been adopted. *Armstrong*, 773 So.2d at 18-21.

This Court, upon finding that the summary statement for Constitutional Amendment 5 is insufficient, unfair and prejudicial, should apply the same logic as the Florida Supreme Court in reaching the conclusion that the irregularities are of a sufficient magnitude so as to cast doubt on the validity of the election. The purpose of the summary statement is to give voters an informed understanding of the probable effects of the amendment. *Buchanan,* 615 S.W.2d at 11. When this is not done, the irregularity is of a great magnitude—no one can say with any certainty what the vote of the electorate would have been if the voting public had been given a fair and sufficient summary statement. This casts substantial doubt upon the validity of the August 5 election on Constitutional Amendment 5, and this Court should declare it invalid.

2. An extensive evidentiary record is not required simply because the election contest statutory scheme allows for one.

The State argues that because election contests provide for an evidentiary process that is supposedly not allowed in section 116.190, RSMo Supp. 2013, ballot title challenges, it follows that more evidence is required in an election contest even when the sole basis for the challenge is to the summary statement. State's Br., pp. 16-18. First, a challenge under section 116.190 does require evidence—the summary statement and the proposed measure, and if the fiscal note or fiscal note summary is challenged, then a more developed factual record is generally adduced. See, e.g., *Brown*, 370 S.W.3d at 657-58, 661-663, 664-668 (reviewing evidence regarding the fiscal note and fiscal note

summaries for a tobacco tax initiative, minimum wage initiative, and payday loan initiative). Last, election contests cover a far broader range of irregularities than an unfair and insufficient summary statement. Some election irregularities would require an extensive evidentiary record. The statutes are simply providing for the range of possibilities, not requiring a voluminous evidentiary record. The State's argument is muddled.

3. There is no requirement to prove that any voter was actually misled by the summary statement or to prove there would have been a different election result.

The Defendants argue that in an election contest based on an unfair and insufficient summary statement, Plaintiffs must prove that actual voters were misled to vote against their true position on the ballot measure and/or that the outcome of the election would have been different. Jt. Br., pp. 1-5; State's Br. p. 17-18; Intervenors' Br., 11, 19-25. Neither is accurate. The plain language of the applicable statutes contradicts Defendants' arguments.

Section 115.593 requires that the irregularities be of a sufficient magnitude to cast doubt on the validity of the election in order to trigger voiding the election results. That language is clear. The statute authorizing recounts states, "Where the issue is drawn over the validity of certain votes cast, a prima facie case is made if the validity of a number of votes equal to or greater than the margin of defeat is placed in doubt." § 115.583. Neither

statute requires a contestant to prove that there would have been a different result but for the irregularities, or to prove that some number of voters were misled.

The word used in both statutes is "doubt," which is, by definition, uncertainty. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 679 (2002). Defendants' arguments that there must be certainty of deception or of a different outcome conflict with the clear language of the statutes.

G. Rules of statutory construction allow the remedy Plaintiffs seek.

The State argues that the statute does not authorize voiding of the vote without also ordering a new election. It cites only the statute itself.[10] But the statute inherently contemplates a two-step process: (1) finding there were irregularities of sufficient magnitude to cast doubt on the validity of the initial, thereby finding the results of that election void; and (2) order a new election. Plaintiffs are not saying that this Court cannot find that a new election must be held, simply that the Constitution, article XII, section 2(b) reserves to the General Assembly and the Governor the power to set the date of the election. The General Assembly determines the year by when it passes the proposed amendment; the Governor determines whether it is the next general election or at a special election.

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[10] Although some cases are discussed under the heading, "the only remedy Plaintiffs seek is not permitted," the State is once again delving into the "irregularities of a sufficient magnitude" issue, and the sufficiency of the evidence. State's Br., pp. 33-35.

Under the State's argument, if the votes on Amendment 5 were merely 50 votes apart and Plaintiffs brought in 75 people who swore under oath that they voted yes because they were misled by the summary statement, and would have voted no if the summary statement had been sufficient and fair, this Court could do nothing. The State's argument is not a slippery slope one—it would apply to any fact scenario for a constitutional amendment, whether proposed by the General Assembly or by initiative petition. It would mean that for proposed constitutional amendments, any level of irregularities, even those that all parties to this contest might agree are of a sufficient magnitude to cast doubt on the election's validity, the election result cannot be invalidated. When construing 115.593, this Court must assume the General Assembly did not intend such an unreasonable and unjust result. *Turner*, 318 S.W.3d at 675.

Plaintiffs do not suggest that section 115.593 is unconstitutional on its face. Accordingly, no portion needs to be severed. It is only in the context of constitutional amendments, whether proposed by the General Assembly or by initiative petition, that the language stating that the court's order shall set the date of the election conflicts with article XII, section 2(b)'s language as to when the proposed measure may be on the ballot. Plaintiffs' position is that in an order invalidating the election results, the Court must be mindful of article XII, section 2(b) with regard to any language ordering a new election. Statutes are presumed constitutional and when a statute is susceptible of a reasonable construction that will support its constitutionality, a court should follow that construction. *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999). This is what Plaintiffs request.

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, and for other such relief as the Court finds appropriate.

Respectfully submitted,

STINSON LEONARD STREET LLP

By: /s/ Khristine A. Heisinger

Charles W. Hatfield, No. 40363
Khristine A. Heisinger, No. 42584
230 W. McCarty Street
Jefferson City, Missouri 65101
573-636-6263
573-636-6231 (fax)
chuck.hatfield@stinsonleonard.com
khristine.heisinger@stinsonleonard.com

Attorneys for Plaintiffs Dotson and Morgan

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned counsel certifies that on this 2nd day of December 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:

Jeremiah Morgan
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102
Tel. (573) 751-1800
Fax (573) 751-0774
jeremiah.morgan@ago.gov

Attorneys for Defendant Kander

Marc H. Ellinger
Stephanie Bell
Blitz, Bardgett & Deutsch, L.C.
308 East High Street, Suite 301
Jefferson City, MO 65101
Tel. (573) 634-2500
Fax (573) 634-3358
mellinger@bbdlc.com
sbel@bbdlc.com

David H. Welch
Deputy General Counsel
Missouri House of Representatives
Capitol Building, Room 407C
Jefferson City, MO 65101
Tel. (573) 522-2598
david.welch@house.mo.gov

Attorneys for Intervenor/Defendants Dempsey, Jones and Richard

David Brown
Brown Law Office LC
501 Cherry Street Suite 100
Columbia, MO 65201
Tel. (573) 814-2375
Fax (800) 906-6199
dbrown@brown-lawoffice.com

Attorney for Intervenors/Defendants Missourians to Protect the 2nd Amendment and Schaefer

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 7,146 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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