SC94482

IN THE SUPREME COURT OF MISSOURI

D. SAMUEL DOTSON, II, et al.,

Plaintiffs,

vs.

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

Defendants/Intervenors.

BRIEF OF THE STATE

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RESPONSE TO JURISDICTIONAL STATEMENT

As set forth in the argument below, this Court is without jurisdiction in this case and should dismiss, or alternatively transfer.

STATEMENT OF FACTS

On May 7, 2014, the Missouri General Assembly passed Senate Committee Substitute for Senate Joint Resolution No. 36 (SJR 36). (Joint Stipulation (Jt. Stip.) ¶ 6, Ex. 2). SJR 36 proposed an amendment to Article I, § 23 of the Missouri Constitution. (Jt. Stip. ¶ 6, Ex. 2). The General Assembly also prepared and included in SJR 36 a summary statement for the ballot title, but did not include a fiscal note or fiscal note summary. (Jt. Stip. ¶ 6, Ex. 2).

SJR 36 was delivered to the Secretary of State's office on May 30, 2014. *Dotson v. Kander*, 435 S.W.3d 643, n.1 (Mo. banc 2014). The Secretary of State, a named defendant in this action,[1/] then forwarded the proposed

[1/] The Secretary of State is named as a defendant because of his role regarding certification of the official ballot title, which includes ballot summary language prepared by the General Assembly. The ballot summary is included in the official ballot title as required by § 116.155, RSMo. The Secretary of State, however, plays only a ministerial role in the preparation or approval of this ballot summary language. As such, the Secretary of State takes no position regarding the challenge to the ballot summary language. Because this case involves questions as to the validity of a provision of

amendment to the State Auditor's office for preparation of a fiscal note and fiscal note summary. After receiving the fiscal note and fiscal note summary from the State Auditor's office, the Secretary of State certified the official ballot title on June 13, 2014, which included the General Assembly's summary statement as well as the State Auditor's fiscal note summary. (Jt. Stip. ¶ 8, Ex. 3).

By proclamation on May 23, 2014, Governor Nixon placed the proposed amendment on the August primary election ballot. (Jt. Stip. ¶ 7). And on June 13, 2014, the Plaintiffs in this case filed a petition in Cole County Circuit Court challenging the fairness and sufficiency of the General Assembly's summary statement under § 116.190,[2/] later filing an amended petition. (Jt. Stip. ¶ 9). Plaintiffs' earlier petition was consolidated at the circuit court level with a separate challenge filed by other opponents. (Jt. Stip. ¶ 10). Final judgment was entered by the circuit court on July 1, 2014, dismissing the case as moot under § 115.125.2, but also holding that the summary statement was fair and sufficient. (Jt. Stip. ¶ 11); *see also Dotson*,

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Missouri's Constitution, arguments against Plaintiffs' Petition are presented by counsel on behalf of the State of Missouri.

[2/] All references to the Missouri Revised Statutes are to the 2014 Cumulative Supplement unless otherwise specified.

435 S.W.3d at 643. This Court also found the case moot as of June 24, 2014 and dismissed the case without reaching the merits, thereby leaving the measure on the ballot. *Dotson*, 435 S.W.3d 643.

Over 60% voted in favor of the amendment, securing its passage by a margin of 216,555 votes (602,863 votes "yes," and 386,308 votes "no"). (Jt. Stip. ¶ 16). Pursuant to Article XII, § 2(b), of the Missouri Constitution, the new amendment became effective thirty days after the election, on September 5, 2014. Then, on September 24, 2014, Plaintiffs challenged the election results on the basis of voter irregularities under § 115.555, filing their Petition in this Court, as well as a Petition in the Circuit Court of Cole County.

In support of their claim of voter irregularities, Plaintiffs argue only that the summary statement was unfair and insufficient. Provided an opportunity to submit evidence of any voter irregularities, Plaintiffs submitted only the summary statement and requested that the vote of the people be set aside and the constitutional amendment be invalidated. (Petition, p. 11; Plaintiffs' Br. p. 17).

SUMMARY OF THE ARGUMENT

The voting on SJR 36 produced a dramatic result, though not particularly surprising considering the subject matter of the proposal:

- 602,863 voted in favor of the amendment; and
- 386,308 voted against the amendment.

Plaintiffs' post-election contest now seeks to set-aside all of those votes and remove the amendment entirely from the Missouri Constitution. To support such a drastic, and ultimately unauthorized remedy, Plaintiffs claim that the wording of the summary statement for SJR 36 constituted an irregularity of "sufficient magnitude to cast doubt on the validity" of the election results. § 115.593. But were 602,863 voters, or even 216,555 voters (the margin of passage), really deceived or misled by the summary statement in this case? No, they were not.

Before reaching any merits analysis, however, this Court's jurisdiction and the Plaintiffs' claim must be examined closely. The Missouri Constitution does not provide for original jurisdiction in the Supreme Court (or even exclusive appellate jurisdiction) for challenges to ballot measures such as this. Instead, challenges to summary statements are expressly provided for (and limited) in § 116.190. Plaintiffs now seek to apply the standards for pre-election review to post-election contests. But those standards are not appropriate, and fail in any event.

Nowhere in chapter 115 – the chapter dealing with post-election contests – is there any reference to summary statements. Yet, in chapter 116 – the chapter dealing with pre-election challenges – there are numerous references to summary statements. This difference is significant. While pre-election challenges are focused on the legal question of whether a summary statement provides sufficient "notice of the purpose" of the proposal, *see United Gamefowl Breeders Ass'n of Mo. v. Nixon*, 19 S.W. 3d 137, 140 (Mo. banc 2000), post-election contests are focused on some observable conduct that occurs at the location of the election. Indeed, Plaintiffs must set forth the points on which they wish to contest the election and "the facts" they will prove in support of such points. § 115.557. Plaintiffs have failed to do so.

And even if the pre-election standards for fairness and sufficiency of a summary statement were applied to a post-election contest, the Plaintiffs' claim in this case would still fail. Plaintiffs acknowledge, for example, that it is beyond dispute "that the great majority of Missourians support the right to keep and bear arms." (Plaintiffs' Br. p. 29). And so the results of the election were not surprising since the proposed constitutional amendment in SJR 36 sought to strengthen the right to keep and bear arms in Missouri. This is exactly what the summary statement described to voters.

The summary statement provided notice that the proposed amendment would "include a declaration that the right to keep and bear arms is a

unalienable right" and that the government's role would change from one merely of not taking away an existing right to one of affirmatively supporting and upholding the right, and protecting against its infringement. This is precisely what the proposal does, and the summary statement was not required to provide every detail or supposed legal consequence. The summary statement, therefore, was not unfair or insufficient such that it misled or deceived hundreds of thousands of voters.

ARGUMENT

"Because this case was submitted on stipulated facts, [the] standard of review is set forth in *Schroeder v. Horack*, 592 S.W.2d 742, 744 (Mo. banc 1979)" – determining the legal consequence of the stipulated facts. *Knight v. Carnahan*, 282 S.W.3d 9, 15 (Mo. App. W.D. 2009) (citing *Overfelt v. McCaskill*, 81 S.W.3d 732, 735 (Mo. App. W.D. 2002)). "Additionally, where the people have demonstrated their will through their vote, [the Court's] duty is to seek to uphold that decision." *Knight*, 282 S.W.3d at 15 (citing *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 12 (Mo. banc 1981)).

Here, the Plaintiffs' claim fails for several reasons, not the least of which is a lack of jurisdiction. The people have overwhelmingly spoken in favor of the constitutional amendment at issue, and there was no irregularity of a sufficient magnitude – either alleged or proven – to cast doubt on the validity of the election. As such, the case should be dismissed or, in the alternative, transferred.

I. This Court Should Dismiss or Transfer for Lack of Jurisdiction or for Want of a Cognizable Claim.

This Court's jurisdiction is expressly proscribed by the Missouri Constitution. Even a statute that purports to confer jurisdiction on the Court is subject to constitutional limitations. *See, e.g., Robinson v. Nick*, 134 S.W.2d 112, 115 (Mo. banc 1939) (rejecting jurisdiction conferred by statute);

Greenbriar Hills Country Club v. Dir. of Revenue, 47 S.W.3d 346, 350 (Mo. banc 2001) ("This Court is a court of limited jurisdiction, and it has a duty to determine the question of its jurisdiction sua sponte."). For the reasons that follow, the Court lacks jurisdiction in this case and should, therefore, dismiss or, in the alternative, transfer to the circuit court.

A. There is No Original Jurisdiction in the Supreme Court for Review of Ballot Titles.

Article V of the Missouri Constitution – the article devoted to the judicial department – sets forth various provisions concerning the judicial department, including the judicial power of the courts. While Article V specifically provides for the jurisdiction of the Supreme Court, it does not provide original jurisdiction for review of ballot titles as alleged in this case. Even the exclusive appellate jurisdiction of the Supreme Court, provided in Article V, § 3, is limited:

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

Thus, not only is there no provision in Article V of the Constitution for original jurisdiction in this Court, but even the Court's exclusive appellate jurisdiction does not extend to ballot titles. And, of course, this is not an appellate matter. Instead, original jurisdiction over ballot titles is in the circuit courts, which have "original jurisdiction over all cases and matters, civil and criminal." Mo. Const. Article V, § 14.

Unable to find any jurisdiction in this Court under Article V, Plaintiffs turn to Article VII, which relates to public officers, not the judiciary. According to Plaintiffs, § 5 of Article VII provides "original jurisdiction over this election contest." (Plaintiffs' Br. p. 1). Not so. Plaintiffs quote only a portion of Article VII, § 5 in support of their claim, stripping the quoted portion of any meaningful context. *See State v. Schleiermacher*, 924 S.W.2d 269, 276 (Mo. banc 1996) (requiring a construction of words to give "meaning to the words used in the context") (citing *Sullivan v. Carlisle,* 851 S.W.2d 510, 512 (Mo. banc 1993)).

Article VII, § 5 provides in full as follows:

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

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

While Plaintiffs pluck a sentence from the middle of this provision, reading its full text makes clear that Article VII, § 5 addresses only election contests involving public officers. *See 20th & Main Redevelopment P'ship v. Kelley,* 774 S.W.2d 139, 141 (Mo. banc 1989) ("Ascertaining and implementing the policy of the General Assembly requires the court to harmonize all provisions of the statute."). There is no reference to, nor mention of, election contests concerning ballot measures. Indeed, every section of Article VII concerns public officers. And ballot measures concerning initiative petitions and referendums are covered by entirely different articles. *See, e.g.,* Mo. Const. Art. III, §§ 49-53 & Art. XII §§ 1-2(b). Thus, Plaintiffs' reliance on Article VII, § 5 is misplaced.

Plaintiffs also cite § 115.555 and § 115.557, to support their assertion that original jurisdiction over election contests rests with this Court. The matters over which this Court possesses jurisdiction, however, are designated by the Constitution, and cannot be affected by statute. Accordingly, this case should be dismissed or, alternatively, transferred to the circuit court. *See* Mo. Const. Art. V, § 11 ("An original action filed in a court lacking jurisdiction or venue shall be transferred to the appropriate court.").

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

Not only is there no original jurisdiction or exclusive appellate jurisdiction in the Supreme Court for this case, there is no jurisdiction in any court. A post-election contest of a ballot title such as this is not provided for under any constitutional or statutory provision. The Constitution provides that "[a]ll amendments proposed by the general assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title *as may be provided by law*." Mo. Const. Art. XII, § 2(b) (emphasis added). The General Assembly did just that in chapter 116 – providing for ballot titles and the exclusive means to challenge them.

Section 116.190 provides that "[a]ny citizen who wishes to challenge the official ballot title or the fiscal note prepared for a proposed constitutional amendment submitted by the general assembly . . . may bring an action in

the circuit court of Cole County. *The action must be brought within ten days* after the official ballot title is certified by the secretary of state." § 116.190.1 (emphasis added). Plaintiffs brought such a timely challenge. But their challenge became moot and was appropriately dismissed by this Court. *See Dotson v. Kander*, 435 S.W.3d 643 (Mo. banc 2014). In accordance with established cannons of construction – *lex specialis derogate legi generali* – "section 116.190.1's specific deadline would control" over any general provision for election contests. *Knight*, 282 S.W.3d at 20-21.

In the *Dotson* decision, we acknowledge, this Court said that "judicial review of a claim that a given ballot title was unfair or insufficient (when not previously litigated and finally determined) is available in the context of an election contest should the proposal be adopted." *Id.* at 645 (citing § 115.555). But there was no further description of what such a claim would look like. Nevertheless, Plaintiffs brought this case seeking to invalidate the overwhelming vote of the people based solely on the summary statement portion of the ballot title. The Plaintiffs' claim is inconsistent with the plain language of the statute and the surrounding statutory provisions.

Section 115.555 provides for a post-election contest as to "*the results* of elections on constitutional amendments," but there is no reference to summary statements anywhere in the statute. Indeed, in all of chapter 115 there is not a single reference to summary statements. In contrast, chapter

116 – which provides for pre-election challenges – references summary statements repeatedly. *See, e.g.,* § 116.010; § 116.155; § 116.160; § 116.180; § 116.190; § 116.334. What, then, did the General Assembly mean by allowing a post-election contest as to "the results" of an election in chapter 115? Did it contemplate that one of "the results" that could be contested post-election would be the summary statement? If that were the case, the General Assembly could have easily used the language it used repeatedly in chapter 116. But it did not.

Instead, reference to "the results" in § 115.555 is to alleged "irregularities." On this point, Plaintiffs agree – that there must be "irregularities" of "sufficient magnitude to cast doubt on the validity" of the election. § 115.593. (Plaintiffs' Br. p. 12). The question of what constitutes an irregularity is where the Plaintiffs depart from the plain language of the statute and surrounding statutory provisions. *See Utility Serv. Co., Inc. v. Dep't of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc 2011) ("No portion of a statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions."). The right to contest an election exists only by virtue of statute and the jurisdiction of the circuit court is confined to those statutory provisions governing election contests. *Landwersiek v. Dunivan*, 147 S.W.3d 141 (Mo. App. S.D. 2004).

The term "irregularity" – which is never used in chapter 116 but used several times in chapter 115 – always refers to problems in the process, and not in the substantive provisions under consideration (or the ballot title for that matter):

- "[W]itness and report to the election authority any failure of duty, fraud or irregularity" § 115.053.3;
- "Watchers are to observe the counting of the votes and present any complaint of irregularity or law violation" § 115.107.2;
- "[E]lection authority responsible for conducting the election in any area where an alleged irregularity occurred" § 115.533.2; § 115.559.2; § 115.567.2; § 115.579.2; § 115.585;
- "[A]ll evidence by the contestant and contestee bearing on the alleged irregularities" § 115.537;
- "If the court or legislative body hearing a contest finds there is a prima facie showing of irregularities which place the result of any contested election in doubt" § 115.583;
- "[T]here were irregularities of sufficient magnitude to cast doubt on the validity" § 115.593;

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

In each reference to "irregularity," the statutes contemplate some observable conduct that occurs at the location of the election, not some static summary statement that is the same regardless of the location. The ability to contest election results because of an irregularity is not a panacea for all possible claims in the election process. *Cf. Kohrs v. Quick*, 264 S.W.3d 645, 647 (Mo. App. W.D. 2008) (A contestant should not be allowed to circumvent the deadline of § 115.526.2 by alleging that violation of a qualification statute constitutes an irregularity in the election.); *Kasten v. Guth*, 395 S.W.2d 433, 437-438 (Mo. 1965) (The general rule is that the eligibility of candidates is not a proper issue in an election contest.).

Moreover, the statutory language for post-election contests expressly contemplates *evidence* of irregularities (e.g., voters receiving the incorrect ballot style for their district, improperly counting or rejecting absentee ballots, disenfranchising eligible voters, ensuring only eligible voters vote, etc.), not a mere legal determination. Plaintiffs are required to set forth the points on which they wish to contest the election and "the facts" they will prove in support of such points. § 115.557. The parties are also given the opportunity to contest the validity of any votes and "the facts" that

will be proven in support of such contest. § 115.559.3; *see also Ledbetter v. Hall*, 62 Mo. 422, 1876 WL 9740 (Mo. 1876) (Examining an earlier form of our current election contest statutes, this Court noted that Wagn. Stat., 573, § 54, provided that: "In every contested election, the party contesting shall give . . . the names of all voters objected to, with the objections."). Commissioners are even empowered to compel the attendance and take the testimony of witnesses, to administer oaths, take depositions, and to compel discovery in accordance with the rules of discovery in civil cases. § 115.561.

This evidentiary process is in stark contrast to pre-election summary statement challenges, where courts are instructed only to consider the petition and hear arguments. § 116.190.4. The difference could not be clearer: pre-election ballot summary challenges are matters of legal argument, while post-election contests are evidentiary matters in order to determine whether disqualifying irregularities occurred with respect to actual voting. *See, e.g., Marre v. Reed*, 775 S.W.2d 951, 952 (Mo. banc 1989) (Involved a detailed examination of 11 specific voters whose qualifications were the subject of controversy.); *Royster v. Rizzo*, 326 S.W.3d 104, 109-111 (Mo. App. W.D. 2010) (Challenger failed to make a prima facie case for recount because he did not demonstrate that the validity of a number of votes equal to or greater than the margin of defeat was placed in doubt.).

On October 3, 2014, this Court appointed the Honorable Daniel R. Green to serve as commissioner in this case, and to take whatever evidence would be relevant to the contest. On October 8, 2014, the parties submitted their Joint Stipulation of Facts and Exhibits to Judge Green. Judge Green then submitted his Commissioner's Report to this Court, advising the Court of the Parties' Joint Stipulation, and that no other evidence was offered by any party. The only supposed "evidence" of irregularities submitted by the Plaintiffs was the bare summary statement of the ballot title. But that is not evidence and cannot support a post-election contest. *Cf. Applegate v. Eagan*, 74 Mo. 258, 1881 WL 10254 (Mo. 1881) (finding that an argument concerning allegedly false and fraudulent handbills that supposedly misled voters was untenable, "first and mainly, because the name of not one voter of the 300 voters who were said to be thus influenced is given").

The Missouri Court of Appeals in *Knight*, while recognizing certain post-election review of voter-approved measures, concluded that because § 116.190 already provides a specific deadline for pre-election challenges to the ballot title, a post-election contest must fail. *Id.* at 20-21 ("Here the legislature provided a deadline in 116.190.1 for pre-election challenges to the fiscal note summary; we do not read its language as superfluous."). To conclude otherwise would render the specific deadline in § 116.190 superfluous. Under Plaintiffs' theory, a party could simply play wait and see,

and thereby render specific statutory language in § 116.190 meaningless as well as hundreds of thousands of votes. Having established no actual voter irregularities, Plaintiffs' claim must fail.

C. The Plaintiffs' Claim is Moot or Untimely Under Article XII, § 2(b) of the Missouri Constitution.

Finally, Plaintiffs' request to set aside the election results and the constitutional amendment on the basis of supposed voting irregularities should be dismissed because it is moot or untimely. The constitutional amendment proposed in SJR 36 was passed on August 5, 2014. In accordance with Article XII, § 2(b), the amendment took effect at the end of thirty days after the election – September 5, 2014. *See Knight*, 282 S.W.3d at 17, n.5. This action was filed on September 24, 2014, nearly three weeks after the constitutional amendment became effective. Indeed, Plaintiffs acknowledge that the new provision is already being used. (Plaintiffs' Br. p. 28, n. 28); *see State v. Merritt*, SC94096. And it surely is, well beyond just the one case cited by Plaintiffs.

Plaintiffs' only request for relief is to set aside the entire election and to void the constitutional amendment. As set forth below, and in accordance with Article XII, § 2(b) of the Missouri Constitution, this remedy is not available for alleged voter irregularity. The constitutional amendment at

issue became effective before any challenge was made. Therefore, the Plaintiffs' claim is moot or untimely, and should therefore be dismissed.

II. The General Assembly's Summary Statement was Fair and Sufficient.

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

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

Prior to September 5, 2014, Article I, § 23 of the Missouri Constitution provided:

> That the right of every citizen to keep and bear arms in defense of his home, person 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 amendment adopted in August kept much of this language, added the word "family," extended the right to include ammunition and relevant accessories, and removed the final clause regarding concealed weapons. It also adopted numerous additional provisions as follows:

- The rights guaranteed by this section shall be unalienable.
- Any restriction of these rights shall be subject to strict scrutiny[.]
- 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 a result of a mental disorder or mental infirmity.

Summarizing these changes presented a significant challenge for the preparation of the summary statement, which is limited to 50 words,

excluding articles. More challenging still was preparing a summary statement that put voters on notice concerning the purposes of the proposal without attempting to address or opine on uncertain legal questions and issues. Therefore, the General Assembly's summary statement provided as follows:

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

The critical language used in the summary statement was that the Missouri Constitution is amended "to include a *declaration* that *the right* to keep and bear arms is a unalienable right." The General Assembly added a statement regarding the right's unalienability (at that time absent from Mo. Const. Art. I, § 23), while making clear that "the" right to keep and bear arms already exists. The amendment also placed an obligation on the state to uphold "that right." This is a fair and sufficient summary of the amendment.

Plaintiffs complain, however, that the summary statement did not focus on certain details, including: the deletion of language within Article I, § 23 regarding concealed weapons; a strict scrutiny standard applicable to any restriction of the right to keep and bear arms; explicit extension of the right to cover ammunition and accessories; and, mention of the General

Assembly's retention of the ability to limit the rights of certain groups. Yet, it would have been impossible to highlight every detail within the 50 word limit for the summary statement.

Plaintiffs further complain that the summary statement described what was a then-existing unalienable right, which the state was already required to follow. Under any standard, but particularly under the deferential standard that must be applied where the people have demonstrated their will through their vote, the summary statement in this case was fair and sufficient and should be upheld. *See United Gamefowl Breeders*, 19 S.W.3d at 141.

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

Unlike in chapter 116, there is no ballot title standard specific to post-election contests. The right to contest an election exists only by virtue of statute and the jurisdiction of the circuit court is confined to those statutory provisions governing election contests. An election contest challenges the validity of the very process by which we govern ourselves; it alleges that through an irregularity in the conduct of an election, the officially announced winner did not receive the votes of a majority of the electorate. *Landwersiek v. Dunivan*, 147 S.W.3d 141 (Mo. App. S.D. 2004).

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

Not every irregularity warrants a new election, though. The election statutes provide that a court may order a new election if it finds irregularities of sufficient magnitude to cast doubt on the validity of the election. *Id.* Irregularities have traditionally involved qualified voters being disenfranchised, unqualified voters being permitted to vote, design defects in ballots, absentee voting procedure, and an examination of evidence supporting or refuting the allegations. *See Landwersiek*, 147 S.W.3d at 144; *Gasconade R-III Sch. Dist. v. Williams*, 641 S.W.2d 444 (Mo. App. E.D. 1982). All applicable authority makes clear that election contests involve matters of irregularities in the conduct of an election, such as voters receiving the incorrect ballot style for their district, improperly counting or rejecting absentee ballots, disenfranchising eligible voters, or ensuring only eligible voters vote. Election contests are meant to examine external actions related

to the election, not to provide a second look at a successful measure's summary statement.

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

If the Court is willing to entertain Plaintiffs' pre-election ballot title summary challenge in this post-election contest setting, the State suggests that the Court apply a heightened standard. Application of such a standard must result in this Court ruling against Plaintiffs' claim. Not only does Plaintiffs' challenge fail to satisfy the pre-election standards of Chapter 116, there exists no colorable argument or evidence that flaws existed within the summary statement that amount to irregularities of a sufficient magnitude to cast doubt on the validity of the entire election.

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

Plaintiffs' claim fails under the requirements of Chapter 116 as well. In pre-election challenges, summary statements must meet the following standard: They must not be insufficient or unfair, which is to say it cannot "with bias, prejudice, deception and/or favoritism state the consequences of

the initiative." *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006).

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

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

language proposed by [the opponents] is more specific, and even if that level of specificity might be preferable," that does not establish that the existing title is unfair or insufficient. *Id.*

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

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

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

The General Assembly believed it necessary to ensure that the rights at issue in SJR 36 are unalienable, and to specify the State's responsibilities in upholding these protections, as expressed in detailed language in the amendment. It is certainly appropriate for those provisions to be highlighted in the summary statement. The summary statement conveyed precisely what

was found in the main substantive provision in SJR 36 – that "the rights guaranteed by this section shall be unalienable."

Of particular importance is the fact that the summary statement used the phrase "the right" in identifying the object of the proposed amendment. This phrasing made clear that the right to keep and bear arms already existed, and that it will continue to exist, but that the right was being further declared and enhanced as unalienable and in other ways. Using the phrase "the right" would make no sense if the right had not already existed. This position is borne out by the fact that the General Assembly kept most of the existing language in this section and simply added to its strength, as described in the summary statement. It is not for a court to decide whether this new language would in fact be different. That will be for a later date. Nevertheless, there is no disputing that the language is new.

The other notable change is refining the government's role from one merely of not taking away an existing right to one of affirmatively supporting and upholding the right, and protecting against its infringement. Because the constitutional amendment in SJR 36 did, in fact, amend the Missouri Constitution to further secure the right of Missourians to keep and bear arms, and enhanced the government's role in securing these rights, described now as "unalienable," the summary statement was accurate in describing its purpose.

Plaintiffs' criticisms of the summary statement's use of "unalienable," as well as other attacks regarding the legal meaning and import of phrases found within SJR 36 miss the point entirely. Plaintiffs ask this Court to go beyond the text of the summary statement, and to rule on the merits of the proposal. "Unalienable," at a minimum, is a reference to a significant change proposed by SJR 36 – and it is a direct quote of the proposal's language. While Plaintiffs complain at several points that the summary statement fails to highlight the proposal's language, they simultaneously criticize the summary statement for quoting the proposal directly. Plaintiffs suggest an impossible standard, belying the validity of their concerns. This is not a trial on the merits of SJR 36, it is simply a review of the legal sufficiency and fairness of the summary statement.

Plaintiffs' basic argument is that the summary statement was insufficient and unfair because it did not mention details Plaintiffs believe are important. For example, Plaintiffs complain that the summary statement should have mentioned that restrictions to the rights of citizens to keep and bear arms would be subjected to strict scrutiny. As noted previously, however, the summary statement need not describe every single detail, particularly legal concepts such as standards of review.

In this case, the level of scrutiny applied is not necessary for an informed understanding of the purposes of SJR 36, and a glancing reference

to a complicated legal principle would have served no practical purpose. Indeed, as the Plaintiffs acknowledge, we do not need evidence "to conclude that the great majority of Missourians support the right to keep and bear arms." (Plaintiffs' Br. p. 29). These Missourians would have (and did) favorably view the strengthening of that right as described in the summary statement. The summary provided that the right is "unalienable," capturing for the ordinary voter the enhanced importance contemplated by the proposal. The level of scrutiny applied to proposed restrictions is not required to be included within the summary statement's 50 word limit.

Plaintiffs also argue that the summary statement was insufficient and unfair because it did not mention the removal of the reference to concealed weapons within the existing provision. The removal of this language is a detail that is not necessary for an informed understanding of the purposes of SJR 36. And the point would be an extremely technical one to make and uncertain as to its legal implications. Not to mention the fact that since the proposal passed, Missourians may carry concealed weapons, just as they could before passage. To include a description of this detail in the summary statement surely would have drawn the claim that it restates an existing right.

As it stood before passage of SJR 36, Article I, § 23 did not permit or prohibit the wearing of concealed weapons. It simply provided that Article I,

§ 23 cannot be relied upon as permission to wear concealed weapons. Plaintiffs' assorted arguments that the existing language was a limitation on citizens' rights to carry concealed weapons is unsupported by the plain language of Article I, § 23. The deleted language does not limit the right, but rather only limited the extent to which that section may be applied. Permission to wear concealed weapons, and a framework for doing so, is found within Chapter 571. It is unclear how removing this language will affect any right afforded to Missouri's citizens, and is not a detail required for inclusion in the summary statement.

Plaintiffs also argue that the summary statement was insufficient and unfair because it did not mention the extension of this right to ammunition and accessories typical to the normal functioning of such arms. Again, Plaintiffs ignore that a summary statement need not provide every detail. The summary statement, read as a whole, made it clear that the proposal was geared towards strengthening the right to keep and bear arms. The critical standard is not whether all details are included within the summary statement, but whether the summary statement is fair and sufficient. The summary statement for SJR 36 satisfied this standard, and Plaintiffs have failed to prove otherwise.

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

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

The applicable statutes make clear, and the available remedies demonstrate, that the focus of election contests concerning "irregularities" is ensuring that only qualified voters are allowed to vote, and that election officials act in a proper manner. The relief a court may grant is limited to that specifically authorized by statute. *Board of Election Comm'rs of St. Louis County v. Knipp*, 784 S.W.2d 797, 798 (Mo. banc 1990) (citing *Hockemeier v. Berra,* 641 S.W.2d 67, 68 (Mo. banc 1982)).

The election laws provide two remedies in an election contest when irregularities are shown: § 115.583 permits a recount, and § 115.593 authorizes a new election. A recount is authorized where irregularities affect only the result of an election. Section 115.583 provides for a recount where there is "a prima facie showing of irregularities which place the result of any contested election in doubt." While the conduct of an election obviously affects its outcome, the "result" of an election is the official announcement of the winning candidate. *Board of Election Comm'rs of St. Louis County*, 784 S.W.2d at 798. Plaintiffs do not request a recount, and they provided no

evidence that improper counting constituted an irregularity. The margin, after all, was more than 200,000 votes.

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

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

While recounts and new elections are statutorily permitted remedies, Plaintiffs' prayer that the results of the election be "set aside" or "invalidated," or that the provision be removed from the Constitution, are not. No authority cited by Plaintiffs allows for any remedy beyond ordering a re-count or a new election, and Plaintiffs concede on page 17 of their brief that "this Court cannot set a new election as envisioned in § 115.593, RSMo. 2000." No authority authorizes the remedy Plaintiffs seek.

Plaintiffs ask this Court to take the unprecedented action of removing a provision from the Missouri Constitution because they did not approve of its summary statement, in the absence of any constitutional, statutory, jurisprudential, jurisdictional, or evidentiary basis. Plaintiffs' requested relief should, therefore, be rejected and their claim dismissed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 7,903 words.

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