SC94516

IN THE SUPREME COURT OF MISSOURI

WES SHOEMYER, *et al.*,

Contestants,

v.

JASON KANDER, *et al.*,

Contestees.

INTERVENOR MISSOURI FARMERS CARE RESPONSE BRIEF

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RESPONSE TO JURISDICTIONAL STATEMENT

After losing a statewide election, and then losing a statewide recount, Wes Shoemyer now asks this Court to annul almost a half-million Missourians' ballots and overturn the outcome of a statewide election because, Shoemyer contends, "The summary statement of the official ballot title of Constitutional Amendment No. 1 was insufficient, misleading, prejudicial, and unfair."[1] Petition ¶15. Shoemyer's petition asks this Court to overturn the election adopting the Right-to-Farm Amendment because Shoemyer claims the ballot title was "deceptive" and "misleading." *Id.* ¶20; Brief p. 13. Shoemyer does not claim there were any irregularities in the conduct of the election.

Section 116.190[2] provides, "any citizen who wishes to challenge the official title … 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." App. A22.

Neither Shoemyer, nor anyone else, challenged the Right-to-Farm Amendment summary statement under §116.190. Rather, after Missouri voters adopted the Amendment and after Shoemyer lost a recount challenging the election, Shoemyer turned

[1] Amendment 1 on the August 2014 statewide election is also called the Right-to-Farm Amendment. The term "ballot title" refers to both the summary statement and fiscal note. Shoemyer's challenge concerns only the text of the summary statement portion of the ballot title.

[2] All references to statutes are to the Revised Statutes of Missouri.

to this Court and demands this Court overturn almost one-half million Missouri citizens' votes because, Shoemyer says, the General Assembly's summary statement was "insufficient, misleading, prejudicial, and unfair." Shoemyer claims the General Assembly "deceived" and "misled" almost one-half million voters with the summary statement it wrote, the Attorney General reviewed, and the Secretary of State certified.

But no matter what Shoemyer says, Missouri does not allow disgruntled voters to overturn a statewide election by challenging the ballot title after losing an election. This Court does not possess jurisdiction to nullify a statewide vote on the basis of a ballot title challenge brought after the election. Accordingly, this Court should dismiss Shoemyer's petition for want of jurisdiction.

STATEMENT OF FACTS

The Missouri Right-to-Farm Amendment is a state constitutional amendment the Missouri General Assembly referred to Missouri voters. The Missouri House of Representatives voted 132 to 25 in favor of the Right-to-Farm Amendment and in favor of the summary statement, an eighty-four percent supermajority of the House. App. A51-52. The Missouri Senate voted 28 to 6 in favor of the amendment and the summary statement. App. A54-55. This is an eighty-two percent supermajority of the Senate. The Missouri Right-to-Farm Amendment enjoyed bi-partisan support, with twenty-four Democrats in the Republican-controlled House and Senate voting for the measure. App. A51, A54.

The Right-to-Farm Amendment proposed §35 be added to Article I of the Missouri Constitution. The Right-to-Farm Amendment provides:

> *That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.*

App. A1-2, A4.

The General Assembly, as provided in §116.155.1, also included an "official summary statement," part of the ballot title. The General Assembly's summary stated:

Shall the Missouri Constitution be amended to ensure that the right of Missouri citizens to engage in agricultural production and ranching practices shall not be infringed?

App. A2.

As required by §116.025, the Secretary of State prepared a "fair ballot language statement." *See* App. A20. The Secretary of State referred this statement to the attorney general, who approved the statement. The "fair ballot language statement" provided:

A "yes" vote will amend the Missouri Constitution to guarantee the rights of Missourians to engage in farming and ranching practices, subject to any power given to local government under Article VI of the Missouri Constitution.

A "no" vote will not amend the Missouri Constitution regarding farming and ranching.

If passed, this measure will have no impact on taxes.

App. A24.

Had Shoemyer and his two fellow contestants desired, they could have challenged the ballot title and the fair ballot language statement. Sections 116.190 and 116.025 specifically provided Shoemyer the opportunity to raise such a challenge in Cole County Circuit Court before the election. Had Shoemyer brought such a challenge, and had there been any merit to Shoemyer's arguments, the ballot title could have been revised before the August election.

But, rather than challenge the ballot title or challenge the fair ballot summary, Shoemyer acquiesced in the ballot title and instead organized a political action committee called "Missouri's Food for America" to campaign against the Right-to-Farm Amendment. App. A56.

Shoemyer and his organization opposed the Right-to-Farm Amendment. The Missouri Ethics Commission reported Shoemyer's Political Action Committee spent more than $800,000 opposing the Right-to-Farm Amendment. App. A60. Both Shoemyer and Missouri Farmers together spent more than $1.5 million to advocate for and against the Right-to-Farm Amendment. Kevin McDermott & Tim Barker, Supporters, *Opponents of "Right to Farm" Referendum Have Raised More than $1.5M*, ST. LOUIS POST-DISPATCH (Aug. 1, 2014); App. A62-64.

The Right-to-Farm Amendment was not some obscure issue. The Right-to-Farm Amendment was the first and preeminent constitutional question on the August statewide ballot. Those supporting the Right-to-Farm Amendment and those, such as Shoemyer, opposing the Right-to-Farm Amendment spent millions advocating their respective positions. These millions were spent on television, internet, direct-mail and phone calls seeking to inform voters of the respective merits (or alleged demerits) of the Right-to-Farm Amendment.[3]

[3] Shoemyer's brief perplexingly references one of his PAC's television campaign advertisements as evidence of how the "media" explained who the Right-to-Farm

Not only that, the full text of the Right-to-Farm Amendment and the sixty-three-word "fair ballot language statement" written by Secretary of State Kander, reviewed and approved by Attorney General Koster, was posted in every polling place in the entire state allowing every voter opportunity to review the full text of the measure as well as the fair ballot language statement. *See* §116.025 ("Each [fair ballot language] statement shall be posted in each polling place next to the sample ballot."); App. A20.

On the first Tuesday of last August, more than a year and a month after the secretary of state certified the Right-to-Farm Amendment, Missouri voters went to the polls and adopted the Right-to-Farm Amendment casting 499,581 ballots in favor and 497,091 ballots against. App. A27, A31. The Amendment passed with a margin of 2,490 votes, which was one-quarter of one percent of the votes cast. *Id.*

Shoemyer demanded a recount. Section 115.601 allowed Shoemyer a recount because the margin was less than one percent. App. A17. The state spent approximately $100,000 conducting the recount. Pat Pratt, *Recount Set for Tuesday*, THE SEDALIA DEMOCRAT (Sept. 5, 2014); App. A61. During the recount, election authorities found that 879 ballots not included in the Election Day tally were eligible to be counted. The

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Amendment benefits. Brief p. 18. The advertisement illustrates the intensity of public awareness concerning the Right-to-Farm Amendment and undermines Shoemyer's argument that voters were deceived by the ballot title and did not know the purpose of the Right-to-Farm Amendment.

final certified result after the recount was 499,963 in favor of the Right-to-Farm Amendment and 497,588 opposed. App. A32. Again, the measure passed by a margin of 2,375 votes. *Id.* The statewide recount uncovered no irregularities in the conduct of the election. There was no indication of vote fraud or any other misconduct in the election or in the counting of ballots. And Shoemyer alleges no irregularities in the conduct of the election.

But Shoemyer, and his two fellow contestants, refused to accept this outcome. Instead Shoemyer, *et al.*, filed this lawsuit demanding this Court overturn the August 2014 election and invalidate this constitutional amendment supported by super majorities of the Missouri general assembly and adopted by a majority of almost one million Missouri voters. Shoemyer says the voters were "deceived" and "misled" by the General Assembly's ballot title and, on this basis, asks this Court to "Order that Constitutional Amendment No. 1 be remanded to the legislature." Petition p. 6. Shoemyer is murky on what a "remand to the legislature" looks like or what he actually asks this Court to order the legislature to do on remand. But one thing is clear. Shoemyer asks this Court to nullify the August 2014 statewide election adopting the Right-to-Farm Amendment.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to hear Shoemyer's post-election challenge to the summary statement of the ballot title. Chapter 116 requires a ballot title challenge be filed in Cole County circuit court ten days after the Secretary of State certifies the summary statement. Shoemyer elected to not file a timely challenge to the summary statement and cannot now raise a ballot title challenge post-election by pretending it is a chapter 115 election contest.

Further, to the extent this Court entertains Shoemyer's challenge, Shoemyer provides no legal or factual basis upon which this Court may annul the ballots one-half million Missourians cast in favor of the Right-to-Farm Amendment.

ARGUMENT

I. THE GOVERNING PROVISIONS OF MISSOURI ELECTION LAW.

Our constitution declares "all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Mo. Const. Art. I, §1; App. A3. To this end, our constitution provides the citizens may directly adopt constitutional amendments and statutes by initiative petition. Our constitution likewise provides the General Assembly may propose constitutional amendments by referendum, which Missouri voters may then adopt or reject in a statewide election. *See* Mo. Const. Art. XII, §§2(a) and (b); App. A5-6. All amendments to the constitution require the approval of the people. *Id.* §2(b); App. A6.

The General Assembly adopted statutes specifying the procedures governing the initiative and referendum process. These rules are found in Chapter 116. The General Assembly also adopted rules and procedures governing the conduct of elections generally, codified in Chapter 115. Three separate procedures are relevant to this action; the provisions governing challenges to a ballot title, when and how a recount is conducted, and the rules governing post-election contests.

A. Chapter 116 governs constitutional referendum and ballot title challenges.

Chapter 116 specifies the rules governing statewide initiative and referendum. "This chapter shall apply to elections on statewide ballot measures." §116.020; App. A19. Chapter 116 provides, "to the extent that the provisions of chapter 116 directly conflict [with those in chapter 115] chapter 116 shall prevail." *Id.* Chapter 115 contains the general rules for the conduct of Missouri elections, including provisions governing recounts and post-election contests.

When the Missouri General Assembly refers a constitutional amendment to the voters as a statewide ballot measure, §116.155 provides:

> The general assembly may include the official summary statement and a fiscal note summary in any statewide ballot measure that it refers to the voters. The official summary statement approved by the general assembly shall … be the official ballot title. ... The title shall be a true and impartial statement of the purposes of the proposed measure in language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.

App. A21.

When the General Assembly refers a proposed constitutional amendment to voters, §116.025 requires the secretary of state to prepare and send the attorney general a "fair ballot language statement[] that fairly and accurately explain[s] what a vote for and

what a vote against the measure represent. … Such fair ballot language statements shall be true and impartial statements of the effect of a vote for and against the measure in language neither intentionally argumentative nor likely to create prejudice for or against the proposed measure." §116.025; App. A20. Further, the "attorney general shall within ten days approve the legal content and form of the proposed [fair ballot language] statement[]." *Id.*

If any citizen believes the ballot title or the fair ballot language statement is not accurate, §116.190 allows the citizen to "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 in accordance with the provisions of this chapter." §116.190.1; App. A22. "The petition shall state the reason or reasons why the summary statement portion of the official ballot title is insufficient or unfair and shall request a different summary statement portion of the official ballot title." §116.190.3; *see also* §116.190.4 ("the court shall consider the petition, hear arguments, and in its decision certify the summary statement portion of the official ballot title to the secretary of state…. Any party to the suit may appeal to the supreme court within ten days after a circuit court decision.").

This Court explained, "[Section 116.190] authorizes an action to challenge the ballot title, although it does not authorize an injunction to stop the election. If the ballot title challenge is timely filed, the court is authorized to do no more than certify a correct ballot title." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 829

(Mo. 1990). In other words, a point we discuss more fully below, under this Court's holdings, a ballot title challenge only allows the Court to revise the ballot title before the election. Chapter 116 does not grant this Court jurisdiction to enjoin the election in response to a ballot title challenge and it does not grant this Court jurisdiction to nullify the outcome of an election.

B. Chapter 115 has general procedures for recounts and election contests.

Chapter 115, as the title states, is about "election authorities and conduct of elections." This chapter contains two relevant procedures. Section 115.601.3 allows "the person whose position on a question [submitted for statewide referendum or initiative] was defeated by less than one-half of one percent of the votes cast on the question" to request a recount. A "'recount' means one additional counting of all votes counted for … the question…." §115.601.5.

Chapter 115 also contains provisions allowing a losing candidate or a registered voter to "contest the election for any office or on any question." Section 115.553.2 says:

> The result of any election on any question may be contested by one or more registered voters…. In any such contest, the proponents and opponents of the ballot question shall have the right to engage counsel to represent and act for them in all matters involved in and pertaining to the contest.

App. A7.

An election contest brought under chapter 115 is unlike a challenge to the ballot title brought under chapter 116. A challenge to the ballot title and a challenge to the fair

ballot language summary must be filed in Cole County circuit court ten days after the secretary of state certifies the ballot title. *See* §§116.190 and 116.020, *supra*.

On the other hand, a post-election contest brought under chapter 115 is heard and determined by this Court in the first instance. *See* §115.555; App. A8. A chapter 115 election contest is a fact-based inquiry into how the election was conducted. The contestant in an election contest bears the burden of presenting evidence proving "there were irregularities of sufficient magnitude to cast doubt on the validity of the initial election." §115.593; App. A15. The election contest provisions of chapter 115 require the contestant to file a verified petition setting "forth the points on which the contestant wishes to contest the election and the facts he will prove in support of such points, and shall pray leave to produce his proof." §115.557; App. A9. Chapter 115 provides this Court will appoint a Commissioner to conduct a trial and take evidence to resolve an election contest. *See* §§115.561, 115.571, and 115.581; App. A10-12.

II. SHOEMYER ASKS THIS COURT TO DO SOMETHING CONTRARY TO ALL AUTHORITY.

Shoemyer wants this Court to do something quite remarkable. Shoemyer wants this Court to invalidate a constitutional amendment that nearly one-half-million Missouri voters adopted. What Shoemyer asks this Court to do is something this Court has never before done.

The substance of Shoemyer's challenge is that the Right-to-Farm Amendment ballot title was "insufficient, misleading, prejudicial, and unfair." Shoemyer does not allege any irregularities in the conduct of the August 2014 election nor does Shoemyer allege any fraud or irregularities in the counting of the ballots cast in the August 2014 election. Shoemyer demanded, and was granted, a full statewide recount of all votes cast in the August election. Shoemyer's recount cost Missouri taxpayers approximately $100,000, not including legal expenses to counties or the parties. *See* Pat Pratt, *Recount Set for Tuesday*, *supra*; App. A61. The statewide recount found no irregularities in the conduct of the August election. Shoemyer does not challenge anything about the conduct of the August 2014 election, nor does Shoemyer challenge anything about the conduct of the recount.

The Missouri General Assembly passed legislation referring the Right-to-Farm Amendment to voters in May 2013. The General Assembly's legislation included the ballot title. Secretary of State Kander certified the ballot title on June 24, 2013, and placed the proposed amendment on the August 2014 ballot – more than one year following certification.

If Shoemyer really believed the ballot title was (in the words of his allegation) "insufficient, misleading, prejudicial, and unfair," then §116.190 allowed Shoemyer to challenge the ballot title by filing an action in Cole County circuit court. And, if he did not like the decision, Shoemyer could appeal to this Court. Had Shoemyer believed the "fair ballot language statement" was "insufficient, misleading, prejudicial, and unfair,"

§116.025 allowed him to challenge the "fair ballot language statement" by filing an action in Cole County circuit court with a right to appeal to this Court.[4]

But Shoemyer did not file *any* challenge to the ballot title nor to the fair ballot language statement. No one challenged the accuracy of the ballot title. No one challenged the accuracy of the fair ballot language statement. It was only after the Right-to-Farm Amendment was adopted by a majority of Missouri voters and after Shoemyer lost his recount challenging this outcome that Shoemyer brought this action seeking to nullify this statewide vote.

Shoemyer cross-dresses his complaint as an "election contest" under §115.557 – but it is not. "The legal character of a pleading is determined by its subject matter and not its designation to the extent that courts ignore the denomination of a pleading and look to its substance to determine its nature." *Weber v. Weber*, 908 S.W.2d 356, 359 (Mo. 1995) (citing *J.R. Watkins v. Hubbard*, 343 S.W.2d 189, 195 (Mo. App. W.D. 1961)).

The substance of Shoemyer's complaint is a challenge to the ballot title governed by Chapter 116 and §116.190 specifically. Chapter 116 provides, "This chapter shall apply to elections on statewide ballot measures. The election procedures contained in

[4] Shoemyer certainly had knowledge of the ballot title certification process because he submitted information to the State Auditor during that process commenting on the fiscal note provided by the General Assembly. *See* App. A38, A40-43.

chapter 115 shall apply to elections on statewide ballot measures, ***except to the extent that the provisions of chapter 116 directly conflict, in which case chapter 116 shall prevail."*** §116.020 (emphasis added); App. A19.

A challenge to the ballot title is *not* an election contest under Chapter 115. Election contests concern the conduct of the election itself and any "irregularities" in the conduct of the election. A post-election contest under §115.553 challenges the correctness of the election returns, "charging that irregularities occurred in the election." App. A7. A contestant is required to make a "prima facie showing of irregularities which place the result of any contested election in doubt…." §115.583; App. A13. An election contest, as opposed to a ballot title challenge, is primarily concerned with "the validity of certain votes cast [and] 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." *Id.*

Shoemyer's petition contains no allegations or any evidence of fraud or "irregularities" in the conduct of the August 2014 election. And, to the extent Chapter 115 provisions governing election contests are applicable, as the language quoted above states, Chapter 116 still governs a challenge to the ballot title.

Shoemyer ignores this explicit statutory language and instead claims dictum in *Dotson v. Kander*, 435 S.W.3d 643 (Mo. 2014), allows him to raise a post-election challenge to the ballot title. The *Dotson* dictum is inapplicable to Shoemyer's ballot-title challenge. Here is why.

Dotson is a case in which, unlike Shoemyer, the opponents of a referendum *did* file a timely challenge to a ballot title in Cole County as provided by §116.190. As §116.190 required, the circuit court "consider[ed] the petition, hear[d] arguments, and in its decision certif[ied] the summary statement…." §116.190.4; *see also Dotson*, 435 S.W.3d at 644. The circuit court found the ballot title acceptable and further held that because it was, then, within six weeks of the election, the court lacked jurisdiction to order any change in the ballot title even if the court were to find the ballot title insufficient. *Id.* Dotson appealed that holding to this Court, and this Court affirmed the point of law that a court loses authority to order any change in a ballot title six weeks before Election Day. *Id.* at 644-45.

The *Dotson* holding is inapplicable here. But Shoemyer seizes upon the following dictum from *Dotson*: "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. This was an *en passant* statement, not this Court's holding.

There are at least four reasons why this *Dotson* dictum offers Shoemyer no succor.

- Dotson complied with §116.190 and challenged the ballot title in an action filed in Cole County within ten days after the ballot title was certified. Shoemyer did not comply with §116.190.

- The *Dotson* dictum is limited to circumstances, such as *Dotson*, "when [the ballot title challenge was] not previously litigated and finally determined." In *Dotson*, the ballot title was litigated in Cole County circuit court (as required by §116.190) but the final determination fell within six weeks of the election and made it impossible for the court to modify the ballot title language – had it found the language unfair or insufficient. Not so here. Had Shoemyer brought a ballot title challenge as §116.190 requires, he had a *full year* to litigate the issue which could have been resolved much sooner than six weeks before the election.

- The *Dotson* dictum, to the extent it applies to Shoemyer's action, is flatly contrary to the explicit language of Chapter 116 which requires a ballot title challenge be filed within ten days after the ballot title is certified. *See* §116.190. A ballot title challenge is *not* an election contest described in Chapter 115. The post-election contests described in Chapter 115, including §115.555, are fact-based challenges to the conduct of the election and counting of ballots. An election contest within the ambit of Chapter 115 requires the contestant to file a verified petition "set[ting] forth the points on which the contestant wishes to contest the election and the facts he will prove in support of such points, and shall pray leave to produce his proof." §115.557. An election contest requires this Court to appoint a Commissioner, take testimony, and conduct a trial. *See* §§115.561,

115.571, 115.581, and 115.599; App. A10-12, A16. Simply put, chapters 116 and 115 do not grant this Court jurisdiction to consider a post-election ballot challenge under the guise of an election contest.

- Unlike the contestants in *Dotson*, Shoemyer enjoyed a full year to litigate the ballot title had he wished to do so. The ballot title for the Right-to-Farm Amendment was certified on June 24, 2013. The ten-day period for filing a ballot title challenge under §116.190 expired on July 4, 2013. The six-week period prior to the August 2014 election fell on June 24, 2014.

Accordingly, this Court lacks jurisdiction over Shoemyer's post-election challenge to the ballot title.

III. SHOEMYER'S POSITION, IF ADOPTED, WOULD OPEN PANDORA'S BOX AND UPEND MISSOURI ELECTION LAW.

Shoemyer asks this Court to grant a draconian request. Shoemyer asks this Court to invalidate a statewide election in which almost one-half million Missourians voted to adopt a constitutional amendment. Shoemyer claims these Missouri voters were "deceived" and "misled" into voting for this constitutional amendment by the General Assembly writing a "prejudicial" and "unfair" ballot title. Shoemyer contends he need not challenge the "misleading" ballot title before the election when (if it were misleading) it could be corrected. Rather, Shoemyer waited until after the election and until after he demanded (and lost) a recount to bring this action requesting this Court to now invalidate

the constitutional amendment and "remand" the matter to the General Assembly. Never in its history has this Court done such a thing as Shoemyer asks.

For this Court to grant Shoemyer's request, this Court will have to: (1) Hold a challenge to a ballot title is not limited to the pre-election period specified by §116.190 but a ballot title challenge can be first raised after the election; (2) Further hold that, if successful, a ballot title challenge allows this Court to nullify a statewide election; and (3) Find as a matter of fact a supermajority of the Missouri General Assembly (both Republicans and Democrats) deceived and misled voters by writing a ballot title that was also certified by the Secretary of State and reviewed by the Attorney General.

Were this Court to adopt the holding Shoemyer advocates, it would render §116.190 meaningless because no one would ever litigate a ballot title before the election. Rather, proponents and opponents of referenda and initiatives would wait until after the election and, if their side of the issue did not prevail, ask this Court to invalidate the election arguing (as Shoemyer does here) the ballot title was "misleading."

It is therefore no surprise to find this Court has *never* nullified a statewide election adopting a constitutional amendment on the basis of a ballot title challenge. Indeed, this Court has never nullified a statewide election adopting a constitutional amendment in any post-election challenge of any nature. To the contrary, this Court has demonstrated "a healthy suspicion of the partisan who would use the judiciary to prevent the initiative [or referendum] process from taking its course." This Court noted:

> [I]t is important to make some general observations regarding the initiative process provided by the constitution. Nothing in our constitution so closely models participatory democracy in its pure form…. The people, from whom all constitutional authority is derived, have reserved the "power to propose and enact or reject laws and amendments to the Constitution." When courts are called upon to intervene in the initiative process, they 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. Constitutional and statutory provisions relative to initiative are liberally construed to make effective the people's reservation of that power.
>
> *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827 (internal citation omitted).[5]

In *United Labor Committee of Mo. v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. 1978), this Court similarly noted its prior holdings "have discussed the importance of the

[5] Citing *State ex rel. Blackwell v. Travers*, 600 S.W.2d 110, 113 (Mo. App. E.D. 1980). On rare occasions, this Court has, as in *Missourians*, sustained an injunction to prevent a measure proposed by initiative petition that did not comply with the constitutional requirement of presenting only a single subject from being placed on the ballot. But this decision did not invalidate an election and, as the quoted decision noted, was undertaken with restraint and trepidation.

initiative and referendum, emphasizing that procedures designed to effectuate these democratic concepts should be liberally construed to avail the voters with every opportunity to exercise these rights."

After the 2000 presidential election, voters have become rightly wary of partisans seeking to litigate the outcome of elections and courts overturning the will of the electorate in post-election lawsuits. The Commission on Federal Election Reform co-chaired by President Carter and Secretary of State James Baker observed:

> The vigor of American democracy rests on the vote of each citizen. Only when citizens can freely and privately exercise their right to vote and have their vote recorded correctly can they hold their leaders accountable. Democracy is endangered when people believe that their votes do not matter or are not counted correctly.
>
> *Building Confidence in U.S. Elections*
>
> (Carter-Baker Report Sept. 2005), p. 1.[6]

Democracy is likewise endangered when citizens believe their votes do not matter because the outcome will be determined by post-election litigation and the election will be decided by lawyers and judges, not voters. What Shoemyer asks this Court to do will

[6] The United States Supreme Court looked to the Carter-Baker Report as authority on election law matters in *Crawford v. Marion County Election Board*, 553 U.S. 181, 194, 197, 231-32, 238, 240-41 (2008).

undermine voter confidence and discourage citizens from participating in elections. When the outcome of an election is not determined at the ballot box but in subsequent litigation, voters are discouraged and believe their votes do not count.

What should the half-million Missourians who voted to adopt the Right-to-Farm Amendment be told? That they were deceived by the General Assembly? That Missourians are incapable of reading and understanding a sixty-three word constitutional amendment? Florida Supreme Court Justice Ervin observed, "As a court, we can't 'play God' for the people and 'wet-nurse' them on the supposition that if we don't they will make egregious errors foreign to our political philosophy. Fears that 'the people drunk' will overawe 'the people sober' are unjustified in the long run." *Adams v. Gunter*, 238 So.2d 824, 835 (Fla. 1970) (Ervin, J., dissenting).

Shoemyer asks this Court to invalidate the outcome of a constitutional issue decided by almost one million Missouri voters. The rules were followed, the election was fairly conducted, and the ballots were counted – and accurately recounted. Shoemyer does not dispute the final certified vote tally – 499,963 in favor of the Right-to-Farm Amendment and 497,588 opposed. App. A32. Shoemyer alleges no irregularities in the conduct of the election. Shoemyer alleges neither vote fraud nor any other mischief in how the August 2014 election was conducted. In short, Missourians adopted the Right-to-Farm Amendment in a fair and honest election.

Shoemyer is asking for something that has never happened and for which there is no remedy prescribed by Missouri statute. [7]

IV. THE RIGHT-TO-FARM BALLOT TITLE WAS NEITHER UNFAIR NOR INSUFFICIENT, AND THE GENERAL ASSEMBLY DID NOT "DECEIVE" OR "MISLEAD" VOTERS.

Shoemyer alleges voters adopted the Right-to-Farm Amendment because they were "deceived" and "misled" by the General Assembly's ballot title. No matter what one thinks of the twenty-six-word summary statement, every voter had access to the full sixty-three-word text of the amendment. The Right-to-Farm Amendment, together with the "fair ballot language statement" was posted in every polling place and on the Secretary of State's website. And, had Shoemyer really believed these descriptions of the Right-to-Farm Amendment to be unfair or inaccurate, he had a year before the election to litigate that contention. But Shoemyer did not. Shoemyer sat on his hands making no effort to challenge the ballot title. Millions were spent advocating for and against the measure and taxpayers spent millions to conduct a statewide election to decide whether to

[7] We know of no authority allowing this Court to "remand" a referendum to the General Assembly presumably to be reenacted in some manner Shoemyer asks this Court to direct. Doing so violates separation of powers and would have this Court acting as a super-legislature in violation of Article II of our state constitution.

adopt or reject the Right-to-Farm Amendment. Now, after the election, Shoemyer challenges the ballot title.

Shoemyer claims the General Assembly wrote a ballot title that "deceived and misled voters and failed to accurately reflect the legal and probable effects of the Amendment…." Petition ¶20. This ballot title was also reviewed and certified by Attorney General Koster and the Secretary of State Kander. So, is Shoemyer correct? Did the General Assembly, Secretary of State and Attorney General write, review and approve a ballot title that deceived and misled Missouri voters? The Court of Appeals noted the standard that applies when someone challenges a summary statement or fiscal note:

> The words "insufficient" and "unfair" require definition. Statutory interpretation requires that the common meaning be applied to words. Insufficient means "inadequate; especially lacking adequate power, capacity, or competence." *Merriam Webster's Collegiate Dictionary* 607 (10th ed. 1993). The word "unfair" means to be "marked by injustice, partiality, or deception." *Merriam Webster's Collegiate Dictionary* 1290 (10th ed. 1993). Thus, the words insufficient and unfair as used in section 116.190.3, RSMo Supp. 1993, and applied to the fiscal note mean to inadequately and with bias, prejudice, deception and/or favoritism state the fiscal consequences of the proposed proposition. As applied to the fiscal note summary, insufficient and unfair means to inadequately and with bias,

prejudice, or favoritism synopsize in thirty-five words or less, section 116.170.3, RSMo Supp. 1993, the fiscal note.

Hancock v. Sec'y of State, 885 S.W.2d 42, 49 (Mo. App. W.D. 1994) (internal citation omitted).[8]

Shoemyer admits he bears the burden of proving the ballot title was unfair or insufficient. *See* Brief p. 14 (citing *Seay v. Jones*, 439 S.W.3d 881, 888 (Mo. App. W.D. 2014), and *Hancock*, 885 S.W.2d at 49). Prevailing on this point requires Shoemyer to prove the ballot title is in fact deceptive and misleading *and* the General Assembly acted with "bias, prejudice, deception and/or favoritism" when it wrote and adopted the ballot title. Further §§115.557 and 115.553 require Shoemyer to produce proof "challeng[ing] the correctness of the returns for the office, charging that irregularities occurred in the election." This is a very high bar, for "the general rule is that an election will not be annulled in the absence of fraud, even if some technical provisions of the law are not strictly followed." *Royster v. Rizzo*, 326 S.W.3d 104, 115 (Mo. App. W.D. 2010) (citation omitted).

A new election is a "drastic remedy" and can only be ordered "when the trial court is firmly convinced irregularities affected the outcome of the election…." *Gerrard v.*

[8] *Opinion adopted and reinstated after retransfer* (Oct. 31, 1994) (citing *Buechner v. Bond*, 650 S.W.2d 611 (Mo. 1983)); *see also Cures Without Cloning v. Pund*, 259 S.W.3d 76, 81 (Mo. App. W.D. 2008).

Board of Election Commissioners, 913 S.W.2d 88, 90 (Mo. App. E.D. 1995) (citing *Board of Election Commissioners v. Knipp*, 784 S.W.2d 797, 798 (Mo. 1990)). Because Shoemyer has failed to allege or present *any* evidence that *any* votes were actually affected by the alleged infirmity of the ballot title, Shoemyer has facially failed to meet his burden, and his petition must be dismissed.

Shoemyer presents *no* evidence or proof as Chapter 115 requires. Shoemyer offers only allegations. Shoemyer alleges two reasons he believes the ballot title was "insufficient and unfair." Neither of these allegations meets the requirement of the election contest statute of producing evidence of fraud that could have affected the outcome of the election. In fact, neither even comes close to meeting the standard of unfairness or insufficiency.

Section 116.155.2 requires the ballot title to be "a true and impartial *statement of the purposes of the proposed measure*…." App. A21 (emphasis added). A summary statement cannot, in less than fifty words, describe every nuance of a ballot measure – the "idea is to advise the citizen what the proposal is about." *Seay*, 439 S.W.3d at 889 (quoting *Billington v. Carnahan*, 380 S.W.3d 586, 595 (Mo. App. W.D. 2012)). If the Court adopts Shoemyer's argument, then *every* ballot title would be "insufficient and unfair." We explain this point more fully below.

Shoemyer first argues the ballot title "failed to apprise voters of an explicit limitation on the 'right to farm'…." Brief pp. 14-15. According to Shoemyer, the right

to farm guaranteed in the amendment is subject to the authority of municipal government. Therefore, Shoemyer argues, the voters were deceived because the ballot title failed to note this constitutional right to farm is subject to this "limitation." Shoemyer's premise is that voters supporting an unlimited Right-to-Farm Amendment would not support a limited Right-to-Farm Amendment. Shoemyer provides no support for this supposition.

This is like saying the First Amendment is deceptive because it does not expressly recognize the limitation that it does not guarantee a person the right to yell "fire" in a crowded theater. But Shoemyer's argument makes even less sense because Article VI of the Missouri Constitution places no limitations on farming, and the amendment itself expressly acknowledges that Article VI does not necessarily contain any limitations on the right to farm.[9] Thus, including reference to Article VI in the ballot title would have added nothing to a description of the *purpose* of the Right-to-Farm Amendment. The purpose of the amendment is to protect the right to farm. Even if there is some limitation upon that right, this limitation does not change the *purpose* of the amendment. Shoemyer's first point fails.

[9] The amendment states "the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, *if any*, conferred by article VI…." Mo. Const. Art. I, §35 (emphasis added); App. A1, A4.

Shoemyer next argues the ballot summary statement "inaccurately identified the beneficiaries of the new right to farm." Brief p. 17. Shoemyer contends the General Assembly attempted to deceive voters by using "farmers and ranchers" in the text of the amendment but the term "citizens" in the ballot title. Many, if not most, family farms in Missouri are titled to a closely-held entity such as a limited liability company, family partnership, trust or corporation. Shoemyer makes the absurd argument that "The wording of the amendment extends protections only to farmers and ranchers, and not 'persons.'" Brief p. 19. Shoemyer admits that under Missouri law the word "persons" includes not only individuals but entities such as corporations and partnerships. *Id.* (citing §1.020). But, Shoemyer contends, "ranchers and farmers" are not "persons" and, therefore, the ballot title is deceptive when it refers to "citizens" instead of "ranchers and farmers." *Id.*

The Fifth Amendment provides, "[n]o person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Yet no one would claim it is deceptive and misleading to say "the Fifth Amendment ensures the right of citizens to be justly compensated when the government takes their property." The protections of the Fifth Amendment's Just Compensation Clause extend to corporate entities and individuals that are not naturalized citizens even though the amendment refers to "person." Shoemyer's second point is likewise unavailing.

V. THIS COURT SHOULD REQUIRE SHOEMYER TO REIMBURSE MISSOURI TAXPAYERS AND MISSOURI FARMERS FOR THE COST OF THIS FRIVOLOUS ACTION.

Shoemyer's challenge has nothing to do with the merits of the Right-to-Farm Amendment. We realize there were strongly-held views for and against this amendment. That is why the amendment was presented to the voters. But the election is over and a majority of Missourians cast ballots to adopt this amendment. This action involves something even more important than an amendment to our constitution. This action involves the integrity of our election process and the foundational principle that the citizens are sovereign. The citizens – not lawyers and courts – decide the outcome of our elections.

Shoemyer premises his challenge upon a fantastical supposition. Shoemyer's supposes a bi-partisan supermajority of the General Assembly, with Secretary of State Kander and Attorney General Koster's complicit support, determined to deceive and mislead Missouri voters into adopting the Right-to-Farm Amendment. Shoemyer's flight of fancy is not a harmless lark. Shoemyer's recount cost Missouri taxpayers $100,000. App. A61. Now Shoemyer's post-election challenge is costing taxpayers even more. Shoemyer's litigation is costly and it needlessly consumes judicial resources this Court could devote to more meaningful matters. More important than all else, Shoemyer's irresponsible effort to void the August election and nullify the votes of a half-million

Missourians further contributes to undermining public confidence in our elections and undermining participation in elections.

Shoemyer suggests a "legislative history" something like the following:

"Senator Dempsey, so good to see you this afternoon. Do you mind stepping into this anteroom?" Speaker Jones asked as he opened the door to a small coatroom off the House Chamber.

"Why certainty Tim," Senator Dempsey replied.

"We need to talk to you about pig farmers and puppy mills," Speaker Jones began.

"Why Speaker Jones, those are two topics near and dear to my heart – especially Chinese-owned hog farms. And, here in the Senate, we call them *hog* farms, not pig farms. Are you familiar with that pearl of bucolic wisdom, 'Pigs get fat, hogs get slaughtered?'" Senator Dempsey said, waving his hand to clear the cigar smoke.

"I stand corrected. Yes, hog farms," Jones said. "Anyway, I've got twenty Democrats in the House that will vote for a constitutional amendment to protect Chinese-owned *hog* farms. How many Democrats do you have in the Senate?" Jones asked.

"I've got four Democrats. So, with the Republicans we can carry a supermajority in both houses," Dempsey answered.

"Perfect," Jones said. "But, what do we do about that pesky ballot title? We cannot call it the Chinese hog-farm amendment. Gotta come up with something better than that."

"How about a ballot title that says the amendment ensures the right of Missouri citizens to engage in agricultural production and ranching?" Dempsey proposed.

"Brilliant!" Jones said as he slapped Dempsey on the back. "It is no wonder they elected you President Pro Tem. The voters will never figure out the real purpose of this constitutional amendment is to protect Chinese corporations' right to run hog farms."

"Talk about 'Pork!'" Dempsey quipped. Jones laughed so hard his cigar fell to the floor.

"But we need to get Koster and Kander on board," Dempsey said.

As Speaker Jones lit another cigar, Senator Dempsey took out his iPhone and called Attorney General Koster and Secretary of State Kander.

"Hey, Jason and Chris, I'm here with Tim and we have this brilliant idea. Remember when we were talking about Chinese hog farms? Well, we can't put that in the ballot title, so we decided to instead say the amendment ensures the right of Missouri citizens to engage in agricultural production and ranching. You guys good with that?"

"Absolutely," Secretary of State Kander and Attorney General Koster replied in unison.

"I'll certify that ballot title and write the fair ballot language," Kander promised.

And, I'll approve it. But," Koster paused, "are farmers and ranchers persons?"

"Who knows," Dempsey replied. "We'll let the Supreme Court figure that out."

Such a scenario does not bear even a simulacrum of reality. But a campfire story like this is what Shoemyer requires this Court to imagine when he asks it to nullify a

statewide constitutional amendment on a supposition that the General Assembly intended to "deceive" and "mislead" the voters when it wrote the ballot title Secretary of State Kander certified and Attorney General Koster reviewed.

Election contests are not a parlor game. Post-election lawsuits, recounts and election contests cost taxpayers millions. Shoemyer's statewide recount has already cost Missourians more than a hundred thousand dollars. The Election Assistance Commission noted the substantial cost involved in recounts and election contests. *See generally*, Contested Elections and Recounts: Issues and Options in Resolving Disputed Federal Elections, Federal Election Assistance Commission (Autumn 1990). The Election Assistance Commission observed:

> It is reasonable, then, that the States should be concerned with these costs and assign them in such a way as to discourage frivolous challenges while not discouraging legitimate ones …. Most States rule that the party who requests the recount or brings the contest bears the cost, and they usually require a deposit or bond as a precondition to starting the action.

Id. at 46-47, 48.

Missouri has precisely such a provision. Section 115.591 provides:

> In each case of a contested election, the court or legislative body may require the contestant to post bond for the costs and expenses of the election contest. The costs and expenses of any election contest, including the cost and expense of a recount, may be adjudged against the

unsuccessful party with payment of the costs and expenses enforceable as in civil cases.

App. A14.

Accordingly, in addition to dismissing his petition, this Court should require Shoemyer and his two co-contestants to reimburse the State and Missouri Farmers for the cost they have each incurred responding to Shoemyer's meritless challenge to the Right-to-Farm Amendment.

CONCLUSION

Shoemyer wants this Court to give him a mulligan. Actually, Shoemyer wants more than a mulligan. He wants this Court to nullify the half-million votes Missourians cast to adopt the Right-to-Farm Amendment. And Shoemyer wants this Court, by *ipsi dixit*, to grant him and his two co-contestants the outcome they wanted. What Shoemyer seeks is like trying to claim yesterday's winning lottery ticket.

For the reasons we detail above, even were this Court inclined to give Shoemyer the outcome he seeks, this Court has no jurisdiction to do so. Shoemyer is bringing a post-election challenge to the ballot title. Missouri allows ballot titles to be challenged, but requires they be challenged and resolved before the election. Shoemyer had a year to litigate the Right-to-Farm ballot title before the election. But he did not, preferring instead to sit on his hands. Shoemyer wants to hunt with the hounds and run with the fox. He campaigned against the Right-to-Farm Amendment as it was written and titled by the General Assembly, certified and reviewed by the Secretary of State and Attorney General, and now that the voters adopted the amendment and rejected Shoemyer's views, he wants this Court to overturn the election. Shoemyer cannot have it both ways. He cannot acquiesce in the ballot title and, now that he lost the election, bring a post-election challenge claiming the ballot title was "deceptive."

Simply put, Missouri law does not allow Shoemyer to now raise a post-election ballot title challenge cross-dressed as an election contest. Shoemyer's petition is without any merit and should be dismissed. Accordingly, we ask this Court to dismiss

Shoemyer's petition and require Shoemyer to reimburse the state and Missouri Farmers for the "costs and expenses of this election contest" as provided in §115.591.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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

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I further certify that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that it contains 7,785 words.

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