SC94516

IN THE SUPREME COURT OF MISSOURI

WES SHOEMYER, *et al.*, Plaintiffs,

vs.

JASON KANDER, Defendant,

MISSOURI FARMERS CARE, TIMOTHY JONES, BILL REIBOLDT, and TOM DEMPSEY, Intervenors/Defendants.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PETITION FOR ELECTION CHALLENGE

Charles F. Speer MO 40713
Peter Britton Bieri MO 58061
Charles D. Miller MO 62352
Andrew R. Klonowski MO 66010
SPEER LAW FIRM, P.A.
104 W. Ninth Street, Suite 400
Kansas City, MO 64105
Phone: (816) 472-3560
Fax: (816) 421-2150
cspeer@speerlawfirm.com
bbieri@speerlawfirm.com

Anthony L. DeWitt, MO 41612
Bartimus, Frickleton, Robertson & Goza, P.C.
715 Swifts Highway
Jefferson City, MO 65109
Telephone: (573) 659-4454
Facsimile: (573) 659-4460
aldewitt@bflwafirm.com

Attorneys for Plaintiffs

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JURISDICTIONAL STATEMENT

As previously stated, Plaintiffs firmly believe that Section 115.555 of the Missouri Revised Statutes, which states that "all contests to the results of elections on constitutional amendments . . . shall be heard and determined by the Supreme Court," unambiguously grants this Court jurisdiction to hear contests to constitutional amendments. Defendant's claim[1] that Section 115.555 is unconstitutional is tenuous at best. Section 115.555 is presumed constitutional and can be found unconstitutional only if it clearly and undoubtedly violates a constitutional provision. *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012). Nowhere in the provisions cited by Defendant is it stated that the original jurisdiction of this Court is unambiguously limited in such a way as to prevent this Court from hearing this action.

As Plaintiffs stated in their initial brief, Article VII, § 5 of the Missouri Constitution states that "[t]he 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." Plaintiffs believe that jurisdiction is granted to this Court by the legislature through this sentence and the subsequent passage of Section 115.555. Defendant argues that the words "several classes of election contests"

[1] In the interest of economy and clarity, Plaintiffs will address their arguments generally to those raised by Defendant Secretary of State Kander, except insofar as any intervening parties have raised issues which differ materially, at which point Plaintiffs will note the proponent of such arguments.

as used in Article VII, § 5 only contemplates contests dealing with elected officials. Such a reading is unnecessarily narrow and ignores the plain language of Section 115.555. The error of Defendant's analysis is particularly apparent when reading the preceding sentence in Article VII, § 5 which provides that:

> [c]ontested 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.

(Emphasis added.)

First, it is important that the above two sentences both specifically use the terms officers and officials. Those terms are not used in the portion of Article VII, § 5 to which Plaintiffs cite, authorizing the general assembly to pass laws relating to jurisdiction and administration for all other types of election contests (which the legislature did in passing Section 115.555). The above sentences lay out the procedures for hearing all election contests of public officers, the first dealing with statewide officials and the second dealing with all other officials. If this Court adopts Defendant's interpretation of Article VII, § 5 as only dealing with elections of public officials, then it would render the portion relating to "several class of election contests" meaningless. "This Court must assume that every word contained in a constitutional provision has effect, meaning, and is not mere surplusage." *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 206 (Mo. banc 2008). In

contrast, adopting Plaintiffs' interpretation that the first two sentences of Article VII, § 5 govern contests of elections of public officials and the last sentence deals with all other types of contests, including this one, provides that each sentence has a unique purpose. Therefore, if two competing interpretations exist where one provides constitutional harmony and the other results in the nullification of a Constitutional provision, the former should be adopted. In sum, jurisdiction of this matter is proper before this honorable Court.

ARGUMENT

I. PLAINTIFFS HAVE ALLEGED SUFFICIENT IRREGULARITIES TO CAST DOUBT ON THE VALIDITY OF THE ELECTION OF AMENDMENT 1.

Defendant fails to provide any reasonable or sufficient explanation for the obvious, unnecessary, significant, and misleading differences between the ballot title and actual text of Amendment 1. Rather, Defendant essentially argues that the standard is so low that even though the ballot title was blatantly different from the actual text of Amendment 1, it is simply not a big deal. Defendant's argument is hardly convincing. The standard Plaintiffs must meet is clear. Plaintiffs must show that an irregularity existed in the election that would cast doubt on the validity of the outcome. Section 115.593 RSMo. In defining what constitutes an irregularity under Section 115.593 RSMo, the Court of Appeals for the Eastern District noted that, "[a]pplying the plain meaning of the word irregularity clearly would include disregarding a statute." *Gerrard v. Board of Election Com'rs*, 913 S.W.2d 88, 90 (Mo. App. E.D. 1995).

A. An insufficient or unfair ballot title is an election irregularity.

Plaintiffs have alleged that in the election concerning Amendment 1, an election statute was violated or disregarded, namely Section 116.155 RSMo. Nothing in Section 115.593 RSMo states, as Defendant suggests, that only "external actions" may constitute irregularities. Defendant's logic fails to show why violating an election statute such as improper voter registration should be treated differently than violating the requirement under Section 116.155 that a ballot title be fair and accurate. In both instances, an election law has been disregarded. In both instances, the election is irregular. In fact, this Court has expressly stated its belief that an unfair ballot title is an irregularity under Section 115.555 RSMo. *Dotson v. Kander*, 435 S.W.3d 643, 645 (Mo. banc 2014).

B. Defendant has not refuted the irregularities in the ballot title.

As noted above, Defendant does not credibly dispute any of the discrepancies to which Plaintiffs point in their Petition. Instead, Defendant provides elaborate sophistry to argue that the average voter was fully aware of the grammatical subtleties and alleged overarching intent of the legislature in drafting Amendment 1 and its accompanying ballot title. Such a conclusion lacks evidentiary support and is unconvincing.

First, Defendant argues that the omission in the ballot summary of a significant restriction on the right to be protected by Amendment 1 was innocuous because of the complicated meaning of the word "infringe." This argument fails because it assumes that the average Missouri voter would understand that the statement that the right to farm shall not be infringed, according to Defendant's argument, should be properly read to say, "shall not be interfered with except where subject to existing applicable laws, specifically

those found in Article VI of the Constitution of Missouri." Such an assumption is tenuous at best and, as in *Seay v. Jones*, is insufficient to inform the public of the effect of their vote. *See Seay v. Jones*, 439 S.W.3d 881 (Mo. App. W.D. 2010).

Defendant further argues that this case should be distinguished from *Seay* because of the nuance of the term "infringe." However, the same flawed argument could and may have been made in *Seay* as relates to the term "permit." In *Seay*, the court reviewed the sufficiency of a ballot title that simply asked, "[s]hall the Missouri Constitution be amended to permit voting in person or by mail for a period of six business days prior to and including the Wednesday before the election day in all general elections?" *Id*. at 889. However, the actual statute included a restriction that early voting would only be available in years where the General Assembly allocated funds. *Id*. There the court held that the ballot title was insufficient because it failed to properly apprise voters of the funding limitation. "Permit" means: to allow (something) to happen; to make something possible. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, ELEVENTH EDITION (2003). Applying Defendant's logic, it would appear that the ballot title in *Seay* was also sufficient because the average voter should have realized that "permit" does not mean "always provide." That was not the conclusion of the court in *Seay* and there is no reason for this Court to entertain such an argument in the instant matter.

Finally, Defendant argues that the substitution of the term "Missouri Citizens" in place of "farmers and ranchers" is not misleading because the true intent of the General Assembly was simply to protect Missouri Citizens, which are included within the term "farmers and ranchers." Defendant provides no support for its conclusion that the

intended beneficiaries of Amendment 1 are Missouri Citizens. If it were true that the intended beneficiaries of Amendment 1 are Missouri citizens and not foreign entities who may own or operate farms or ranches in this state, then the obvious question is, "why didn't the General Assembly use the term Missouri Citizens in the amendment language?" The inconsistencies in Defendant's arguments simply do not add up. Furthermore, Defendant's argument that any inconsistencies are harmless because the full amendment language was available at every polling site is irrelevant because that does nothing to remedy the violation of the election rules, namely Section 116.155 RSMo.

C. The irregularities in the ballot title are significant enough to cast doubt on the validity of the election contest.

Given the extremely narrow margin of victory and the significance of the misleading nature and inadequacies in the ballot title, it is easy to see that the irregularities were sufficient to cast doubt on the validity of the election results. Intervenor Missouri Farmers Care ("Corporate Intervenor")[2] argues that Plaintiffs fail to meet their burden in this regard because Plaintiffs are unable to point to enough specific voters who were misled to cause a reversal of the present outcome of the election.

[2] Again, despite Corporate Intervenor's insinuation and self-labelling their group as "Missouri Farmers," Missouri Farmers Care does not represent the opinions or interests of all Missouri farmers, but rather only those affiliated with the Missouri Farmers Care group. Notably, each of the Plaintiffs is a Missouri farmer not in any way affiliated with Missouri Farmers Care.

Apparently Corporate Intervenor believes that Plaintiffs have the burden of violating individual Missouri citizens' right to a secret ballot by inquiring into not only how they voted, but why they voted the way they did. As this Court opined back in 1921, such activity is expressly prohibited. *Ex parte Oppenstein*, 289 Mo. 421, 233 S.W. 440, 442 (Mo. banc 1921).[3]

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[3] The system of ballot voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases, and **that no one is to have the right, or be in a position, to question his independent action, either then or at any subsequent time. The courts have held that a voter, even in the case of a contested election, cannot be compelled to disclose for whom he voted**; and for the same reason we think others who may accidently, or by trick or artifice, have acquired knowledge on the subject, should not be allowed to testify to such knowledge, or to give any information in the courts on the subject. Public policy requires that the veil of secrecy should be impenetrable. Unless the voter himself voluntarily determines to limit it, his ballot is absolutely privileged; and to allow evidence of its contents when he has not waived the privilege is to encourage trickery and fraud, and would in effect establish this remarkable anomaly, that, while the law from motives of public policy establishes the secret ballot with a

In order for Plaintiffs to provide the information Corporate Intervenor demands, they would have to commit countless violations of the privacy rights of Missouri voters. Such an absurd requirement cannot be the standard to which Plaintiffs are held and to Plaintiffs' knowledge, has never been required in previous cases.

In contrast, Plaintiffs have shown that multiple provisions of Amendment 1 were obviously and blatantly omitted or mischaracterized in the ballot title prepared by the General Assembly and approved by Defendant. Plaintiffs have also shown that the issues that were insufficiently or unfairly summarized were central issues of debate in the discussion over passage of Amendment 1. Given these circumstances, and that the ballot language clearly misstated that Amendment 1 applies only to Missouri citizens, it is nearly impossible to conclude that such important irregularities, if remedied (which would include the truthful statement that Amendment 1 would apply to all foreign entities), would not have changed the outcome of an election which was decided by less than 0.25% of the votes cast. With a margin that close, any irregularities, let alone ones as

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> view to conceal the elector's actions, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated and the voter's action disclosed to the public. Cooley on Constitutional Limitations (17th Ed.) pp. 912, 913.

Ex parte Oppenstein, 289 Mo. 421, 233 S.W. 440, 442 (Mo. banc 1921) (emphasis added).

central as those present here, would easily have had potential to change the final outcome of the vote.

II. DEFENDANT'S PROCEDURAL ARGUMENTS ARE MERITLESS.

Plaintiffs properly brought this Election Contest within the time allowed by statute and have otherwise complied with all of the requirements for this Court to decide this issue. Defendant's arguments that Plaintiffs' claims are barred by the doctrine of laches, the statute of limitations and Article XII of the Missouri Constitution are erroneous in nature, against public policy or otherwise not applicable.

A. Plaintiffs' Petition is timely.

Plaintiffs have complied with the letter of the statute providing for post-election challenges by filing their Petition twenty-nine (29) days after the final results of the election on Amendment 1 were certified. Defendant and Intervenors do not dispute this except to argue that Plaintiffs' compliance with Section 115.557 violates the Missouri Constitution. First, Plaintiffs contend that the result of the election were invalid due to the irregularities in the ballot language, such that the amendment was not validly passed as contemplated by Section 115.557. Second, Defendant's argument on this point should be rejected because it would create absurd results making all election challenges to constitutional amendments all but impossible and drastically eroding Missouri citizens' right to ensure that voting on such amendments is done fairly and in accordance with established election laws.

Defendant contends that Article XII, § 2(b) requires that any irregularities in the election of a constitutional amendment must be fully resolved within thirty (30) days of

an election or be deemed entirely moot. Such an interpretation, applied in this instance, would have required Plaintiffs to file their Petition, serve Defendant, allow all parties to fully brief the issues, schedule and conduct oral arguments, and require this Court to make a determination, all before September 4, 2014. For reference, that deadline would have been ten (10) days after the election results were initially announced, the day the Secretary of State began the official recount, and eleven (11) days prior to the official certification of the final election results. Such an accelerated briefing and argument schedule, aside from being all but impossible, would arguably result in the violation of the due process rights of all parties involved and likely result in flawed jurisprudence. To limit review of something as important and lasting as an amendment to the Missouri Constitution is undoubtedly against public policy, justice, and good governance.

B. Plaintiffs' claims are not barred by the doctrine of laches.

Any argument by Defendant that the doctrine of laches has any application in this case is a red herring and should be disposed of summarily. Defendant admits in its brief that the doctrine of laches has no effect on the statutory requirements or rights in this case. Brief of the State, p. 28. Rather, Defendant argues that Plaintiffs can only proceed if they are granted some equitable excuse for delay. That contention is wrong. As noted above and in Plaintiffs' Initial Brief, Plaintiffs have fully complied with the requirements of all applicable election statutes. Because Plaintiffs' claims are provided for by statute and are not susceptible to attack from an equitable defense such as laches, any reliance by Defendant on that theory is misplaced.

Furthermore, and purely for clarification, Defendant's contention that Plaintiffs

had an entire year to air their grievances is inaccurate. Section 116.190.1 RSMo provides that a challenge to a ballot title may be brought under that section only within ten (10) days after it is certified by the secretary of state. Thus, once that time-limit expired, Plaintiffs did not have standing to challenge the title until it was ultimately passed. *See Dotson*, 435 S.W.3d at 645 (holding claim that given ballot title was unfair or insufficient is available through election contest only if not previously litigated and finally determined and provided the proposal has been adopted). Thus, Plaintiffs were required to wait until it was officially determined that the provision had passed before they had standing to challenge the validity of the ballot title under *Dotson*.

III. PLAINTIFFS' REQUEST FOR RELIEF DOES NOT WARRANT DISMISSAL.

Defendant is incorrect in arguing at the close of its brief that Plaintiffs have only requested relief that is not provided for by law. Defendant argues that the only relief Plaintiffs have requested is that the results be set aside, a remedy that Defendant argues is not allowed by law. In truth Plaintiffs' prayer for relief states:

WHEREFORE, Contestants respectfully request this Court:

A. Declare that the summary statement for Constitutional Amendment No. 1 as adopted in TAFP HJR 11 & 7:

   i. is insufficient, unfair, and misleading;

   ii. includes language that was likely to create prejudice for or against the Amendment;

iii. constitutes an election irregularity of sufficient magnitude to cast doubt on the validity of the election on August 5, 2014 regarding Constitutional Amendment No. 1; and

B. Set aside the election results of August 5, 2014, or

C. Order that Constitutional Amendment No. 1 be remanded to the legislature; and

D. any such other or additional relief as this Court deems necessary or proper.

(Emphasis added). Plaintiffs do not dispute that this Court cannot provide any relief under the sun. However, Plaintiffs have requested that this Court provide the relief it deems proper. While a recount has already been conducted and would do nothing to address the irregularities in this election, if this Court determines that the proper remedy is conducting a new election with a sufficient and fair ballot title, then Plaintiffs' Petition clearly allows for such a determination. The harsh response of dismissing Plaintiffs' Petition wholesale is completely unwarranted.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court enter a judgment on the pleadings in favor of Plaintiffs, finding that the ballot title for Amendment 1, which was presented to the voters on August 5, 2014, was insufficient, unfair, deceptive and/or misleading and setting aside the election results on that question, along with any further relief this Court deems just and appropriate.

Respectfully submitted,

SPEER LAW FIRM, P.A.

By: /s/ Charles F. Speer
Charles F. Speer (MO 40713)
Peter Britton. Bieri (MO 58061)
Charles D. Miller (MO 62352)
Andrew R. Klonowski (MO 66010)
104 West 9th Street, Suite 400
Kansas City, Missouri 64105
Tel: (816) 472-3560
Fax: (816) 421-2150
cspeer@speerlawfirm.com
bbieri@speerlawfirm.com
cmiller@speerlawfirm.com
aklonowski@speerlawfirm.com

Anthony L. DeWitt (MO 41612)
BARTIMUS, FRICKLETON,
ROBERTSON & GOZA, P.C.
715 Swifts Highway
Jefferson City, MO 65109
Tel: (573) 659-4454
Fax: (573) 659-4460
aldewitt@bflawfirm.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(b) and, in that the brief contains 3,249 words as directed by Rule 84.06(c). The word count was derived from Microsoft Word.

/s/ Charles F. Speer

CERTIFICATE OF SERVICE

This will certify that on the 13th day of February 2015, a copy of the above and foregoing document was served on the following counsel of record via United States first-class mail, postage prepaid and email:

Mark F. (Thor) Hearne, II
Stephen S. Davis
Arent Fox LLP
112 S. Hanley Road, Suite 200
Clayton, MO 63105
stephen.davis@arentfox.com

David H. Welch
Deputy General Counsel
Missouri House of Representatives
State Capitol
Jefferson City, MO 65101
david.welch@house.mo.gov

Todd Scott
Chief of Staff
Sen. Tom Dempsey
President Pro Tem
State Capitol
Jefferson City, MO 65101
tscott@senate.mo.gov

Attorneys for Intervenors

Jeremiah Morgan
Missouri Attorney General's Office
Supreme Court Building
Jefferson City, MO 65101
jeremiah.morgan@ago.mo.gov

Attorney for Defendant

/s/Charles F. Speer
Attorney for Plaintiffs