

**IN THE SUPREME COURT  
STATE OF MISSOURI**

<b>DONI R. MILLER AND BRUCE C. COHEN</b>	)	
<b>APPELLANTS</b>	)	
	)	<b>CAUSE NO. SC95793</b>
	)	<b>ORAL ARGUMENT</b>
<b>VS.</b>	)	<b>REQUESTED</b>
	)	
	)	
<b>GENEVIEVE FRANK,</b>	)	
<b>ST. LOUIS COUNTY CLERK</b>	)	
<b>RESPONDENT</b>	)	

**REPLY BRIEF OF APPELLANTS**

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## ARGUMENT

### **1. THE SUPREME COURT PROPERLY HAS JURISDICTION OVER THIS MATTER BECAUSE THE ST. LOUIS COUNTY BOARD OF ELECTION COMMISSIONER'S CONSTITUTIONAL LACK OF AUTHORITY TO ACT UNDER MISSOURI REVISED STATUTES CHAPTER 115 WAS RAISED AND PRESERVED AT THE TRIAL COURT**

Respondent's brief is fairly short. Nonetheless, there are a couple of glaringly obvious points that warrant a reply.

In Respondent's Jurisdictional statement (Respondent's Brief p. 8, hereinafter referred to as "RB"), Respondent asserts, "Supreme Court Appellate jurisdiction is not appropriate in this matter since the actual constitutional validity of the relevant statutes is never at issue in this appeal nor was a constitutional question ever raised or preserved in the trial court." The constitutional infirmity of the St. Louis County Board of Election Commissioners (hereinafter referred to as "SLCBEC") (as created in Missouri Revised Statutes Chapter 115 Sections 115.015 and 115.017 (Appendix p. A7)) under Missouri Constitution Article IV, Section 12 (Appendix p. A3) is the underpinning of Appellants' cause of action, and is set forth initially in the Petition beginning at paragraph 10 (Legal File, P.7

hereinafter referred to as “LF”). In addition, in “Contestants’ Supreme Court Rule 51.07 Motion to Disqualify Interested Judges for Cause” at paragraph 3 (LF p.29), Appellants wrote, “Under Contestants’ theory of the case, the St. Louis County Board of Election Commissioners (as well as the other Boards of Election Commissioners created under Missouri Revised Statutes Chapter 115 which are not assigned to the Office of Administration or any of the Executive Branch Departments) has no constitutional authority under Missouri Constitution Article IV, Section 12 to act.” The constitutional question of the St. Louis County Board of Election Commissioners’ authority to serve as the St. Louis County election authority was properly raised and preserved in the trial court.

**2. MISSOURI CONSTITUTION ARTICLE IV, SECTION 12  
ESTABLISHES THE OFFICE OF SECRETARY OF STATE AND THE  
OFFICE OF ADMINISTRATION AND VARIOUS EXECUTIVE  
BRANCH DEPARTMENTS AND ASSIGNS EXECUTIVE BRANCH  
BOARDS TO THE OFFICE OF ADMINISTRATION OR TO AN  
EXECUTIVE BRANCH DEPARTMENT. THERE IS NO SUCH THING  
AS AN EXECUTIVE BRANCH BOARD “ADMINISTRATIVELY”  
ASSIGNED TO THE SECRETARY OF STATE**

Respondent argues that the SLCBEC “is administratively assigned to the Secretary of State” (RB p. 19). In order to reach this conclusion, Respondent completely ignores the plain language of Missouri Constitution Article IV, Section 12 which provides:

Section 12. The executive department shall consist of all state elective and appointive officials and employees except officials and employees of the legislative and judicial departments. In addition to the governor and lieutenant governor there shall be a state auditor, secretary of state, attorney general, a state treasurer, an office of administration, a department of agriculture, a department of conservation, a department of natural resources, a department of elementary and secondary education, a department of higher education, a department of highways and transportation, a department of insurance, a

department of labor and industrial relations, a department of economic development, a department of public safety, a department of revenue, a department of social services, and a department of mental health. In addition to the elected officers, there shall not be more than fifteen departments and the office of administration. The general assembly may create by law two departments, in addition to those named, provided that the departments shall be headed by a director or commission appointed by the governor on the advice and consent of the senate. The director or commission shall have administrative responsibility and authority for the department created by law.

**Unless discontinued all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by law or by the governor as provided by law to the office of administration or to one of the fifteen administrative departments to which their respective powers and duties are germane.**

(Emphasis added.) (Appendix p. A3)

In *Pearson v. Koster*, 367 S.W. 3d 36, 48 (Mo 2012) (en banc), the Court wrote, “This Court assumes that every word in the constitutional provision has effect and meaning. *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. banc 1983). The primary rule is to ‘give effect to the intent of the voters who adopted the

[provision]’ by considering the plain and ordinary meaning of the words used.

Keller v. Marion Cnty. Ambulance Dist., 820 S.W.2d 301, 302 (Mo. banc 1991); StopAquila.org, 208 S.W.3d at 902.” In addition, the Court will “neither add to nor subtract from the plain meaning of the constitution’s words.” *INEA et al. v. Independence School District*, 223 S.W.3d 131, 137 (Mo. 2007) (en banc).

Respondent notes “Article IV, §12 (Appendix, p.A20) of the Missouri Constitution creates the position of Secretary of State” (RB p.19). This section also creates the Office of Administration and the several executive branch departments. Significantly, the last sentence of the section specifically assigns all executive branch boards to the Office of Administration or to one of the executive branch departments, and not “administratively” to the Secretary of State. Indeed, this last sentence has both meaning and effect, *Pearson, supra*, 367 S.W. 3d at 4.

Incredibly, the last sentence of Article IV, Section 12 is not even mentioned in Respondent’s brief. Respondent makes no attempt to distinguish the SLCBEC from other executive branch boards or otherwise explain why the Court should refuse to give meaning and effect to the assignment requirements of the last sentence. Instead, Respondent relies on a wholly inapposite citation to Missouri Code of State Regulations section 15CSR 30-1.010(1)(E)



(Respondent's Appendix, p A22) which pertains to statewide elections which are not at issue in this case and functions the office of Secretary of State will perform for an election board, but is completely silent as to assigning an election board administratively to the Secretary of State. In short, Respondent is asking the Court to ignore the last sentence of Missouri Constitution Article IV, Section 12.

## CONCLUSION

A corporation in Missouri may have a building and employees and a working phone and be conducting business which gives it a *de facto* existence. But if it fails to register with the state or having registered, it is subsequently administratively dissolved, it has no *de jure* existence, or no right to conduct business.

From the outset, Appellants have acknowledged the *de facto* existence of the SLCBEC (See e.g. Petition par. 10, LF p.7). The constitutional issue before the Court is whether the SLCBEC has a *de jure* existence under Missouri Revised Statutes Chapter 115 when read in *pari materia* with the assignment requirements of Missouri Constitution Article IV, Section 12. The SLCBEC is an executive branch board which has never been assigned to the Office of Administration or to an executive branch department as required by the last sentence of Article IV, Section 12. Respondent offers absolutely no plausible reason why the Court should ignore the last sentence of Article IV, Section 12 and give it no force or effect. Accordingly, the SLCBEC has no authority to conduct business.

Under Missouri Revised Statutes Section 115.015, there are only two choices for an election authority for St. Louis County: Respondent St. Louis County Clerk or the SLCBEC. If the SLCBEC has no authority to act, by

necessity, Respondent must be the St. Louis County election authority.

Accordingly, for all of the above reasons, and the additional reasons set forth in Appellant's Brief, the trial court erred in granting Respondent's Motion to Dismiss.

Respectfully submitted,

/s/ Bruce C. Cohen

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### **CERTIFICATE OF COMPLIANCE**

**The Appellants' Brief contains 1,223 words and complies with the limitations contained in Rule 84.06(b). The brief includes all information required under Rule 55.03. This document was scanned and is virus free.**

**/s/ Bruce C. Cohen**

### **CERTIFICATE OF SERVICE**

**This document and the separate Appendix were filed electronically with the Court's electronic filing system on September 30, 2016. In addition, a printed copy was served on Respondent's counsel by U.S. mail, postage prepaid, addressed as follows:**

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