IN THE SUPREME COURT OF MISSOURI

No. SC94293

D. SAMUEL DOTSON III and REBECCA MORGAN,
Appellants,

v.

MISSOURI SECRETARY OF STATE JASON KANDER, PRESIDENT PRO TEM OF THE MISSOURI SENATE TOM DEMPSEY, SPEAKER OF THE MISSOURI HOUSE OF REPRESENTATIVES TIMOTHY JONES, SENATOR KURT SCHAEFER, and SENATOR RON RICHARD,
Respondents,

and

MISSOURIANS TO PROTECT THE 2ND AMENDMENT,
Respondent.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Judge

REPLY BRIEF OF APPELLANTS DOTSON AND MORGAN

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STATEMENT OF FACTS

The Brief of Respondents Schaefer and Missourians Protecting the 2nd Amendment included a statement of facts section related to mootness. 2nd Amendment Br. at 1. Additionally, Respondent Secretary of State seeks this Court's direction as to treatment of votes already cast. State Br. at 25 n.3. [1] As a result, Appellants wish to

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[1] Appellants are unclear as to exactly which brief contains the Respondents' legal position. The Attorney General purports to represent the "State Respondents" and titled his brief accordingly, while other attorneys have purported to file briefs for some of those same State Respondents. *See Joint Brief of Respondents President Pro Tem of the Missouri Senate Tom Dempsey, Speaker of the Missouri House of Representatives Timothy Jones and Senator Ron Richard* (Dempsey Br.)*, and Joint Brief of Respondents Senator Kurt Schaefer and Missourians Protecting the 2nd Amendment* (2nd Amend. Br.). The Dempsey Brief refers to, and adopts the arguments of, a "Brief of Respondent Secretary of State Jason Kander filed by the Attorney General" but there is no brief with that title and Secretary Kander – the Respondent with the most experience writing ballot titles – specifically declines to take a position on the central issue in this case, which is whether the summary statement written by the General Assembly is insufficient or unfair. State's Br. at 14; also see L.F. 41 n.1, L.F. 50 n.1. To the extent the briefs differ, Appellants assume the Attorney General speaks for the State on legal issues. *State ex rel. Igoe v. Bradford*, 611 S.W.2d 343 (Mo. App. 1981). When this reply brief refers to the

further clarify the state of the record.

Appellants do not dispute that absentee ballots are "made available" for overseas absentee voters beginning June 20, 2014, and for other absentee voters beginning June 24, 2014. 2nd Amend. Br. at 1. But there is no factual record that any local election authority has (1) received requests for absentee ballots; (2) sent out any absentee ballots to voters; or (3) received absentee ballots back from voters. *See* Transcript.

The representations of the parties during the hearings and statements of the court regarding absentee ballots are relevant also in light of the Secretary's request. The Attorney General's Office, which appeared to represent all of the Defendants below,[2] argued against the issuance of a TRO by stating that there was no irreparable harm in denying the Motion for TRO because although an absentee ballot may go out, "that doesn't mean that the ballot will ultimate [sic] be counted if the court decides at some point that this particular ballot title is impermissible." Tr. 6:6-13. Counsel for Appellants recharacterized the argument (without objection from the Secretary of State)

"State Brief," or "the State," it is referring to the brief filed by the Attorney General's Office.

[2] The first TRO hearing primarily involved the Attorney General's Office and Senator Schaefer and his then attorney, Mr. Brown, arguing over whether the Attorney General represented all the State Defendants. Plaintiffs simply requested that the merits of their case be heard and announced their readiness to proceed on June 16. L.F. 14:22-24. The trial court would not do so.

as "I understand the State's chief election official, Secretary of State, to be represent[ing] through his attorneys, that if voters vote on Friday, voters use language on Friday and they vote in favor of this initiative, that there is some legal basis that those votes might not be counted." Tr. 14:13-19. As a result of these representations, the trial court, in announcing the denial of the Motion for TRO, stated, "I think that a TRO does not accomplish those goals and there probably will be some people whose votes may not count if this summary does not prevail." Tr. 73:23-74:7.

ARGUMENT

I. JURISDICTION

The State argues the trial court did not reach Dotson's constitutional claim. State Br. at 2. The Dempsey Brief's sole Point Relied On contains a heading "The trial court did not err as a matter of law by denying Plaintiff's request for declaratory judgment that a portion of section 116.190, RSMo, is unconstitutional." Dempsey Br. at i and 8. The Dempsey Brief then goes on to say the issue was not decided. The constitutional claim (in the first amended petition) was ruled and this Court has jurisdiction to review that finding.[3] The text of the trial court's order requires such a result.

The State then mocks Dotson's argument that this Court will have to decide whether to write a new summary statement should it find the ballot title unfair, characterizing the argument as "this court is without jurisdiction unless it rules in a certain manner" and that the argument "flips jurisdiction on its head." *Id.* By mischaracterizing Appellants' position, the State is able to derisively dismiss it. But the

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[3] The State apparently sees no irony in arguing against this Court's jurisdiction to adjudicate Appellants' request while at the same time making its own request for an advisory opinion from this Court on an issue the trial court did not reach – what to do about those who have allegedly already voted – nor does the State see irony in asking this Court to make that determination even though it in no way involves an issue of constitutionality of a statute. State Br. at 25 n.3.

original position was clear: 1) this court has jurisdiction because the trial court specifically denied a claim involving constitutionality of a state statute; 2) this Court must reach the issue of constitutionality of a statute to resolve this case, therefore this case fits within the letter of the jurisdiction of this court; and, 3) even if this Court did not have jurisdiction due to the Constitutional issues, it may invoke general importance jurisdiction.

As to the second basis for jurisdiction, the State seems to argue that if this Court finds the ballot title unfair, it should send the case elsewhere for a determination of what to do about it. Rule 84.14 specifically authorizes an appellate court to do what Appellants ask and "give such judgment as the court ought to give." *See Thompson v. Committee on Legislative Research,* 932 S.W.2d 392, 395 (Mo. banc 1996) (Supreme Court ordering Secretary of State to make alterations to the ballot). In giving such judgment, this Court must address the constitutional issue.

As to the third alternative for jurisdiction, the State argues general interest jurisdiction only applies to cases that have been in the Court of Appeals. The State does not cite to the *Rodriquez* dissent so may not realize that this position was rejected there. *Rodriquez v. Suzuki Motor Corp.,* 996 S.W.2d 47 (Mo. banc 1999). *Rodriquez* was a direct appeal to this Court. The dissent argued:

> "this Court has the power to order a case transferred from the court of appeals prior to opinion. . . But these alternatives are mutually exclusive. If this Court has exclusive jurisdiction then it may not, by definition, transfer the cause from the court of appeals, and, conversely, if

the cause is ordered to be transferred to this Court, then that requires a holding that jurisdiction was originally proper in the court of appeals." *Id., White, J.,* dissenting.

But that position drew only one vote from this Court and is therefore wrong as a matter of precedent. This Court may exercise general interest jurisdiction in this case.

II. THE CHALLENGE TO THE SUFFICIENCY AND FAIRNESS OF THE BALLOT TITLE IS NOT MOOT.

Respondents argue mootness because absentee ballots were made available (a finding not made by the trial court nor supported by the record) and because a statute prohibits adding measures to the ballot at this point (a basis included in the trial court judgment). The fact that absentee ballots have been cast (if it is true) does not preclude a remedy, and this Court has historically given remedies at this late stage. Nor does the statute prohibit rewriting a ballot title the Court finds to be unfair and deceptive.

A. Neither availability of absentee ballots nor absentee voting moots this case.

Missourians Protecting the 2nd Amendment argues mootness on an additional ground not presented to the trial court and upon which there is no evidentiary record -- that absentee voting "has begun." 2nd Amend. Br. at 1. There is no factual foundation whatsoever for this statement. Transcript.

Neither the availability of absentee ballots, nor (if the record supported it) actual absentee voting moot the challenge to the ballot title for SJR 36. This Court rejected the

argument in *Thompson*, 932 S.W.2d 392. *Thompson* was decided on October 18 for a November 5 election, 18 days before the election. Even though the law required absentee ballots be made available six weeks before the election. § 115.281, RSMo 2000. The fact that absentee ballots were available did not, and does not, preclude a remedy.

Absentee voting is not a right but is a privilege subject to various conditions. *Straughan v. Meyers*, 187 S.W. 1159, 1164 (Mo. banc 1916); *State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 234 (Mo. App. 1978). After absentee ballots were out, and presumably case, the *Thompson* court ordered alterations to the non-absentee ballots:

> To repeat: The secretary of state is ordered to direct the county election authorities to remove the fiscal note summary from the ballot question previously printed for Constitutional Amendment No. 9. If the fiscal note summary cannot be removed entirely from the previously-printed ballot, the secretary of state is ordered to direct the county election authorities: (a) to prepare an opaque, adhesive sticker bearing the ballot title without the fiscal note summary, which sticker shall be of sufficient size to obscure the previously printed ballot title and fiscal note summary completely; and (b) to place the opaque sticker over the previously printed ballot language for Constitutional Amendment No. 9 in such a way as to obscure all of the previously printed ballot language for that proposition.

932 S.W.2d at 395-96.

Despite *Thompson*, Respondents look to *Gartner v. Missouri Ethics Comm'n*, 323 S.W.3d 439 (Mo. App. 2010), which they suggest holds that once absentee voting has

begun, an appellate decision on a ballot issue is moot. 2nd Amend. Br. at 2. But this is not the true holding of *Gartner*. Rather, the challenge was moot because Gartner was already on the primary election ballot, the election had already taken place, and Gartner lost. *Id.* Although the opinion suggests that the beginning of absentee voting was enough, it then went on to set forth all the relevant facts before actually holding the case was moot. *Gartner* is clearly distinguishable from the facts of this case, which are much more like the facts in *Thompson*. *See also, Knight v. Carnahan*, 282 S.W.3d 9 (Mo. App. 2009) (Challenge to proposed initiative not moot even though the election had already been held and the measure had passed.)

Below, the Secretary of State convinced the trial court not to issue a TRO by representing that the distribution of absentee ballots did not prejudice any party. Tr. 6:6-13. The State, which apparently includes the Secretary of State, do not argue mootness on this basis, nor should they with a straight face. Appellants are entitled to relief even if some absentee ballots with an unfair and insufficient ballot title have already been distributed and returned.[4]

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[4] The Secretary of State requests an advisory opinion on what to do about ballots if some have already been returned. This is a question for another day upon a record that does not yet exist.

B. The case is not moot due to *Cole v. Carnahan* or Section 115.125.2

1. The dicta of *Cole v. Carnahan* is not binding on this Court, and is wrong.

Respondents suggest Appellant's failure to address *Cole* is somehow telling of how fatal it is. To the contrary, the portion of *Cole* that Respondents, and the trial court, relied upon is *dicta* and not controlling in the Court of Appeals, much less in this Court. *Cole v. Carnahan*, 272 S.W.3d 392 (Mo. App. 2010). Indeed, Judge Holliger felt so strongly about the issue that he authored a concurring opinion to specifically address the finding of mootness under section 115.125 as *dicta*. *Id.* at 395-96. (*Holliger, J.* concurring). It is this *dicta* that Respondents and the trial court rely on.

In *Knight v. Carnahan*, the same court was later asked to dismiss a challenge to an initiative as moot because the election had already occurred. *Knight* discussed *Cole* and found authority to proceed on a request for declaratory judgment even if the request for injunctive relief was moot. *Knight* went on to review whether statutory requirements had been followed in presenting the issue to voters. Here, Dotson sought declaratory judgment below. L.F. 24. Even if this Court finds the injunctive relief moot, the request for declaratory judgment is not.

Additionally, as set forth in Appellants' Opening Brief[5] and below, the *dicta* in *Cole* is contrary to the plain language of the statute. Plainly put, *Cole* is wrong.

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[5] Opening Brief, pp. 29-31

2. Plaintiffs did not request the trial court place an issue on the ballot. They requested a court order modifying or removing what is already on the ballot. There is no limitation imposed on this requested relief.

Respondents claim the relief sought by Appellants is ineffectual because section 115.125.2 is "on point." As explained in the Opening Brief, the plain language of the last sentence of Section 115.125.2 only applies to adding a candidate or issue (measure) to the ballot. As also noted in the opening Brief, Section 115.125 states nothing about removing a candidate or measure from the ballot or modifying a measure (or candidate) that is already on the ballot.

If the legislature had intended that result, it could have used words that are found in statutes that are *in pari materia*. Section 115.127.3, RSMo Supp. 2013, states, "the election authority shall print the official ballot as the same appears on the sample ballot, and no candidate's name or ballot issue which appears on the sample ballot or official printed ballot shall be stricken or removed from the ballot except on death of a candidate or by court order." (Emphasis added). There is no time limitation in this provision. Clearly, if there is a court order, Section 115.127.3 allows ballot issues to be removed from a ballot without any time limitation such as that in Section 115.125.2. And as noted in the Opening Brief, Section 115.247.2, RSMo Supp. 2013, allows a court to modify a ballot upon the application of a single voter. There is also no time limitation found in that provision. *Id.*

Chapter 115 then provides the following deadlines:

- Adding a candidate or ballot issue – 6 weeks before the election;
- Striking or removing a candidate or ballot issue – no time limit; and
- Modifying (not adding) a ballot – no time limit.

Appellants asked for either a modification to ballot title or that it be removed from the ballot and sent to the legislature. Neither of these is barred by Section 115.125.2.

3. Interpreting 115.125.2 to allow modifications to a ballot title when 116.190 challenges succeed.

The State claims that Appellants' plain reading of the statute renders its language meaningless.[6] It does not. Allowing relief for a successful section 116.190 challenge to a ballot title does not disturb section 115.125's effect on other ballot measures not subject to such challenges. Statewide ballot measures referred by the General Assembly are not the only ballot issues. Ballot issues include far more local issues than statewide issues. Accordingly, Section 115.125.2 has great meaning, even if the Court finds that it does not apply ballot titles subject to Section 116.190 challenges. Examples include: zoning; bond issuances; sales and property taxes; creating a special business district; smoking bans; and alcohol sales and use limitations. There are practically an infinite number of ballot measures that would still be controlled by Section 115.125.2 – prohibiting the addition of such issues to ballots after six weeks prior to an election.

Additionally, this Court should be mindful of initiative petitions that may appear

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[6] State Br. at 9.

on the November ballot in even numbered years. The Secretary of State typically does not determine the sufficiency of signatures until early August.[7] Section 116.200 allows a citizen to challenge that determination. In either case, Respondents' argument, as in this case, is apparently that nothing new can go on and nothing can be removed because of Section 115.125.2. This year, the election is November 4. Six weeks before that is September 23. So, based on Respondents' arguments, if the Secretary of State made an error in the determination of signature sufficiency (on or about August 7), anyone who wants to correct that, and get a ballot issue removed from or added to the ballot has about 50 calendar days from the Secretary's determination to get a final appellate opinion on a matter that requires an extensive factual record.

III. THE BALLOT TITLE IS UNFAIR AND INSUFFICIENT.

Appellants sought an order declaring the title insufficient and unfair, rewriting the ballot title and certifying a new one to the Secretary of State. L.F. 24. Yet the Secretary of State takes no position on the issue here. The 2nd Amendment Respondents and the State Respondents argue that the ballot title is fair because it is accurate and only omits mere details. The ballot title is deceptive on its face without even considering what it omits. But the changes omitted by the summary statement are a far cry from details.

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[7] On August 7, 2012, the Secretary issued a news release regarding determinations of sufficiency of signatures. http://sos.mo.gov/news.asp?id=1114.

The State's Brief correctly announces that a summary statement must fairly summarize the proposal, but does not inform the court as to what "summarize" means. Instead, the State explains what is *not* meant by summarize. Of course a summary need not include details, but what must it include? By definition it must include the main points. Missouri courts have recognized this standard by holding that the ballot title should promote an informed understanding of the likely effect of the amendment. *See Coburn v. Mayer*, 368 S.W.3d 320, 324 (Mo. App. 2012) (*citing Cures Without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. App. 2008)). This summary does not summarize the main points or promote an informed understanding of the likely effect of the changes to our Constitution.

A. *Expressio unius est exclusio alterius*.

The State correctly summarizes one of Appellants' arguments on page 21 its brief. The current ballot title misleads because it implies only two changes are being made when this is simply not true. The State argues the "implication" argument must fail because details are not required to be included in a ballot title.

But the State misses the point, which is founded on a bedrock principle for interpreting the meaning of words – the doctrine of *expressio unius est exclusio alterius*. *See City of Springfield v. Brechbuler,* 895 S.W.2d 583, 585 (Mo. banc 1995); s*ee also Kansas City v. Threshing Machine Co.,* 87 S.W.2d 195, 205 (Mo. banc 1935) ("It is a general principle of statutory interpretation that the mention of one thing implies the exclusion of another thing."). By telling voters there are two changes to the Constitution, the legislature represents there are no other changes. But there are other changes and

they are significant. The legislature has hidden these significant changes behind the false promise that there are only two small ones.

Appellants also argued that the changes being disclosed are not really changes at all. The State argues mightily that the ballot title reflects actual changes to Missouri law. Appellants do not feel the need to elaborate on the original analysis, which was sound. But regardless of how this Court resolves the issue of whether a right to bear arms is being added and whether the State already has an obligation to uphold that right, the Court must determine whether these two statements in the ballot title are what the measure is *really* about. Appellants suggest that the main effects – the effects the legislature has an obligation to disclose to the voters – are in the changes relegated by the State to the cutting room floor as details.

B. Details, details, details.

The State's chief argument for the fairness and sufficiency of the ballot title is that the ballot title need not include the "details" of a proposal. State Br. at 20. The State characterizes Appellant's argument as "the summary is unfair because it does not mention every single detail." State Br. at 21. That is not Appellants' position.

Of course a summary may leave out the details, but not the main points. "Detail" is defined as "a small and subordinate part." WEBSTER'S THIRD NEW INT'L DICTIONARY 616 (2003). The State also points to 50 word limit as justification for leaving out major changes. The State's argument begs the question: what are the essential elements of the proposal and what are the details? The State argues that the essential elements of the proposal are the statement that the right to bear arms is unalienable and the directive that

the state shall uphold those rights. Certainly the 50 word limit requires some judgment about the main points of the underlying proposal. But the judgment here was clearly wrong.

For example, the State argues that deleting the phrase "nothing herein shall justify the carrying of concealed weapons" from the Constitution is simply a detail. State Br. at 22 ("The removal of this language is a detail that is not necessary for an informed understanding…"). The State also argues that applying strict scrutiny to all gun laws is simply a detail – a small and subordinate part.

The parties have spent a fair amount of space arguing about what the proposed amendment to Missouri's Constitution will do. The State claims that removal of the concealed weapons language "does not affect any right afforded to Missouri's citizens and is not a detail required for inclusion in the summary statement." State Br. at 22.

This Court's decision in *Brooks v. State,* 128 S.W.3d 844 (Mo. banc 2004), says otherwise. Tellingly, none of the many briefs filed by the Respondents even mention *Brooks.* The removed language is what allows the legislature to regulate concealed weapons in spite of the fact that the right to bear arms "shall not be questioned." *Id*.

The Missouri Constitution has contained this provision for more than 130 years. For most of those years, the legislature prohibited the wearing of concealed weapons. Removal of that language is not a detail. It is a major change and voters must be alerted to it. When considered in context of the full measure, the proposal takes Missouri from a state where the government has a right to place reasonable restrictions on a concealed

weapons to a state where those restrictions are subject to the usually fatal standard of strict scrutiny.

The State also argues that adding a strict scrutiny standard for all gun laws is a mere detail that need not be disclosed to the voters. State Br. at 13 and 21. Whether to apply strict scrutiny to a law is not a minor thing. It is a big deal and the level of scrutiny applied will likely mean the difference between whether a law is upheld or not. *See Glossip v. Dep't of Transp.,* 411 S.W.3d 796 (Mo. banc 2013), *State v. Young,* 362 S.W.3d 386 (Mo. banc 2012). Strict scrutiny has never been applied by this Court or the U.S. Supreme Court when analyzing gun laws.

Although some courts have characterized the right to bear arms as a "fundamental" right, that does not mean strict scrutiny automatically applies. *See* James Fleming, *The Myth of Strict Scrutiny for Fundamental Rights*, XII:1 Dartmouth L.J., Vol 2 (2013). Certainly, this Court never even considered applying strict scrutiny in *State v. Richard*, a case analyzing restrictions on possessing a firearm while intoxicated. Even the concurring opinion, which described the right to bear arms as "fundamental", analyzed the statute under a "reasonable" standard rather than a strict scrutiny standard. *State v. Richard,* 298 S.W.3d 529, 533 (Mo. banc 2009), (Fischer, J., concurring).

The 2nd Amendment Coalition agrees that "there is no demonstrable history in Missouri of affording the right to keep and bear arms a legal status akin to other fundamental constitution rights like due process and equal protection." 2nd Amend. Br. at 13. Changing the Missouri Constitution to require a strict scrutiny review of all gun

laws, when that has not been the standard in the entire history of the state, is more than a mere detail. It is a main point of the measure and must be disclosed to the voters.

IV. IS IT CONSTITUTIONAL FOR THE COURTS TO WRITE BALLOT TITLES?

Appellant Dotson's briefing on constitutionality simply repeated an argument the State has made to this Court in the past. Now there appears to be a disagreement among the State Defendants below about the position of the "State Respondents." The "State Respondents", represented by the Attorney General, say "Section 116.190 does not authorize a court to re-write the summary statement." State Br. at 26. But in other briefs, state respondents (Dempsey, Jones and Richard) "differ from Respondent Kander and the Attorney General" on this point. Dempsey Jt. Br. at 5.

Appellants will not rehash the argument, which was aptly put to this Court in the Attorney General's briefing in the *Northcott* case. Brief of Robin Carnahan and Thomas A. Schweich in *Northcott v. Carnahan*, SC92500. But Appellants suggest that the failure of state officials to agree is a good argument for this Court to exercise jurisdiction and resolve the matter. The State Respondents' jurisdictional statement says "it is unclear what presents questions of general interest and importance." Yet the briefing on this issue makes it quite clear. The Court should reach the constitutional issue. Appellants assert that the State was right in earlier arguments to this Court when it said that re-writing of a ballot title be done by the original the drafter. Appellants alternatively request this Court rewrite the ballot title if it has the authority to do so.

CONCLUSION

Appellants Dotson and Morgan respectfully request this Court reverse the decision of the trial court as to the insufficiency and unfairness of the summary statement and rewrite the ballot title if it finds that the Courts have the authority to do so. Alternatively, this Court should order the measure sent back to the legislature for a rewriting of the ballot title.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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The undersigned counsel further certifies that pursuant to Rule 84.06(c), this brief:

(1) contains the information required by Rule 55.03; and

(2) complies with the limitations in Rule 84.06(b) and contains 5,298 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2010; and

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