IN THE SUPREME COURT OF MISSOURI

D. SAMUEL DOTSON III, *et al.*	)	
	)	
Appellants,	)	
	)	
vs.	)	**Case No. SC94293**
	)	
MISSOURI SECRETARY OF STATE JASON KANDER, et al.,	)	
	)	
	)	
Respondents.	)	

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

BRIEF OF APPELLANTS JENNIFER M. JOYCE AND JEAN PETERS-BAKER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTRODUCTION

This appeal involves citizen challenges to a ballot title prepared by the General Assembly for a proposed constitutional amendment (SJR 36) that the Governor has placed on the August 5, 2014 ballot. The circuit court issued a perfunctory judgment that purports to make two contradictory dispositions of the case: it both dismissed the lawsuits as moot and made an *ipse dixit* determination that the ballot title was "fair and sufficient." This Court should reverse.

Section 116.155.2, RSMo.[1] requires that the ballot title for constitutional amendments include a 50-word-or-less summary statement that is "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 measure." § 116.155.2, RSMo. This requirement, along with the provision in § 116.190, RSMo. (cum. supp. 2013) for citizen suits to challenge ballot titles that are "unfair" or "insufficient," are part of our State's procedural safeguards designed "to promote an informed understanding by the people of the probable effects of [a] proposed amendment" and "to assure that the desirability of [a] proposed amendment may be best judged by the people in the voting booth." *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 11-12 (Mo. banc 1981).

Historically, ballot titles have been held permissible when the titles have accurately indicated in a general way the main subject matter of a proposed amendment. But this case does not involve a ballot title framed as a general statement of the main subject matter of SJR 36. In this case, the General Assembly drafted a title that asks Missouri

[1] All citations are to Revised Statutes of Missouri (2000) unless otherwise indicated.

voters if the Missouri Constitution should be amended in two very specific ways – *i.e.*, "to include a declaration that the right to keep and bear arms is a (sic) unalienable right and that the state government is obligated to uphold that right?"

This is false advertising. If validly adopted, SJR 36 would repeal the State's nearly 140-year-old exemption from any constitutional protection of the carrying of concealed weapons and would make other textual changes that would expand the scope of the right to keep and bear arms to encompass new substantive areas and limit the General Assembly's ability to place restrictions on the expanded right. Because the General Assembly's summary statement misinforms voters about what SJR 36 would do, the circuit court erred in declaring it "fair and sufficient."

The circuit court also erred in its alternative (and self-contradictory) dismissal of the § 116.190 suits on mootness grounds. The circuit court cited § 115.125.2, RSMo. (cum. supp. 2013) for why it had no authority to order changes to the ballot, but § 115.125's plain language applies only to prevent a court from ordering "an individual or issue be placed on the ballot less than six weeks before the date of an election…" The § 116.190 suits ask that the title be revised to remedy the deception or be vacated. The litigants did not ask the court to order that SJR 36 be placed on the ballot. SJR 36 has already been placed on the August 5, 2014 ballot by Governor Nixon.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the current matter based on Article V, section 3 of the Missouri Constitution because Appellants Dotson and Morgan challenged the constitutionality of § 116.190, RSMo, an issue which is within the exclusive jurisdiction of this Court pursuant to Article V, section 3 of the Missouri Constitution. Appellants' Joyce and Peters-Baker appeal arises from the same judgment.

BACKGROUND AND STATEMENT OF FACTS

A. Legal Framework for Constitutional Amendments Proposed by the General Assembly.

1. Constitutional provisions

Article XII, section 2(a) of the Missouri Constitution allows the General Assembly to propose constitutional amendments "at any time by a majority of the members-elect of each house of the general assembly, the vote to be taken by yeas and nays and entered on the journal." Article XII, section 2(b) requires that all such amendments "be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election or at a special election called by the governor prior thereto, at which he may submit any of the amendments." In addition, Article XII, section 2(b) prohibits proposed amendments from containing "more than one amended and revised article" of the Missouri Constitution, or "one new article which shall not contain more than one subject and matters properly connected therewith."

2. Statutory provisions

Pursuant to § 116.155.1, RSMo., the General Assembly may "include the official summary statement and fiscal note summary in any statewide ballot measure that it refers

to the voters."[2] Section 116.155.2, RSMo. requires the title to "be a true and impartial statement of the purposes of the proposed measure in language neither intentionally argumentative no likely to create prejudice either for or against the proposed measure," but limits the summary statement to no more than fifty words, excluding articles.

Section 116.180 requires that within "three days after receiving the official summary statement the approved fiscal note summary and the fiscal note relating to any statewide ballot measure, the secretary of state shall certify the official ballot title in separate paragraphs with the fiscal note summary immediately following the summary statement of the measure and shall deliver a copy of the official ballot title and the fiscal note to the speaker of the house or the president pro tem of the legislative chamber that originated the measure…"

"Any citizen who wishes to challenge the official ballot title … for a proposed constitutional amendment submitted by the general assembly… may bring an action in the circuit court of Cole County" within ten days after the official ballot title is certified by the Secretary of State. § 116.190.1, RSMo. (cum. supp. 2013). By statute, the "president pro tem of the senate, the speaker of the house and the sponsor of the measure and the secretary of state shall be the named party defendants" in the action. § 116.190.2, RSMo. (cum. supp. 2013). The petition filed in circuit court must state the reason or

[2] If the General Assembly does not include a summary statement for a proposed constitutional amendment, the Secretary of State must draft the summary statement. § 116.160.1, RSMo.

reasons why the summary statement is "insufficient or unfair and shall request a different summary statement portion of the official ballot title." § 116.190.3, RSMo. (cum. supp. 2013).

Insofar as the action challenges the summary statement, the circuit court is directed to certify in its decision the summary statement portion of the official ballot title to the Secretary of State. § 116.190.4, RSMo. (cum. supp. 2013). The printing costs of court-ordered changes to ballot language for any statewide ballot measure are to be paid by the State. § 116.195, RSMo.

B. The Right to Keep and Bear Arms in Missouri

The State's 1820 and 1845 constitutions both provided that the people's "right to bear arms in defense of themselves and of the State cannot be questioned." Mo. Const. of 1820, Art. XIII, sec. 3; Mo. Const. of 1845, Art. XI, sec. 3.

In 1874, Missouri citizens approved a constitutional convention, which led to the voters ratifying a new constitution in 1875. Among other things, the State's 1875 constitution changed the scope of Missouri's right to bear arms. The language from 1820 was expanded in certain respects, but the updated version also added a new limitation on the right – specifically, a statement that the right did not "justify the wearing of concealed weapons." Mo. Const. of 1875, Art. II, sec. 17.

The language from the 1875 constitution was carried forward to Article I, section 23 of the Missouri Constitution of 1945 and has remained unchanged to the present. In full, Article I, section 23 provides:

That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.

C. Senate Committee Substitute for Senate Joint Resolution 36

Senate Committee Substitute for Senate Joint Resolution 36 (SJR 36) was truly agreed and finally passed by the 97th General Assembly on May 7, 2014. (*See* Legal File (L.F.) 62).[3] SJR 36 seeks to refer to the qualified voters of Missouri an amendment to Article I, section 23 of the Missouri Constitution. If adopted, SJR 36 would repeal and re-adopt Article I, section 23 and make the following language changes:

(1) add to the right to keep and bear arms a right to keep and bear "ammunition, and accessories typical to the normal function of such arms";

(2) add that the right to keep and bear arms includes the defense of "family";

(3) delete Article I, section 23's language that the rights guaranteed by the section "shall not justify the wearing of concealed weapons";

(4) add language providing that "The rights guaranteed by this section shall be unalienable";

(5) add language providing that "Any restriction on these rights shall be subject to strict scrutiny…";

[3] A certified copy of SJR 36 appears at pages A007-A009 of the appendix to this brief and at pages 18-20 of the Legal File.

(6) add language providing that "the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement"; and

(7) add language expressly protecting the ability of the General Assembly to limit the right to keep and bear arms only as to "convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity." (L.F. 19-20)

D. The General Assembly's Summary Statement

The General Assembly chose to prepare its own summary statement for use in the official ballot title for SJR 36. (L.F. 62) The summary statement prepared by the General Assembly states:

> "Shall the Missouri Constitution be amended to include a declaration that the right to keep and bear arms is a (sic) unalienable right and that the state government is obligated to uphold that right?" (L.F. 20)

E. Placement on the August 5, 2014 Ballot

Governor Nixon placed SJR 36 on the August 5, 2014 ballot. (L.F. 63)

F. Certification of the Official Ballot Title

On June 13, 2014, Defendant Kander performed the ministerial task under § 116.180 of certifying the General Assembly's language as part of the official ballot title for SJR 36. (L.F. 21)

G. Ballot title litigation before the Circuit Court.

1. *The* Dotson *suit.*

On June 13, 2014, Missouri citizens D. Samuel Dotson III and Rebecca Morgan filed a petition in the Circuit Court of Cole County challenging the summary statement portion of the official ballot title for SJR 36. (L.F. 4) The case was assigned docket number 14AC-CC00305. (L.F. 1) On June 18, 2013, the circuit court granted an entity named Missourians Protecting the 2nd Amendment leave to intervene and heard argument on a motion by the State defendants for judgment on the pleadings. (L.F. 2)

On June 26, 2014, the circuit court granted the *Dotson* Plaintiffs leave to file a First Amended Petition, which raised an additional issue as to the constitutionality of § 116.190. (L.F. 23 & 24-32) The parties stipulated and agreed that the case presented no genuine disputes of fact and that court could proceed to final judgment on the merits. (L.F. 23)

2. *The* Joyce *suit*

On June 18, 2014, Missouri citizens Jennifer M. Joyce and Jean Peters-Baker filed a separate petition in the Circuit Court of Cole County, also challenging the summary statement portion of the official ballot title for SJR 36. (L.F. 7 & 8-21) The case was assigned docket number 14AC-CC00310. (L.F. 5) On June 20, 2014, the *Joyce* Plaintiffs moved to vacate the ballot title. (L.F. 6) The State defendants moved for judgment on the pleadings. (L.F. 6) On June 26, 2014, the circuit court granted Missourians Protecting the 2nd Amendment leave to intervene and heard argument on all relevant issues. (L.F. 6) The circuit court consolidated the *Joyce* suit with the *Dotson*

suit pursuant to Rule 66.01(b) because of the questions of law and fact common to both suits. (L.F. 6)

3. The Circuit Court's July 1, 2014 Judgment.

On July 1, 2014, the circuit court entered a judgment disposing of the issues in the consolidated suits. The judgment purports to make two contradictory dispositions of the case: it purports to both (1) dismiss the consolidated suits as moot and (2) rule on the merits. (L.F. 61-65)

As to mootness, the circuit court cited § 115.125.2, RSMo. and *Cole v. Carnahan*, 272 S.W.3d 392 (Mo. App. W.D. 2008) and concluded that it was "without authority to order changes to the ballot" because SJR 36 had been set for the August 5, 2014 election ballot, which was less than six weeks away. (L.F. 62)

As to the merits, the circuit court cited four decisions from the Western District Court of Appeals and the 50-word limit for summary statements set forth in § 116.155. The statements of law were followed by a one-sentence summary conclusion that "The General Assembly's summary statement for SCS SJR 36 is fair and sufficient." (L.F. 64-65) The judgment contains no reasoning as to why the court reached this conclusion.

4. The Instant Appeal

The *Dotson* and *Joyce* Plaintiffs filed notices of appeal on July 1, 2014. (L.F. 66 & 82)

POINTS RELIED ON

I.

The circuit court erred in concluding that § 115.125.2 rendered this action moot because the plain language of § 115.125.2 places limits on a court's authority "to order an individual or issue be placed on the ballot less than six weeks before the date of an election…" and such limit is not applicable to Plaintiffs' suit as a matter of law in that Plaintiffs' lawsuit does not request that an individual or issue be placed on the ballot but rather requests that an issue that is already on the August 5, 2014 ballot either (1) have its official ballot title rewritten to conform with § 116.155's and § 116.190's ballot title requirements or (2) have its official ballot title vacated because the title is not in conformity with § 116.155's and § 116.190's ballot title requirements.

Goerlitz v. City of Maryville, 333 S.W.3d 450 (Mo. banc 2011).

§ 115.125.2, RSMo. (cum. supp. 2013).

§ 116.190, RSMo. (cum. supp. 2013).

II.

The circuit court erred as matter of law in ruling that the summary statement portion of the official ballot title for SJR 36 was sufficient and fair because § 116.190 and § 116.155 prohibit a summary statement drafted by the General Assembly from being deceptive or inadequate and the summary statement for SJR 36 does not meet this standard in that it deceptively suggests that SJR 36 would make only the two specific changes to the Missouri Constitution's right to keep and bear arms that are

described in the summary and does not disclose other significant changes of SJR 36, such as the deletion from Article I, section 23 of a nearly 140-year-old exception for carrying of concealed weapons or the addition of language that would make gun restrictions subject to strict scrutiny and add protection for ammunition and other gun accessories.

§ 116.155, RSMo.

§ 116.190, RSMo. (cum. supp. 2013).

Brown v. Carnahan, 370 S.W.3d 637 (Mo. banc 2012).

ARGUMENT

I.

The circuit court erred in concluding that § 115.125.2 rendered this action moot because the plain language of § 115.125.2 places limits on a court's authority "to order an individual or issue be placed on the ballot less than six weeks before the date of an election…" and such limit is not applicable to Plaintiffs' suit as a matter of law in that Plaintiffs' lawsuit does not request that an individual or issue be placed on the ballot but rather requests that an issue that is already on the August 5, 2014 ballot either (1) have its official ballot title rewritten to conform with § 116.155's and § 116.190's ballot title requirements or (2) have its official ballot title vacated because the title is not in conformity with § 116.155's and § 116.190's ballot title requirements.

Although the circuit court proceeded to address the merits of the ballot title for SJR 36, the court first concluded that it could not order any relief with respect to the title because its authority to do so was restricted by the time limit set in § 115.125.2. This conclusion was in error.

"Statutory interpretation is an issue of law that this Court reviews *de novo.*" *Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 930 (Mo. banc 2008). "This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *Parktown Imports, Inc. v. Audi of America, Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). "If the intent of the legislature is clear and unambiguous, by giving the language used in the

statute its plain and ordinary meaning, [the Court is] bound by that intent and cannot resort to any statutory construction in interpreting the statute." *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. banc 2011) (internal quotations omitted).

First, § 115.125.2 read in its entirety appears to be intended to set an outer time limit for courts to order issues to be added to the ballot at the behest of political subdivisions and special election districts. The first sentence of § 115.125.2 addresses the ability of political subdivisions and special districts to obtain leave of a "circuit court of the area of such subdivision or district" to "be permitted to make late notification to the election authority" of a legal notice for an election. Such late notifications are permitted between 10 and six weeks prior to an election. The second sentence of § 115.125.2 then provides that a court does not have authority to "order an individual or issue be placed on the ballot less than six weeks before the date of the election" except in cases involving the death of a candidate.

Second, even if one assumes that the second sentence of § 115.125.2 was meant to apply more broadly than to late requests by political subdivisions and special election districts, the plain language of § 115.125.2 still does not prevent a court from declaring an official ballot title insufficient or unfair or revising the ballot title to correct deficiencies under § 116.190. A key word in ascertaining the legislative intent of § 115.125.2 is the term "issue." The term is not defined in Chapter 115, but is used in several provisions to refer to the underlying ballot measure that is being put to the voters

for approval or rejection, in distinction from a candidate for office[4] and in distinction from the ballot itself,[5] which for most purposes refers to the physical ballot card, paper ballot or ballot designated for use with an electronic voting system for the voter to cast his or her vote. *See* § 115.013(2), RSMo. (cum. supp. 2013) (defining "Ballot" for purposes of Chapter 115).

The official ballot title is the text that is printed on the ballot that describes the underlying statewide ballot measure that is to be submitted to the voters for approval or rejection. *See* § 116.010(4), RSMo. (defining "official ballot title") & § 116.010(5), RSMo. (defining "statewide ballot measure"). Changing or revising the official ballot title does not "order *an issue* to be placed on the ballot" within the meaning of § 115.125.2 because a title change does not add any new statewide ballot measure to the slate of measures on which the voters will be able to cast their vote for or against when

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[4] *See, e.g.*, § 115.063.2, RSMo. (requiring state to pay "all costs of special elections involving a statewide candidate or statewide issue…"); § 115.085, RSMo. (cum. supp. 2013) (using term when specifying qualifications of election judges); § 115.104.1, RSMo. (using term in youth election participant oath).

[5] *See, e.g.*, § 115.115.5, RSMo. (cum. supp. 2013) (requiring "coded ballots" when more than one political subdivision or district are to be voted for at for one precinct "to show what candidates and issues the voter is eligible to vote…"); § 115.123.1, RSMo. (cum. supp. 2013) (allowing bond elections to be held in February "but no other issue shall be included on the ballot for such election").

voting a ballot. A title change simply changes the description of the issue already scheduled to appear on the ballot for submission for a vote. In this case, the act of placing the issue on the ballot occurred when Governor Nixon submitted SJR 36 for inclusion on the August 5, 2014 ballot pursuant to his authority under Article XII, section 2(b). *See* Webster's New Twentieth Century Dictionary Unabridged 1371 (2nd ed. 1970) (defining "place" as "to put in a particular place, condition, or relation").

Third, the structure of chapters 115 and 116 provides additional support for the conclusion that § 115.125.2 was not meant to prohibit review of unfair or insufficient ballot titles. Section 116.190 sets forth a number of details about how § 116.190 challenges are to proceed, and it would be logical to expect that the General Assembly would include all the relevant limits in Chapter 116. For example, § 116.190.1 specifies the venue for § 116.190 challenges and includes a time limit of 10 days for filing such suits. Section 116.190.3 sets forth what must be included in the plaintiff's petition. Section 116.190.4 sets forth what the circuit court should consider in the case and provides some details about the possible dispositions that the circuit court can order. Effective November 4, 2014, an amendment to § 116.190 will add a new subsection 5 that will set an outer time limit of 180 days for prosecuting a § 116.190 suit to final judgment unless the court extends the time period for good cause based on court scheduling issues.

Section 115.125.2 is not in the same chapter as other provisions dealing with official ballot titles or challenges to those titles, and it defies logic and basic rules of statutory

construction to conclude that its limits were meant to apply to ballot title litigation, the parameters of which are set forth in § 116.190.

Cole v. Carnahan, 272 S.W.3d 392 (Mo. App. W.D. 2008), cited in the circuit court's judgment should not alter this conclusion. *Cole* involved a plaintiff seeking relief on appeal that he had not requested in the trial court. The only relief requested on appeal was taking a measure off the ballot or declaring the measure null and void if it was ultimately adopted by the voters. The Court of Appeals denied the points on appeal because of plaintiff's failure to raise them in the trial court and because § 116.190 did not authorize the only two remedies plaintiff asked for on appeal. *Id.* at 394-395. In *dicta*, the Court of Appeals stated that even if the plaintiff had been pursuing the relief he had requested in the trial court, *i.e.*, the relief of rewriting the title, the relief could not have been granted because § 115.125 limited a court's authority to award certain types of relief six weeks prior to the election. *Id.* at 395.

Cole's *dicta* is inconsistent with the plain language of § 115.125.2 for reasons stated above. Furthermore, applying § 115.125.2 to this case would mean that the summary statement for SJR 36 could not have received any meaningful review even though § 116.190 provides for review. Due to the timing of passage of SJR 36 and the Governor's decision to place the matter on the August 5, 2014 ballot, the official ballot title was not certified until June 13, 2014. The time frame for filing a suit under § 116.190 did not expire until June 23, 2014, which would have left only a day for the circuit court to hear and decide the issue if § 115.125.2 truly came into play.

II.

The circuit court erred as matter of law in ruling that the summary statement portion of the official ballot title for SJR 36 was sufficient and fair because § 116.190 and § 116.155 prohibit a summary statement drafted by the General Assembly from being deceptive or inadequate and the summary statement for SJR 36 does not meet this standard in that it deceptively suggests that SJR 36 would make only the two specific changes to the Missouri Constitution's right to keep and bear arms that are described in the summary and does not disclose other significant changes of SJR 36, such as the deletion from Article I, section 23 of a nearly 140-year-old exception for carrying of concealed weapons or the addition of language that would make gun restrictions subject to strict scrutiny and add protection for ammunition and other gun accessories.

"On appeal from the trial court's grant of Respondents' motion for judgment on the pleadings," this Court "review[s] the allegations of Appellants' petition to determine whether the facts pleaded therein are insufficient as a matter of law." *State ex rel Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 134 (Mo. banc 2000).

Under § 116.190, a summary statement prepared by the General Assembly or the Secretary of State must be set aside if it is "insufficient" or "unfair." In this context, "'insufficient means inadequate; especially lacking adequate power, capacity, or competence' and 'unfair means to be marked by injustice, partiality, or deception.'" *Brown v. Carnahan*, 370 S.W.3d 637, 653-54 (Mo. banc 2012) (quoting *State ex rel. Humane Soc'y of Missouri v. Beetem*, 317 S.W.3d 669, 673 (Mo. App. W.D. 2010)).

Whether the summary statement could be better written or provide more specifics is not the test because it is well settled that "the summary statement need not include every aspect or detail of the proposed measure." *Billington v. Carnahan*, 380 S.W.3d 586, 595 (Mo. App. W.D. 2012). The critical test is "whether the language fairly and impartially summarizes the purposes of the measure so that voters will not be deceived or misled." *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999).

This Court held in a case reviewing three summary statements prepared by the Secretary of State, but which is equally applicable to review of a legislatively-prepared statement:

> To create such a summary statement that is not insufficient or unfair, the summary statement must be adequate and state the consequences of the initiative without bias, prejudice, deception, or favoritism. *See State ex rel. Humane Soc'y of Missouri,* 317 S.W.3d at 673 (internal quotations omitted). The language used should "fairly and impartially summariz[e] the purposes of the measure so that voters will not be deceived or misled." *Missouri Mun. League v. Carnahan*, 364 S.W.3d 548, 552 (Mo.App.2011) (internal quotations omitted). It should accurately reflect the legal and probable effects of the proposed initiative. *Missouri Mun. League*, 303 S.W.3d at 584. Sometimes it is necessary for the secretary of state's summary statement to provide a context reference that will enable voters to understand the effect of the proposed change. *See Missouri Mun. League*, 364 S.W.3d at 553.

Brown, 370 S.W.3d at 654.

"*De novo* review of the trial court's legal conclusions about the propriety of [a] summary statement … is the appropriate standard of review when there is no underlying factual dispute that would require deference to the trial court's factual findings." *Id.* at 653.

A. The General Assembly's summary statement is insufficient and will mislead voters because it represents that SJR 36 will make only two specific changes to the State's longstanding right to keep and bear arms.

The question of whether a summary statement is "insufficient" is concerned with the statement's ability to convey the effects or purpose of the amendment with some level of competence. Perfection is not required. But something at least akin to a C passing grade is needed.

Historically, titles which have correctly identified the general subject matter of an amendment but left out the details have been held to be permissible. In *United Gamefowl Breeders Association of Missouri v. Nixon*, 19 S.W.3d 137, 138 (Mo. banc 2000), for example, the challengers sought to invalidate a proposed statutory amendment that would prohibit fighting involving animals. The challengers claimed, among other things, the summary statement was deficient because it "d[id] not mention the exemptions within [the proposed statutory amendment], for filmmaking, hunting, farming, poultry-raising, gamefowl-raising, and rodeos." *Id.* at 140. This Court rejected the argument because the summary statement did not need to "set out the details of the proposal." *Id.* at 141.

Likewise, the Court of Appeals in *Overfelt v. McCaskill*, 81 S.W.3d 732, 738 (Mo. App. W.D. 2002) rejected a details argument that the summary statement should have

covered where revenues generated by the initiative petition's proposed tax would be used and that it would create a Life Sciences Research Board. The Court of Appeals found that the existing summary statement was "set forth in language that does not appear likely to deceive or mislead voters or any other interested parties as to the purpose of the measure" and thus was sufficient and fair. *Id.* at 739. "

But the summary drafted by the General Assembly for SJR 36 cannot be likened to the titles held sufficient in prior cases. SJR 36's summary statement specifically indicates that a "yes" vote for SJR 36 would result in two (and, by implication, only two) specific changes to the Missouri Constitution – namely, the addition of a declaration to the Missouri Constitution that (1) the right to keep and bear arms is "a (sic) unalienable right" and (2) the "state is obligated to uphold that right."

If asked to describe the proposed constitutional amendment to which this summary statement pertains, a reasonable voter would logically conclude that the proposal in question is one that would add a "declaration" that the right to keep and bear arms in Missouri is "unalienable" and some language requiring the state government to uphold the right, but would not make other changes to the constitution. The amendment actually suggested by the summary statement is depicted in Figure 1:

Figure 1: Amendments to Article I, section 23 that Voters would reasonably anticipate from the General Assembly's Summary Statement

Section 23. That the right of every citizen to keep and bear arms, in defense of his home, person, and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons. **The rights guaranteed by this section shall be unalienable. The state of Missouri shall be obligated to uphold these rights.**

The summary statement gives the impression that SJR 36 would make no other changes to the right to keep and bear arms partly because the summary refers to "*the right* to keep and bear arms." The quoted phrase tends to confirm for the voter that there already is a presently existing right to keep and bear arms in the State and that the contours of the right are fixed and are not otherwise being changed, other than adding a declaration that *the right* in the current form is "unalienable."[6]

[6] Rights which are "unalienable" (or, more commonly, "inalienable") are sometimes defined as a "Rights which are not capable of being surrendered or transferred without the consent of the one possessing such rights." Black's Law Dictionary 521 (6th ed. 1991). But the term is vague and imprecise. Many state constitutions and the Declaration of Independence make reference to "inalienable" rights. These statements are "taken as widely accepted statements of political principle," and "not as enforceable limits to government power." Thomas B. McAffee, *Restoring the Lost World of Classical*

The summary has a further tendency to mislead because "the right" to bear arms in Missouri has been in place in its present form decades before any current Missouri voter was born. As noted *supra* Missouri constitutions have included a provision protecting the right of Missouri citizens to bear arms for nearly 200 years. The State's 1820 and 1845 constitutions both provided that the people's "right to bear arms in defense of themselves and of the State cannot be questioned." Mo. Const. of 1820, Art. XIII, sec. 3; Mo. Const. of 1845, Art. XI, sec. 3.

In 1875 the language from 1820 was expanded in certain respects, but the updated version also added a new limitation on the right – specifically, a statement that the right did not "justify the wearing of concealed weapons." Mo. Const. of 1875, Art. II, sec. 17.[7]

Legal Thought: The Presumption in Favor of Liberty over Law and the Court over the Constitution, 75 U. Cin. L. Rev. 1499, 1505 & n.19 (2007). *See also Derden v. McNeel*, 978 F.2d 1453, 1456 n.4 (5th Cir. 1992) ("general statements about inalienable rights or 'fundamental fairness' tell us little about the prerogatives of an individual in concrete factual situations"); Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, 2 U. Pa. J. Const. L. 609, 632-34 (2000) (describing the "ambiguity over the terms inalienable and non-alienable" in Supreme Court jurisprudence, among other places).

[7] This Court's opinion in *State v. Keet* describes what motivated the addition of an exception for concealed weapons and the adoption of various laws prohibiting the practice:

The language from the 1875 constitution appears in Article I, section 23 of the Missouri Constitution of 1945 and has remained unchanged to the present.

For more than 100 years, this Court has concluded that the rights guaranteed by Article I, section 23 and its predecessor in the 1875 constitution have not encompassed the wearing of concealed weapons because of the exception for concealed weapons that was added in 1875. *See State v. Shelby*, 90 Mo. 302, 2 S.W. 468, 469 (1886) ("our constitution, in express terms, says that it is not intended thereby to justify the practice of wearing concealed weapons"); *State v. Keet*, 269 Mo. 206, 190 S.W. 573, 576 (1916) (noting that in 1875, Missouri amended its constitution to speak "in no uncertain language" that the right to bear arms did not protect the "practice of carrying … weapons concealed"); *Brooks v. State*, 128 S.W.3d 844, 847-48 (Mo. banc 2004) (Article I, section 23 does not include any right to wear concealed weapons).

> Less than a century ago the arms of the pioneer were carried openly, the rifle on his shoulder, his hunting knife on his belt. Since then deadly weapons have been devised small enough to be carried effectively concealed in the ordinary pocket. The practice of carrying such weapons concealed is appreciated and indulged in mainly by the enemies of social order. Our state has been one of the slowest to act in meeting this comparatively new evil, but she has finally spoken in no uncertain language.

State v. Keet, 269 Mo. 206, 190 S.W. 573, 576 (1916).

Early cases from this Court cited the exception in upholding laws prohibiting the wearing of concealed weapons generally and in school and church settings specifically. *See Shelby*, 2 S.W. at 469; *State v. Wilforth*, 74 Mo. 528, 531 (1881).

Second, this Court has concluded that the right to openly keep and bear arms can be subject to reasonable limitations when public safety concerns are implicated. When reviewing the constitutionality of laws restricting a person's right to carry arms openly, this Court has found such laws constitutional upon a determination that the law is reasonably directed at public safety. In *State v. Richard*, 298 S.W.3d 529, 532 (Mo. banc 2009), for example, this Court held that § 571.030.1(5), RSMo., which criminalized the possession of a loaded firearm by an intoxicated person, did not violate Article I, section 23 because it "represents a reasonable exercise of the legislative prerogative to preserve public safety by regulating the possession of firearms by intoxicated individuals." *Id.*

In *State v. White*, 253 S.W. 727, 727 (Mo. 1923), this Court noted that "[t] he moment the citizen ceases to act in protection of his home, his person, or his property, unless acting in aid of the civil power, he steps out from under the protection of the Constitution, and his right to bear arms may be taken away or limited by reasonable restrictions." *See also City of Cape Girardeau v. Joyce*, 884 S.W.2d 33, 35 (Mo. App. E.D. 1994) (reviewing the scope of Missouri's right to bear arms provision and rejecting a challenge to a municipal law conviction for openly carrying a firearm readily capable of lethal use because "[n]othing in the Missouri constitution limits the power of the legislature to enact laws pertaining to the time, place and manner of carrying weapons").

Having been advised on the ballot that SJR would change the Missouri Constitution only by adding the "declaration" described in the summary statement, a reasonable voter would surely be startled to learn the truth – that the measure on which they were casting a vote would make many other significant modifications to a constitutional right that has otherwise been unchanged for nearly 140 years.

The numerous textual changes that SJR 36 would make to Article I, section 23 and which voters would not anticipate from the summary are italicized in Figure 2 below.

Figure 2: Amendments to Article I, section 23 that Voters would not anticipate from the General Assembly's Summary Statement

Section 23. That the right of every citizen to keep and bear arms, ***ammunition, and accessories typical to the normal function of such arms,*** in defense of his home, person, ***family*** and property, or when lawfully summoned in aid of the civil power, shall not be questioned*[; but this shall not justify the wearing of concealed weapons]*. **The rights guaranteed by this section shall be unalienable.** ***Any restriction on these rights shall be subject to strict scrutiny and*** **the state of Missouri shall be obligated to uphold these rights** ***and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.***

B. Several changes that SJR 36 would make to the State's longstanding right to keep and bear arms are such significant changes that the summary is inherently misleading to voters by not having covered the changes.

What makes SJR 36's title especially problematic is that SJR 36, if validly adopted, would create a number of legal and probable effects that not only are not described in the summary statement, but that are also likely more significant in a substantive legal sense than the two changes that the summary does describe. Indeed, the summary statement does not convey half of the substantive changes SJR 36 would make to Article I, section 23.

This conclusion follows from settled principles of constitutional construction. "Words used in constitutional provisions are interpreted to give effect to their plain, ordinary, and natural meaning." *Wright-Jones v. Nasheed*, 368 S.W.3d 157, 159 (Mo. banc 2012). "Every word in a constitutional provision is assumed to have effect and meaning; their use is not meaningless surplusage." *Thompson v. Comm. on Legislative Research*, 932 S.W.2d 392, 395 n.4 (Mo. banc 1996).

Rules of statutory interpretation apply to constitutional provisions as well. *See id.* These rules hold that when language of a provision is to be amended, "the legislature's action of repeal and enactment is presumed to have some substantive effect such that it will not be found to be a meaningless act of housekeeping." *City of Willow Springs v. Missouri State Librarian,* 596 S.W.2d 441, 444-445 (Mo. banc 1980). A court may "not … conclude that the legislature's deleting significant terms from [a law] is meaningless." *State v. Bouse,* 150 S.W.3d 326, 334 (Mo. App. W.D. 2004). It is also presumed that

"the legislature is aware of the interpretation of existing [laws] placed upon them by the state appellate courts, and that in amending a [law] or in enacting a new one on the same subject, it is ordinarily the intent of the legislature to effect some change in the existing law." *Kilbane v. Director of Department of Revenue*, 544 S.W.2d 9, 11 (Mo. banc 1976).

Applying the above principles to SJR 36 shows that SJR 36 will change the law with respect to the wearing of concealed weapons. SJR 36 would delete Article I, section 23's language that the rights guaranteed by the section "shall not justify the wearing of concealed weapons." App. A0008. As noted *supra* this phrase has been interpreted for over a century to withdraw the carrying of concealed weapons from any constitutional protection and to permit the General Assembly to prohibit or limit concealed weaponry. *Shelby*, 2 S.W. at 469; *State v. Keet*, 190 S.W. at 576; *Brooks*, 128 S.W.3d at 847-48. The drafters of SJR 36 are presumed to be aware of this interpretation and to intend to effect some change in the existing law by making the deletion. *Kilbane*, 544 S.W.2d at 11. The summary statement is deceptive for not alerting voters to this change.

Second, SJR 36 would make "[a]ny restriction" on the right to keep and bear arms as amended "subject to strict scrutiny." App. A008. This, too, is likely to have a significant probable legal effect that is not disclosed by the summary statement. "Strict scrutiny" is one of the most exacting forms of judicial review. *See Republican Party of Minnesota v. White*, 416 F.3d 738, 749 (8th Cir. 2005) (en banc) ("Strict scrutiny is an exacting inquiry, such that 'it is the rare case in which ... a law survives strict scrutiny.'") (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)). When the strict scrutiny test applies, the government has the burden of proving that any restrictions on a protected right "are

narrowly tailored measures that further compelling governmental interests." *Johnson v. California*, 543 U.S. 499, 505 (2005).

The strict scrutiny test is much more difficult to satisfy than a test that analyzes whether a law is reasonably related to an important governmental interest, a test that is similar to the test this Court applied in *State v. Richard*, 298 S.W.3d 532, when determining that it was permissible for the General Assembly to have criminalized the possession of a loaded firearm by an intoxicated person. As described by the United States Supreme Court in the context of prison regulations, a reasonableness test allows governmental classifications or restrictions to be upheld even when there are other, less-burdensome methods available and even when the governmental classifications or restrictions do not in practice advance the governmental interest. *Johnson*, 543 U.S. at 513. If strict scrutiny applies, by contrast, the measure must be shown to actually advance the governmental interest and may not go beyond what the state's interest requires. *Id. See also Weinschenk v. State*, 203 S.W.3d 201, 210-211 (Mo. banc 2006) (describing strict scrutiny test); *In re Care and Treatment of Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007) (same); *State v. Young*, 362 S.W.3d 386, 397 (Mo. banc 2012) (contrasting strict scrutiny test with the less-demanding rational-basis review). Given the exacting nature of strict scrutiny review, the constitutionality of any number of gun laws will become an unanswered question if SJR 36 is adopted. But what is not an unanswered question is whether the legal framework for assessing the validity of gun restrictions will change. SJR 36 will make restrictions easier to challenge and more difficult for the State to justify. The summary statement is deceptive for not alerting voters to this change.

Finally, SJR 36 would make several other significant substantive changes to Article I, section 23 that are not described, such as extending the protections to "ammunition, and accessories typical to the normal function of such arms" and to the defense of "family." Another easily recognized change is that SJR 36 would expressly preserve the General Assembly's right to limit the right to keep and bear arms only as to two narrow classes of persons: "convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity." Even with a strict scrutiny test in play, at least some limits would remain permissible as to these two groups if SJR 36 is adopted. But as to other groups of persons, such as convicted *nonviolent* felons like drug dealers, domestic violence defendants, or those who would carry deadly weapons into schools, the outcome is not expressly assured by the text of SJR 36 and will be an unanswered question upon SJR 36's adoption until the contours of its expanded right to bear arms are authoritatively construed by Missouri courts in what are likely to be myriad challenges to existing statutory restrictions. The summary statement is deceptive for not alerting voters to these changes.

For all of these reasons, the summary statement is insufficient under § 116.190 and not in conformity with the requirements of § 116.155. In the circuit court, Appellants requested that the circuit court vacate the summary statement and leave any revisions to be accomplished by the General Assembly. As an alternative remedy, Appellants submitted the following summary statement for the circuit court's consideration as a summary that would accurately state the legal and probable effects of SJR 36 within the applicable word limits:

Shall the Missouri Constitution be amended to:

- Remove limits on concealed weapons, such as carrying them in schools and churches;
- Declare the right to bear arms "unalienable";
- Require strict legal scrutiny in favor of gun rights and the government to uphold them;
- Allow limits for violent felons and dangerous persons with mental disorders?

CONCLUSION

This Court should reverse the circuit court's July 1, 2014 judgment and issue such other and further relief with respect to the official ballot title as justice may require.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies further certifies that the foregoing brief that:

(1) this brief contains the information required by Rule 55.03;

(2) this brief complies with the limitations contained in Rule 84.06(b); and

(3) there are 8,081 words in this brief;

/s/ Heidi Doerhoff Vollet
Heidi Doerhoff Vollet

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Clerk of the Court on this 3rd day of July, 2014, to be served by operation of the Court's electronic filing system on all counsel of record, as follows:

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