**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**

---

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

---

**Heidi Doerhoff Vollet, #49664**
**COOK, VETTER, DOERHOFF & LANDWEHR, P.C.**
**231 Madison Street**
**Jefferson City, MO 65101**
**Telephone: (573) 635-7977**
**Facsimile: (573) 635-7414**

**Burton Newman #22648**
**BURTON NEWMAN, P.C.**
**231 S. Bemiston, Suite 910**
**Clayton, MO 63105**
**Telephone: (314) 862-7999**
**Facsimile: (314) 862-4340**
**E-mail: burtnewman44@gmail.com**

**Attorneys for Appellants Jennifer M. Joyce and Jean Peters-Baker**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

**Constitutional Provisions**

## ARGUMENT

### I. The instant case presents a live controversy.[1]

#### A. Section 115.125.2's plain terms do not apply to the relief requested by Appellants; *Cole v. Carnahan* misread this statute.

Respondents' arguments that § 115.125.2, (RSMo. cum. supp. 2013) moots this appeal are not persuasive. Respondent Kander asserts that "the text of § 115.125.2 … makes clear that it applies in instances where ballot language may be changed." (Kander Br. p. 8) But Respondent Kander's statement of the applicability of § 115.125.2 does not match the actual text of § 115.125.2, text that this Court must interpret in light of its plain language and other settled rules of statutory construction. By its plain terms, § 115.125.2

[1] Respondents have questioned whether this Court has jurisdiction over the appeal. Appellants do not concede that jurisdiction is lacking. However, to avoid any question about this Court's jurisdiction, Appellants also filed a protective notice of appeal to the Western District Court of Appeals and will invoke this Court's transfer jurisdiction. That notice of appeal was filed on July 9, 2014 and is in the process of being docketed by the Western District Court of Appeals, with a docket number expected later this afternoon. As soon as practicable after a docket number has been assigned, Appellants will file with this Court a motion to transfer the appeal prior to opinion under Rule 83.01 and have said appeal be submitted on the same briefs as this case. The forthcoming transfer motion need not be ruled if the Court deems jurisdiction proper by direct appeal under Mo. Const. Article V, sec. 3.

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 the election." For reasons stated in the Joyce Appellants' initial brief (p. 14-16), these words do not cover revision of an unfair or insufficient ballot title for an issue that has already been scheduled for a vote more than six weeks prior to the election.

Rather than focusing on plain language and statutory construction of § 115.125.2, Respondent Kander and Respondents Schaefer and Missourians Protecting the 2nd Amendment (the Schaefer Respondents) rely on the Court of Appeals' conclusion in *Cole v. Carnahan*, 272 S.W.3d 392, 395 (Mo. App. W.D. 2008) that § 115.125.2 would have prevented revision of a ballot title under § 116.190 less than six weeks prior to an election. There are at least four reasons *Cole* is not "fatal" to Appellants' claims. (Kander Br. 10) First, this Court is not bound by *Cole*. *Cole* was not a decision by this Court. It is a decision emanating from a lower court over which this Court has supervisory authority. Mo. Const. Art. V, sec. 4.

Second, *Cole* has limited persuasive value on the meaning of § 115.125.2 because it did not undertake *any* textual analysis of § 115.125.2. When the legal issue is a question of statutory interpretation, a conclusion reached without textual analysis is like the dog which Sherlock Holmes observed did not bark in the night – in other words, the absence of statutory analysis in *Cole* is an important clue that something was amiss with the lower court's reasoning.

Third, it appears that the Court of Appeals tumbled to § 115.125 as an alternative basis for denying appellant's points on appeal without the benefit of briefing by the

parties. Most notably, the brief filed by the Attorney General on behalf of the Secretary of State *did not contend* that the time limits in § 115.125.2 rendered the *Cole* appeal moot. The table of authorities in the State's brief did not even list § 115.125.2 as a relevant statute. The Secretary of State defended the appeal on grounds that the appellant was seeking relief not requested in the trial court and, in any case, the ballot title was fair and sufficient. *See* Brief of Respondent Carnahan, Case No. WD70082, *available at* 2008 WL 5040737.

Finally, the decisions from this Court which *Cole* cited when concluding that § 115.125.2 prevented ballot title revisions less than six weeks prior to an election involved factual circumstances that fell within the plain terms of § 115.125.2 and which are plainly distinguishable from those present in this case. In *State ex rel. Referendum Petitioners Comm. Regarding Ordinance No. 4639 v. Lasky*, 932 S.W.2d 392, 392 (Mo. banc 1996), for example, this Court held that § 115.125.2 prevented a circuit court from issuing an order "to the board of election commissioners of St. Louis County to include on the November 5, 1996, ballot a referendum question regarding a city ordinance." The city council and city mayor had not approved the addition of the ordinance to the ballot until September 23, 1996, which was less than six weeks prior to the election. *Id.* In concluding that § 115.125.2 prevented a court from making a late addition of *a new issue* to the ballot at the behest of a political subdivision, this Court in no way suggested that § 115.125.2 prevented a court from ordering a ballot title revision under § 116.190. *See id.*

*State ex. rel. Brown v. Shaw*, 129 S.W.3d 372, 374 (Mo. banc 2004), concerned a court's authority to order an individual mayoral candidate be placed on the ballot after a city clerk refused to do so on grounds that the candidate had failed to pay real estate taxes. In declining to overturn a circuit court order directing the city clerk to order the individual be placed on the ballot, the Court observed that the circuit court had ordered the relief more than six weeks prior to the election. *Id.* at 374. In a footnote, this Court noted that if the circuit court order been sought less than six weeks prior to the election, § 115.125.2 would have come into play, and judicial relief would have been limited to an election contest. *Id.* at 374 n.2. Again, this description of § 115.125's parameters in the context of reviewing whether a circuit court has authority order a mayoral candidate to appear on the ballot before the six week deadline does not speak to whether § 115.125 applies to prohibit a court from making title revisions sought under § 116.190 for an issue already scheduled for a vote.

*State ex rel. Nixon v. Blunt*, 135 S.W.3d 416 (Mo. banc 2004) also does not address whether § 115.125.2's time and remedy limits apply to § 116.190 litigation. In *Blunt*, the Governor ordered a constitutional amendment to be placed on an August ballot. *Id.* at 416-17. The Secretary of State contended that because he received the amendment from the General Assembly less than 10 weeks before the August ballot, he could not comply with the notice requirements set forth in § 116.240 and the measure may have to be postponed to a later election. *Id.* at 419. This Court disagreed, noting that the Governor had the constitutional authority to place the measure on the August ballot and that many statutory provisions in Chapter 115 contemplated ballot revisions after § 116.240 notices

were issued. *Id.* at 419-420. In a concurring opinion, Judge Benton remarked that § 115.125 set forth a bright line rule preventing courts from ordering that issues be placed on the ballot less than six weeks prior to the election. *Id.* at 420 (Benton, J. concurring). Neither the majority's nor Judge Benton's concurring opinion in *Blunt* commented on whether § 115.125.2 restricts title revisions, as opposed to limiting courts from placing new issues on the ballot less than six weeks prior to an election. In sum, *Cole* was on shaky legal ground in concluding that § 115.125.2 applies to § 116.190 litigation based on this Court's analysis in *Lasky*, *Brown*, or *Blunt*.

Respondent Kander argues that interpreting § 115.125.2 to be rendered meaningless when "application of its timing requirements is not convenient for Plaintiffs vis-à-vis § 116.190 … would violate the longstanding principles that words in statutes must be given meaning, and that they are not mere surplusage." (Kander Br. p. 10) This argument proceeds from a faulty premise. Appellants do not contend, as the Kander brief seems to suggest, that § 115.125.2 applies by its plain terms to § 116.190 litigation but § 115.125.2 limits should be deemed a legal nullity when they would interfere with § 116.190 litigation. Appellants' argument on appeal is § 115.125.2 should be interpreted according to its plain terms and those plain terms *do not apply* to § 116.190 suits seeking title revisions. Appellants' pointed out that this conclusion finds further support from the facts that § 115.125.2 does not cross reference § 116.190 and applying § 115.125.2 to § 116.190 would defeat the availability of a § 116.190 remedy in circumstances where the time between certification of a summary statement and election as short as it in this case. But this interpretation does not ever render § 115.125.2 a legal

nullity. As *Lasky* and *Brown* show, § 115.125.2's limits will be legally operative and will prevent courts from ordering an individual or issue from being placed on a ballot less than six weeks prior to an election.

**B. The commencement of military and absentee voting does not render this case moot.**

The Schaefer Respondents contend that the case is moot for another reason. Specifically, they argue that because military and absentee voting have commenced under the challenged ballot title, any decision regarding the validity of the title will merely be an advisory opinion, citing *Gartner v. Missouri Ethics Commission*, 323 S.W.3d 439, 441-42 (Mo. App. W.D. 2010). (Schaefer Br. p. 2) They are wrong.

First, § 115.125.2's time limits do not apply to this § 116.190 litigation for the reasons stated *supra*. And because a court's authority to award relief under § 116.190 litigation is not subject to a statutorily-imposed cutoff, questions concerning whether a ballot title should be revised under § 116.190 remain a legally viable question until SJR 36 is fully submitted to the voters. This is because until SJR 36 is fully submitted to the voters, it remains theoretically possible for alternative ballot language to be used on the ballot. *Cf. Asher v. Carnahan*, 268 S.W.3d 427, 430 (Mo. App. W.D. 2008) (the court's application of § 116.190's insufficient and unfair standard to a ballot title became moot when it was no longer possible for underlying measure to appear on ballot; when a theoretical chance for measure to appear on ballot still existed, case was not moot).

*Gartner v. Missouri Ethics Commission* should not persuade this Court to hold otherwise. *Gartner* addressed when the mootness doctrine applied to an appeal seeking

review of whether a candidate could appear on a ballot. In *Gartner*, the Missouri Ethics Commission (MEC) had advised a county clerk that a candidate for associate circuit judge was disqualified from running for office because the candidate had not timely filed a disclosure form. 323 S.W.3d at 440. After a hearing, the circuit court ordered that the candidate be placed on the August primary ballot. *Id.* MEC appealed, claiming that circuit court erred in ordering the candidate be reinstated on the August ballot. *Id.* at 441. At the time the Court of Appeals issued its appellate opinion, the primary had already occurred and the candidate had lost. *Id.* The Court of Appeals noted that these events had occurred, but without citation to any authority, concluded that the appeal became moot as soon as absentee voting had begun. *Id.*

Regardless of whether *Gartner* was correct that mootness occurs when absentee ballots are distributed for purposes of reviewing a circuit court's authority to have ordered a municipal candidate to be placed on the ballot, its holding does not speak to the question of when issues concerning the validity of a ballot title for a constitutional amendment become moot. Questions concerning whether the ballot title for a constitutional amendment complies with statutory law have constitutional significance. This is because Article XII, section 2(b) requires that any constitutional amendment proposed by the General Assembly "be submitted to the electors for their approval or rejection *by official ballot title as may be provided by law*…." (emphasis added). Today, § 116.155.2, RSMo. provides a legal requirement for official ballot titles for constitutional amendments. Specifically, § 116.155.2 mandates that the ballot title 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. If SJR 36's ballot title is not "a true and impartial statement of the purposes of the proposed measure…" within the meaning of § 116.155, then SJR 36 is not being, or will not have been, validly submitted to the electors as "provided by law" as required by Article XII, section 2(b). In other words, Article XII, section 2(b) indicates that an amendment submitted on a title which does not comply with statutory law is not validly submitted to the electors and votes on such a legally defective ballot will not count. Thus, if this Court concludes that if § 116.190 litigation becomes moot as soon as military and absentee voting begins, then questions concerning whether its title complies with § 116.155's requirements may simply be postponed until after the election, at which time litigants could contest the amendment's validity based on the title being defective. Presumably one of the reasons the General Assembly enacted § 116.190 was to allow title corrections to be made *before* the election to protect against a measure being invalidated post-election when it unquestionably would be too late to make title corrections.

## II. The General Assembly's summary statement is insufficient and misleading.

The Schaefer Respondents contend that the primary purpose of SJR 36 is to make a declaration concerning how the right to keep and bear arms in Missouri is to be regarded following the U.S. Supreme Court decisions in *D.C. v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010). (Schaefer Br. p. 5) Respondent Kander argues that SJR 36's title is satisfactory because the title recounts two changes

that SJR 36 would make to Article I, section 23 and the other changes not covered are "details" that are too technical or too insignificant to render the summary "insufficient" or "unfair" within the meaning of § 116.190. (Kander Br. p. 18-24) These arguments lack merit.

**A. The Schaefer Respondents' arguments concerning the "purposes" of SJR 36 are confused and contradictory.**

SJR 36 proposes to amend the *Missouri* constitution through changes that are textually different from the language of the Second Amendment of the U.S. Constitution and other state constitutions. Despite the differences between the right to bear arms proposed in SJR 36 and the Second Amendment of the U.S. Constitution, the Schaefer Respondents contend that the "clear" purposes of SJR 36 are "to bring the Missouri constitution in line with *Heller* and *McDonald,* to ensure that the Missouri right to keep and bear arms remains coextensive with the federal right as explicated in *Heller* and *McDonald,* and to provide a prophylactic against legislative or judicial action that would violate *McDonald*." (Schaefer Br. p. 14)

The Schaefer Respondents essentially admit the summary drafted by the General Assembly does not inform voters of what they say are the "clear purposes" of SJR 36; indeed, they contend no summary could convey these "clear" purposes because "it would be impossible (and fatally confusing)" to do so concisely. (*Id.*) The Schaefer Respondents' admission in this regard may well be the first time in ballot title litigation that the sponsor of a measure has argued that no summary statement could possibly describe the clear purposes of the measure without misleading voters. It is tantamount to

an admission that SJR 36's summary does not and could not comply with § 116.155's requirement that the summary include "a true and impartial statement of the purposes of the proposed measure…"

Like several other portions of the Schaefer Respondents' brief, however, the arguments are confused and contradictory. As an initial matter, it at best questionable that SJR 36 would align Missouri rights with the federal rights declared in *Heller* and *McDonald*. Without attempting an exhaustive list of differences, a few observations are in order. For example, SJR 36 would provide that restrictions on the right to bear arms "shall be subject to strict scrutiny." In *Heller*, the United States Supreme Court did not establish a level of scrutiny for gun restrictions. It invalidated the District of Columbia's ban on handguns in the home on grounds that it "would fail constitutional muster" under "any of the standards of scrutiny that [the Court has] applied to enumerated constitutional rights." *Heller*, 554 U.S. at 628-629; *see also id.* at 634 (recognizing Justice Breyer's criticism of the majority opinion for "declining to establish a level of scrutiny for evaluating Second Amendment restrictions").

Further, the Second Amendment right discussed in *Heller* and *McDonald* was centered on a right of self-defense, particularly in the home. The Supreme Court stated: "[I]ndividual self-defense is 'the *central component*' of the Second Amendment right." *McDonald*, 561 U.S. at ------, 130 S. Ct. at 3036 (quoting *Heller*, 554 U.S., at 599, 128 S.Ct. at 2801–2802)(Emphasis in original). The SJR 36's changes to Article I, section 23 would extend state constitutional protections to defense of "family" and leave

unchanged Article I, section 23's protection for defense of "property" that exists in addition to defense of "home."

SJR 36 would also go beyond *Heller* and *McDonald* with regard to granting unalienable rights with respect to "ammunition" or firearm "accessories," neither of which were the subject of the two federal decisions.

**B. Deletion of Article I, section 23's exception for concealed weapons and other significant substantive changes are not mere "details" which can be omitted at the General Assembly's whim.**

The Schaefer Respondents also contend that SJR 36's summary statement need not reference the proposed deletion of Article I, section 23's language concerning concealed weapons because "Missouri court have not relied on the constitutional 'shall not justify' phrase as support for its concealed weapons laws." (Schaefer Br. p. 18) This contention is demonstrably false. Missouri courts have frequently cited and found significant the "shall not justify the wearing of concealed weapons" language when discussing and upholding the General Assembly's authority to regulate concealed weapons. Most recently, in *Brooks v. State*, 128 S.W.3d 844, 847 (Mo. banc 2004), this Court characterized the "shall not justify the wearing of concealed weapons" language as "an exception or limitation on the constitutional 'right of every citizen to keep and bear arms....'" In *State v. Keet*, this Court quoted and discussed the "shall not justify" language several times in its opinion and specifically noted that a Vermont Supreme Court decision striking down a concealed weapons law was predicated on a right to bear arms that did not have a similar exception "about 'the practice of wearing concealed

weapons.'" 190 S.W. 573, 574 (Mo. 1916). *State v. Wilforth* likewise quoted Missouri's right to bear arms and the "shall not justify" exception when upholding a conviction under a law enacted in 1875 that the Court concluded was "directed against the practice of carrying concealed weapons or firearms." 74 Mo. 528, 530-31 (1881).

The Schaefer Respondents also contend that "the question whether strict scrutiny applies to gun laws has never been asked or answered in Missouri." (Schaefer Br. p. 21) This is a rather surprising statement in light of decisions such as *State v. Richard*, 298 S.W.3d 529, 532 (Mo. banc 2009) and *State v. White*, 253 S.W. 727, 727 (Mo. 1923), which upheld firearms restrictions for reasonableness.

Respondent Kander does not mischaracterize Missouri case law like the Schaefer Respondents, but Respondent Kander nonetheless contends that "removal of [the concealed weapons exception from Article I, section 23] is a detail that is not necessary for an informed understanding of the purposes of SJR 36." To say that deletion of constitutional language has been held significant for over a century on the question of whether Missouri citizens have a state constitutional right to carry concealed weapons, is a mere "detail" that need not be indicated by the ballot title would strip § 116.155 of meaning.

Section 116.155 requires the title to state "the purposes" of the amendment. It does not say that only "some of the purposes" need be included. The ballot title under review in this case describes only two of SJR 36's purposes and omits others, such as the change concerning concealed weapons, and the imposition of a new and heightened scrutiny requirement and other purposes discussed in more detail in Appellants' initial brief.

Respondents argue that within the confines a 50-word limit, not every detail needs to be set out. But this case does not present a situation in which the General Assembly was omitting details or was prevented by the 50-word limit in summarizing more of the amendment's obvious purposes. The title drafted by the General Assembly consists of only 28 words, excluding articles. Twenty-two more words were available to carry out § 116.155's directive to state "the purposes" of SJR 36 in fair and sufficient language. The General Assembly failed to accurately state SJR 36's purposes of significantly changing the parameters of Missouri's 140-year-old right to keep and bear arms, and the current title should therefore be set aside.

## 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,

*/s/Heidi Doerhoff Vollet*
Heidi Doerhoff Vollet, #49664
COOK, VETTER, DOERHOFF
& LANDWEHR, P.C.
231 Madison Street
Jefferson City, MO 65101
Telephone: (573) 635-7977
Facsimile: (573) 635-7414
Email: hvollet@cvdl.net

*/s/Burton Newman*
Burton Newman #22648
BURTON NEWMAN, P.C.
231 S. Bemiston, Suite 910
Clayton, MO 63105
Telephone: (314) 862-7999
Facsimile: (314) 862-4340
E-mail: burtnewman44@gmail.com

*Attorneys for Appellants Jennifer M. Joyce and Jean Peters-Baker*

**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 3,786 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 10th day of July, 2014, to be served by operation of the Court's electronic filing system on all counsel of record, as follows:

James Layton
Jeremiah Morgan
Jonathan Hensley
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102
Tel. (573) 751-1800
Fax (573) 751-0774
james.layton@ago.mo.gov
jeremiah.morgan@ago.mo.gov
jonathan.hensley@ago.mo.gov
*Attorneys for Respondents State Defendants*

David Brown
Brown Law Office LC
501 Cherry Street Suite 100
Columbia MO, 65201
Tel. (573) 814-2375
Fax (800) 906-6199
dbrown@brown-lawoffice.com
*Attorney for Respondent Missourians to Protect the 2nd Amendment*

Kurt U. Schaefer
201 W. Capitol Ave., Rm. 221
Jefferson City, Missouri 65101
Tel. (573) 751-3931
Fax (573) 751-4320
kurt.schaefer@senate.mo.gov
*Attorney for Senator Schaefer*

David H. Welch
Deputy General Counsel
Missouri House of Representatives
Capitol Building, Room 407C
Jefferson City, MO 65101
Tel. (573) 522-2598
david.welch@house.mo.gov
*Additional Attorney for Speaker Jones*

Charles W. Hatfield
Khristine A. Heisinger
Stinson Leonard Street LLP
230 W. McCarty Street
Jefferson City, MO 65101
Tel. (573) 636-6263
Fax (573) 636-6231
*Attorneys for Appellants Dotson and Morgan*

**COOK, VETTER, DOERHOFF & LANDWEHR, P.C.**

By *__/s/ Heidi Doerhoff Vollet__*

Heidi Doerhoff Vollet #49664
231 Madison Street
Jefferson City, MO 65101
Telephone: (573) 635-7977
Facsimile: (573) 635-7414
hvollet@cvdl.net