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

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

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JURISDICTIONAL STATEMENT

Jurisdiction is not properly vested in the Missouri Supreme Court and this case should be transferred to the Court of Appeals, Western District. Section 477.070, RSMo 2000 and Mo. Const. Article V, Section 3. In further support, Respondents Dempsey, Jones and Richard adopt the Jurisdictional Statement in the Brief of Respondent Kander, filed by the Attorney General.

STATEMENT OF FACTS

Respondents Dempsey, Jones and Richard adopt the Statement of Facts submitted in the Brief of Respondent Kander, filed by the Attorney General.

POINT RELIED ON

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 BECAUSE THE LEGISLATURE HAS VALIDLY AND UNAMBIGUOUSLY AUTHORIZED COURTS TO REVISE BALLOT TITLES PURSUANT TO SECTION 116.190, RSMo, IN THAT ARTICLE XII, SECTION 2(B) OF THE MISSOURI CONSTITUTION PROVIDES THAT A BALLOT TITLE SHALL BE AS PROVIDED BY LAW AND IN SECTION 116.190, RSMo, THE GENERAL ASSEMBLY PROPERLY DELEGATED REVIEW OF A BALLOT TITLE AND AUTHORITY TO REWRITE THE SUMMARY STATEMENT PORTION OF A BALLOT TITLE TO THE COURTS.

Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824 (Mo. banc 1990)

Cures Without Cloning v. Pund, 259 S.W.3d 76 (Mo. App. W.D. 2008)

Section 116.190, RSMo Supp. 2013

Mo. Const. art. XII, § 2(B)

INTRODUCTION

This case arrives before the Supreme Court out of two actions previously filed in the Circuit Court of Cole County, 19th Judicial Circuit, challenging Truly Agreed and Finally Passed Senate Committee Substitute for Senate Joint Resolution 36 (SJR 36, hereinafter), and more particularly the summary statement portion of the ballot title prepared by the General Assembly.

The trial court properly found that this cause of action was moot in that the court was constrained not to alter ballot title inside of six (6) weeks from the date of election, August 5, 2014. Further, the trial court, in an abundance of caution, addressed the merits of the claims regarding the summary statement and properly found that the summary statement was sufficient and fair pursuant to Section 116.190, RSMo Supp. 2013. With respect to jurisdiction of this Court and the rulings on the merits regarding the summary statement, Respondents Dempsey, Jones and Richard join in the Brief filed by the Attorney General on behalf of Respondent Kander.[1]

Appellants Dotson, et al., raise an additional third point on appeal relating to the interpretation of Section 116.190.[2] The trial court properly did not address this argument presented by Appellants Dotson, et al., in that it was not necessary to reach the

[1] Those points are Points Relied On I and II in the Brief of Respondent Kander filed by the Attorney General.

[2] Appellants Joyce, et al., raise only two points, which duplicate Appellants Dotson, et al.'s first two points.

merits of that issue to resolve the pleadings filed before the Court. Based upon the arguments of all Defendants/Respondents related to mootness and the merits on the ballot title, Respondents Dempsey, Jones and Richard agree that the trial court's decision not to address the constitutional claims belatedly raised by Appellants Dotson, et al.[3]

However, out of abundance of caution, in the event that the constitutional and statutory interpretation arguments of Section 116.190 are properly before this Court and required to be addressed, Respondents Dempsey, Jones and Richard differ from Respondent Kander and the Attorney General of the State of Missouri in that the language contained in Section 116.190.4 is clear and unambiguous and provides that the Court shall rewrite a ballot title in the event that the ballot title is found unfair and insufficient. The long history of cases in this Court and the Western District of the Court of Appeals affirms that the sole and exclusive remedy pursuant to Section 116.190.4 is the Court rewriting a summary statement. This history has never been questioned by any decision of any Appellate Court in Missouri. Moreover, pursuant to the provisions of Article XII, Section 2(B) of the Missouri Constitution, the ballot title,

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[3] Appellants Dotson, et al., filed their Amended Petition on June 26, 2014, which was eight (8) days after the case had been argued and submitted for decision on the merits. Accordingly, the question of the constitutionality of Section 116.190 was not raised at the earliest possible moment and is thus not properly before this Court. See, e.g., *Dydell v. Taylor*, 332 S.W.3d 848, 852 (Mo. banc 2012) and *State ex rel. Houska v. Dickhaner*, 323 S.W.3d 29, 33 (Mo. banc 2010).

and therefore any ensuing litigation regarding such ballot title, shall be as "provided by law." Section 116.190 is the embodiment of that law. Therefore the statute properly complies with the express provisions of the Constitution.

The provisions of Section 116.190 do not violate Article II, Section 1 of the Missouri Constitution (relating to separation of powers) in any manner, as they are expressly authorized by Article XII, Section 2(B) of the Missouri Constitution. Further, remand to the General Assembly is not an authorized remedy in the above-captioned matter as Section 116.190.4 plainly provides that the Circuit Court shall certify a ballot title and makes no provision for remand on a summary statement claim. To provide for remand would require this Court to add language to a statute, which is in excess of the powers of the Court.

Finally, the relevant provisions of Section 116.190.4, if found to be unconstitutional, cannot be severed from Section 116.190 and thus the entirety of Section 116.190 would have to be declared invalid. This would therefore provide Appellants with the prior existing remedy which is a post-election contest. Thus, in the event that Section 116.190 violates the separation of powers, the statute in its entirety should be stricken and the case should be dismissed; with provision that Appellants can file a post-election contest. For these reasons and as more thoroughly detailed in the argument below, the existing ballot title of House Joint Resolution 36 should be approved and certified by this Court and Appellants' action should be dismissed.

STANDARD OF REVIEW

Respondents Dempsey, Jones and Richard agree with and adopt the Statement of Review delineated in Respondent Kander's Brief filed by the Attorney General.

ARGUMENT

Respondents Dempsey, Jones and Richard hereby and herein adopt Points I and II of the argument filed in the Brief of Respondent Secretary of State Jason Kander filed by the Attorney General of the State of Missouri concurrent with the filing of this Brief.[4] For the reasons stated in those points, Respondents Dempsey, Jones and Richard urge this Court to affirm the trial court's decision.

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 BECAUSE THE LEGISLATURE HAS VALIDLY AND UNAMBIGUOUSLY AUTHORIZED COURTS TO REVISE BALLOT TITLES PURSUANT TO SECTION 116.190, RSMo IN THAT ARTICLE XII, SECTION 2(B) OF THE MISSOURI CONSTITUTION PROVIDES THAT A BALLOT TITLE SHALL BE AS PROVIDED BY LAW AND IN SECTION 116.190, RSMo, THE GENERAL ASSEMBLY PROPERLY DELEGATED REVIEW OF A BALLOT TITLE AND AUTHORITY TO REWRITE THE

[4] Respondents Dempsey, Jones and Richard urge that deference to the General Assembly on the summary statement is the primary tenet of reviewing the merits of such summary statement.

SUMMARY STATEMENT PORTION OF A BALLOT TITLE TO THE COURTS. (Responds to Appellant Dotson's Point III)

Respondents Dempsey, Jones and Richard agree with Respondent Kander and the Attorney General that the trial court, and this Court, need not reach the issue of remedy under Section 116.190.4, RSMo Supp. 2013.[5] Based upon the arguments in Points I and II of Respondent Kander's Brief, adopted in whole by Respondents Dempsey, Jones and Richard, the summary statement should be certified as written. However, if remedy is an issue, Respondents Dempsey, Jones and Richard disagree with Respondent Kander and the Attorney General on such remedy and the interpretation of Section 116.190.4.

Article XII of the Missouri Constitution provides the sole means by which the Constitution of the State of Missouri may be amended by the General Assembly. Section 2(A) of Article XII provides that constitutional amendments may be provided by a majority vote of both houses of the General Assembly. Mo. Const., art. XII, §2(A). For purposes of the matter before the Court today, the critical language regarding amending the Constitution is contained in the next section of Article XII which states in part:

> All amendments proposed by the General Assembly or by the initiative shall be submitted to the electors for their approval or rejection by official

[5] Section 116.190, RSMo Supp. 2013 has two versions, one effective until November 4, 2014 and one effective thereafter. For purposes of this appeal only the former is relevant. Hereinafter a citation to Section 116.190 shall be to such version, unless otherwise expressly noted.

> 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…

Mo. Const., art. XII, §2(B) (emphasis added).

As is clear from the plain language of Article XII, §2(B), the amendments shall be provided in an official ballot title which is to be "provided by law." The General Assembly has provided such a law regarding the provision of the ballot title for constitutional amendments. Specifically, Section 116.155, RSMo, provides that the General Assembly may provide an official summary statement and fiscal note summary for a ballot measure, and where either is not provided, the Secretary of State or State Auditor, respectively, may provide the same. Section 116.155, RSMo, 2000. The enactment of Senate Joint Resolution 36 (SJR 36, hereinafter) included a summary statement for the ballot title, but did not include a fiscal note summary.[6]

To provide for a challenge to such ballot title, whether the amendment is proposed by the legislature or by the initiative process, the General Assembly enacted Section 116.190. The provisions of Section 116.190 provide that a challenge may be brought in the Circuit Court of Cole County; provides a limited timeframe for the same; identifies who the proper parties that must be named are in such suit; provides the claims necessary

[6] No challenge was brought to the fiscal note or fiscal note summary and therefore issues regarding the same are not before this Court.

for such suit; and provides a remedy if required. Specifically, Section 116.190.4 provides in pertinent part as follows:

> The action shall be placed at the top of the civil docket. Insofar as the action challenges the summary statement portion of the official ballot title, the court shall consider the petition, hear arguments, and in its decision certify the summary statement portion of the official ballot title to the secretary of state. Insofar as the action challenges the fiscal note or fiscal note summary portion of the official ballot title, the court shall consider the petition, hear arguments, and in its decision either certify the fiscal note or fiscal note summary portion of the ballot title to the secretary of state or remand the fiscal note or fiscal note summary to the auditor for preparation of the new fiscal note or fiscal note summary pursuant to the procedures set forth in Section 116.175…In making the legal notice to election authorities under Section 116.240, and for purposes of Section 116.180, the secretary of state shall certify the language which the court certifies to him.

Section 116.190.4 (emphasis added). The emphasized language contained in Section 116.190.4 is clear and unambiguous: It is up to the Court to certify the appropriate summary statement, and there is no provision for remand.

Precedent on Summary Statement Litigation Universally Results in the Court Certifying Language and Finding No Separation of Powers Concern

Since the original enactment of Section 116.190, in 1980, there have been numerous cases concerning this statute before this Court and the Western District of the Court of Appeals.[7]

Consistently, this Court and the Western District Court of Appeals in reviewing challenges brought under Section 116.190 have agreed on numerous occasions as to the meaning of the plain language in Section 116.190.4. In *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824 (Mo. banc 1990), this Court addressed a complex argument dealing with Section 116.190 and ultimately stated: "If the ballot title challenge is timely filed, the court is authorized to do no more than certify a correct ballot title." *Id.* at 829. This Court has never found that Section116.190 provides for any type of remand on a summary statement challenge.

[7] All summary statement challenges are required to be brought in the Circuit Court of Cole County and thus appeals can only be to the Western District Court of Appeals, which has jurisdiction pursuant to Mo. Const. Art. V, § 3 and Section 477.070, RSMo. Jurisdiction only lies in this Court pursuant to Article V, § 3 if this Court accepts jurisdiction. While more thoroughly discussed elsewhere, Respondents here assert that there is no basis for jurisdiction of this appeal in the Supreme Court and the case should be transferred to the Western District Court of Appeals. *See* Jurisdictional Statement of Respondent Kander filed by the Attorney General and adopted by Respondents Dempsey, Jones, and Richard.

The Western District, which has handled the bulk of the cases regarding summary statement litigation, has more succinctly addressed this issue:

> Section 116.190 allows the trial court to correct any insufficient or unfair language of the ballot title and to certify the corrected official ballot title to the secretary of state. This is the exclusive remedy allowed under the statute. 'If the ballot title challenge is timely filed, the court is authorized to do no more than to certify a correct ballot title.'

Overfelt v. McCaskill, 81 S.W.3d 732, 736 (Mo. App. W.D. 2002), quoting *Missourians to Protect the Initiative Process*.

More recently, in *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010) the Western District Court of Appeals found that the summary statement portion of the ballot title was not fair and sufficient and rewrote that ballot title, and in its conclusion stated as follows:

> We reverse the circuit court's revision of the ballot summary on the Article I petition. Pursuant to Rule 84.14, we hereby enter a judgment modifying the ballot summary as set forth herein and remand the modified ballot summary to the secretary of state for certification.

Id. at 588-9 (emphasis added). There are numerous other cases from the Western District and this Court that have similarly addressed issues containing summary statements. Most recently, *Brown v. Carnahan*¸370 S.W.3d 637 (Mo. banc 2012) wherein this Court reversed the Circuit Court's rewriting of the summary statement on the payday loan initiative petition but did not question the Court's authority to do so. *Id.* at 663-664. This

Court, in *Brown*, referenced *Cures Without Cloning v. Pund*, 259 S.W.3d 76 (Mo. App. W.D. 2008).

In *Cures Without Cloning*, the Western District analyzed a ballot initiative petition to amend the stem cell research provisions and discussed the authority the trial court had to modify a summary statement. The court addressed the same argument raised here by Appellants (and, in part, supported by the Attorney General in *Cures Without Cloning*), regarding the issue of separation of powers where a court rewrites the summary statement language originally drafted by the Secretary of State, under an Article II, § 1 separation of powers challenge. The Western District did a substantive analysis of this claim and concluded as follows:

> Contrary to the Secretary's interpretation, Missouri courts have recognized that "Section 116.190 allows the trial court to correct any insufficient or unfair language of the ballot title and to certify the corrected official ballot title to the secretary of state." *Overfelt v. McCaskill*, 81 S.W.3d 732, 736 (Mo. App. 2002); *Blunt*, 799 S.W.2d at 829 ("If the ballot title challenge is timely filed, the court is authorized to do no more than certify a correct ballot title."). These decisions are consistent with Section 116.190.3, which allows a petitioner in circuit court to request a "different summary statement" if the Secretary's ballot title is determined insufficient or unfair. Notably, there is no provision for a remand of the summary statement under these circumstances. Section 116.190.4 gives the court discretion to *remand a fiscal note or fiscal note summary to the State Auditor* to correct

> deficiencies, *but the statute does not authorize remand of any portion of the ballot title to the Secretary for modification*. The statute implicitly allows the court to certify a corrected summary statement, and then "the secretary of state shall certify the language which the court certifies to [her]." Section 116.190.4.

Id. at 83 (emphasis italicized in original and added). This Court denied the application for transfer in *Cures Without Cloning* on August 26, 2008, allowing the Western District's opinion to stand. This Court should expressly adopt this reasoning in the case at hand.

It is clear through the longstanding history of jurisprudence in the state of Missouri and the plain language of Section 116.190.4, that the court has the authority to rewrite summary statements and that such authority does not violate the separation of powers under Article II, § 2 of the Missouri Constitution.

Appellants Dotson, et al., have a heavy burden to demonstrate that Section 116.190.4 is invalid. As this Court has noted:

> A statute is presumed to be constitutional and will not be held unconstitutional unless it clearly and undoubtedly contravenes the constitution. *Lester v. Sayles*, 850 S.W.2d 858, 872 (Mo. banc 1993). The courts will enforce a statute unless it plainly and palpably affronts fundamental law embodied in the constitution. *Id.* The party claiming that the statute is unconstitutional bears the burden of proof. *Id.*

Sanders v. Ahmed, 364 S.W.3d 195, 202 (Mo. banc 2012).

Appellants sole support of their argument is a Brief filed, in a prior case, by the Attorney General, regarding an initiative petition. In that case, while the issue was raised, this Court did not find or even hint at a separation of powers concern. See, *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012) (which was consolidated with multiple other cases, including *Northcutt v. Carnahan*, SC92500). That Brief struggles, and ultimately fails, to rebut the clear holding in *Cures Without Cloning v. Pund*, 259 S.W.3d 76 (Mo. App. W.D. 2008).

This Court best addressed this argument in *Sanders*, by stating, "The General Assembly has the right to create causes of action and to prescribe their remedies." *Sanders*, 364 S.W.3d at 205. In this case, pursuant to Article XII, Section 2(B), the General Assembly has provided a process for an official ballot title, provided a cause of action for the same and prescribed the remedy in such action. Thus, this Court should follow *Sanders* and find no separation of powers issue.

Moreover, the Secretary of State's argument, that Section 116.190.4 compels a remand to the General Assembly is unsupported, not only by the case law (and expressly rejected in *Cures Without Cloning*), but by the plain language contained in Section 116.190.4.

As discussed above, the language plainly states that the court shall certify the summary statement and this language has been constant throughout the history of Section116.190.

Prior to the 2003 amendments, Section 116.190.4 specified that the court would certify a correct ballot title (both summary statement and fiscal note summary) to the

Secretary of State. After the decision in *Overfelt v. McCaskill*, 81 S.W.3d 732 (Mo. App. W.D. 2002), the General Assembly amended Section 116.190 to provide clarification on Section 116.190.4 with respect to fiscal notes and fiscal note summaries.

House Bill 511 amended Section 116.190 to add, in direct response to *Overfelt v. McCaskill*, the second sentence contained in Section 116.190.4, which provides that where the fiscal note or fiscal note summary is found insufficient or unfair, the remedy shall be remand to the State Auditor. HB 511/SB 623, Laws 2003. At the same time, the General Assembly also amended the first sentence contained in Section 116.190.4 to provide that the trial court, with respect to the summary statement portion of the official ballot title, shall certify the summary statement to the Secretary of State. The General Assembly made it abundantly clear that remand is only an available remedy with respect to the fiscal note and the fiscal note summary and is expressly not available with respect to the summary statement.

The Secretary of State's argument that, in the event the summary statement is insufficient or unfair, it should be remanded to the General Assembly simply has no support in the plain language of the statute, in the legislative history of the statute, or in the case law interpreting that statute for more than 20 years.

> This Court must examine the language of the statutes as they are written. *City of Wellston v. SBC Commc'ns, Inc.*, 203 S.W.3d 189, 192 (Mo. banc 2006). It cannot simply insert terms that the legislature has omitted. *Turner v. Sch. Dist. Of Clayton*, 318 S.W.3d 660, 668 (Mo. banc 2012).

Loren Cook Co. v. Director of Revenue, 414 S.W.3d 451, 454 (Mo. banc 2013). This Court added that if the legislature intended to include a provision, providing a reduction in the price of a sale of a plane, "it could have done so. The fact that it didn't" means no such reduction exists. *Id.* at 454-5.

As this Court has pointed out on numerous occasions, the judiciary does not have the authority to rewrite existing statutes nor add language which was not included by the General Assembly. See, e.g., *Akin v. Director of Revenue*, 934 S.W.2d 295, 300 (Mo. banc 1996). Particularly in a situation such as this where the legislature clearly voiced its intent not to add remand as an option, this Court is without any jurisdiction to add that language to the statute.

If Section 116.190.4, RSMo, violates the Missouri Constitution as alleged by Appellants, then such sentence cannot be severed and the entire statute must fall.

Section 116.190.4 provides the sole and exclusive remedy for a challenge to a ballot title, including the summary statement and the fiscal note summary. This subsection is critical to the entire basis of Section 116.190, which provides for a purely statutory cause of action to challenge a ballot title. In the event that any provision therein is deemed unconstitutional by this Court, then the entire statute must fail. This is particularly the case when the remedy provision is deemed to be unconstitutional.

Generally, unconstitutional provisions of statutes may be severed pursuant to Section 1.140, RSMo. However, that severance can only occur if the court makes a finding that the measure would have been enacted without the severed language. It would be meaningless for the legislature to have enacted Section 116.190 in any form without

providing relief in the event of a finding that a summary statement is unfair or insufficient. To write out of the statute the only provision granting relief would be to effectively gut the entirety of Section 116.190.

As this Court has stated before:

> Severance is inappropriate if the valid provisions of the statute are so essentially and inseparably connected with, and so dependent on, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one. *Club Executives [v. State]*, 208 S.W.3d [885] at 889 [(Mo. banc 2006)]. Severance is also inappropriate if the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. *Id.*

Legends Bank v. State, 361 S.W.3d 383, 387 (Mo. banc 2012).

An action to challenge a ballot title is a purely statutory creation. If that action is deemed to be invalid, then the entire action is invalid and other alternatives must be considered: To-wit, an election contest pursuant to the provisions of Chapter 115. The Western District of the Court of Appeals in *Cole v. Carnahan*, 272 S.W.3d 392 (Mo. App. W.D. 2008) identified other remedies that are available, such as an election contest. *Id*. at 395. Similarly in the current situation if the first sentence of Section 116.190.4 is invalid, then the entirely of Section 116.190 must be found invalid and therefore, ultimately, the only relief regarding a legislatively-created ballot title, or any ballot title for that matter, is a post-election contest. Such resolution offers the benefit of preserving judicial economy, in that proposed measures would not have to go through extensive

litigation prior to an election which would protect the scarce judicial resources which are currently consumed in such actions.

Obviously if the legislature wishes to address this issue and provide a route for relief, it can do as it did in 2003, in response to the *Overfelt v. McCaskill* decision and rewrite and revise Section 116.190, if necessary.

CONCLUSION

Respondents Dempsey, Jones and Richard urge this Court to affirm the trial court and find the action brought to be moot as out of time pursuant to Section 115.125 and the *Cole v. Carnahan* case, *supra*. In the alternative, Respondents Dempsey, Jones and Richard urge this Court to find that the summary statement for House Joint Resolution 36 is fair and sufficient and certify the same to the Secretary of State for the August 5, 2014, ballot.

If, however, this Court deems the summary statement to be insufficient and unfair, then it should rewrite the summary statement and certify that new summary statement for inclusion on the August 5, 2014, ballot. If in the unlikely alternative that this Court finds it does not have such authority due to a separation of powers concern, then it should find Section 116.190 to be invalid in its entirety and therefore dismiss Appellants' appeal and their underlying cause of action as not ripe pending an election contest to be brought post-election, pursuant to Chapter 115, RSMo.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned counsel certifies that on this 9th day of July, 2014, a true and correct copy of the foregoing brief was served on the following by eService of the eFiling System and a Microsoft® Office Word 2010 version was e-mailed to:

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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;

(2) complies with the limitations in Rule 84.06(b) and contains 5,410 words, determined using the word count program in Microsoft® Office Word 2010; and

(3) the Microsoft® Office Word 2010 version e-mailed to the parties has been scanned for viruses and is virus-free.

/s/ Marc H. Ellinger