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IN THE SUPREME COURT OF MISSOURI

No. SC94293

DOTSON et al.,

Appellants,

v.

KANDER, et al.,

Respondents.

Appeal from the Circuit Court of Cole County, Missouri

19th Judicial Circuit

The Honorable Jon E. Beetem, Judge

Nos. 14AC-CC00305 & 14AC-CC00310 (Consolidated)

JOINT BRIEF OF RESPONDENTS

SENATOR KURT SCHAEFER

and

MISSOURIANS PROTECTING THE 2ND AMENDMENT

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STATEMENT OF FACTS

For completeness, the record should reflect the status of military and absentee voting. Ballots containing the disputed ballot title were made available to military personnel on Friday, June 20, 2014 and to ordinary absentee voters on Tuesday, June 24, 2014. Tr. 5:7-15; *see also* Tr 16:11-12.

ARGUMENT

I. THIS APPEAL IS MOOT BECAUSE A DECISION ON THE MERITS WOULD NOT HAVE ANY PRACTICAL EFFECT ON AN EXISTING CONTROVERSY AND WOULD BE MERELY AN ADVISORY OPINION IN THAT (A) MILITARY AND ABSENTEE VOTING ON THE OFFICIAL BALLOT TITLE HAS BEGUN AND (B) CERTIFICATION OF A CORRECTED OFFICIAL BALLOT TITLE IS PROHIBITED BY SECTION 115.125.2.[1] (Responds to: Joyce Point I / Dotson Point II)

The trial court dismissed this action as moot. The trial court was correct, as explained below.

A. Legal Standard for Mootness

A "threshold question" in any appellate review is the mootness of the controversy. *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. 2001). When an event occurs that makes a court's decision unnecessary or makes granting effectual relief impossible, the case is moot. *Id.* "Even a case vital at inception of the appeal may be mooted by an

[1] All statutory references in this Brief are to the current Revised Statutes of Missouri.

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intervenient event which so alters the position of the parties that any judgment rendered merely becomes a hypothetical opinion." *Id.* In deciding whether a case is moot, an appellate court is allowed to consider matters outside the record. *Id.*

An action to control the content of an election ballot becomes moot if voting begins with the challenged content on the ballot. *Gartner v. Missouri Ethics Comm'n*, 323 S.W.3d 439, 441-42 (Mo. Ct. App. 2010). Once voting on a challenged ballot has begun, an appellate decision whether the ballot may be submitted to voters "will no longer have any practical effect on an existing controversy and would merely be an advisory opinion." *Id.* at 441-42.

Regardless whether voting has begun, a challenge to an official ballot title becomes moot six weeks before the date of the election because after that deadline, pursuant to section 115.125.2, no court shall have the authority to order an issue be placed on the ballot. *Cole v. Carnahan*, 272 S.W.3d 392 (Mo. App. W.D. 2008); *see also State ex rel. Nixon v. Blunt*, 135 S.W.3d 416, 420-24 (Mo. 2004) (Benton, J., concurring; Limbaugh, J., concurring). The legislature enacted this "bright line" in 2003, in its last review of election laws. *Blunt*, 135 S.W.3d at 420. The six-week deadline is reasonable because absentee ballots are to be available by then, candidate withdrawals and disqualifications may occur until then, and local issues may be added until then. *Id.* at 421.

B. The Present Case Is Moot

At the time of the filing of this brief (July 8, 2014), the relevant election date is less than four weeks away, military voting has been underway for nineteen days, and

absentee voting has been underway for fifteen days.[2] Both as a practical matter and under the bright line test in section 115.125.2, these circumstances render this appeal moot.

The relief requested, and the statutory relief that may be granted in this case, is to certify a revised official ballot title to the Secretary of State.[3] Because voting on the original official ballot title has begun, that would not be effectual relief as to military and absentee voters, and therefore this appeal is moot. Put simply, it is impossible to order the Secretary of State to change the ballot because the ballot has already been made available and voters have voted.

This situation was anticipated by the General Assembly when it enacted the deadline found in section 115.125.2. As noted above, the six-week deadline is reasonable because it reflects the time when absentee ballots are to be available. Because that statutory deadline has passed, judicial relief is limited to an election contest. *State ex rel. Brown v. Shaw*, 129 S.W.3d 372, 374 n.2 (Mo. 2004); *Cole* at 395.

[2] The official ballot title has been certified the for the primary election to be held on August 5, 2014. Ballots containing the disputed ballot title were made available to military personnel on Friday, June 20, 2014 and to ordinary absentee voters on Tuesday, June 24, 2014. Tr. 5:7-15; *see also* Tr 16:11-12.

[3] Section 116.190.

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C. Appellants' Arguments Have No Merit

None of Appellants' arguments address the fundamental, "threshold question" whether this Court can grant effectual relief. Instead, Appellants argue points of statutory interpretation that have no relevance to the practical concern of mootness.

First, Appellants argue that section 115.125.2 does not apply because Appellants are not asking that an issue be "placed" on the ballot (Dotson Br. 30). This is sophistry. The present case is a statutory action in which the plaintiff "shall request a different fiscal note or fiscal note summary portion of the official ballot title" and in which the court—regardless whether it grants relief to the plaintiff—"shall. . . in its decision certify the summary statement portion of the official ballot title to the secretary of state." Section 116.190. This is precisely the judicial conduct that the legislature intended to subject to the deadline of section 115.125.2. *See Blunt*, 135 S.W.3d at 420-21. Furthermore, regardless what the word "placed" means in section 115.125.2, military and absentee voting has occurred on the official ballot title, rendering this appeal moot.

Second, Appellants argue that the only interest to be protected relates to the costs to local election authorities (Dotson Br. 31). Quite the contrary, the interests of military and absentee voters must be protected, and that is the primary purpose of section 115.125.2. *See Blunt*, 135 S.W.3d at 420-21.

Third, Appellants argue that section 115.125.2 does not apply because the election in this case was not called by a political subdivision or special district (Dotson Br. 32). This is a point of statutory construction that does not matter because, as shown above,

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this appeal is moot based on practical consideration of military and absentee voting. The same reasoning discredits all of Appellants arguments concerning section 115.125.2.

II. THE SUMMARY STATEMENT FOR SJR 36 FAIRLY AND SUFFICIENTLY SUMMARIZES THE PURPOSE OF THE BALLOT MEASURE, WHICH IS PRIMARILY TO MAKE A DECLARATION CONCERNING HOW THE EXISTING RIGHT TO KEEP AND BEAR ARMS IS TO BE REGARDED AND SECURED IN MISSOURI IN THE WAKE OF THE LANDMARK U.S. SUPREME COURT DECISIONS *HELLER* AND *MCDONALD*. (Responds to: Joyce Point II / Dotson Point I)

Appellants contend that the ballot measure adds and removes substantive rights to and from the Missouri constitution and that the summary statement unfairly obscures these substantive changes. To the contrary, as explained below, the primary purpose of the ballot measure is to declare how an existing right in the constitution is to be regarded and secured in the wake of two landmark U.S. Supreme Court cases. It is those landmark cases, and not the ballot measure, that made a "sea change" in the law (*see* Dotson Br. 15). When the history of the right to keep and bear arms is taken into consideration, including the recent landmarks cases, Appellants' arguments do not hold.

A. Legal Standard for Challenging a Summary statement

Appellants brought this action pursuant to section 116.190, which authorizes any citizen to challenge an official ballot title by alleging that the summary statement is insufficient or unfair. Section 116.155.2 further requires that a summary statement

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approved by the legislature "shall be 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 proposed measure."

Although the Court of Appeals has developed various tests of the fairness and sufficiency of a summary statement, this Court recently explained the test as follows:

- The statement "must be adequate and state the consequences of the initiative without bias, prejudice, deception, or favoritism."
- The language used should “fairly and impartially summarize the purposes of the measure so that voters will not be deceived or misled."
- The statement "should accurately reflect the legal and probable effects of the proposed initiative."

Brown v. Carnahan, 370 S.W.3d 637, 654 (Mo. 2012).

B. The Disputed Ballot Title

To understand the purpose of the disputed SJR 36 ballot measure, one must first consider the scope and history of the current constitutional right to keep and bear arms.

1. A Brief History of the Right to Keep and Bear Arms and "Well Recognized Exceptions" to the Right

The "right of the people to keep and bear arms" is the subject of the Second Amendment to the U.S. Constitution, which was ratified in 1791. The Second Amendment was not intended to lay down a novel principle but rather codified a right inherited from English common law. *D.C. v. Heller*, 554 U.S. 570, 599, 128 S. Ct. 2783, 2801, 171 L. Ed. 2d 637 (2008). The right is fundamental in the sense that it is neither

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"granted by the Constitution" nor "in any manner dependent upon that instrument for its existence." *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L. Ed. 588 (1875).

(a) *Bliss v. Commonwealth*

The first significant American legal controversy concerning the right to keep and bear arms was whether the right is absolute, or whether it is subject to exceptions. The first reported case on this issue occurred in Kentucky in 1822 when a man was indicted and convicted for carrying a sword concealed in a cane. *Bliss v. Commonwealth*, 12 Ky. 90, 2 Litt. 90, 91–92, 13 Am. Dec. 251 (1822). The Kentucky Supreme Court overturned the conviction on the theory that any statute that denies to the citizen the right to carry arms, whether openly or concealed, is an infringement of the right to keep and bear arms that is guaranteed by the Kentucky constitution. *Id. Bliss* was later abrogated, and the absolutist view it endorsed is no longer the law anywhere in the United States. *See Posey v. Com.*, 185 S.W.3d 170, 189 (Ky. 2006).

(b) *United States v. Cruikshank*

The U.S. Supreme Court had no occasion to address the right to keep and bear arms until 1875, when it overturned a conviction under the Enforcement Act of 1870, which prohibited two or more people from conspiring to deprive anyone of their constitutional rights. *United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1875). *Cruikshank* held that the right to keep and bear arms is not absolute but is limited to "bearing arms for a lawful purpose." *Cruikshank*, 92 U.S. at 553.

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(c) *State v. Wilforth*

This Court first addressed the right to keep and bear arms in 1881 in *State v. Wilforth*, 74 Mo. 528 (1881). Wilforth was convicted of going into a church house where people were assembled for literary purposes while having about his person fire-arms. *Id*. As discussed in the later case of *State v. Shelby*, Wilforth committed the offense simply by carrying a deadly weapon into a place where people were assembled for educational, literary, or social purposes. 90 Mo. 302, 2 S.W. 468, 469 (1886). Concealment was not an element of the offense. *Id.* There was a split among the states at that time: Kentucky and Tennessee held that the right to keep and bear arms was absolute, whereas Georgia, Louisiana, Arkansas, Indiana and Alabama held that concealed weapons could be criminalized. *Wilforth*, 74 Mo. at 530. After surveying the decisions of those states, this Court held that "a law which is merely intended to promote personal security, and to put down lawless aggression and violence. . . does not come in collision with the constitution." *Wilforth*, 74 Mo. at 530-31. The Court reached this conclusion "[f]ollowing the weight of authority as indicated by the state courts." *Id.*

(d) *State v. Shelby*

This Court next considered an exception to the right to keep and bear arms in 1881 when it examined the constitutionality of a statute making it a crime to carrying a weapon concealed or while intoxicated. *State v. Shelby*, 90 Mo. 302, 2 S.W. 468 (1886). The Court summarized its prior decision in *Wilforth* as establishing the principle that "the legislature may regulate the manner in which arms may be born. . . as to time and place" and extended this principle to allow the legislature to "do the same thing with reference to

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the condition of the person who carries such weapons." *Id.* at 469. Once again, the Court held that a statute "designed to promote personal security, and to check and put down lawlessness" is "in perfect harmony with the constitution." *Id.* The Court in *Shelby* went even further, holding that, "[W]e are of the opinion the act is but a reasonable regulation of the use of such arms, and to which the citizen must yield, and a valid exercise of the legislative power." *Id.* As to the power of the legislature to prohibit carrying concealed, the Court noted that the right of the legislature to prohibit the wearing of concealed weapons under state constitutions "is now generally conceded." *Shelby*, 2 S.W. at 469.

(e) *Robertson v. Baldwin*

In 1897, the Supreme Court recognized that the fundamental right to keep and bear arms is inherently limited by "well-recognized exceptions" and therefore is not infringed by concealed weapons laws:

> The law is perfectly well settled that the first 10 amendments to the constitution. . . embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus. . . the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons. . . .

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Robertson v. Baldwin, 165 U.S. 275, 281-82, 17 S. Ct. 326, 329, 41 L. Ed. 715 (1897).

(f) *State v. Keet*

This Court addressed the issue of concealed weapons in 1916 in *State v. Keet*, 269 Mo. 206, 190 S.W. 573 (1916). The Court expressly rejected the *Bliss* approach from Kentucky and Tennessee and adopted instead the reasoning of the leading case from Alabama, *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44 (1840). The persuasive passage in *Reid*, quoted at length by this Court in *Keet*, holds that the right to bear arms is not absolute, and it reads as follows:

> The right guaranteed to the citizen is not to bear arms upon all occasions and in all places, but merely "in defense of himself and the state." The terms in which this provision is phrased seem to us necessarily to leave with the Legislature the authority to adopt such regulations of police as may be dictated by the safety of the people and the advancement of public morals.

Keet, 190 S.W. at 575, quoting *Reid, supra*. The Court concluded as follows:

> 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

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> comparatively new evil, but she has finally spoken in no uncertain language.

Keet, 190 S.W. at 576.

In the present context, the most notable aspect of *Keet* is that this Court upheld the constitutionality of a prohibition against concealed weapons without any reliance whatsoever on the constitution's "shall not justify the wearing of concealed weapons" language.

(g) *State v. White*

In 1923 this Court returned to the generalized question whether the right to keep and bear arms may be restricted. *State v. White* held that the purpose of the Missouri right to keep and bear arms "is to deny to the Legislature the power to take away the right of the citizen to resist aggression, force, and wrong at the hands of another." 299 Mo. 599, 253 S.W. 724, 727 (1923). The Court expressly held, however, that the "right to bear arms may be taken away or limited by reasonable restrictions." *Id.*

(h) *D.C. v. Heller*

Perhaps the most significant case on the right to keep and bear arms is the landmark U.S. Supreme Court decision *D.C. v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). *Heller* struck down certain provisions of the Firearms Control Regulations Act of 1975 based on the holding that the Second Amendment to the U. S. Constitution applies to federal enclaves and protects an individual's right to possess a firearm for traditionally lawful purposes, such as self-defense within the home. In the context of the present case, *Heller* is most notable for its authoritative review of the right

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to keep and bear arms, which should illuminate this Court's consideration of the present case, but which Respondent will cite rather than summarize due to its length. *See Heller*, *supra*. Along the way, *Heller* notes that the right to keep and bear arms is "a natural right which the people have reserved to themselves, confirmed by the Bill of Rights" but that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." 554 U.S. at 594, 128 S. Ct. at 2799.

Although *Heller* struck down certain weapons restrictions, the Court affirmed the validity of what it called, "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-27, 128 S. Ct. 2783, 2816-17.

(i) *McDonald v. City of Chicago, Ill.*

The final significant case on the right to keep and bear arms was the landmark U.S. Supreme Court decision in *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). In McDonald, the U.S. Supreme Court held that the Second Amendment right to keep and bear arms "is fully applicable to the States." 130 S. Ct. at 3026. The Court held that the right is "among those fundamental rights necessary to our system of ordered liberty." 130 S. Ct. at 3042. The Court also affirmed, as it did in *Heller*, the validity of "such longstanding regulatory measures as prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of

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firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. 130 S. Ct. at 3047.

2. The Purpose of the SJR 36 Ballot Measure

The SJR 36 ballot measure must be interpreted in light of *Heller* and *McDonald* because its purpose is to revise the Missouri constitution in the wake of *Heller* and *McDonald*. When the Missouri Constitution was drafted in 1820 and again in 1845, the post-civil-war Fourteenth Amendment to the U.S. Constitution did not exist. As a result, when those constitutions were adopted, the federal Second Amendment did nothing more than forbid the federal government to infringe the right to keep and bear arms. When this Court decided *Wilforth* in 1881, it was "an open question" whether the federal Second Amendment applied, and the question remained open until *McDonald* was decided in 2010.

Following *McDonald*, the right to keep and bear arms must be recognized among the list of coextensive constitutional rights found both in the Missouri and federal constitutions, which include due process, the protection against unreasonable searches and seizures, the ban on ex post facto laws, and equal protection. *See, e.g.*, *Doughty v. Dir. of Revenue*, 387 S.W.3d 383, 387 (Mo. 2013)(due process); *State v. Jones*, 865 S.W.2d 658, 660 (Mo. banc 1993)(unreasonable search and seizure); *Doe v. Phillips*, 194 S.W.3d 833, 841–42 (Mo. banc 2006)(ex post facto laws); *State v. Young*, 362 S.W.3d 386, 396 (Mo. banc 2012)(equal protection). However, as shown in Appellants' brief, there is no demonstrable history in Missouri of affording the right to keep and bear arms a legal status akin to other fundamental constitutional rights like due process and equal

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protection. As argued below, this Court could conceivably hold the Missouri right to keep and bear arms to be a lesser right to the federal right explicated in *Heller* and *McDonald* (although it would certainly be an adventurous and unlikely speculation to predict that result).

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 explicated in *Heller* and *McDonald*, and to provide a prophylactic against legislative or judicial action that would violate *McDonald*. The method by which SJR 36 accomplishes these purposes is to make a declaration concerning how the existing right to keep and bear arms is to be regarded and secured in Missouri. Because it would be impossible (and fatally confusing) to concisely explain this purpose to voters in the summary statement, the legislature prepared the following summary statement:

> Shall the Missouri Constitution be amended to include a declaration that the right to keep and bear arms is a unalienable right and that the state government is obligated to uphold that right?

As argued more fully below, this is a sufficient and fair summary of the purpose of the ballot measure.

C. Misleading Voters About Rights That Already Exist

Appellants contend that the summary statement suggests that the law is being changed in ways that it is not (Dotson Br. 20). In general, this line of argument ignores that *Heller* and *McDonald* already changed the law and that the primary purpose of the

ballot measure is to make a declaration concerning how the right to keep and bear arms, as defined and clarified by *Heller* and *McDonald*, is to be regarded and secured in Missouri.

First, Appellants contend that the Summary statement "tells voters that the right to bear arms is not currently part of the group of rights in the constitution" (Dotson Br. 21-22). The implication is that voters are being misled to believe that the ballot measure would create, for the first time in Missouri, a right to keep and bear arms. The Joyce Appellants disagree:

> [T]he 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. . . .

(Joyce Br. 22, italics in original).

On this narrow point, the Joyce Appellants are correct. Sometimes it is necessary for a summary statement "to provide a context reference that will enable voters to understand the effect of the proposed change." *Brown v. Carnahan*, 370 S.W.3d 637, 654 (Mo. 2012). In the present case, to provide context, the summary statement appropriately references "the right to keep and bear arms." As the Joyce Appellants recognize, this confirms for the voter that there is a presently existing right to keep and bear arms, a confirmation which is not misleading. In an attempt to construe the phrase to be misleading, the Dotson Appellants ignore the words "a declaration that the right" and read the summary as if it says, "shall the constitution be amended to declare a right," which is not how the summary reads.

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Second, Appellants suggest that because the term "unalienable" appears in the Declaration of Independence[4] but not in the U.S. Constitution, the term "appears to be of no legal significance" (Dotson Br. 23). This shallow analysis does not hold.

As the U.S. Supreme Court has explained, there exist certain rights, including the right to life and the right to liberty, which enjoy the special status that the rights "may not be submitted to vote; they depend on the outcome of no elections." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S. Ct. 1178, 1185-86, 87 L. Ed. 1628 (1943). It is the highest duty of the State of Missouri is to protect these unalienable rights:

> The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their

[4] The final version of the Declaration of Independence uses the word "unalienable," but several earlier drafts used the word "inalienable," and there is no reason to believe that the framers of the Declaration intended any distinction between the two forms. CARL LOTUS BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 175 n.1 (1922). In modern parlance, the terms "inalienable" and "unalienable" are interchangeable terms for the same proposition. Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, And Supermajority Rules*, 2 U. Pa. J. Const. L. 609 (2000).

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> boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator."

United States v. Cruikshank, 92 U.S. 542, 553, 23 L. Ed. 588 (1875).

To declare a right to be unalienable, then, is to secure the existence of that right against a vote of the legislature or a decision of the judiciary, and it tasks the State of Missouri to protect the right as its highest duty. Surely this amounts to a legal consequence.

Third, Appellants contend that the summary statement implies that state government is not currently obligated to uphold the right to bear arms, when in fact it is so obligated through the oaths of government officials who can be impeached if they fail to uphold the constitution (Dotson Br. 23-24). This argument makes no sense because only a few state officials are subject to impeachment, and an impeachment remedy is truly extraordinary. Furthermore, the fiscal note information prepared by the Attorney General is substantial evidence that the ballot measure would create new legal obligations for the state to act to uphold the right to keep and bear arms. Finally, the summary statement is not misleading in any event because it simply states that the constitution will be amended to include a declaration concerning the obligation of state government, which is an accurate statement.

D. Details Not Included in the Summary Statement

Appellants also complain that various details of the ballot measure are not expressly stated in the summary. The applicable rule is that a ballot title "need not set out

the details of the proposal." *United Gamefowl Breeders Ass'n of Missouri v. Nixon*, 19 S.W.3d 137, 141 (Mo. 2000).

First, Appellants contend that the ballot measure would repeal language "that allows the legislature to regulate the carrying of concealed weapons" (Dotson Br. 24; *see also* Joyce Br. 28). The implication is that the legislature has no authority to regulate concealed weapons absent an enabling phrase in the constitution. This is untrue.

As shown above, the right to keep and bear arms has "from time immemorial, been subject to certain well-recognized exceptions." *Baldwin*, 165 U.S. at 281-82, 17 S. Ct. at 329. In incorporating the right to keep and bear arms into fundamental American law, "there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed." *Id.* It is not surprising, then, that since 1897, the U.S. Supreme Court has expressly held that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Id.* Even *Heller* holds that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." 554 U.S. at 594, 128 S. Ct. at 2799. There is no basis for this Court to hold that the authority of the legislature to regulate concealed weapons requires or depends on an express enabling provision in the Missouri constitution.

Historically, Missouri courts have not relied on the constitutional "shall not justify" phrase as support for its concealed weapons laws, which have been consistently upheld since 1916. Instead, Missouri courts have relied on historical precedent, as has the U.S. Supreme Court, as described above. When faced with the issue of criminalizing

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concealed weapons in 1916, this Court considered and the absolutist *Bliss* approach from Kentucky, rejected it, and then focused and relied on the "in defense of himself and the state," language in the Missouri constitution without even partial reliance on the "shall not justify" language that is proposed to be removed by the ballot measure. *Keet*, 190 S.W. at 575.[5]

There is nothing in the history of the right to keep and bear arms, the decisions of the U. S. Supreme Court, or Missouri case law that in any way suggests that the authority of the legislature to regulate concealed weapons derives from, or in any way depends upon, any particular phrase in the state constitution. If the ballot measure passes, and if this Court is thereafter faced with a challenge to the authority of the legislature to regulate concealed weapons, Respondent presumes that this Court would follow every

[5] The Joyce Appellants erroneously assert that in *Keet* this Court noted 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 (Joyce Br. 24). This is a reckless and completely misleading statement. There is no reference in *Keet* to the 1875 amendment, and the "no uncertain language" is a reference to the challenged statute prohibiting the carrying of concealed weapons. The Joyce Appellants also erroneously suggest that the *Shelby* decision relied on the language proposed to be removed from the constitution (Joyce Br. 24), when in fact this Court noted that the right of the legislature to prohibit the wearing of concealed weapons under state constitutions "is now generally conceded." *Shelby*, 2 S.W. at 469.

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other court in the land in holding that the right to keep and bear arms does not prevent the legislature from regulating concealed weapons.

Second, Appellants contend that the summary statement fails to disclose the significant probable effect of making the right to keep and bear arms subject to strict scrutiny (Joyce Br. 28; *see also* Dotson Br. 27). Strict scrutiny is the highest and most stringent standard used by federal courts to determine the constitutionality of governmental actions. Federal courts apply strict scrutiny in cases involving an impingement upon a fundamental right explicitly or implicitly protected by the Constitution.[6] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31, 93 S. Ct. 1278, 1295, 36 L. Ed. 2d 16 (1973). Missouri courts apply strict scrutiny in an identical manner, including where a classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *Etling v. Westport Heating & Cooling Servs., Inc.*, 92 S.W.3d 771, 774 (Mo. 2003).

Although the concept of strict scrutiny has its origins in a famous footnote written by Justice Stone in 1938,[7] strict scrutiny was not actually applied to the issue of

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[6] Strict scrutiny also applies to inherently suspect classifications like race, but that analysis is not relevant to the present case.

[7] "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on the face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *United States v. Carolene*

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fundamental rights until the 1942 case of *Skinner v. Oklahoma*, 316 U.S. 535 (1942). Even so, the "modern strict scrutiny formula did not emerge until the 1960s, when it took root simultaneously in a number of doctrinal areas." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267. As a result, it is ridiculous to read the landmark Missouri weapons cases like *Wilforth* (1881), *Shelby* (1886), *Keet* (1916), and *White* (1923), and suggest on that basis that this Court has rejected strict scrutiny in gun cases (*see* Dotson Br. 27). To the contrary, this Court has never expressly determined whether the right to keep and bear arms is a "fundamental right explicitly or implicitly protected by the Constitution," and the question whether strict scrutiny applies to gun laws has never been asked or answered in Missouri.

If the question were squarely presented, Respondent can conceive of no sound basis for this Court to reject strict scrutiny for gun laws. Because the right to keep and bear arms is explicitly protected by the Missouri constitution, this Court would have to hold that the right to keep and bear arms, although protected by the constitution, is not a "fundamental" right. Given the history of the right, that would be a difficult position to justify, and in the wake of *Heller* and *McDonald*, the federal right to keep and bear arms is (i) is "among those fundamental rights necessary to our system of ordered liberty" and (ii) "fully applicable to the States." *McDonald*, 130 S. Ct. at 3042 & 3026. Although it is conceivable that this Court could hold that the state version of the right is lesser than the

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Products Co., 304 U.S. 144 (1938).

historical and federal versions, this Court would nonetheless be obliged to apply strict scrutiny in order to enforce the fundamental federal right recognized by *McDonald*.

To summarize, the current state of the law in Missouri is that there is a federal constitutional right to keep and bear arms that is fundamental and applies to the states, and there is a state constitutional right to keep and bear arms that appears to be fundamental. Under these circumstances, a current challenge to a gun law would, if the question were presented to this Court, have to be analyzed under the strict scrutiny standard that applies in cases involving an impingement upon a fundamental right explicitly or implicitly protected by the Constitution. This makes the declaration in the ballot measure that "[a]ny restriction on these rights shall be subject to strict scrutiny" nothing more than a declaration of the law as it clearly stands in the wake of *McDonald*, not an "abandonment of the current analytical framework" as Appellants erroneously contend (Dotson Br. 28).

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III. APPELLANTS' CHALLENGE TO THE CONSTITUTIONALITY OF THE JUDICIAL REMEDY PROVIDED IN SECTION 116.190 IS NOT RIPE FOR REVIEW BECAUSE THAT REMEDY HAS NOT BEEN APPLIED IN THIS CASE; FURTHERMORE, THE REMEDY DOES NOT VIOLATE THE SEPARATION OF POWERS IN THAT THE FUNCTION OF WRITING A SUMMARY STATEMENT IS NOT AN EXERCISE OF ANY EXCLUSIVE LEGISLATIVE POWER AND THERE IS NO CONCENTRATION OF POWER. (Responds to: Dotson Point III)

Appellants challenge the constitutionality of the portion of section 116.190 "that allows a court, after it has found a summary statement adopted by the General Assembly to be unfair and insufficient, to rewrite the summary statement and certify it to the Secretary of State" (Dotson Br. 38). Appellants contend that this remedy violates the separation of powers by delegating a legislative function to the judiciary. For the reasons set forth below, this question is not ripe for review, and there is no constitutional violation in any event.

A. Ripeness

"In the context of a constitutional challenge to a statute, a ripe controversy generally exists when the state attempts to enforce the statute." *Missouri Alliance for Retired Americans v. Dep't of Labor & Indus. Relations*, 277 S.W.3d 670, 677 (Mo. 2009). "A ripe controversy exists if the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." *Id.* In the

present case, the circuit court dismissed the action below as moot. Dismissal for mootness in no way implicates the separation of powers or any other constitutional issue.

Furthermore, the circuit court has not attempted to enforce the statutory provision that Appellants asks this Court the review in that (i) the court did not find that the summary statement adopted by the General Assembly is unfair or insufficient, and (ii) the court did not rewrite the summary statement and certify it to the Secretary of State. Under the extant circumstances, there is no presently existing controversy whether the Cole County Circuit Court may rewrite a summary statement and certify it to the Secretary of State. Until that statutory process has actually occurred and been completed, "Plaintiff's constitutional claims are not ripe for consideration." *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 84 (Mo. App. W.D. 2008).

B. Separation of Powers

Appellants contend that if a court were to rewrite a summary statement originally drafted by the legislature, the result would be a violation of the separation of powers (Dotson Br. 41). The implicit argument is that writing a summary statement is a non-delegable exercise of legislative power. This argument fails on multiple grounds.

The legislative power is the power to make laws. *Merchants' Exch. of St. Louis v. Knott*, 212 Mo. 616, 111 S.W. 565, 571 (1908). The judicial power includes the power to grant a remedy. *See* Mo. Const. art. I, § 14 ("That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay"). The legislature, when making a law that creates a cause of action, "has the authority to

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choose what remedies will be permitted." *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 375 (Mo. 2012) cert. denied, 133 S. Ct. 39, 183 L. Ed. 2d 679 (U.S. 2012).

When it enacted section 116.190, the legislature properly chose a remedy for a violation of section 116.190, and that remedy "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." *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 83 (Mo. Ct. App. 2008); citing *Overfelt v. McCaskill*, 81 S.W.3d 732, 736 (Mo.App.2002). A court carrying out this remedy is exercising the organic judicial power to grant a remedy, not the legislative power to make laws. Furthermore, given that there is no "concentration of unchecked power in the hands of one branch of government," there can be no violation of the separation of powers. *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. 1993). Quite the contrary, the legislature proposes the ballot measure, the judiciary may review and rewrite the summary statement, and ultimately the people vote whether to adopt the ballot measure. This is a desirable distribution of power, not a concentration of power.

Appellants' best argument on this point is that writing a summary statement is ordinarily a legislative function, and so a court is performing a legislative function when it rewrites a summary statement. This argument has two faults. First, "[t]he separation of powers mandate is primarily concerned with separating the *powers* constitutionally assigned to one department of government, not with prohibiting one department from exercising the *functions* normally associated with another. *Corvera Abatement Technologies, Inc. v. Air Conservation Comm'n*, 973 S.W.2d 851, 857 (Mo.

1998)(emphasis added). Second, writing a summary statement is not an exclusive function of the legislature in that it is also an executive function performed by the secretary of state whenever a referendum petition is certified (section 116.025) and whenever the General Assembly proposes a constitutional amendment without including a summary statement (section 116.160).

If this Court affirms Appellants' argument, all of the ballot procedures in Missouri will have to be rewritten so that the summary statement for an official ballot title is always written by the legislature, including for referendum petitions. That is the logical conclusion if writing a summary statement is an exercise of legislative power. On the other hand, if a summary statement can be written by the secretary of state, then it is not an exercise of legislative power, and there is no separation of powers issue in the present case. As shown above, that is, indeed, the case.

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IV. CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal as moot, and, in any event, this Court should certify the original summary statement portion of the official ballot title to the secretary of state.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

This brief complies with the type-volume limitation of Rule 84.06 because this brief contains less than 7,548 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and type style requirements of Rule 84.06(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 13-point Times New Roman. The electronic files filed with the Court and served on opposing counsel have been scanned for viruses and are virus free.

/s/ David G. Brown

CERTIFICATE OF SERVICE

I certify that on July 9, 2014, the forgoing was filed using the Missouri efile system, causing it to be electronically served on all counsel of record.

/s/ David G. Brown