

Summary of SC94482, *D. Samuel Dotson III and Rebecca Morgan v. Missouri Secretary of State Jason Kander, Tom Dempsey, Timothy Homes, Ron Richard, Kurt Schaefer and Missouriians Protecting the 2nd Amendment*

Original proceeding – election contest

Argued and submitted February 25, 2015; opinion issued June 30, 2015

Attorneys: The individuals who brought the election contest were represented by Charles W. Hatfield and Khristine A. Heisinger of Stinson Leonard Street LLP in Jefferson City, (573) 636-6263. The secretary of state was represented by Deputy Solicitor General Jeremiah J. Morgan and Jonathan M. Hensley of the attorney general’s office in Jefferson City, (573) 751-3321. The legislator-intervenors were represented by David H. Welch, deputy general counsel of the Missouri House of Representatives in Jefferson City, (573) 522-2598; and Marc H. Ellinger and Stephanie Bell of Blitz, Bardgett & Deutsch LC in Jefferson City, (573) 634-2500. Schaefer and Missouriians Protecting the 2nd Amendment were represented by Senator Kurt U. Schaefer of his Jefferson City office, (573) 751-3931 and David G. Brown, an attorney in Columbia, (573) 814-2375.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: In an election irregularity proceeding, individuals challenge the summary statement of the title of a ballot issue that voters passed during the August 2014 election. In a per curiam decision that cannot be attributed to any particular judge, the Supreme Court of Missouri holds the election results are valid. The ballot title may be challenged post-election. It was not insufficient or unfair for the ballot title not to include reference to the amendment’s three provisions regarding strict scrutiny, concealed weapons, or ammunition and accessories. The ballot title was not misleading in asking voters whether the constitution should be amended to include certain declarations, nor was it improper for voters to add another declaration. Because the ballot title was sufficient and fair, there was no election irregularity.

Judge Zel M. Fischer concurs. He writes separately to emphasize that the purpose of the constitutional amendment was not to change the law but to make sure the state constitution is at least as protective as the United States Supreme Court has declared the right to bear arms is under the Second Amendment to the federal constitution. He would find the ballot summary sufficiently and fairly described this purpose.

Judge Laura Denvir Stith concurs in result. She believes that the principal opinion’s discussion of “strict scrutiny” requires clarification, that the words “strict scrutiny” in the amendment were intended in their common and everyday lay sense, and that chapter 115 does not apply to post-election challenges to a ballot title.

Judge Richard B. Teitelman dissents from the principal opinion to the extent it holds that the summary statement of the ballot title fairly and sufficiently informed Missouri voters of the legal and probable effects of the amendment. Because the summary statement fails to include any

discernible reference to the several substantive changes, the author would hold the summary statement was so deficient that it constituted an election irregularity under chapter 115, RSMo.

Judge George W. Draper III concurs in part in Judge Stith's opinion and in the strict scrutiny analysis of Judge Teitelman's opinion.

Facts: The legislature passed a referendum to modify the right to bear arms in article I, section 23 of the state constitution, and the governor scheduled the referendum for the August 2014 election. The summary statement of the ballot title the legislature drafted that appeared on the ballot asked: "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 the right?" The day the ballot title was certified, two individuals challenged the sufficiency and fairness of the ballot title before the election, but this Court in July 2014 dismissed their challenge in *Dotson v. Kander (Dotson I)*. Because section 115.125.2 prohibits a court from ordering an individual or issue placed on a ballot fewer than six weeks before an election, this Court found the challenge was moot because the six-week deadline (which was only 11 days from the day the ballot title was certified and the individuals filed their challenge) had passed before the trial court resolved the merits. The voters approved the referendum during the August 2014 election, and the two individuals filed an election contest in this Court to challenge the summary statement as an election irregularity pursuant to section 115.555.

ELECTION RESULTS VALID.

Court en banc holds: (1) A post-election challenge to a ballot title can be brought under chapter 115. Section 116.190, RSMo, allows any citizen to challenge, before an election takes place, the sufficiency or fairness of the official ballot title proposed by the legislature. Pre-election review can be an elusive remedy, however, when there is a short period of time between the time the ballot title is certified and the time the election is to be held because section 115.125.2 prohibits courts from adding issues to ballots within six weeks of an election. *Dotson I* highlighted this problem; it was unlikely both trial court and appellate judicial review could have been completed within 11 days. Because of the narrow window for judicial review, the challengers – due to no delay on their part – were foreclosed from bringing their challenge. Chapter 115, however, allows voters to contest the result of any election on any question after an election has been held for "irregularities" that occur during elections. Nothing in chapter 116 indicates a pre-election challenge is the only vehicle for a challenge to a ballot title. Under section 116.020, RSMo, a challenge to the ballot title of a proposed constitutional amendment may be brought as an election irregularity in a post-election action under chapter 115, so long as the issue previously has not been litigated and determined.

(2) Because the ballot title was sufficient and fair, there was no irregularity in the election. When challenges to the sufficiency of a ballot title are brought post-election, courts must determine if the ballot title met the requirements of chapter 116, as there can be no chapter 115 irregularity without an underlying chapter 116 violation of the sufficiency and fairness required for ballot titles. A summary statement accurately should reflect both the legal and probable effects of the proposed initiative and should be fair and impartial so voters will not be deceived or misled, but it is not necessary for the summary statement to use the best language or to set out every detail of

the proposal. It was not insufficient or unfair for the ballot title not to include reference to the amendment's three provisions regarding strict scrutiny, concealed weapons, or ammunition and accessories. First, the nuances of how strict scrutiny applies depending on the right involved demonstrates the amendment did not change the law affecting the right to bear arms but established a broader guideline of how such laws should be scrutinized – and that standard already would have applied. Second, this Court's 2004 decision in *Brooks v. State* that the legislature may regulate concealed weapons remains consistent with the text of article I, section 23; the amendment did not change the current law regarding concealed weapons regulations. Third, whatever practical difference the addition of the phrase "ammunition or accessories" into the constitution may have, it is not so material that a failure to note this addition renders the ballot title insufficient or unfair. Further, because the ballot title asked voters whether the constitution should be amended to include certain declarations, it was not misleading, nor was it improper for voters to add a declaration that the right to bear arms is unalienable.

Concurring opinion by Judge Fischer: The author concurs fully in the principal opinion and writes separately to emphasize that the purpose of the constitutional amendment was not to change the law but to make sure the state constitution is at least as protective as the United States Supreme Court has declared the right to bear arms is under the Second Amendment to the federal constitution. The amendment adopted the United States Supreme Court's 2008 decision in *District of Columbia v. Heller* and 2010 decision in *McDonald v. City of Chicago* as Missouri law. Because these decisions already bind the states, the amendment does not change the law. Further, the amendment ensures the Missouri protection of the right to bear arms matches the federal protection as it currently is recognized in *Heller* and *McDonald*, should the United States Supreme Court later interpret the Second Amendment in a manner not originally intended. The August 2014 amendment's various declarations align with *Heller* and *McDonald*. As the principal opinion makes clear, this Court's precedent supports applying strict scrutiny following *McDonald*. Legislative restrictions on the right to bear arms are not now presumptively invalid; the well-settled legal standard is that a law is presumed valid and will be declared unconstitutional only if the challenger proves it clearly and undoubtedly violates the constitution. The ballot language gave voters a sufficient and fair summary.

Opinion concurring in result by Judge Stith: (1) Although the author concurs in result, she believes clarification is required regarding the principal opinion's holding that the addition of the "strict scrutiny" clause to article I, section 23 of the Missouri Constitution does not work a substantial change in Missouri law governing review of the right to bear arms. While the right to bear arms is a fundamental right, that does not mean the traditional legal definition of strict scrutiny applies. The United States Supreme Court has avoided using or requiring a particular type of scrutiny when examining regulation of certain fundamental rights, including the right to bear arms. The lesson from these cases is that scrutiny of whatever type is simply a means of determining constitutional validity. Moreover, nothing in the ballot summary or the amendment itself states that the term is intended to have a technical legal meaning. In the absence of a clear statement that "strict scrutiny" is used in its technical sense, the words must have been intended in their common and everyday lay sense. The words "strict scrutiny" to the lay voter simply mean that the courts are to scrutinize carefully and severely any attempt to regulate the right to bear arms. Because the words are used in their normal lay sense, this change was not required to be included in the ballot title for it to be fair and sufficient.

(2) The author disagrees with the principal opinion’s construction of chapter 115 to apply to post-election ballot-title challenges. Chapter 115 governs challenges to election irregularities, not challenges to ballot titles; instead, chapter 116 governs challenges to ballot titles. Chapter 116 mandates that a ballot-title challenge must be brought within 10 days of certification of a matter for the ballot. It does not provide that, alternatively, such a challenge may be brought after the election under chapter 115. Nothing in chapter 115 or in any case interpreting or applying it holds that ballot title sufficiency and fairness can be litigated as part of a challenge to election irregularities. Chapter 115 is intended as a mechanism for voters to contest the result of any election on any question after an election. But, in a ballot title case, the petitioner does not contest the result of the election, but the wording of the ballot title. This Court’s dicta in its 2014 decision in *Dotson v. Kander (Dotson I)* that speculated that chapter 115 could be used to review a ballot title was improper. Although chapter 115 is not the proper method to challenge a ballot title, the author would apply law of the case principles to hold that, in reliance on this Court’s invitation to these petitioners to file an election contest in *Dotson I*, this case may be considered on its merits as if brought under chapter 116. For the reasons above, the author would hold the ballot title was fair and sufficient.

Opinion dissenting in part and concurring in part by Judge Teitelman: The author dissents from the principal opinion to the extent it holds that the summary statement of the ballot title fairly and sufficiently informed Missouri voters of the legal and probable effects of the amendment. Neither of the declarations in the summary statement – that the right to bear arms is unalienable and that the state is obligated to uphold that right – creates any practically important substantive change to the state constitutional right to keep and bear arms. But the amendment made sweeping substantive changes that were absent from the summary statement. First, “strict scrutiny” will require courts to invalidate firearms regulations that are not narrowly tailored to compelling state interests, thereby establishing a new guideline for judicial review of firearms regulations that directly affects the right to keep and bear arms. Second, the amendment deleted the only express textual limitation on the individual right to keep and bear arms – a century-old provision stating this right does “not justify the wearing of concealed weapons,” which is irrelevant to the fact that the legislature retains regulatory authority over concealed weapons. Third, by reaffirming regulatory authority with respect to violent felons while declining to do so with respect to nonviolent felons, the amendment places nonviolent felons on the same plane as law-abiding citizens for regulating the right to keep and bear arms. The amendment also creates a new constitutional right to ammunition and accessories. Because the summary statement fails to include any discernible reference to the several substantive changes, the author would hold the summary statement was so deficient that it constituted an election irregularity under chapter 115.