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

OPENING BRIEF OF APPELLANTS DOTSON AND MORGAN

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JURISDICTIONAL STATEMENT

This case includes a claim that Section 116.190.4, RSMo,[1] allows the judiciary to exercise legislative power in violation of the Missouri Constitution's Separation of Powers Clause. This Court has exclusive jurisdiction over "all cases involving the validity of a . . . statute or provision of the constitution of this state." MO. CONST. ART. V, SEC. 3. Where there is a constitutional question and also other issues, the constitutional issue is sufficient to confer jurisdiction in this Court over the entire appeal. *Taylor v. Dimmit*, 78 S.W.2d 841, 842 (Mo. 1935); *accord Williams v. Kimes*, 949 S.W.2d 899, 899 (Mo. banc 1997). This Court also has jurisdiction over cases that present questions of general interest and importance. MO. CONST. ART. V, SEC. 10. As will be shown below, this case involves several questions of general interest and importance that make it appropriate for this Court to exercise jurisdiction. Fifteen years ago, in *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47 (Mo. banc 1999), this Court reviewed extensively the jurisdictional requirements in cases presenting both constitutional challenges to the validity of a state statute and questions of general interest and importance. *Rodriguez* makes abundantly clear that this Court has jurisdiction over this appeal.

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[1] All statutory references in this Brief are to the Revised Statutes of Missouri (2000) unless otherwise indicated. All references to § 116.190 are to RSMo Supp. 2013 (the version effective until November 4, 2014).

The challenge to the validity of Section 116.190.4 is addressed in Appellants' Point Relied On III. The specific constitutional question is whether Section 116.190 violates separation of powers and usurps the legislative prerogative for the judiciary to rewrite a ballot summary that the legislature has written itself. This Court's jurisdiction in cases involving constitutionality of state statutes extends to "plausible claims, which are necessarily made in good faith, but not feigned, fictitious or counterfeit claims, which necessarily are not." *Rodriguez* , 996 S.W.2d at 52.

Here, there is no question that the constitutionality of Section 116.190 is a plausible claim, made in good faith. Indeed, as discussed under Point III *infra*, arguments regarding the constitutionality of this requirement have previously been advanced to this Court, but they have not yet been firmly and finally addressed. The State of Missouri, through its Attorney General, has previously argued that the Constitution mandate unfair ballot titles must be sent back to the drafter for a re-write. Brief of Robin Carnahan and Thomas A. Schweich in *Northcott v. Carnahan*, SC92500. But the State has also argued that the Courts have the option of either re-writing the summary or sending it back to the drafter. *Aziz v. Mayer*, Cole County Circ. Court No. 11AC-CC00439 (2012), App. A29. As this Court indicated in *Rodriguez*, "one clear indication that a constitutional challenge is real and substantial and is made in good faith is that the challenge is one of first impression with this Court." *Id*.

Respondents have argued that exclusive jurisdiction is somehow inappropriate because the trial court did not reach the constitutional issue. This position is wrong both on the facts and on the law. On the facts, the trial court below did resolve the

constitutional issue against Appellants. Although the trial Court's judgment recites that the court "need not reach" the constitutional issue, the Court went on to do exactly that, holding that "all claims presented by Plaintiffs through their original and first amended petitions are denied." L.F. 65. In denying (and not dismissing) all claims, the Court did reach the constitutional issue and ruled against the Appellants on the merits. This finding is made crystal clear by the Court's reference to the claims in the first amended petition. The only change in the amending of the original petition was the addition of the constitutional challenge to the validity of a statute. *Cf.* Supp. L.F. 1-9 and L.F. 24-33. Had the Court declined to rule on the issue, it would not have included the language that all claims in the amended petition were denied.

On the law, this Court has long made clear that it has jurisdiction in cases involving the validity of a state statute even when the lower court has "declined to pass on the constitutional questions presented." *City of Joplin v. Industrial Comm'n*, 329 S.W.2d 687, 688 (Mo. 1959). *See also Estate of McCluney*, 871 S.W.2d 657, 659 n.1 (Mo. App. 1994) ("The Supreme Court in *City of Joplin*. . . was apparently not bothered by the trial court's declination to decide the challenged constitutionality of a statute and proceeded to determine the issue on appeal"). The doctrine of avoiding constitutional questions in general is appropriate, but it does not strip this Court of exclusive jurisdiction over this case involving the validity of Section 116.190.

As the Court noted in *Rodriguez*, "[t]his Court, following a long line of cases, generally declines to rule on constitutional issues that are not essential to the disposition of the case, and retains jurisdiction nonetheless where, as here, there is reversible error as

to other issues." *Rodriguez*, 996 S.W.2d at 53 (citations omitted). Similarly, "the fact that a constitutional challenge used to invoke this Court's jurisdiction is ultimately rejected by this Court . . . does not mean that the challenge was not real and substantial and brought in good faith." *Rodriguez*, 996 S.W.2d at 52.

This Court has even gone so far as to retain jurisdiction over an appeal when the Plaintiff's petition below was "patently insufficient to raise a constitutional issue and a question concerning the validity of" a statute. *Callier v. Director of Revenue*, 780 S.W.2d 639, 641 (Mo. 1989). The Court took that extraordinary step because it was in the public interest to determine whether a statute was valid and because transfer would have created uncertainty about the statute. *Id*. Similarly, this appeal involves whether and how to re-write a ballot title for a proposed constitutional amendment that is currently scheduled to appear on the August ballot. In the area of state governance, nothing could be of greater public interest than how to change the Constitution. Transferring this case to the Court of Appeals would be an injustice at this stage when expedited review is necessary. This is an issue on which guidance is required and the public interest dictates a ruling.

Respondents also contend that the lower court's determination of mootness somehow renders the constitutional claim unripe for appellate review. This argument, too, is erroneous. This case involves a challenge to the validity of the statute that authorizes the judiciary to rewrite the ballot summary without returning it to the drafter. Should this Court agree with Appellants that the ballot title is unfair and insufficient, the constitutional question that is present in this case and was denied below will have to be

resolved. The trial court's erroneous conclusion that the case is moot does not remove the constitutional challenge from the case or deprive this Court of its exclusive jurisdiction.

In *Rodriguez*, this Court found the questions of general interest and importance to be an alternative basis for this Court's jurisdiction. Although the exclusive appellate jurisdiction in this case is clear, this case also presents several questions of general interest and importance, including: 1. Does it violate the Missouri Constitution's Separation of Powers Clause for the judiciary to rewrite a ballot summary that the legislature has drafted? 2. Does a ballot title that affirmatively misleads voters about the current right to bear arms and fails to describe critical changes to the ability to regulate concealed weapons under the Missouri Constitution fairly and sufficiently present the issue to the voters? Legislation regarding concealed weapons has been considered, rejected, amended, passed, and vetoed by the voters, the legislature, and the Governor at various times over the past fifteen years. Given this history, whether an amendment to the Missouri Constitution that would substantially restrict the ability of the legislature to regulate concealed weapons can be presented to the voters without informing them of the substance of that amendment surely presents a question of general interest and importance statewide.

This case involves a plausible, good faith challenge to the constitutionality of Section 116.190 in a question of first impression that has been presented previously, but never resolved by this Court. Under Article V, Section 3 of the Missouri Constitution, the exclusive appellate jurisdiction over this case lies with this Court.

STATEMENT OF FACTS

A. The Parties

Appellant D. Samuel Dotson III and Rebecca Morgan, Plaintiffs below, are citizens and taxpayers. L.F. 23, 24; Tr. 23:12-20. Respondents Secretary of State, President Pro Tem of the Missouri Senate, Speaker of the Missouri House of Representatives, and the sponsors of the joint resolution are named as defendants below as required by Section 116.190.2. L.F. 24-25. The trial court allowed "Missourians to Protect the 2nd Amendment" to intervene as a defendant. L.F. 2.

B. Senate Joint Resolution 36 and its Summary Statement

Senate Joint Resolution 36 is a proposed amendment to Section 23 of the Bill of Rights of the Missouri Constitution, regarding the right to keep and bear arms. As originally introduced in the legislature, SJR 36 proposed the following changes to the Missouri Constitution (new language in ***bold italics***, deleted language ~~struck through~~):

> Section 23. That the right of every citizen to keep and bear arms in defense of his home, person***, family*** and property, or when lawfully summoned in aid of the civil power, shall not be questioned~~; but this shall not justify the wearing of concealed weapons~~. ***The rights guaranteed by this section shall be unalienable. The state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement.***

L.F. 25-26, 35-36, 43, 23.

As authorized by Section 116.155, the originally introduced version of SJR 36 set forth the following proposed summary statement:[2]

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

On May 7, 2014, the General Assembly passed the final version of SJR 36. ("SJR 36"[3]). L.F. 62. On May 23, 2014, the Governor issued a proclamation setting the vote on TAFP SCS SJR 36 for the August 5, 2014, election. L.F. 23, 26, 43, 63. Defendants Senate President Pro Tem Dempsey and House Speaker Jones signed and delivered SJR 36 to Defendant Secretary of State Kander on May 30, 2014. L.F. 23, 26, 43.

The Secretary certified the official ballot title for SJR 36 on June 13, 2014. L.F. 63. The official ballot title included the General Assembly's ballot summary and the Auditor's fiscal note summary. L.F. 23, 26-28, 38-40, 44.

The official ballot title for SJR 36 remained the same as in the original (as

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[2] The language states "the official ballot title of this act shall be as follows:" (emphasis added). L.F. 35-39. An official ballot title is comprised of a summary statement and a fiscal note summary. § 116.010(4). Nevertheless, the Legislature's "official ballot title" lacked a fiscal note summary. That fiscal note summary was later added pursuant to the requirements of Chapter 116.

[3] SJR 36 as used in this Brief refers to the TAFP SCS SJR 36. Other versions of the resolution will be so indicated, e.g., "as introduced."

introduced) version of the Resolution:

> 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?

But as a result of amendments through the process, the underlying proposed constitutional amendment, as finally passed, reads as follows (new language in ***bold italics***, deleted language ~~struck through~~):

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

L.F. 37-39.

C. The Trial Court Proceedings

Dotson and Morgan filed their lawsuit challenging the sufficiency and fairness of the summary statement on the same day the Secretary certified the official ballot title. L.F. 4, 40, 63. Plaintiffs sought a temporary restraining order, and a hearing on that motion and argument on the merits of the case occurred on June 16 and 18, 2014. L.F. 2-4; Transcript. The State argued against a TRO and suggested to the Court that votes cast based on incorrect ballot language could simply not be counted. Tr. 6:6-10; 13:13-15:5. On the 18th, the lower court denied the motion for a temporary restraining order and took the case under advisement for a decision on the merits. L.F. 2; Tr. 73:16-74:11.

On June 24, 2014, counsel for Dotson and Morgan sent a letter to the Court requesting a judgment in the *Dotson* case, citing the desire to avoid any arguments of mootness based upon Section 115.125.2, RSMo Supp. 2013. L.F. 22.

The Final Judgment was issued July 1, 2014. L.F.1, 61-65. The trial court's judgment recites that it ruled against Plaintiffs on all claims in their original and first amended petition. L.F. 65. This appeal followed. L.F. 66-81.

POINTS RELIED ON

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE SUMMARY STATEMENT FOR SJR 36 WAS FAIR AND SUFFICIENT BECAUSE THE SUMMARY STATEMENT UNFAIRLY AND INSUFFICIENTLY EXPLAINS THE UNDERLYING INITIATIVE IN THAT (A) THE SUMMARY STATEMENT SUGGESTS THAT THE MISSOURI CONSTITUTION DOES NOT CURRENTLY (1) PROTECT THE RIGHT TO KEEP AND BEAR ARMS; AND (2) REQUIRE STATE GOVERNMENT TO UPHOLD THE RIGHT; AND (B) THE SUMMARY STATEMENT FAILS TO SUMMARIZE THE MAIN POINTS WHEN IT OMITS CRITICAL INFORMATION FOR VOTERS – THE FACT THAT THE LEGISLATURE'S AUTHORITY TO REGULATE WEAPONS IS BEING DRAMATICALLY CHANGED AND ALL GUN LAWS WILL BE SUBJECTED TO STRICT SCRUTINY.

Missouri Mun. League v. Carnahan, 303 S.W.3d 573 (Mo. App. 2010)

Brooks v. Nixon, 128 S.W.3d 844 (Mo. banc 2004)

Coburn v. Mayer, 368 S.W.3d 320 (Mo. App. 2012)

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE COURT WAS WITHOUT AUTHORITY TO GRANT THE RELIEF SOUGHT BY PLAINTIFFS BECAUSE THE COURT IS NOT BARRED BY SECTION 115.125.2 FROM REMOVING THE MEASURE FROM THE BALLOT OR MAKING CORRECTIONS TO A DEFICIENT BALLOT TITLE IN THAT THE STATUTE ONLY PREVENTS ADDING CANDIDATES OR MEASURES TO THE BALLOT, NOT REMOVING THEM OR AMENDING THEM TO CONFORM TO LEGAL REQUIREMENTS.

State ex rel. Nothum v. Walsh, 380 S.W.3d 557 (Mo. banc 2012)

S. Metro Fire Prot. Dist. v. City of Lee's Summit, 278 S.W.3d 659 (Mo. banc 2009)

Thompson v. Committee on Legislative Research, 932 S.W.2d 392 (Mo. banc 1996)

III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING PLAINTIFFS' REQUEST FOR A DECLARATORY JUDGMENT THAT A PORTION OF SECTION 116.190 IS UNCONSTITUTIONAL BECAUSE A PORTION OF THAT STATUTE ALLOWS THE JUDICIARY TO EXERCISE POWER PRESERVED FOR THE LEGISLATURE IN THAT THE STATUTE PURPORTS TO ALLOW THE JUDICIARY TO RE-WRITE A LEGISLATIVE ENACTMENT WHEN THE PROPER REMEDY WOULD BE TO RETURN THE ENACTMENT TO THE LEGISLATURE FOR THEIR RECONSIDERATION.

Treme v. St. Louis County, 609 S.W.2d 706 (Mo. App. 1980)

Missouri Coalition for Env't v. Jt. Comm. on Administrative Rules, 948 S.W.2d 125 (Mo. banc 1997)

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

STANDARD OF REVIEW

The decision below was made on undisputed facts – the language of TAFP SCS SJR 36 and the summary statement. Thus, the only question on appeal as to the summary statement is whether the trial court drew the proper legal conclusions. This Court reviews those legal conclusions *de novo." Missouri Mun. League v. Carnahan*, 303 S.W.3d 573, 580 (Mo. App. 2010) ("*MML I*") *(*citing *Overfelt v. McCaskill*, 81 S.W.3d 732, 735 (Mo. App. 2002)).

As to the constitutional validity of the portion of Section 116.190 that authorizes the court to rewrite the summary statement, this Court's review is also *de novo. Brown v. Carnahan*, 370 S.W.3d 637, 647 (Mo. banc 2012)(citing *Gurley v. Missouri Bd. of Private Investigator Examiners,* 361 S.W.3d 406, 411 (Mo. banc 2012)).

INTRODUCTION

There are two ways to amend the Missouri Constitution — by Constitutional Convention or by a vote of the people. MO. CONST. ART. XII. Constitutional Amendments may be presented to the people by either an initiative petition process or by the General Assembly. MO. CONST. ART. III, SEC. 50; MO. CONST. ART. XII, SEC. 2(a). Regardless of the processing to bring a proposed Constitutional Amendment to the people, the voters see an "official ballot title as may be provided by law." MO. CONST. ART. XII, SEC. 2(b).

This Court has long recognized that procedural safeguards — both those in the Constitution and those created by the legislature — are important and necessary in the [initiative petition] process for two reasons "(1) to promote an informed understanding by the people of the probable effects of the proposed amendment; or (2) to prevent a self-serving faction from imposing its will upon the people without their full realization of the effects." *Buchanan v. Kirkpatrick,* 615 S.W.2d 6, 11 (Mo. 1981). The legislature is not exempt from these requirements and, when writing a ballot title, is required to "promote an informed understanding of the probable effect" of a proposed amendment. *Coburn v. Mayer,* 368 S.W.3d 320, 324 (Mo. App. 2012) (citing *Cures Without Cloning v. Pund,* 259 S.W.3d 76, 82 (Mo. App. 2008)).

To that end, the legislature has itself imposed a requirement that the ballot summary "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." § 116.155.2. In order to protect impartiality, the

legislature has also authorized any citizen to petition the court for review of the summary statement and a determination of whether it "is insufficient or unfair." § 116.190.

The legislature's ballot title in this matter fails to promote an informed understanding of the probable effects of a Constitutional Amendment. It misleads the voters in two ways: 1) it leads the voters to believe it is adding a right to bear arms to the Constitution, when that right has existed since the State was formed[4]; and 2) it fails to inform the voters of the real probable effects of the amendment — a sea change in the carry and conceal laws of this state and a heightened level of constitutional scrutiny for every gun law.

As a result, the ballot title is unfair and misleading. It is likely to prejudice voters to vote for the measure without a full understanding of the way in which they are changing the fundamental document of state governance.

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[4] MO. CONST. OF 1820, ART. XIII, SEC. 3 (App. A.14). MO. CONST. OF 1865, ART. SEC. VIII (App. A19); MO. CONST. OF 1875, ART. II, SEC. 17 (App. A28).

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE SUMMARY STATEMENT FOR SJR 36 WAS FAIR AND SUFFICIENT BECAUSE THE SUMMARY STATEMENT UNFAIRLY AND INSUFFICIENTLY EXPLAINS THE UNDERLYING INITIATIVE IN THAT (A) THE SUMMARY STATEMENT SUGGESTS THAT THE MISSOURI CONSTITUTION DOES NOT CURRENTLY (1) PROTECT THE RIGHT TO KEEP AND BEAR ARMS; AND (2) REQUIRE STATE GOVERNMENT TO UPHOLD THE RIGHT; AND (B) THE SUMMARY STATEMENT FAILS TO SUMMARIZE THE MAIN POINTS WHEN IT OMITS CRITICAL INFORMATION FOR VOTERS – THE FACT THAT THE LEGISLATURE'S AUTHORITY TO REGULATE WEAPONS IS BEING DRAMATICALLY CHANGED AND ALL GUN LAWS WILL BE SUBJECTED TO STRICT SCRUTINY.

Missouri's Constitution declares:

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

MO. CONST. ART. I, SEC. 23.

By way of SJR 36, the Generally Assembly asks the voters if they would like to

amend that Constitutional provision as follows (new language in ***bold italics***, deleted language ~~struck through~~):

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

Unless this Court acts, the ballot title appearing on the ballots before the voters will characterize the changes as follows:

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

This summary statement is insufficient and unfair. It materially misleads the voters about the effect of a "yes" vote on SJR 36. The ballot title suggests that current

law does not include the right to bear arms and further suggests that the state has no current obligation to uphold that right. Most voters will likely feel it important to vote yes if they believe the right to bear arms is not currently protected by the Missouri Constitution. But what those voters are not being told is that the true substantive changes made by SJR 36 are not summarized in the ballot title at all. The title makes no reference to the deletion of language on carrying concealed weapons and it fails to disclose that gun laws will be subjected to strict scrutiny review.

The ballot title offers the red-caped promise of a new right to bear arms but, like a skilled matador, it conceals the sword of strict scrutiny that will strike at the heart of Missouri's existing gun laws. Missouri law is clear that the cape may not be used to bait the voters and the sword must be openly displayed.

Section 116.190 allows a summary statement to be challenged if it is insufficient or unfair. Missouri courts have previously defined "insufficient or unfair":

> Insufficient means "inadequate; especially lacking adequate power, capacity, or competence." The word "unfair" means to be "marked by injustice, partiality, or deception." Thus, the words insufficient and unfair ... mean to inadequately and with bias, prejudice, deception and/or favoritism state the [consequences of the proposed amendment].

Cures without Cloning v. Carnahan, 259 S.W.3d 76, 81 (Mo. App. 2008) (quoting *Hancock v. Sec'y of State*, 885 S.W.2d 42, 49 (Mo. App. 1994)).

A summary statement should accurately reflect the legal and probable effects of the proposed measure. *Brown*, 370 S.W.3d at 654 (quoting *MML I*, 364 S.W.3d at 584). The law regarding the summary statement is designed: "(1) to promote an informed understanding by the people of the probable effects of the proposed amendment, [and] (2) to prevent a self-serving faction from imposing its will upon the people without their full realization of the effects of the amendment." *Id.* (quoting *Buchanan*, 615 S.W.2d at 11–12). The Court of Appeals has also acknowledged that an explanation of existing law may be necessary to give appropriate context. *Coburn,* 368 S.W.3d at 324.

The cases in this area articulate fundamental principles of fairness, but they also discuss the specific requirements of state law regarding the crafting of the ballot title. Art. XII, Sec. 2(b) requires that Constitutional Amendments be submitted to the people through a ballot title, "as may be provided by law." The legislature has so provided for a ballot title and a method to provide that ballot title. The official ballot title is the "summary statement" together with the "fiscal note summary." § 116.010(4). In this case, the legislature had the authority to provide its own "summary statement." § 116.155.1.

Those laws governing the preparation of the ballot title make clear that the title must convey to the voters the impact of the underlying measure. The short word "summary" speaks volumes. Words in a statute are, of course, interpreted using their plain and ordinary meaning. *Utility Serv. Co., Inc. v. Department of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc 2011). A "summary" statement therefore must be a "short restatement of the main points." WEBSTER'S THIRD NEW

INTERNATIONAL DICTIONARY 2289 (2002). A summary that does not summarize the "main points" is insufficient as a matter of dictionary definitions and statutory construction.

A. SJR 36's Ballot Title Unfairly and with Partiality Leads Voters to Believe the Law is Being Changed in Ways it is Not.

The ballot title that will appear on the ballot absent this Court's intervention asks voters whether the Constitution should be amended to include a statement that the right to bear arms is unalienable and that the State must enforce that right. But both of those things are already true.

The problem addressed here -- an implication that the law does not currently protect the right to bear arms -- was squarely addressed in *MML I*. There, the summary statement for a proposed amendment to the constitution regarding eminent domain told voters that the proposal would require that landowners receive just compensation for the taking of land. *MML I*, 364 S.W.3d at 573.

The Court of Appeals found that such language in the ballot title suggested that the proposed amendment would add just compensation to the constitution when that requirement was already part of the constitution. *Id.* at 579. The Court struck the portion of the summary statement regarding just compensation, noting that its inclusion make the summary statement unfair. In so doing, the Court endorsed the trial court's reasoning that a "suggestion that something would be added to the Constitution when it already exists, is unfair and prejudicial." *Id.*

In a second *Missouri Municipal League* case, the Court of Appeals was confronted

with a similar measure, the summary for which included the phrase "while continuing to provide just compensation." The Court endorsed the idea that a summary of this nature "makes clear that the Missouri Constitution currently provides for 'just compensation." The Court went on to acknowledge that "in some instances, context *demands* a reference to what is currently present to understand the effect of the proposed change (emphasis supplied)." *Missouri Mun. League v. Carnahan (MML II)*, 364 S.W.3d 548, 553 (Mo. App. 2011).

Cures without Cloning, 259 S.W.3d 76 (Mo. App. 2008) suggests the same result. There, the Secretary certified a summary statement saying the proposed constitutional amendment would repeal the current ban on human cloning when, as a matter of law, it would not. The Court found that the proposed amendment would change the ban, not repeal it, and rewrote the ballot title. Although the measure did replace the existing definition of cloning, the Court struck the word "repeal" and replaced it with the word "change" in order to let the voters know that there was an existing ban, which would be altered by the proposal. The Court of Appeals explained that "Missouri voters are likely to be confused by a ballot title stating that the amendment would 'repeal the ban on human cloning.'" *Id.* at 82. Telling voters a law will change if they vote yes when that law will not change is misleading and unfair.

The current ballot title advises voters that the Constitution is being "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." The word "include" means "to put into a group." WEBSTER'S II NEW COLLEGE DICTIONARY 560 (Margery S. Berube

ed. 1999). By using the word "include", the ballot title tells voters that the right to bear arms is not currently part of the group of rights in the constitution.

But if this language is to be left in the ballot title, which it should not be, context demands the voters be told that there is an existing right to bear arms, so stated in the Constitution already, and that this right shall not be questioned. As discussed in later sections of this Brief, given the existing protections of the Constitution, the addition of this declaration is not a major change that even needs to be summarized. But if the Court is inclined to allow a discussion of the "unalienable" declaration, the language should clearly disclose that there is an existing right to bear arms.

The Court need not engage in that exercise, however, because telling the voters that their existing right to bear arms is "unalienable" does nothing to promote an understanding of the probable effects of the measure. Appellants find only one Missouri case that uses the phrase "unalienable right." *City of Pleasant Valley v. Baker,* 991 S.W.2d 725, 729 (Mo. App. 1999). That case acknowledges that the Declaration of Independence uses the phrase "unalienable" rights in reference to life, liberty and the pursuit of happiness[5], those rights are not absolute and may be curtailed under

[5] Although the Court of Appeals references the United States Constitution, it does not appear that the Constitution specifically identifies rights that are "unalienable." The Declaration of Independence, while an important historical document, is not binding legal precedent on this State or any state as it was adopted by the Continental Congress prior to the Revolutionary War.

appropriate circumstances. Of course, several Missouri cases use the phrase "inalienable" rights. Those cases are mostly older cases, but all acknowledge that "inalienable rights" are not subject to any particular level of scrutiny or legal status (other than that they cannot be taken away without justification). *See, e.g. State ex rel. Burrell-El v. Autrey,* 752 S.W.2d 895, 900-01 (Mo. App. 1988) (discussing the balance between the free exercise of religion and the authority of a trial judge to order the defendant to remove his head covering while in court).

The phrase "unalienable" appears to be of no legal significance at all. None of the Defendants below cited any case law indicating that an unalienable right was entitled to any particular protection. Because the Missouri Constitution already declares the right to bear arms and commands that right not be questioned, a declaration of unalienability is no change in the law at all. To imply otherwise is unfair and misleading.

The Ballot Title also tells voters that "state government is obligated to uphold that right." The phrase "that right" refers to the right to bear arms. The implication of the Ballot Title is clearly that state government is not currently obligated to uphold the right to bear arms and a "yes" vote on SJR 36 will impose that obligation. But it is simply not the case.

The Constitution directs that the right to bear arms shall not be questioned. This is clearly a directive that state government shall not question the right. Every officeholder in Missouri must take an oath to uphold the Constitution and to faithfully execute the law. MO. CONST. ART. VII, SEC. 11. The Governor, who is the chief executive officer of the State, is obligated to ensure that the laws are faithfully executed. MO. CONST. Art. IV,

SEC. 2. Any elected official who willfully neglects their duty to uphold the right to bear arms is subject to impeachment. MO. CONST. ART. VII, SEC. 2. Impeachment extends to situations where state officers allow those under their supervision to disregard the law. *Impeachment of Moriarty,* 902 S.W.2d 273, 276-77 (Mo. banc 1994). As discussed above, a statement that the government must enforce the law, without reference to existing law on the matter, is misleading. Because of existing law, the ballot title's discussion of state government's duty to uphold the right is pure redundancy while unfairly suggesting that a change is being made to existing law. It improperly baits the voters into voting yes without the proper context.

B. SJR 36's Ballot Title is also Unfair and Prejudicial because it Fails to Summarize the Major Changes Being Made to the State's Gun Laws.

A "summary" statement must be a "short restatement of the main points." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2289 (2002). When crafting the ballot title, the legislature has an obligation to promote an informed understanding of the probable effects of the Amendment. *Coburn*, 368 S.W.3d at 324. SJR 36 makes grievous material omissions as to the legal effect of the proposed measure. The ballot title fails to inform voters that it is making fundamental changes to the Constitutional treatment of gun laws. First, it is repealing language that allows the legislature to regulate the carrying of concealed weapons. Additionally, it subjects all gun regulation (including regulation of ammunition) to a strict scrutiny analysis. Both of these changes are substantial, material changes to Missouri law. The ballot title must disclose these changes to the voters in order to be fair and sufficient.

1. The summary statement fails to inform voters that it will delete current language which has been interpreted to allow the legislature to regulate the carrying of concealed weapons.

The proposed measure repeals language in Article I, Section 23 specifying that nothing in that section "shall justify the wearing of concealed weapons." The existence of that language is very significant because it gives the Missouri General Assembly "the final say in the use and regulation of concealed weapons." *Brooks v. Nixon*, 128 S.W.3d 844, 848 (Mo. banc 2004). Such language has been in our constitution for over a century. MO. CONST. OF 1875, ART II, SEC. 17 (App. A28). As stated in *Brook*s, "There is no constitutional prohibition against the wearing of concealed weapons; there is only a prohibition against invoking the right to keep and bear arms to justify the wearing of concealed weapons," The repeal of the language in Section 23, "but this shall not justify the wearing of concealed weapons" is a repeal of the "prohibition on invoking the right to keep and bear arms to justify the wearing of concealed weapons." *Id*. A "yes" vote means that citizens *may* now invoke the right to bear arms to justify carrying concealed weapons. SJR 36 makes this change crystal clear by specifying that all gun laws will now be subject to strict scrutiny (as discussed below).

Changing the law on carrying concealed weapons is a significant legal issue, but it is also a significant and substantial public policy decision, which has historically been highly contentious. Prior to 1999, Missouri law did not allow the wearing of concealed weapons. In 1999, the General Assembly submitted statutory changes to the people, proposing a change that would allow the granting of such permits. House Bill 1891, 89th

General Assembly. That measure was defeated by the people in a very close vote at a special election. http://www.sos.mo.gov/enrweb/allresults.asp?arc=1&eid=8. In 2003, the General Assembly again passed legislation to allow citizens to carry concealed weapons. The Governor vetoed the bill and the legislature over-rode that veto. *Brooks,* 128 S.W. 3d at 845. Today, the people have the option of obtaining a permit to carry concealed weapons, but the legislature has the right to change that law.

In spite of the legal importance of removing the language and in spite of the long-standing controversy over this issue, the ballot title fails to advise voters that a yes vote would change the law on regulation of concealed weapons. As a result, the ballot title does not meet the statutory requirement that it "summarize" the measure, much less the responsibility to promote an understanding of the probable effect of the measure.

2. The summary statement fails to inform voters that the measure will constitutionally mandate strict scrutiny of all gun laws.

Worse still, in addition to removing language allowing the legislature to regulate concealed weapons, SJR 36 enshrines strict scrutiny review of all gun laws (and all laws governing ammunition and accessories) directly in the Missouri Constitution. But there is no mention of this whatsoever in the summary statement. Although strict scrutiny was not part of the SJR as introduced, it was added during the process — without updating the ballot title to advise the voters of this significant change. The failure to mention that the amendment would require that the strict scrutiny standard be applied to any restriction on the right to keep and bear arms is insufficient and misleading. It is insufficient because it fails to disclose an important part of the underlying change and the ballot title is

misleading because it implies (by omission) that no such change is being made, rather a statement about the unalienability of the right to bear arms is simply being added to the Constitution.

Missouri has many statutes dealing with weapons. Those statutes are currently presumed constitutional unless they "clearly and undoubtedly" violate the Constitution and "palpably affront some fundamental law embodied in the constitution." *State v. Richard*, 298 S.W.3d 529, 530 (Mo. banc 2009). Under current law, the state has the "inherent right to regulate the carrying of firearms as a proper exercise of police power." *Id.* at 532.

Strict scrutiny is a horse of a different color. Neither this Court, nor the U.S. Supreme Court, has ever said that strict scrutiny should apply to gun laws. *See e.g., District of Columbia v. Heller,* 554 U.S. 570, 629 (2008) (striking District of Columbia total ban on handgun possession in the home because it fails constitutional analysis "under any of the standards of scrutiny that we have applied"). *See also,* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: an Analytical Framework and Research Agenda*, 56 UCLA L. Rev. 1443 (2009). Therefore the amendment announces a new level of scrutiny that has never been applied before. Nor has the Missouri Constitution required such scrutiny during the 150 plus years Missouri has been a State. If the voters wish to apply strict scrutiny to gun laws, they certainly have the right to do that, but they must be told of this important change to the Missouri Constitution in order for them to make an informed decision.

Strict scrutiny is normally reserved for certain types of First Amendment

restrictions and laws that impact a protected class. As this Court well knows, strict scrutiny review requires that a restriction "serve compelling state interests and be narrowly tailored to meet those interests." *Weinschenk v. State,* 203 S.W.3d 201, 211 (Mo. 2006). If adopted by the people, SJR 36 would abandon the current analytical framework in *Richard* for the strict scrutiny standard of review. The voters deserve to know that changing the analysis is a "probable effect" should SJR 36 become law.

C. Conclusion

The current summary statement unfairly lures voters in with a suggestion that Missouri law does not protect the right to bear arms and that state government is not required to enforce the right. But it completely fails to alert voters, even in the most oblique way, that strict scrutiny would now apply to all restrictions on the right to keep and bear arms, and that carrying concealed weapons, currently only a privilege granted by statute, will become part of the right to keep and bear arms. This summary statement is clearly insufficient and unfair.

To the extent the Court finds that the Judiciary has the authority to re-write the summary statement (see Point III), this Court should revise and modify the summary statement and instruct the trial court to certify such statement to the Secretary of State. There is some debate at the Court of Appeals as to the breadth of the authority to rewrite the summary. In *Cures Without Cloning,* 259 S.W.3d at 83, the majority limited re-writing authority to simply correcting any insufficiency or unfairness. The dissent, however, read the statutes to allow the Court to write its own ballot title upon the threshold finding of unfairness. *Id*. at 84. On this question, Appellants agree with Judge

Smart's dissent and suggest that, if the Court has authority to re-write the title, it may do so at its discretion and certify the title it believes sufficiently and fairly summarizes the measure. A fair and sufficient summary statement would not improperly suggest that state law is being changed and would summarize the major effects of the proposal. Appellants propose that the following statement is appropriate:

> Shall the Missouri Constitution be amended to repeal the current provision that allows restrictions on wearing concealed weapons, subject gun laws to strict scrutiny and add keeping and bearing ammunition and gun accessories to the existing right to keep and bear arms?

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE COURT WAS WITHOUT AUTHORITY TO GRANT THE RELIEF SOUGHT BY PLAINTIFFS BECAUSE THE COURT IS NOT BARRED BY SECTION 115.125.2 FROM REMOVING THE MEASURE FROM THE BALLOT OR MAKING CORRECTIONS TO A DEFICIENT BALLOT TITLE IN THAT THE STATUTE ONLY PREVENTS ADDING CANDIDATES OR MEASURES TO THE BALLOT, NOT REMOVING THEM OR AMENDING THEM TO CONFORM TO LEGAL REQUIREMENTS.

In the court below, Plaintiffs requested alternative relief: Either the trial court should have rewritten the ballot title and certified a new title or the trial court should have sent the measure back to the legislature for a rewriting of the ballot title. The trial court

found that Section 115.125.2[6] prohibited the requested relief as the date of its judgment was less than six weeks from the election, and the case was therefore moot.

Section 115.125.1 requires local election authorities to receive notice of elections from the entity "calling the election" no later than the tenth Tuesday prior to an election. Section 115.125.2 specifies that between 10 weeks and six weeks prior to an election, late notice of the election may be provided pursuant to court order. That subsection ends with the following sentence: "No court shall have the authority to order an individual or issue be placed on the ballot less than six weeks before the date of the election, except as provided in sections [dealing with the death of a candidate]."

A. Plaintiffs did not request that "an issue be placed on the ballot."

The plain language of the last sentence of Section 115.125.2 only applies to adding a candidate or issue (measure) to the ballot. Absent a statutory definition, words are to be given their plain and ordinary meaning as derived from the dictionary. *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 575 (Mo. banc 2012). "Place" (vb.) is defined as, "to put into or as if into a particular position" and "to find a place for." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1727 (2002). Section 115.125 states nothing about removing a candidate or measure from the ballot or about modifying a measure (or candidate) that is already on the ballot. "A court may not add words by implication to a statute that is clear and unambiguous." *Asbury v. Lombardi*, 846 S.W.2d 196, 202 n.9 (Mo. banc 1993).

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[6] All references to Section 115.125 are to RSMo Supp 2013.

Other statutes support this interpretation of the last sentence of Section 115.125.2 in that they allow a court to make modifications to the ballot less than six weeks before the election. Section 115.247.2, RSMo Supp. 2013, allows a court to correct errors in the printing of a ballot upon the application of a single voter. Sections 115.391-.393 allow correction of errors on primary election sample ballots before the official ballot is printed. The sample ballots must be prepared at least four weeks before the election, so these statutes also contemplate changes to a ballot less than six weeks prior to an election. Words in a statute "must be considered in context and sections of the statutes in *pari materia*, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words." *S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009). Reading these statutes together in a consistent manner further supports the plain language interpretation of § 115.125.2 — that it does not apply to removal or modifications to a ballot but only to placing new measures or candidates on the ballot.

B. The interest protected by Section 115.125, the cost to local election authorities of having to reprint ballots, is not at issue for the relief requested by Plaintiffs.

In addition to the plain language of the statutes and other statutes that are in *pari materia*, if one looks at the context of the last sentence within the rest of the statute – at what Section 115.125 as a whole is concerned with – it is evident that the interest being protected by the provision is the local election authority's interest in not having to pay for reprinting ballots. *S. Metro. Fire Prot. Dist.*, 278 S.W.3d at 666 (words must be

considered in context). Removal of an issue from the ballot does not require reprinting. If an issue is to be removed from the ballot, there are two alternatives that do not require reprinting of the ballot: (1) The votes on that measure can simply not be counted – the result of the election on that issue would not be certified; or (2) similar to what was done in *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392 (Mo. banc 1996), an opaque sticker could be applied to cover the issue on the ballot.

Similarly, if the summary statement is reworded, an opaque sticker with the revised ballot title on it could be affixed to ballots, covering the unfair and insufficient ballot language. None of these require reprinting of the ballot. As such, the relief requested by Plaintiffs is not moot under Section 115.125, because it only applies to adding measures to the ballot, not removal or rewording. Additionally, ballots would not need to be reprinted to grant the relief requested by Plaintiffs.

C. Section 115.125 only applies to elections that are called by an agency or official. The primary election on August 5, 2014, is not such an election, so the relief sought by Plaintiffs is not mooted by section 115.125.2.

The primary election is a standing election set forth by statute, Section 115.121.2, RSMo Supp. 2013 ("The primary election day shall be the first Tuesday after the first Monday in August of even-numbered years"). The Secretary did not call the August 5, 2014, election; he certified questions to be included on an official ballot for a primary election. § 115.245.

The Secretary's own actions support that Section 115.125 is not applicable to Constitutional Amendment 5. The election is August 5, 2014. As previously stated, if applicable here, Section 115.125 only allows notifications to the local election authorities after ten weeks prior to an election if they are "pursuant to court order." Ten weeks prior to the primary election was May 27, 2014. Nevertheless, on June 13, 2014, less than ten weeks before the primary election, the Secretary of State, without a court order, certified the official ballot title for Constitutional Amendment 5 and notified local election authorities of the same. It is clear that the Secretary of State, the chief state election official, interprets Section 115.125 as not applying to primary elections. Accordingly, if Constitutional Amendment 5 is properly on the ballot in the first instance, certainly a court may rewrite the summary statement or may remove the measure from the August 5, 2014, ballot.

D. The trial court interpreted Section 115.125.2 in a manner that conflicts with Section 116.190. It is incumbent upon a court, however, to harmonize apparently conflicting statutes and that is what the trial court should have done in this case.

Interpreting Section 115.125.2 as the trial court did forecloses judicial review under Section 116.190 for most measures referred by the legislature to the voters on an August primary election ballot. Moreover, this interpretation invites manipulation of the ballot measure processes to ensure foreclosure of judicial review.

"Where two statutory provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing

court must attempt to harmonize them and give them both effect." *S. Metro. Fire Prot. Dist.*, 278 S.W.3d at 666.

The trial court provided dicta in its decision indicating that the dispute was moot because the Court was barred from ordering changes to the ballot by application of Section 115.125.2. And yet Section 116.190 allows a citizen to challenge an official ballot title by bring an action within 10 days of the certification, and requires such cases be placed at the top of the civil docket.

This case provides one example. June 24th is six weeks before August 5th. The Secretary certified the official ballot title on June 13th. Under Section 116.190, a citizen has ten days to file a petition challenging the ballot title. In this case, ten days after certification was June 23rd — 6 weeks and 1 day before the election. So in this case, applying the trial court's interpretation of § 115.125.2, a citizen that files a petition on the tenth day as authorized by Section 116.190 would have a moot claim in two days. This would never be enough time to obtain a court judgment.

In this case, Plaintiffs Dotson and Morgan filed their petition within hours of the certification of official ballot title (on a Friday), and noticed up a TRO hearing for the following Monday (June 16). On Wednesday (June 18), all parties (to that case) argued the merits of the case. Thus the case was ready for decision five calendar days from its filing. Plaintiffs' counsel sent a letter to the Court urging a ruling. Plaintiffs did everything within their power to move their case as quickly as possible, and succeeded. The trial court even recognized the diligence of the parties "to get this matter ready for a hearing in an expedited manner." App. A3. And yet, according to the trial court, it was

all in vain, because it did not issue its judgment until after June 24th.

"Statutes cannot be interpreted in ways that yield unreasonable or absurd results, and it is assumed that the legislature's enactment of a statute is meant to serve the best interests and welfare of the general public." *State v. Nash*, 339 S.W.3d 500, 508 (Mo. banc 2011). Surely it is not the legislative intent under Section 115.125.2 to render Section 116.190 meaningless in situations such as this case. And the trial court's interpretation interprets Section 115.125.2 in a manner that allows for instances where no citizen could challenge a legislative proposal being placed on the ballot.

In looking at the statutory timeline, in cases where the General Assembly does not adopt one or both parts of an official ballot title in its joint resolution, the Secretary of State or State Auditor would be required to prepare the summary statement, fiscal note and fiscal note summary, or all three. §§ 116.155, 116.160, 116.170. If those officials take the maximum time allowed by law, a challenge would be moot before it was ripe. The legislature cannot have intended such a result.

The Missouri Constitution authorizes the General Assembly to propose constitutional amendments to a vote of the electorate. MO. CONST. ART. XII, SEC. 2(b). Such proposals are in the form of a house or senate joint resolution, which travels through each chamber of the legislature just as any bill would. The legislature is automatically adjourned on May 30th of every year. MO. CONST. ART. III, SEC. 20(a). The time period between the last day of session and May 30th is when truly agreed to and finally passed bills are enrolled, engrossed and signed. *Id.* As such, it seems likely that what happened in this case would be routine – the TAFP HJR or SJR would be signed and delivered to

the Secretary of State on May 30th.

As previously noted, the primary election is set by statute – the first Tuesday after the first Monday in August of even-numbered years. August 5, 2008; August 3, 2010; August 7, 2012; August 5, 2014. For the purposes of demonstrating that a case can easily be moot before it is ripe, August 5 is a reasonable date. June 24 is six weeks before August 5. Therefore, under the trial court's interpretation of Section 116.125.2, a challenge to the official ballot title would be moot on June 25. But there might not even be a ballot title by June 25.

Applying the statutory timelines results in a case being moot before it is ripe when the General Assembly does not enact both a summary statement and a fiscal note summary in the TAFP HJR or SJR signed on May 30:

Example 1: Summary statement needed:

- If there is no summary statement in the joint resolution, the Secretary has 20 days to prepare and transmit to the attorney general a summary statement of the measure as the proposed summary statement. § 116.160. It is now June 19.
- The Attorney General has 10 days to approve the legal content and form of the proposed statement. § 116.160. It is now June 29. **The case is moot before it is ripe.**

Example 2: Fiscal note summary needed:

- If there is no fiscal note summary in the joint resolution, the State Auditor has 30 days (from delivery to the Auditor) to prepare and file with the Secretary a

fiscal note and fiscal note summary for the proposed measure in accordance with Section 116.175, RSMo Supp 2013. It is now June 29. **The case is moot before it is ripe.**

- There is an additional ten days for the Attorney General to review the fiscal note and summary, § 116.175, RSMo Supp. 2013. It is now July 9. **The case is moot before it is ripe.**

The foregoing demonstrates the potential for manipulation by any of several officials or bodies involved in the process to ensure there is no judicial review of the official ballot title, in direct conflict with Section116.190. This cannot possibly be what the legislature intended by Section 115.125.2. Such an interpretation does not serve the best interests and welfare of the general public but instead serves the interest of proponents of a measure who have lobbied the general assembly to ensure that a summary statement that they desire, including one that is insufficient and misleading, is adopted by the legislature as part of a joint resolution, but cannot be reviewed by the judiciary. It is a roadmap to undermine judicial review of statewide ballot measures that are set on the primary election ballot. The trial court must be reversed on its determination of mootness. Interpreting the statute as limited to its plain meaning – preventing additions but not amendments to the ballot – is a proper interpretation that serves the best interests of the public.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING PLAINTIFFS' REQUEST FOR A DECLARATORY JUDGMENT THAT 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 VIOLATES THE SEPARATION OF POWERS OF MISSOURI'S CONSTITUTION IN THAT RE-WRITING THE BALLOT TITLE IS A LEGISLATIVE FUNCTION RESERVED SOLELY FOR THE LEGISLATIVE BRANCH.

Dotson and Morgan also sought a declaration from the trial court that statutory provisions allowing the courts to rewrite a ballot title originally drafted by the legislature violate the separation of powers requirement of ARTICLE II, SECTION 1. Section 116.190 allows the Courts to re-write ballot titles. *Cures Without Cloning*, 259 S.W.3d at 82.

Violation of separation of powers can occur in two ways: (1) when one branch interferes impermissibly with the other's performance of its *constitutionally assigned power*; or (2) when one branch assumes a power that more properly is entrusted to another. *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997).

Here, the power to amend the Constitution is reserved to the people. Such amendment may be proposed through the legislative process. The General Assembly

chose to write their own Ballot Title in this case rather than defer to the Secretary of State. When a court concludes that legislatively written ballot title is insufficient and unfair, the re-writing of the ballot title is more properly entrusted to the legislature itself.

In 2008, the State urged the Court of Appeals to rule that the judiciary had no authority to rewrite a ballot title and that, upon a finding of unfairness, the measure should be remanded to the Secretary of State. The Court of Appeals rejected that argument. *Cures Without Cloning,* 259 S.W.3d at 82.

In 2011, the State of Missouri (and the Missouri legislature) argued that a ballot title written by the legislature should be corrected by the legislature when found to be unfair. *Aziz,* Case No. 11AC-CC00439. In *Aziz,* the Cole County Circuit Court considered a ballot title for a Constitutional Amendment related to voting. The legislature's position in that case (as represented by the Attorney General) was that, if the Court found the ballot title insufficient or unfair, "The Court could either revise the summary statement or vacate the summary statement and allow the General Assembly to revise it." App. 34.

In 2012, the State told this Court that the judiciary could not re-write a ballot title written by the Secretary of State because doing so would be a violation of separation of powers. Brief of Robin Carnahan and Thomas A. Schweich in *Northcott v. Carnahan*, SC92500. There, the State told this Court that "consistent with the doctrine of separation of powers and the definition of 'certify,' the court's authority and remedy under Section 116.190 is limited to certifying those portions of the Secretary's summary it

believes are fair and sufficient, with a remand to the Secretary to rewrite those portions that cannot be certified." *Id*. This Court did not reach the issue.

As the State argued in that case:

> The 'sole exception to the unbending rule' of separation of powers exists only in instances 'expressly directed or permitted' by the Missouri Constitution. *Mo. Coalition for Env't v. Jt. Comm. on Admin. Rules*, 948 S.W.2d 125, 133 (Mo. banc 1997). But Missouri courts have not been expressly directed or permitted to write or rewrite ballot summary language under the Missouri Constitution. Indeed, even the court of appeal's decision in *Cures Without Cloning*, recognized that at best the authority to rewrite is 'implicit[].' *Cures Without Cloning*, 259 S.W.3d at 83. 'The judicial power granted to the courts by the constitution is the power to perform what is generally recognized as the judicial function – the trying and determining of cases in controversy.' *State ex rel. Pulitzer Pub. Co. v. Coleman*, 152 S.W.2d 640, 646 (Mo. banc 1941). When a court actively rewrites a summary statement, rather than remanding to the Secretary [of State] for revision, it in effect mandates that the Secretary write the summary in one specific way, when many other ways of writing the summary would themselves be fair and sufficient.

Missouri courts have long recognized that infringing on the discretion afforded to an executive officer violates the bedrock principle of separation of powers. The power and authority of the government in this

> country is vested in distinct, coordinate departments – legislative, executive and judicial – and the judicial department may not control or coerce the action of the other two within the sphere allotted to them by the fundamental law, for the exercise of judgment and discretion. *Comm'n Row Club v. Lambert*, 161 S.W.2d 732, 736 (Mo. App. E.D. 1942); *see also*, e.g., *Pruneau*, 652 S.W.2d 281. Missouri courts similarly recognize that they cannot usurp the functions of other branches of government when ordering relief. For example, while '[c]ourts obviously have the power to declare a legislative enactment void or invalid as contrary to constitutional mandates, … they cannot take the further step of ordering … [anything that] is, in essence, legislating, which is not the function of a court.' *Treme v. St. Louis County*, 609 S.W.2d 706, 710 (Mo. App. E.D. 1980).

Id.

The doctrine of separation of powers prevents the legislature from performing judicial functions. Re-writing the title of a resolution passed by the legislature would violate the doctrine of separation of powers. As a result the portion of the statute that allows the Court to do so is invalid.

CONCLUSION

For all the foregoing reasons, Appellants respectfully request this Court reverse the decision of the trial court as to the insufficiency and unfairness of the Summary Statement and rewrite the ballot title if it finds that the Courts have the authority to do so. Alternatively, this Court should order the measure sent back to the legislature for a rewriting of the ballot title.

Respectfully submitted,

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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 12,143 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2010; and

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