No. WD86595

In the

Missouri Court of Appeals for the Western District

ANNA FITZ-JAMES,

Respondent,

v.

JOHN R. ASHCROFT,

Appellant.

Appeal from the Circuit Court of Cole County
The Honorable Jon E. Beetem

REPLY BRIEF OF APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT[1]

Respondent has not identified even a single regulation that would be constitutional under her petitions. To the contrary, she says even the basic right to receive an ultrasound would be unconstitutional. And she does not deny that, had her petitions been in effect in 2018, they would have prohibited shutting down the Columbia abortion clinic after clinic staff admitted the physician was using moldy equipment on women.

These are the consequences of Respondent's maximalist petitions. *Every* regulation is either (1) categorically invalid (if it interferes with "autonomous decision-making") or (2) presumed invalid. And that presumption is rebuttable only if (after months or years) state or local officials satisfy a standard even stricter than strict scrutiny. There is a way to advance pro-choice policies while still permitting basic common-sense regulations like sanitation rules. This is not it. These petitions court anarchy.

Tellingly, Respondent *concedes* that the plain text of her petitions lead to these "absurd results" when read in a "literal" way. Resp.Br.26, 36. She argues, however, that courts will likely avoid these "absurd results" by using canons of construction to narrow the plain text. That contradicts binding precedent: "If the language of a statute is plain and unambiguous, this Court is bound to apply that language as written and may not resort to canons of construction to arrive at a different result." *State ex rel. Hillman v. Beger*, 566

[1] Under Missouri law, the Secretary must certify the ballot title within three business days of receiving the fiscal note summary. § 116.180, RSMo. Respondent incorrectly implies the Secretary did so "[s]ix days" after receiving the documents. Resp.Br.12. In fact, the Secretary received the fiscal note summary on Friday, July 21st, and certified the petitions on July 26th, three business days later. D33, at 4.

S.W.3d 600, 605 (Mo. banc 2019). In any event, the Secretary may draft summaries based on a plausible reading of the petitions' language, even if courts might later adopt a different interpretation.

Even on Respondent's nonliteral reading, the Secretary's language suffices. The adjectives "unregulated" and "unrestricted" are close enough even if the petitions would allow a small category of regulations. Because perfect precision cannot occur in 100 words, "very broad" language is allowed, even language that "include[s] [topics] to which the initiative does not apply." *Hill v. Ashcroft*, 526 S.W.3d 299, 319 (Mo. App. W.D. 2017). What matters is that "the voters affected … are put on notice that they should read the specific details of the initiative before casting their vote." *Id.* The Secretary's language does just that.

As both the trial court and Respondent have admitted, the Secretary's summary statements align with a possible interpretation of the petitions. Resp.Br.26, 36; D74, at 2 n.1; App. 2. Indeed, it is reasonably likely Respondent will later advance this interpretation and courts will adopt it. This Court should not disregard the obvious incentive Respondent has to interpret these petitions narrowly now and expansively later. *Dept. of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) ("[Courts are] not required to exhibit a naiveté from which ordinary citizens are free."). If these petitions pass, Respondent, her organizational counsel, or similar advocacy organizations will almost certainly advance a literal-text interpretation to try to dismantle Missouri's ban on partial-birth abortion, upend basic health-and-safety measures, and force taxpayers to support abortion. This Court should permit the Secretary to inform voters of the reasonable likelihood this will occur.

ARGUMENT

I. The summaries accurately state the reasonably likely consequences of the petitions.

A. The petitions are likely to impose a straitjacket on regulation.

Faced with plain text that (1) categorically invalidates any government act that interferes with "autonomous decision-making," (2) presumes unlawful "any" other act that interferes with or delays abortion, and (3) allows officials to rebut that presumption only by satisfying ultrastrict scrutiny, Respondent tries to backpedal. Her arguments fail.

1. Start first with her contention (at 27) that nobody yet knows how courts will rule in future challenges. Respondent ignores that the Secretary need only state consequences that are reasonable likely, not those that are certain. It certainly is reasonably likely that regulations (including health-and-safety regulations) will fall under language where *every* regulation is either categorically invalid or presumed invalid—especially because that presumption can be rebutted only by satisfying a new tier of scrutiny much more stringent even than strict scrutiny.

Highlighting just how difficult regulating would be, Respondent volunteers that two provisions of Missouri's informed-consent law would become unconstitutional. Resp.Br.30, 32 (citing § 188.027.1(2), (4), RSMo). Yet courts have held that these laws simply guarantee women the right to truthful information. As the Missouri Supreme Court held, section 188.027.1(4) guarantees women the right to an "opportunity to have or to view an ultrasound." *Doe v. Parson*, 567 S.W.3d 625, 630 (Mo. banc 2019) (emphasis omitted). The other guarantees the right to receive a pamphlet stating that "[a]bortion will

terminate the life of a separate, unique, living human being." § 188.027.1(2), RSMo. Respondent says (at 32) this pamphlet is "inaccurate," but the Eighth Circuit held the opposite, determining that identical language in a pamphlet required by South Dakota was "truthful, non-misleading information relevant to a patient's decision to have an abortion." *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008) (en banc).

Under Respondent's petitions, Missouri could not even guarantee the right to receive an ultrasound or "truthful, non-misleading information." Indeed, Respondent volunteers that she designed her petitions to *target* these informed-consent laws. Resp.Br.30, 32. If the legislature cannot even guarantee women the right to an "opportunity to have or to view an ultrasound," *Doe*, 567 S.W.3d at 630, then it is unclear the legislature could do anything.

2. Tellingly, Respondent does not dispute that government could *never* take emergency action under her petitions. In his opening brief, the Secretary explained at length that Respondent's rule, would have blocked health officials from closing an abortion clinic after discovering that the physician had been using "moldy" equipment, filled with "bodily fluid," on women *for months*. D31, at 6–8. In her brief, Respondent does not dispute this.

And contrary to Respondent's contention (at 28), government officials must comply with the Constitution, even absent a court order. Just last month, the New Mexico Attorney General refused to enforce a firearm executive order because it was unconstitutional—

despite no court having weighed in. Chavez & Segarra, *New Mexico Attorney General Says He Won't Back the Governor's Gun Order*, KRQE News (Sept. 13, 2023).[2]

3. Respondent next tries to retreat from her maximalist language that government action never is permitted if it interferes with "autonomous decision-making." At the outset, even if her interpretations were correct, it would not matter. As Respondent concedes, her petitions would still render presumptively invalid *every* regulation that delays abortion even one second, and the ultrastrict scrutiny needed to rebut that presumption is likely insurmountable.

In any event, Respondent's attempt to downplay the "autonomous decision-making" language fails. She asserts that this text simply guarantees "the right to make decisions, not the right to carry them out." Resp.Br.31. But nobody ever talks about abortion this way. In creating a right to abortion, *Roe v. Wade* greatly restricted "governmental power to limit personal *choice* to undergo abortion." *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 868–69 (1992) (emphasis added), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Nobody thought *Roe* created only a right to make a "choice," not to "carry it out." Faced with the consequences of her maximalist drafting decision, Respondent tries to flee from her own text. If one of her petitions passes, she will undoubtedly embrace that text once again. The Secretary was right to draft language informing the voters what this text would likely do.

[2] https://www.krqe.com/news/politics-government/new-mexico-attorney-general-says-he-wont-back-the-governors-gun-order/

No better is Respondent's attempt (at 32) to address the problem created by the "autonomous decision-making" language by invoking the canon against surplusage. Respondent concedes that the plain text of her petitions lead to "absurd results" when read in a "literal" way. Resp.Br.26, 36. She argues, however, that courts would likely apply canons to narrow the plain text. But "[c]anons of statutory construction," the Missouri Supreme Court has held, "are employed only when a statute is ambiguous." *Wilson v. City of St. Louis*, 662 S.W.3d 749, 757 (Mo. banc 2023). The Secretary agrees with Respondent that the literal text of her petitions lead to results that are "absurd," but that is the consequence of her own drafting decision.

B. Abortion throughout all nine months is a likely consequence of the petitions.

The petitions state that "under no circumstance" may the legislature regulate where any healthcare provider states that abortion could have any positive effect on physical or mental health. *See, e.g.*, D23, at 2. Because this would enable every healthcare professional to exempt every woman from every law, the Secretary properly stated that the petitions would likely permit abortion throughout all nine months of pregnancy.

Just a few weeks ago, the Ohio Supreme Court upheld language very similar to the Secretary's language. The Ohio petition stated that "abortion may be prohibited after fetal viability. But in no case may such an abortion be prohibited if in the professional judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health." *State ex rel. Ohioans United for Reprod. Rights v. Ohio Ballot Bd.*, 2023 WL 6120070, ¶ 30 (Sept. 19, 2023). Abortion advocates challenged a summary statement

that said the petitions would "[a]lways allow an unborn child to be aborted at any stage of the pregnancy" if a physician determined abortion was needed for a patient's health. *Id.* In rejecting the challenge, the Ohio Supreme Court held that, in light of the capacious exception, the summary statement "is factually accurate" and "not improperly argumentative." *Id.* ¶ 46. So too in Missouri, where the petitions create an even broader exception. (They apply to any healthcare professional, not just physicians.) Under Respondent's petitions, abortion would be allowed "at any stage of the pregnancy."

Seizing on the term "needed," Respondent tries to narrow the exception, stating that women would be exempt from state law only if a healthcare professional determined that abortion was "necessary" for health. Resp.Br.33–34. That changes nothing. A dermatologist could still enable a woman to obtain an abortion by certifying that abortion is "needed" to resolve an acne problem or "needed" to avoid weight gain. Healthcare professionals will always be able to certify that abortion is "needed" for some reason related to health. Respondent accuses the Secretary of "provid[ing] no evidence that the good-faith-judgment requirement is not a sufficient safeguard," Resp.Br.34, but Respondent simply ignores the evidence already provided. As the Secretary explained, physicians have openly stated that they "will certify that any pregnancy is a threat" to health, and the health-exception created by *Doe v. Bolton*, 410 U.S. 179 (1973), permitted

abortion through all nine months of pregnancy even though it was *less* capacious than Respondent's. App.Br.38–39.[3]

C. The petitions would likely gut the laws on medical licensure and medical malpractice.

Abortion advocates have long opposed health-and-safety laws requiring that persons performing abortions be licensed physicians. Yet rather than disclaim that goal, Respondent admits that Missouri's laws on medical licensure and medical malpractice will be presumed invalid. Resp.Br.36. And she refuses to say the State would overcome that presumption. *Id.* Instead, she asserts (incorrectly) that the "Secretary provides no rationale for concluding that the state will be unable to meet this burden." *Id.* But as already explained, her petitions prohibit any regulation unless abortion clinics are already "widely" compliant. App.Br.34; *e.g.*, D23, at 2 (prohibiting any regulation not "consistent with widely accepted clinical standards"). That means Missouri likely never could enforce a regulation not already adopted by large abortion organizations like Planned Parenthood and not required by nearly all other States. As of last year, 19 States no longer require abortion providers to be licensed physicians. Nicole Dube, *States Allowing Non-Physicians to Provide Abortion Services*, Connecticut Office of Legislative Research, at 1 (July 29, 2022).[4] If one of these petitions passes, it is almost certain that any licensure

[3] Similarly, Respondent is wrong to assert that the exemption advanced by these petitions is "comparable … to the standard for determining a medical emergency in the statute." Resp.Br.34. That statute permits abortion only when there is "a serious risk of substantial and irreversible physical impairment of a major bodily function." § 188.015(7), RSMo. Respondent's petitions permit abortion to resolve any physical or mental health issue, including minor ones like acne.

[4] https://www.cga.ct.gov/2022/rpt/pdf/2022-R-0167.pdf

requirement would be challenged on the ground that it is not "widely" accepted across the country.

D. Nullification of Missouri laws, including Missouri's law prohibiting partial-birth abortion, is a likely consequence of the petitions.

Respondent does not dispute that one goal of her petitions is to eliminate a policy against elective abortion that has been on the books for 200 years. *See* App.Br.43. So it was accurate to state that her petitions would nullify longstanding Missouri law. Respondent says her petitions in fact simply "add to Missouri law." Resp.Br.38. But the provisions she would "add" would declare every other law either invalid or presumptively invalid.

The petitions likely would nullify not just the ban on elective abortion, but also Missouri's ban on partial-birth abortion. Respondent asserts that the language about partial-birth abortion is misleading because partial-birth abortion would remain banned by federal law. Resp.Br.40. But Respondent does not dispute that Missouri's law is broader, and the summaries do not say the petitions would eliminate the federal ban. They state the petitions would overturn "*Missouri* law …, including but not limited to partial-birth abortion." D25, at 1–6 (emphasis added).

Eliminating Missouri's ban on partial-birth abortion is common to all six petitions. One petition has no provision purporting to allow regulation of late-term abortion. D23, at 4. Respondent does not dispute it would eliminate Missouri's ban on partial-birth abortion. For the other petitions, she asserts that the State *might* be able to maintain a partial-birth abortion ban *if* the State can prove it is "needed to maintain the health of the patient."

Resp.Br.40. But as Respondent no doubt knows, partial-birth abortion bans have been justified not on health grounds, but because it is a "brutal and inhumane procedure" with "disturbing similarity to the killing of a newborn" that demeans "the integrity and ethics of the medical profession." *Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007). Respondent admits that partial-birth abortion is "deeply unpopular." Resp.Br.41. Yet her petitions aim to constitutionally remove that ban. Voters have the right to know.

E. Taxpayer support for abortion is a likely consequence of the petitions.

Having conceded at trial that, under her petitions, Missouri's "current statute, which forbids funds for abortion, could be challenged," Tr. 16, and that her petitions would prohibit the State from blocking "insurance coverage for abortion," Tr. 14–15, including taxpayer-funded insurance, Respondent is unable to offer any cogent defense of the trial court's decision to strike the Secretary's language. She focuses narrowly on the argument that the petitions might not force the legislature to issue "appropriati[ons]" directly funding abortion. Resp.Br.49. But she does not deny that her petitions likely would require taxpayers to fund abortion indirectly, such as through paid time off for abortion, travel expenses for abortion, health insurance, and special tax-exemptions for donations to abortion clinics.

Also telling is how much Respondent relies on the canon against surplusage throughout her brief, only to flee from it on this issue. In two petitions, Respondent drafted a provision purporting to state that nothing requires directly funding abortion. D23, at 2, 16. But she did not include it in the other four petitions, suggesting she believes taxpayer funding *would* be required by those other four petitions.

F. Stripping local governments of authority is a likely consequence of the petitions.

Without any citation, Respondent asserts that local governments "already lack the authority to tax or regulate medical procedures," and so it is misleading to say her petitions would remove authority. Resp.Br.54. That is demonstrably wrong. On taxation, Missouri courts have expressly recognized that local governments have authority to tax medical services unless preempted by a state statute. *See, e.g.*, *Tri-State Osteopathic Hosp. Ass'n v. Blakely*, 898 S.W.2d 693 (Mo. App. S.D. 1995). The same is true for regulations. Unless barred by state statute, "a municipality may enact regulations that supplement or enlarge upon provisions of a state statute by requiring more than what is required in the statute." *St. Charles County Ambulance Dist. v. Town of Dardenne Prairie*, 39 S.W.3d 67, 69 (Mo. App. E.D. 2001).

Respondent identifies no state law barring localities from taxing or regulating abortion clinics. Indeed, Missouri's statute governing abortion facilities expressly reserves for municipalities authority to include requirements beyond state law: "Nothing in sections 197.200 to 197.240 shall be construed to impair or abridge the authority of a governmental unit to license ambulatory surgical centers or abortion facilities." § 197.205.2, RSMo. "Governmental unit" includes "any city, county or other political subdivision of this state, or any department, division, board or other agency of any political subdivision of this state." § 197.200(5), RSMo.

II. None of the Secretary's statements was argumentative.

Preservation. Respondent contends (at 42) that the Secretary has failed to dispute that his summary statements are argumentative. Not so. The Secretary's opening brief expressly says the notion that the phrases are "argumentative … is incorrect." App.Br.29, 42; *see also id.* at 64–65. Moreover, the Secretary argued at length that the summary statements are not "insufficient or unfair." A statement is "insufficient or unfair" if it is "unduly argumentative." *State ex rel. Kander v. Green*, 462 S.W.3d 844, 850 (Mo. App. W.D. 2015). By arguing that the statements were *not* insufficient or unfair, the Secretary necessarily contended that the phrases were not argumentative.

Argument. In contending that the statements were argumentative, Respondent makes three major errors.

First, she contends the phrases are still argumentative even though she admits some of them "might not be misleading." Resp.Br.47. But "court[s] will not deem language to be argumentative when it is accurate." *Ohioans United for Reprod. Rights*, 2023 WL 6120070, ¶ 46. Respondent cites no case where language was stricken as too argumentative despite a concession that it is *not* misleading. In any event, the standard is not whether language is argumentative, but whether language is "*unduly* argumentative." *Green*, 462 S.W.3d at 850 (emphasis added).

Second, Respondent strangely accuses the Secretary of using "systematic reasoning," contending that this is the very definition of "argumentative." Resp.Br.44. But language is not unduly argumentative simply because it is logical.

Third, Respondent assumes a statement must be argumentative if it can be interpreted as value laden. But this Court has squarely held that a summary statement is not made insufficient or unfair by "the mere use of a value-laden term." *Sedey v. Ashcroft*, 594 S.W.3d 256, 266 (Mo. App. W.D. 2020). Respondent makes no attempt to distinguish cases where this Court determined that the Secretary used "value-laden" terms like "puppy mill cruelty," "fair share," and "wrong" but upheld the statements anyway. App.Br.57 (citing cases); *see also Sedey*, 594 S.W.3d at 266.

Respondent's argument about certain terms being "value-laden" falls especially flat for those terms the Secretary lifted verbatim from current law. "References to current law," the Supreme Court has concluded, that "provide context to a summary statement do not render the summary statement unfair or prejudicial." *Brown v. Carnahan*, 370 S.W.3d 637, 660 (Mo. banc 2012).

None of the Secretary's phrases was argumentative, much less "unduly argumentative."

1. **Partial-birth abortion**. Respondent contends that "partial-birth abortion" is argumentative because it is "deeply unpopular." Resp.Br.41. But it is Respondent's fault, not the Secretary's, that her petitions would likely eliminate Missouri's ban on a deeply unpopular procedure. It would be prejudicial *not* to inform voters of that legal consequence.

No better is Respondent's contention that the term is argumentative because it is not a medical term of art. *Id.* There is no common medical term for the procedure. It is known in textbooks by a wide variety of monikers, including "'intact D & E,' 'dilation and

extraction' (D & X), and 'intact D & X.'" *Carhart*, 550 U.S. at 136. These terms mean nothing to the average Missouri citizen. The Secretary quite properly used terms that are "familiar and easily understood," *Stickler v. Ashcroft*, 539 S.W.3d 702, 718 (Mo. App. W.D. 2017), such as "[r]eferences to current law," *Brown*, 370 S.W3d at 660. The term "partial-birth abortion" occurs in common parlance, *Carhart*, 550 U.S. at 136; *Rounds*, 530 F.3d at 734; in federal law, 18 U.S.C. § 1531; and in Missouri law, §§ 188.026.2(26), 565.300.2(3), RSMo. The Secretary also had only 100 words. No succinct term better informs voters of this change in law than "partial-birth abortion," and Respondent provides none.

2. **Right to life**. The attack on the language "right to life" fails for similar reasons. The Secretary lifted this language verbatim from the law (§ 188.017, RSMo) that Respondent admits is the immediate target of her petitions. D20, at 18; Tr. 36. There is no better way of informing voters of the petitions' legal consequences than by referencing the statutory right Respondent admits she targets.

Respondent nonetheless contends it is prejudicial to tell Missourians which existing right she would eliminate because doing so suggests there is "a moral conflict … requiring voters to take a side." Resp.Br.46. But the abortion issue is inherently moral—as Respondent elsewhere admits. Resp.Br.43. And it is Respondent who is asking voters to take sides. Existing law guarantees the "right to life" to humans in utero. § 188.017, RSMo. It would be prejudicial for the Secretary not to inform voters that Respondent seeks to eliminate that right.

3. **Unborn child**. Contrary to Respondent's contention (at 48) that "child" or "unborn child" is a value-laden term, courts routinely use these to describe humans at the fetal stage of development. Even *Roe v. Wade* used the term "unborn child" as a neutral term, *Roe v. Wade*, 410 U.S. 113, 162 (1973), as has the Missouri Supreme Court, *Connor v. Monkem Co.*, 898 S.W.2d 89, 89–93 (Mo. banc 1995); *State v. Knapp*, 843 S.W.2d 345, 346–49 (Mo. banc 1992). Just a decade ago, the U.S. Supreme Court found it entirely uncontroversial to declare unanimously that a person who suffered a miscarriage "lost a child." *Porter v. McCollum*, 558 U.S. 30, 33 (2009). And just weeks ago, the Ohio Supreme Court rejected the assertion that "unborn child" is argumentative. Regardless of whether moral connotations come with the term, the court held that it "is factually accurate" and thus permissible. *Ohioans United for Reprod. Rights*, 2023 WL 6120070, ¶ 44.

4. **From conception to live birth. At any time.** Respondent's only argument against these phrases is her assertion that they suggest abortion could occur *at* the moments of conception and live birth—in other words, at times where abortion is literally impossible. Resp.Br.45. But the Secretary's language—"from conception to live birth" and "at any time"—most naturally reads to refer to moments between conception and birth because it is impossible to perform an abortion if a woman is not pregnant. And Respondent does not dispute that her petitions in fact permit abortion at every moment of pregnancy. At bottom, Respondent simply contends (wrongly) that the Secretary could have drafted better language, but this Court has repeatedly held that is not the test. *Asher v. Carnahan*, 268 S.W.3d 427, 431 (Mo. App. W.D. 2008).

These phrases are also common in case law. *Roe v. Wade* used the phrase "some point between conception and live birth." *Roe*, 410 U.S. at 133. Cases imposing heightened penalties on criminals who harm pregnant women, thus harming the woman's child, have had no problem saying that government has a compelling interest in protecting human life "from the moment of conception until live birth." *Commonwealth v. Bullock*, 868 A.2d 516, 529 (2005), *aff'd*, 913 A.2d 207 (Pa. 2006). And the Ohio Supreme Court rejected an argument similar to Respondent's just weeks ago, upholding language stating, among other things, that a matter would "[a]lways allow an unborn child to be aborted at any stage of pregnancy." *Ohioans United for Reprod. Rights*, 2023 WL 6120070, ¶¶ 45–46. That court upheld the language because it "is factually accurate" and "is not improperly argumentative." *Id.*

III. Respondent's request to overrule precedents prohibiting trial courts from entirely rewriting summary statements should be rejected.

Unable to seriously defend the trial court's unreasoned order rewriting every word of every statement, Respondent asks this Court to hold that the Secretary somehow waived any argument against the trial court rewriting summary statements in their entirety. Barring that, Respondent then asks the Court to overturn precedent. Both arguments fail.

1. Respondent does not dispute that the Secretary argued in his opening brief (at 54–59) that the trial court was wrong to rewrite the summary statements in their entirety. Respondent contends instead that the Secretary should have made this argument *before* the trial court made this error. But she provides no citation for her novel suggestion that a party must prebut every possible error by attacking it before it arrives. Had the court

erroneously dismissed Respondent's challenges based on some issue neither party briefed, Respondent of course could appeal despite not anticipating the error in advance. Courts "do not consider arguments waived when, although not raised below, they were nevertheless passed on by the district court." *United States ex rel. Keshner v. Nursing Pers. Home Care*, 794 F.3d 232, 235 (2d Cir. 2015) (citing *United States v. Williams*, 504 U.S. 36, 41 (1992)). The trial court rewrote every word of every statement. The Secretary can thus appeal that decision as an error. In any event, the Secretary did in fact remind the trial court of its duty to "act with restraint" and "give deference to the Secretary's summary statements" as much as possible. D21, at 2–3. By rewriting the summary statements entirely, the trial court neglected this duty, and violated clearly established precedent prohibiting trial courts from "re-writ[ing] the entire summary statement." *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 83 (Mo. App. W.D. 2008).

2. Recognizing that precedent is against her, Respondent urges the Court to overturn that precedent and hold that trial courts can rewrite summary statements entirely. Resp.Br.58–60. But current precedent is a reasonable interpretation of the statute, and no text supports Respondent's contention. If anything, the text better supports the Secretary having sole authority to write summary statements because the Secretary is the only actor expressly given authority by the statute to write summaries. § 116.334, RSMo. The trial court is permitted only to "certify" summaries. § 116.190, RSMo. No text expressly gives courts authority to edit summaries, much less rewrite them entirely. Unlike Respondent, the Secretary does not call for overturning precedent. But if this Court accepts

Respondent's invitation, the better read is that courts have no authority to rewrite statements, not carte blanche authority.

IV. This Court should at least insert the term "elective" before "abortion" in the trial court's misleading summary statements.

As the Secretary previously noted, the trial court's decision to state that the petitions would "remove Missouri's ban on abortion" is misleading because it suggests that Missouri bans all abortions, not just elective abortions. Recognizing this point, Respondent "does not object to a modifier" before the term "abortion." Resp.Br.63 n.10. She simply says that "elective abortion" is "dated terminology." *Id.* To the contrary, the largest abortion provider in America, Planned Parenthood, currently uses the term "elective abortion."[5] And courts in just the last few years have too. *E.g., Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244 (2022); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 276 (2d Cir. 2021); *Reprod. Health Services v. Strange*, 3 F.4th 1240, 1254 (11th Cir. 2021); *see also Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 687 (Mo. banc 2006) ("Section 188.039, RSMo. Supp.2003, creates an informed consent requirement including a 24-hour waiting period

[5] *See, e.g.*, Planned Parenthood League of Massachusetts, https://www.plannedparenthood.org/planned-parenthood-massachusetts/campaigns/telemedicine-abortion ("If you plan on using insurance, please check with your insurance provider to determine your benefits for *elective abortion* and telehealth care.") (emphasis added); Planned Parenthood North Central States, https://www.plannedparenthood.org/planned-parenthood-north-central-states/get-care/preparing-for-your-visit/preparing-your-abortion-visit-iowa ("If you have commercial insurance, please contact your insurance company – ask if *elective abortion* is a benefit of your plan and whether you have a deductible or co-pay.") (emphasis added).

before elective abortions may be performed in Missouri."). At the very least, this Court should insert the term "elective" before "abortion."

V. Respondent's complaint that the Secretary included an "introduction" section and "road-mapping" content is meritless.

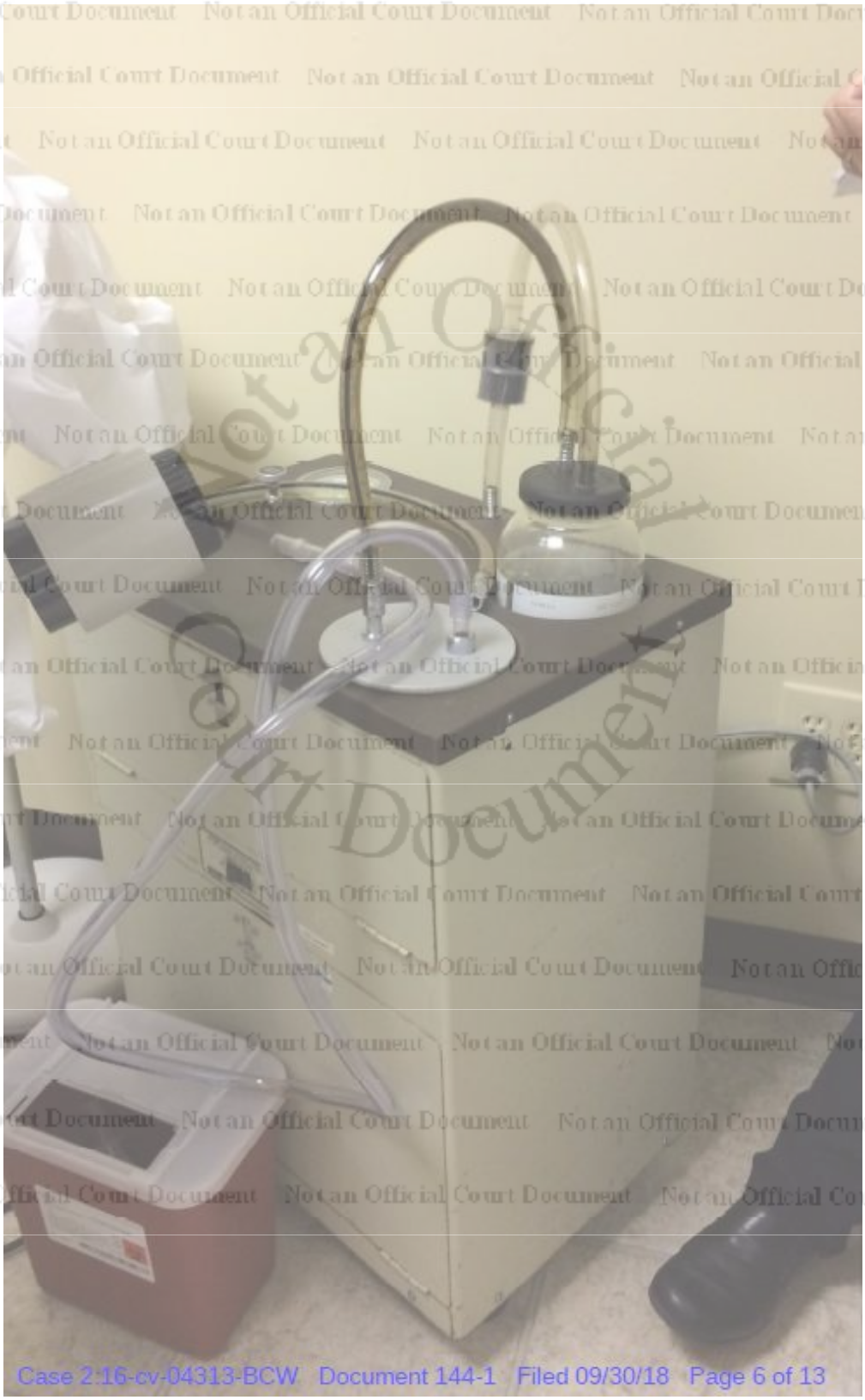
Respondent asks this Court (at 66) to disregard the Secretary's "Introduction and Summary of Argument" section in the opening brief as well as the Secretary's road-mapping content between the "Argument" heading and the first subheading. But no rule prohibits these common features. Rule 84.04 prescribes only the floor of what a brief "*shall* contain." Rule 84.04(a) (emphasis added). It does not prohibit including additional content. To hold otherwise would mean that no party could ever file a reply brief, because the rule says nothing about what a reply brief should include. Respondent does not dispute that the Secretary included everything required by Rule 84.04, nor that the Secretary's Argument section is "limited to those errors included in the 'Points Relied On'" section that preceded the Argument section. Rule 84.04(e). In any event, everything referenced in those road-mapping sections is later referenced in a Point-Relied-On subheading within the Argument section. *Compare, e.g.,* App.Br.10 *with* App.Br.31 (both discussing an abortion clinic's months-long use of moldy equipment on women).

So common are these road-mapping sections, in fact, that the attorney who signed Respondent's brief routinely uses them in this Court, both as lead counsel and co-counsel. *E.g.*, Br. of App., *Am. Civ. Liberties Union of Missouri v. Ashcroft*, No. WD82880, at 13 (June 24, 2019) ("Introduction" section before the "Argument"); Br. of App., *Malin v. Cole*

Cnty. Prosecuting Att'y, WD85703 (Jan. 18, 2023) ("Introduction" section before "Facts" section).

But in an abundance of caution, the Secretary reprints on the following page the picture of the moldy equipment a physician in Columbia used on women for months. It is telling that Respondent offers no response to the Secretary noting that the petitions would prevent health officials from responding to similar emergencies.

Statement of Deficiencies, Doc. 141-1, No. 2:16-cv-04313, at 6 (W.D. Mo. 2018).



CONCLUSION

The Court should reinstate the Secretary's language or remand for the trial court to explain its reasoning.

Dated: October 23, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 5,105 words, is in compliance with Missouri Supreme Court Rule 84.06(b) and Missouri Court of Appeals, Western District Rule 41, includes the information required by Rule 55.03, and includes information on how the brief was served on the opposing party. Pursuant to Rule 55.03(a), I hereby certify that the undersigned electronically signed the original version of this document.

/s/ Joshua M. Divine

CERTIFICATE OF SERVICE

I hereby certify that, on October 23, 2023, a true and correct copy of the foregoing was filed with the Court's electronic filing system to be served by electronic methods on counsel for all parties entered in the case.

/s/ Joshua M. Divine