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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ANNA FITZ-JAMES,	)	
	)	
Respondent,	)	
	)	
vs.	)	WD86595
	)	
JOHN ASHCROFT, MISSOURI SECRETARY OF STATE,	)	
	)	
Appellant.	)	
	)	

Appeal from the Circuit Court of Cole County

Division No. 1

Honorable Jon E. Beetem, Judge

Amicus Curiae Brief of Lawyers for Life, Inc.

in Support of Missouri Secretary of State

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IDENTITY AND INTEREST OF AMICUS CURIAE

Lawyers for Life, Inc. is a Missouri corporation and organization in good standing consisting of legal counsel, almost all licensed Missouri attorneys, who believe in the protection of innocent, unborn life and protection of women. These persons live, pay taxes, practice law, and vote in Missouri. The initiative proposals all threaten innocent, unborn life by dramatically changing unborn law in Missouri, and threatening said lives, and adversely affecting the mental and physical health and welfare of women, and all citizens of Missouri.

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JURISDICTIONAL STATEMENT

On September 25, 2023, the Secretary of State appealed from a September 25, 2023, Judgment of the Circuit Court of Cole County finding that the Secretary of State's summary portion of an official ballot titles for six initiative petitions were either argumentative or do not fairly describe the purposes or probable effect of the initiatives and certifying new ballot language for each proposal (D75).

Because this matter is not within the exclusive jurisdiction of the Supreme Court of Missouri, this Court has jurisdiction pursuant to Missouri Constitution article V, §3 (1875), as amended. See *Yes to Stop Callaway Committee v. Kirkpatrick*, 685 S.W.2d 209, 210 (Mo. App. W.D. 1984), and *Bergman v. Mills*, 988 S.W.2d 84,86 n.1 (Mo. App. W.D. 1984). Jurisdiction lies in the Western District under §477.070, RSMo.

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STATEMENT OF FACTS

Following the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), Missouri became one of the first states to ban abortion, except in medical-emergency situations. See MRS §188.017. In response, plaintiff initially filed eleven initiative petitions, now reduced to six (D79-84 p.2 of each, EX. A-F). All are directed to enshrining abortion rights as part of Missouri's Constitution.

The Secretary of State certified the official ballot title on July 26, 2023 (D8, p.1). Plaintiff filed suit in Cole County Circuit Court (D78, D87), and all six suits were consolidated into case no. 23AC-CC03167 (D121). The trial court heard oral arguments on September 11, 2023, and on September 25, 2023, entered a Judgment, certifying six different ballot summary proposals (D74). None of the language of the Secretary of State was used for any of the variations prepared by the trial court.

The Secretary filed Notice of Appeal on September 25, 2023 (D75), and this file was assigned number WC 86595. The plaintiff has not filed an appeal.

The texts of every ballot summary of the Secretary of State are recited below and also found in D19 pgs. A3, A5, A7, A9, A11. The texts of every trial court summary are also recited below and are found in D74 p.4-7 inclusive. The texts of each initiative petition are identified by the Document, Page, Exhibit, and Petition numbers in the table below (page 13 of this Brief). (Document numbers for the proposals are identified beginning with document number 34 and continuing to number 39, although the first summary statement (for Petition 2024-085) is Document 37).

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The text of each ballot summary of the Secretary of State, those of the trial court, and the six initiative proposals are as follows:

a. The ballot summary of the Secretary of State for initiative proposal 2024-085 (excluding fiscal note below) (D19 p. A3; App) recites:

Do you want to amend the Missouri Constitution to:

- allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;
- nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;
- allow for laws to be enacted regulating abortion procedures after Fetal Viability, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time; and
- require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding?

The trial court (D74 p.4) instead created the following initiative proposal for 2024-085:

Do you want to amend the Missouri Constitution to:

- establish a right to make decisions about reproductive health care, including abortion and contraceptives, with any governmental interference of that right presumed invalid;
- remove Missouri's ban on abortion;
- allow regulation of reproductive health care to improve or maintain the health of the patient;

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- allow abortion to be restricted or banned after Fetal Viability except to protect life or health of the woman;
- allow General Assembly to enact a parental consent requirement for abortion with an alternative authorization procedure; and declare government funding of abortion is not required?

b. The ballot summary of the Secretary of State for initiative proposal 2024-078 (excluding fiscal note below) (D19 p. A5;App) recites:

Do you want to amend the Missouri Constitution to:

- allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;
- nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;
- require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding; and
- prohibit any municipality, city, town, village, district, authority, public subdivision, or public corporation having the power to tax or regulate or the state of Missouri from regulating abortion procedures?

The trial court (D74 p.5) instead created the following Initiative proposal 2024-078

Do you want to amend the Missouri Constitution to:

- establish a right to make decisions about reproductive health care, including abortion and contraceptives, with any governmental interference of that right presumed invalid;
- remove Missouri's ban on abortion; and
- allow regulation of reproductive health care to improve or maintain the health of the patient?

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c. The ballot summary of the Secretary of State for initiative proposal 2024-080 (excluding fiscal note below) (D19 p.A7;App) recites:

Do you want to amend the Missouri Constitution to:

- allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;
- nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;
- allow for laws to be enacted regulating abortion procedures after 24 weeks, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time; and
- require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding?

The trial court (D74 p.5,6) instead created the following Initiative proposal 2024-080

Do you want to amend the Missouri Constitution to:

- establish a right to make decisions about reproductive health care, including abortion and contraceptives, with any governmental interference of that right presumed invalid;
- remove Missouri's ban on abortion;
- allow regulation of reproductive health care to improve or maintain the health of the patient;
- allow abortion to be restricted or banned after 24 weeks except to protect life or health of the woman; and
- allow General Assembly to enact a parental consent requirement for abortion with an alternative authorization procedure?

d. The ballot summary of the Secretary of State for initiative proposal 2024-082 (excluding fiscal note below) (D19 p.A9; App.) recites:

Do you want to amend the Missouri Constitution to:

- allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;
- nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;
- allow for laws to be enacted regulating abortion procedures after 24 weeks, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time; and
- require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding?

The trial court (D74 p.6) instead created the following Initiative proposal 2024-082

Do you want to amend the Missouri Constitution to:

- establish a right to make decisions about reproductive health care, including abortion and contraceptives, with any governmental interference of that right presumed invalid;
- remove Missouri's ban on abortion;
- allow regulation of reproductive health care to improve or maintain the health of the patient; and
- allow abortion to be restricted or banned after 24 weeks except to protect life or health of the woman?

e. The ballot summary of the Secretary of State for initiative proposal 2024-086 (excluding fiscal note below) (D19 p.A11;App) recites:

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Do you want to amend the Missouri Constitution to:

- allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;
- nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;
- allow for laws to be enacted regulating abortion procedures after Fetal Viability, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time; and
- require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding?

The trial court (D74 p.6,7) instead created the following Initiative proposal 2024-086:

Do you want to amend the Missouri Constitution to:

- establish a right to make decisions about reproductive health care, including abortion and contraceptives, with any governmental interference of that right presumed invalid;
- remove Missouri's ban on abortion;
- allow regulation of reproductive health care to improve or maintain the health of the patient; and
- allow abortion to be restricted or banned after Fetal Viability except to protect life or health of the woman?

f. The ballot summary of the Secretary of State for initiative proposal 2024-087 (excluding fiscal note below) (D19 p.7) recites:

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Do you want to amend the Missouri Constitution to:

- allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;
- nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;
- allow for laws to be enacted regulating abortion procedures after Fetal Viability, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time; and
- require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding?

The trial court (D74 p.7) instead created the following Initiative proposal 2024-087:

Do you want to amend the Missouri Constitution to:

- establish a right to make decisions about reproductive health care, including abortion and contraceptives, with any governmental interference of that right presumed invalid;
- remove Missouri's ban on abortion;
- allow regulation of reproductive health care to improve or maintain the health of the patient;
- allow abortion to be restricted or banned after Fetal Viability except to protect life or health of the woman; and
- declare government funding of abortion is not required?

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The full text of the six initiative petitions are set forth in following references:

Document	Page	Exhibit	Petition #
34	2	A	2024-078
35	2	B	2024-080
36	2	C	2024-082
37	2	D	2024-085
38	2	E	2024-086
39	2	F	2024-087

(Note that the trial court organized the numbers of the Initiative Petitions into Counts not in sequence with the above document and petition numbers. For example, the first initiative petition addressed on page 4 of its Judgment is for 2024-085 and is identified as Count I. This is thus Document 37. The petitions can also be found in other parts of the record, for example D67 -72, Exhibits MM-RR.

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POINTS RELIED ON

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY USURPING THE EXECUTIVE CONSTITUTIONAL ROLE OF THE MISSOURI SECRETARY OF STATE. IT ENTIRELY RE-AUTHORED EVERY PARAGRAPH OF EVERY BALLOT PROPOSAL, NAMELY INITIATIVE PROPOSALS NUMBERS 2024-085, 2024-078, 2024-080, 2024-082, 2024-086, AND 2024-087, IN VIOLATION OF ARTICLE IV §12 AND 14 OF THE MISSOURI CONSTITUTION AND MISSOURI REVISED STATUTES CHAPTERS 115 AND 116.

1. It is primarily the role of the Missouri Secretary of State to craft ballot summary language for initiative ballot proposals.

Albright v. Fischer, 64 S.W. 106 (Sup. Ct. Mo. 1901)

Article IV section 12 Missouri Constitution

Article IV section 14 Missouri Constitution

Chapter 115 Revised Statutes Missouri

Chapter 116 Revised Statutes of Missouri

Missouri Revised Statutes section 116.334

2. The courts have a duty to exercise "restraint and trepidation" when reviewing summary statements.

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

Missourians Against Cloning v. Carnahan, 190 S.W.3d 451 (Mo. App. W.D. 2006)

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Missouri Municipal League v. Carnahan 364 S.W.3d 548 (W.D. 2011)

State ex rel Hwy and Transportation Commission v. Pruneau, 652 S.W.2d 281 (Mo. App. 1983)

3. Whether an initiative ballot summary statement proposed by the Secretary of State is the best language is not the test .

Bergman v. Mills, 988 S.W.2d 84 (Mo. W.D. 1984)

Overfelt v. McCaskill, 81 S.W.3d 732 (W.D. 2002)

Missourians Against Cloning v. Carnahan, 190 S.W.3d 451 (Mo. App. W.D. 2006)

4. The plaintiff respondent failed to fulfill its burden of proof to demonstrate that the complained of language is insufficient or unfair.

Bergman v. Mills, 988 S.W.2d 84 (Mo. W.D. 1984)

Missouri Municipal League v Carnahan, 303 S.W. 3d 548 (Mo. App W.D. 2010);

Missourians Against Cloning v. Carnahan, 190 S.W.3d 451 (Mo. App. W.D. 2006)

5. The Secretary of State has great discretion in crafting ballot language.

United Gamefowl Breeders v. Nixon, 195 S.W.3d 137 (Mo. banc 2000)

State ex rel Hwy and Transportation Commission v. Pruneau, 652 S.W.2d 281 (Mo. App. 1983)

Missouri Municipal League v. Carnahan 364 S.W.3d 548 (Mo. W.D. 2011)

Bergman v. Mills, 988 S.W.2d 84 (Mo. W.D. 1984)

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B. THE TRIAL COURT'S CONCLUSION THAT THIRTEEN DIFFERENT PHRASES INCLUDED IN THE SECRETARY'S STATEMENT WERE EITHER ARGUMENTATIVE OR DO NOT FAIRILY DESCRIBE THE PURPOSE OR PROBABLE EFFECT OF THE INITIATIVE WAS UNSUPPORTED AND THE SUMMARY STATEMENTS OF THE SECRETARY SHOULD BE REINSTATED.

1. The standard of review is de novo.

Millers Mutual Insurance Association v Shell Oil Company, 959 S.W. 2d 864, 866-67 (Mo. App. 1997).

ITT Financial Corp v. Mid- America Marine Supply, 854 S.W.2d 371 (Mo. banc 1993)

Supreme Court Rule 55.27(6)

2. The ballot summary language prepared by the Secretary of State was not deceptive, misleading, incorrect, unfair, or confusing and the trial court did not claim such was the case.

3. The trial court's holding that one of three possibilities was the reason for its findings, was alternate, vague and ambiguous, and inadequate to form the basis for its Judgment, and the Judgment in this regard simply improperly recited unsupported conclusions. The actual reason for denial of the Secretary's summary language cannot be determined.

Smelling v. Washington, 963 S.W.2d 366 (E.D. Ct. App. 1998)

4. The phrases of the Secretary of State cited by the court were not argumentative, but even if one or more are considered "argumentative", such

does not disqualify use of these terms. Just because someone does not sympathize with terminology does not carry with it a brand of "unfairness".

State ex rel Ohioans United for Reproductive Rights v. Ohio Ballot Board, No.2023-1088 WL 6120070 September 19, 2023

Hancock v Secretary of State, 885 S.W. 2d 42 (Mo. App. W.D. 1994)

Humane Society of Missouri v Beeton, 317 S.W. 3d 669 (Mo. W.D. 2010)

Missourians Against Cloning v. Carnahan, 190 S.W.3d 451 (Mo. App. W.D. 2006)

5. Contrary to the assertion of the trial court, the Secretary's ballot summaries fairly describe the purpose or probable effect of the initiatives. The proposed initiatives would undoubtedly accomplish the result the Secretary of State describes.

6. Language of the Secretary of State summarizing the ballot proposals is accurate.

Missouri Revised Statutes sections 1.205, 188.010, 188.017, 188.020, 188.027, 188.028, , 188.038

C. THE PROPOSED SUMMARY STATEMENTS OF THE TRIAL COURT FAIL TO DEFER TO THE LANGUAGE OF THE SECRETARY, ARE BIASED, MISSTATE THE MEANING OF THE INITIATATIVE PETITIONS, FAIL TO ADVISE VOTERS AS TO THE PROBABLE CONSEQUENCES IF THE PETITION(S) ARE APPROVED, AND OMIT IMPORTANT INFORMATION NECESSARY FOR VOTERS TO MAKE INFORMED DECISIONS.

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1. The Trial Court Failed to Defer to the summary statement language of the Secretary whose assigned role is to prepare the ballot summaries. Furthermore, even if one version is arguably better than another, the Secretary's language should be used.

2. The Trial Court used biased language.

3. The Trial Court misstated important parts of the summary statements.

Union Electric Co. v. Kirkpatrick, 606 S.W.2d 658 (S. Ct. en banc 1980)

Planned Parenthood of Mid-Missouri et al v. Dempsey, 167 F.3d 458 (1999)

Coe v. Melahn, 958 F.2d 223 (1992)

Planned Parenthood of Kansas City and Mid- Missouri v. Brownback, 799 F Supp.2d 1218 (2011)

4. What the trial court failed to include

a) Unborn child,

State ex rel Ohioans United for Reproductive Rights v. Ohio Ballot Board, No.2023-1088 WL 6120070 September 19, 2023

Missouri Revised Statutes sections 188.010, 188.017, 188.056

b) End of life

c) Allowing abortions until birth,

State ex rel Ohioans United for Reproductive Rights v. Ohio Ballot Board, No.2023-1088 WL 6120070 September 19, 2023

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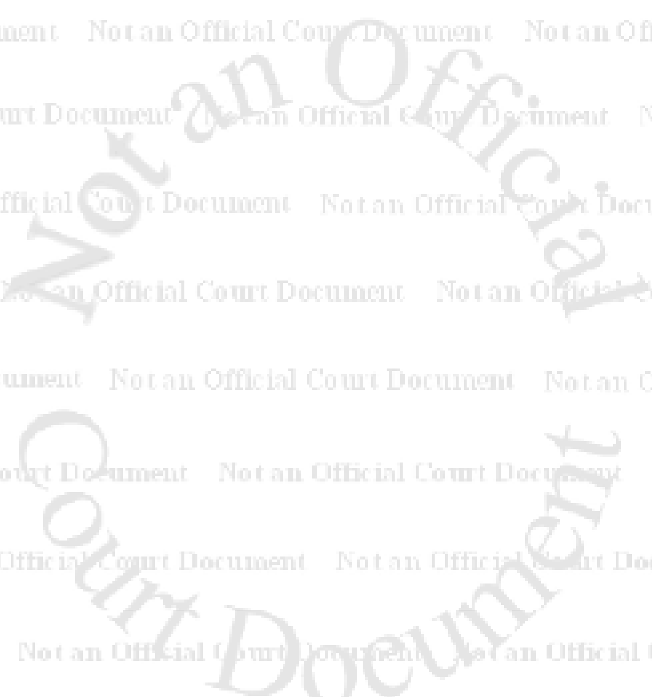
d) Longstanding Missouri law protecting the right to life would be nullified.

e) No medical license is required nor is there potential of being subject to medical malpractice.



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ARGUMENT

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY USURPING THE EXECUTIVE CONSTITUTIONAL ROLE OF THE MISSOURI SECRETARY OF STATE. IT ENTIRELY RE-AUTHORED EVERY PARAGRAPH OF EVERY BALLOT PROPOSAL, NAMELY INITIATIVE PROPOSALS NUMBERS 2024-085, 2024-078, 2024-080, 2024-082, 2024-086, AND 2024-087, IN VIOLATION OF ARTICLE IV §12 AND 14 OF THE MISSOURI CONSTITUTION AND MISSOURI REVISED STATUTES CHAPTERS 115 AND 116.

1. It is primarily the role of the Missouri Secretary of State to craft ballot summary language for initiative ballot proposals.

Missouri law grants the legislature authority to pass legislation, but the constitution grants the Secretary special authority pertaining to initiative and referendum petitions. The Secretary of State, an elected official himself, is the chief election officer of the state. See Chapters 115 and 116 of the Revised Missouri Statutes and Article IV §12 and 14 Missouri Constitution (App. A25, 26).

Chapter 116 sets forth very many election legal duties of the Secretary. The legislature has delegated the role of preparing the ballot authority to the Secretary of State. In particular see section 116.334 RMS (App.28). Missouri law defines the Secretary of State as the expert in drafting the Summary Statement, and the Attorney General as the expert in reviewing them. The powers of government were long ago divided into three distinct branches, and neither shall execute powers belonging to the other. *Albright v Fisher*, 64 S.W. 106 (Sup Ct. Mo. 1901). Nor does the Constitution grant legislative power to the General Assembly. *Bergman v. Mills*, 988 S.W. 2d 84, 89 (Mo. App. W.D. 1999). Although the courts

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serve some limited role reviewing language of the Secretary of State, changing every clause of six ballot summaries crosses the line.

2. The courts have a duty to exercise "restraint and trepidation" when reviewing summary statements.

Courts insist that "restraint and trepidation" be exercised when summary statements are reviewed. *Missourians Against Cloning v Carnahan*, 190 S.W. 3d 451, 456 (Mo. App. W.D. 2006); *Missouri Municipal League v. Carnahan*, 364 S.W. 3d 548 (Mo. W.D. 2011). In general, courts of the state may not interfere with, or attempt to control, the exercise of discretion by the executive department in those areas where the law visits such right to exercise judgment in a discretionary manner with the executive branch of government. *State ex rel Mo. Hiway and Transportation Commission v Pruneau*, 652 S.W. 2d 281, 289 (Mo. App. 1983).

Those few cases that have drawn distinctions pertaining to the Secretary's choice of ballot summary language, and re-worded his wording, have done so sparingly, revising only a small part of the Secretary's summary statement language.

It is true that minimal adjustments, if any, are sometimes undertaken by the courts, but the courts role is not to re-write the entire summary. The trial court, in this case, however, re-wrote every clause of all six Secretary of State summaries, and thus abused its authority.

A comparison of the language of the Secretary (recited in the aforesaid Statement of Facts), to the version of the trial court, (also recited in said Statement of Facts), indeed documents that the trial court completely rewrote every clause of every ballot proposal of the Secretary. With all due respect, the trial court stole the function of the executive branch, ignoring its constitutional limitations, and replaced the Secretary's product, "lock, stock, and barrel", with its own opinion.

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This was "grand larceny in the courtroom". The trial court in effect cast aside the executive branch of government by acting in this aspect like Missouri had no constitution, entirely taking over the role of summary statement authorship. This massive invasion of the trial court into the executive province of the Secretary is even more puzzling because the trial court herein in the second paragraph of the first page of his Judgment (D74 p.1) concedes "The Court's role in the initiative process is limited". However, the trial court in fact did not limit its role in re-authoring six ballot summaries in any way. The trial court committed grave error by not applying the very hornbook law it agrees on the first page of its Judgment should apply in reviewing initiative ballot summaries.

3. Whether an initiative ballot summary statement proposed by the Secretary of State is the best language is not the test .

Whether the summary statement prepared by the Secretary is the best language for describing an initiative is not the test even if language proposed by others might be preferable. "Whether the summary statement prepared by the Secretary of State is the best language…is not the test". *Bergman v. Mills*, 988 S.W. 2d 84, 92 (Mo. W.D. 1984). Whether the summary prepared by the Secretary is the best language for describing the ballot initiative is not the test whether the title is sufficient or unfair *Overfelt v. McCaskill*, 81 S.W. 3d 732, 738 (Mo. App. W.D. 2002). Similarly, in *Missourians Against Cloning v. Carnahan*, 190 S.W. 3d 451 (Mo. App. W.D. 2006) language of the summary statement that the proposal would "ban human cloning or attempted cloning" was held not unfair or insufficient, despite the claim that the amendment would actually result in human cloning. The language of the secretary prevailed even though a different version was suggested.

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4. The plaintiff respondent failed to fulfill its burden of proof to demonstrate that the complained of language is insufficient or unfair.

The burden is on opponents to show that the language of the Secretary is insufficient or unfair. *Bergman, supra*, p. 92. Opponents have the burden of demonstrating in the first instance that the language is insufficient or unfair. *Missouri Municipal League v. Carnahan*, 303 S.W. 3d 573, 582 (Mo. App W.D. 2010); *Missourians Against Cloning v. Carnahan, supra*, p.456 .

In the present case, the Judgment fails to explain or justify any of its conclusions (D74). There is a vacuum of "proof". Other than its total replacement of every single phrase of every single summary statement, the opinion is slightly over only three pages. The first two pages recite general case law. This leaves only the bottom part of page 2 of the Judgment, and page 3, which mainly recites conclusions as to what the court sees as unacceptable verbiage. The point made here is that, in a case with hundreds of pages of pleadings and briefs, the Judgment itself is barren of substance. This demonstrates that the burden of proof needed to overrule the Secretary of State's carefully prepared language has not been met.[1]

5. The Secretary of State has great discretion in crafting ballot language.

Courts have given wide discretion and deference to the Secretary of State because of his constitutional and statutory authority over the initiative process. See

[1] The trial court, in footnote 1 on page 2 of its Judgment (D74) states that the Secretary's proposals were not sent until September 18, 2023, but the Secretary was asked to present them a week earlier and implies this is an excuse to "dispense with a detailed analysis of these phrases". With all due respect, the summary statements of the Secretary of State were made part of the court file, including being quoted in all of Plaintiff's Petitions, well before the Judgment was rendered on September 25, 2023. The ballot summaries can be found, for example, in the original Petitions filed July 27, 2023 (D105) and certified by the Secretary of State before that (D105 p.4). The Secretary should not be blamed for authorship of an unsupported Judgment.

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State ex rel Mo. Hiway and Transportation Commission v. Pruneau, *supra*. Further examples are *United Gamefowl Breeders v. Nixon*, 19 S.W. 3d 137 (Mo. Banc 2000) where an exemption for hunting and rodeo was omitted and failed to inform voters further but was nevertheless held not "insufficient or unfair", Bergman v. Mills, 988 S.W. 2d 84 (Mo. App. W.D. 1999) upholding a summary statement prepared by the Secretary as not deceptive or misleading, and *Missouri Municipal League v Carnahan*, 364 S.W. 3d 548 (Mo. W.S. 2011) holding a summary statement was not misleading.

B. THE TRIAL COURT'S CONCLUSION THAT THIRTEEN DIFFERENT PHASES INCLUDED IN THE SECRETARY'S STATEMENT WERE EITHER ARGUMENTATIVE OR DO NOT FAIRLY DESCRIBE THE PURPOSE OR PROBABLE EFFECT OF THE INITIATIVE WAS UNSUPPORTED, AND THE SUMMARY STATEMENTS OF THE SECRETARY SHOULD BE REINSTATED.

1. The standard of review is de novo.

It is first pointed out that although the court heard argument and entered Judgment, this ruling is a de novo review, without deference to the trial court's ruling. S.C. Rule 55.27 (6). *Millers Mutual Insurance Association v Shell Oil Company*, 959 S.W. 2d 864, 866-67 (Mo. App. 1997). *ITT Financial Corp v. Mid-America Marine Supply*, 854 S.W.2d 371 (Mo. banc 1993)

2. The ballot summary language prepared by the Secretary of State was not deceptive, misleading, incorrect, unfair, or confusing and the trial court did not claim such was the case.

Pages two and three of the Judgment (D74 p. 2, 3) list thirteen different clauses taken from various summary statements of the Secretary of State.

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The Judgment, however, says more about "what it doesn't say, than what it does say". By this we mean the Judgment (D74) does not claim that the Secretary's language is deceptive or misleading. It does not assert that any of the verbiage is incorrect, wrong, or false. It does not say that the language of the Secretary is unfair. It does not claim the language is confusing (except possibly with respect to the precise language of requiring the government not to discriminate – which it nevertheless found to be "ancillary") (D74 p.4). The only complaint about the Secretary's language by the court was that the phrases cited are either argumentative or do not fairly describe the purposes or probable effect of the initiative (D74 p.2).

Language which is true, not misleading or deceptive, not unfair, not confusing, and addresses the subject passes the test. Furthermore, how can, under the law, thirteen different phrases supported by case law and statutory authority be entirely trashed? Finding every single line of every six ballot summaries not usable because someone may or may not find one or more argumentative, is a massive overreaction, resulting in an erroneous ruling.

3. The trial court's holding that one of three possibilities was the reason for its findings, was alternate, vague and ambiguous, and inadequate to form the basis for its Judgment, and the Judgment in this regard simply improperly recited unsupported conclusions. The actual reason for denial of the Secretary's summary language cannot be determined.

The court's selected use of the word "or" is pointed out. Specifically, the Judgment asserts that "certain phrases included in the Secretary's summary statement are problematic in that they are either argumentative or do not fairly describe the purposes or probable effect of the initiative". (D 74 pgs. 2 and 3). The comment of the court lacks specificity and merely recites a conclusion. *Smelling v.*

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Washington, 963 S.W. 366, 367 (E.D. Ct. App. 1998). No one can say whether this ruling rests on one, some, or any of the recited phrases being allegedly "argumentative" or whether one or more do not fairly describe the purposes or probable effect of the initiative. All thirteen are lumped together. Readers of the key part of this holding are at a total loss as to the basis for the ruling. The actual reason for denial of the Secretary's summary language cannot be determined and the defendant is unable to guess which reason(s) allegedly justify the ruling of the court.

4. The phrases of the Secretary of State cited by the court were not argumentative, but even if one or more are considered "argumentative", such does not disqualify use of these terms. Just because someone does not sympathize with terminology does not carry with it a brand of "unfairness".

Even if one or more of the complained of phrases were believed by someone to be "argumentative", for example the plaintiff, such does not disqualify use of these terms in a ballot summary. Use of a term someone does not sympathize with, does not carry with it a brand of "unfairness".

Several Missouri examples of this, where ballot terminology could be claimed to be argumentative, are as follows. First, a ballot summary was approved which said that spending cuts would be required by a proposed amendment, and such would affect prisons, schools, colleges. Many voters after reading this allegedly "argumentative" language, could perhaps be persuaded to vote "no" because of the verbiage, but such was held not insufficient or unfair. See *Hancock v Secretary of State*, 885 S.W. 2d 42 (Mo. App. W.D. 1994). In another Western District case, including the terminology "puppy mill" on a ballot summary was held not unfair. Many voters would seem to be opposed to the concept of a "puppy mill", but the ballot summary was held not unfair. *Humane Society of Missouri v*

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Beeton, 317 S.W. 3d 669 (W.D. 2010). See also *Stickler v. Ashcroft, 539 S.W.3d 702,717* (Mo. App. W.D. 2017) holding the term "fair share" to describe union dues was not insufficient or unfair.

Use of the term "unborn child" in a ballot summary was very recently addressed by the Ohio Supreme Court in *State ex rel Ohioans United for Reproductive Rights v Ohio Ballot Board,* No. 2023-1088 WL 6120070, decided September 19, 2023 (App.A1-25). The great majority of the court found that use of the term "unborn child" did not make ballot language improperly argumentative (par. 14 of WL publication, *supra*). The term "unborn child" was held not factually inaccurate and included on the ballot summary! It was asserted that the term elicits a moral judgment, however, the Supreme Court held that the term:

> "does not constitute improper persuasion. If the ballot language is factually accurate and addresses a subject that is in the proposed amendment itself, it should not be deemed argumentative" (citing numerous other authorities (p. 14 of above WL publication).

In the present case, the trial court on the third page of its Judgment (D74 p.3) specifically rejected use of the term "unborn child", included by the Secretary in its summaries. (See pages 7-14 of this Brief and also showing that the trial court deleted the term "unborn child"). This accurate term should have not been labeled "argumentative" by the trial court herein.

The Ohio Supreme Court further found other expressions permissible because they are accurate, such as its proposed amendment would always allow an unborn child to be aborted at any stage of pregnancy (*State ex rel Ohioans, supra*, p.12, 14 and App.A24 filed herein). The Ohio ballot summary is similar to the Secretary of State's ballot summary, which says the proposals here would

guarantee the right of any woman to end the life of their unborn child at any time" (D19 and previous cites).

In other words, accurate information does not mislead voters. In the present case, the court has not even claimed that any of the complained phrases are inaccurate or misleading.

The Ohio Supreme Court also rejected a complaint that its ballot language enumerated only abortion, when the text there applied to five types of decisions . Nevertheless, it found naming only abortion was appropriate, because the amendment largely concerned abortion, addressees abortion in specific detail, deals with "fetal viability", etc. *State ex rel Ohioans, supra*, p.8. This approach greatly emphasizing abortion in its proposal is similar to that of the Missouri initiative petitions also, which greatly stress abortion, and where other situations are not really an issue, but are recited to gain sympathy with voters.

5. Contrary to the assertion of the trial court, the Secretary's ballot summaries fairly describe the purposes or probable effect of the initiatives. The proposed initiatives would undoubtedly accomplish the result the Secretary of State describes.

The purpose of the initiatives is to, of course, make abortion legal in the State of Missouri "without interference of the state", (see for example, D19 p.14 par.3 line3) and such of course would be the probable effect of the initiative if passed. This would be accomplished by a host of dramatic changes under everyone's reading of the initiative petitions[2]. The petitions reach out in many ways to unregulate and unrestrict abortions as described herein.

[2] Discussion herein mainly references document 19 App.p3., which contains common language.

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Each permits the ending of an unborn life any time before birth (D19 pA4 par.2 line3,4), permits anyone to assist with an abortion (D19 p.A4 par.5 line3), grants civil and criminal immunities (D19 p.A4 par.5 full par.), requiring no license to do so (*supra*, par.5), nor would it require insurance to protect a woman from poor care (immunity ,par.5). Variations only superficially require parental consent (D19 P.A8 par.6), granting the decision to abort to "health care professionals" above thus replacing parental input and guidance, and do not require even parental notice (*supra*, par.6). None of the proposals outlaw required use of taxpayer funds to pay for the cost of abortions.

Numerous provisions of the proposals diminish the role of the Missouri general assembly to only superficial status and contain multiple ways for abortion to be continued until the birthing process. These passages insist that there shall be no denial, interference, delay, or other restriction of this right (par.3), superficially limit abortions to a period of time even after "fetal viability" or "twenty-four weeks" (par.4 line 2) but then carve further broad exceptions thereafter for reasons to protect the life or physical or mental health of the mother (par. 4 line 4), to be decided by a healthcare professional (par.4 line3). The texts enshrine the right to abortion as a constitutional right (D19 p.A4 third par.), and say that government laws on the subject are presumed invalid (D19 p.A4 par.3 line4) and must have a "compelling" governmental interest for limited purposes (*supra*, par.3 line3). A person's "autonomous decision making" is made a constitutional right (*supra*, par.3 line3), and any infringement (*supra*, par.3 line7) of a person' rights is outlawed.

The above provisions, individually and in combination, would at least probably result in unregulated and unrestricted abortion, nullifying Missouri laws protecting the right to life, allowing abortions until birth, create immunity for

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anyone even assisting in an abortion, and result in dangerous conditions to the mother due to removal of Missouri's legislative protections.

6. Language of the Secretary of State summarizing the ballot proposals is accurate.

The following is somewhat repetitive of the prior point which deals with the purposes or probable effect of the initiative. Here we show the Secretary's summary statements are accurate.

It is accurate to say, the texts of the proposals de-regulate and fail to restrict abortions (see above discussion). Prior rules are abolished and replaced by constitutional rights that may not be infringed upon (*supra,* par.2 line1). These old statutory protections found, for example, in sections 188 and 1.205 of Missouri statutes, were created to protect women and their unborn children. They would be abolished because of the broad language of the proposals. When the Secretary in his ballot summaries says that the proposals would nullify longstanding Missouri laws protecting the mother and unborn child, these would include a legion of laws passed over decades. See for example, RSMo.1.205(2) 1986 unborn children have protectable interests in life, health, and well-being; 188.010 (Defend the Right to Life of all humans, born and unborn; 188.017 Right to Life of the Unborn Child Act; 188.020 1974 (physician required to perform abortion); 188.027 1979 (informed consent); 188.028 1979 (minor protection); 188.038 (racial and Down's Syndrome discrimination). There are over fifteen (15) more that could be added to the list. With these protections removed, abortions would become more dangerous than they are now. The dramatic change of law would of course be fatal, and obviously more dangerous, for the unborn.

The proposals would make chemical abortion legal in Missouri. They are now illegal. The proposals do not require that a licensed physician prescribe the pills, be present, or monitor the well-being of the patient. No one could be prosecuted (supra, par.5). A physician would no longer be needed to prescribe the pills if the petitions passed. Anyone can "assist" (*supra*, par.5 second sentence). All of these circumstances would cause abortions to be dangerous, like the Secretary said. Any attempted regulations or restrictions prior to Fetal Viability or 24 weeks are not allowed, and the vast majority of abortions happen well before said time anyway. Nevertheless, abortions after Fetal Viability are easily allowed, as previously explained, because of exceptions to protect the life or physical or mental health of the mother. Subsequently, actions by the government are presumed invalid, and a limited compelling interest standard, with strict scrutiny, is imposed. The mother has "autonomous decision making authority", and broad exceptions and conditions allow abortion at any time, from conception to live birth, and the potential for "partial birth abortions" (citation previously supplied).

Since requiring medical malpractice insurance would be an "infringement" on the right to an abortion, and as anyone could "assist" with an abortion, it is accurate to say no medical license is required. All penalties, criminal and civil, would be outlawed, so no one could be accused of medical malpractice .

Since by definition an abortion ends the life of the unborn child, it is accurate to say this "ends the life". Present Missouri law grants the unborn "the right to life" (see previous citations), so these proposals would truly end this "right to life".

There is no time constraint on an abortion being performed because of all the broad constitutional rights, conditions, exceptions, etc. Such being the case, partial birth abortion would then be allowed, and allowed, if for no other reason for any

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mental and physical health reasons decided by any health provider who probably the patient doesn't even know.

Proposals either apply to a minor in the sense that they do not exclude minors and apply to everybody, or they identify minors but allow someone other than a parent to decide whether an abortion should be performed. So, there are no controls anymore for abortions on a minor.

There is a potential of tax-payer funding because it can always be argued that this newly created constitutional right is part of "health care" which the government supports with many of its programs.

Thus, every proposal permits the ending of an unborn life any time before birth, unrestricted and unregulated abortion, permits anyone to assist with an abortion, grants civil and criminal immunities, requiring no license to do so, nor requiring insurance to protect a woman from poor care. Variations only superficially require parental consent, easily avoided, and none of the proposals outlaw use of taxpayer funds to pay for the cost of abortions. Numerous provisions of the proposals diminish the role of the Missouri general assembly to only superficial status and contain multiple ways for abortion to be continued until the birthing process. These passages insist that ther shall be no denial, interference, delay, or other restriction of this right, superficially limit abortions to a period of time even after "fetal viability" or "twenty-four weeks" but then carve further broad exceptions thereafter for the broad reasons of mental or physical health of the mother, to be decided by any healthcare provider. The texts enshrine the right to abortion as a constitutional right and say that government laws on the subject are presumed invalid and must have a "compelling" governmental interest for limited purposes. A person's "autonomous decision making" is made a constitutional right, and any infringement of a person' rights is outlawed.

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Missouri law would be dramatically changed if any of the initiative proposals passed.

The trial court did not state any of the above is incorrect, instead improperly labeling thirteen phrases that "may" be argumentative. Truth, of course, has always been a defense in law. The above facts being true, the summary statement clauses of the Secretary of State set forth on pages 2 and 3 of the Judgment are true and not argumentative.

C. THE PROPOSED SUMMARY STATEMENTS OF THE TRIAL COURT FAIL TO DEFER TO THE LANGUAGE OF THE SECRETARY, ARE BIASED, MISSTATE THE MEANING OF THE INITIATATIVE PETITIONS, FAIL TO ADVISE VOTERS AS TO THE PROBABLE CONSEQUENCES IF THE PETITION(S) ARE APPROVED, AND OMIT IMPORTANT INFORMATION NECESSARY FOR VOTERS TO MAKE INFORMED DECISIONS.

1. The Trial Court Failed to Defer to the summary statement language of the Secretary whose assigned role is to prepare the ballot summaries. Furthermore, even if one version is arguably better than another, the Secretary's language should be used.

The point was earlier addressed in paragraphs A1 and A3 of this Brief and will not be repeated.

2. The trial court used biased language.

The trial court has not accused the Secretary of using "biased" language (D74). However, it has used biased language in its ballot summaries. The term *"reproductive health care"*, wisely not used by the Secretary of State, is a broad, expressive term which according to paragraph 2 of the initiative petitions (D19

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App. P.3), pertains to named subjects, but also the petitions say the term is "not limited" to these (*supra*, par.2 line2). Does this include transgender surgery for the youth? What preservation of conscience rights would remain, if any?

The term *"reproductive health care"* is used a second time (that is, both in bullet points 1 and 3), repeating and compounding the error.

Use of the term *"care"* is particularly inappropriate when it is assumed that "care" includes taking the life of an unborn child, and not only is it false that this is "care", more importantly it misleads the voters into believing such is "care".

Next, use of the terminology *"governmental interference",* as is the case in the trial court's first bullet point (D74), would leave voters with the concept that the government interferes, instead providing services, for the people it represents. Immediately the bullet point sets up teams with the government being on one side, and voters on the other. No one likes "government interference". The language would coach and school voters to vote in favor of the petitions, and against "government interference", regardless of the merits or lack of merits of other provisions. The term "government interference" should have no role in language of the referendums.

The language of the trial court that the proposals "allow regulation of reproductive health care to improve or maintain the health of the patient" is misleading and deceptive in that the "health care", which is really the subject of the proposals, includes abortion. The proposals want voters to assume that abortion, which is the main subject for the initiatives by far, improves or maintains the health of the patient. Furthermore, the passage assumes that the pregnant woman is the only "patient", ignoring the status of the unborn child.

3. The trial court misstated important parts of the summary statements.

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The suggested summary of the court is wrong in reciting abortion can be "banned" after Fetal Viability except to protect the life or health of the woman, because paragraph 4 of the first line of the proposals say the general assembly may "regulate the provision of abortion after Fetal Viability". This petition language is different than saying abortion can be banned after Fetal Viability. But this is what the fourth bullet point of what the trial court proposes (D74 p.4). The trial court asserts in its bullet point 4 that "abortion may be restricted or banned after Fetal Viability" (D74 p.4), which is not what the petitions say. There is a gigantic difference between regulating something and banning it. See *Union Electric Co. v. Kirkpatrick,* 606 S.W.2d 658, 660 (S. Ct. en banc 1980). "Regulation" cannot prohibit the objective sought.

The same clause (health of the woman) of the trial court's version (*supra*, p4 second line of fourth bullet point) fails to include the word, "mental" in its term "protect the life or health of the woman". It does not say "protect the life or mental or physical health of the woman ", which is the wording of all the initiatives and therefore misstates the actual petitions of the plaintiff.

For the version reported on p. 4 of the Judgment (D74) that specifically address a "minor", it mistakenly reports the initiative has a parental consent requirement (with an alternative authorization procedure). Instead, in this initiative petition the parent or guardian is bypassed if any treating health care professional believes an abortion is needed to protect the life or physical or mental health of the pregnant person. In other words, the parent is replaced, even without notice to the parent, according to the wording of the ballot petitions. The health care person makes the decision, not the parent (see par. 6). The wording of the trial court sounds like the parent is in control, which is definitely not the case. The trial court's wording is simply wrong.

The last line of the court suggested ballot summary (D74) says the petitions declare that government funding is not required. This sounds like tax money will not be used to pay for abortion, when this is likely not the case. This is because suits will be filed that claim that government money should be used to pay for health care. It will be said because of the broad language of the initiative, abortion is health care. Suits will be filed because it will be claimed that denial discriminates against women wanting to have abortion paid for from insurance or government assistance. Suits have been filed on this and similar theories. See for example, *Planned Parenthood of Mid-Missouri et al v. Dempsey*, 167 F.3d 458 (1999), *Coe v. Melahn*, 958 F.2d 223 (1992), and *Planned Parenthood of Kansas City and Mid-Missouri v. Brownback*, 799 F.Supp.2d 1218 (2011).

The summary statement that "government funding is not required" should not be included in the ballot summary. The trial court creates the wrong impression that the proposals mean tax monies will not be spent to support abortion if the petitions pass, which is incorrect. A more accurate description, that of the Secretary, is that the petitions would "potentially include tax-payer funding".

4. What the trial court failed to include.

This brings us to the subject of <u>what the trial court has NOT included in its suggested ballot summaries.</u> In other words, what was OMITTED. The trial court (D74 p.2) states that voters should be provided with enough information…to make an informed decision, but then inconsistently skips the following key information.

a) Unborn Child

First and foremost, the trial court, contrary to the Ohio Supreme Court in *State ex rel Ohioans United for Reproductive Rights v Ohio Ballot Board,* No.

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2023-1088 WL 6120070, made no whisper about the UNBORN CHILD. This is sadly amazing due to the obvious fact that it is clear a successful abortion ends the life of an unborn child.

The State of Missouri has expressly recognized the unborn. See for example, §188.010, RSMo. reciting it is the intention of the general assembly to "defend the right to life of all humans, born and unborn" (App.A29). §188.017, RSMo., the "Right to Life of the Unborn Child Act (App. A30-31), and §188.056, RSMo., "Missouri Stand for the Unborn Act" (App. A48-49). How is it then, that a vote can be taken, without the consequences of the vote, that the life of an unborn child will end, not even be disclosed on the ballot? Omission of the unborn child in the ballot summary erroneously compromises the ballot.

b) End of life

The initiative proposals of the trial court wrongly omit that the petitions if approved would "end the life" of the "unborn child". This is because every abortion obviously ends the life of an unborn child, and this is a result which will not probably, but actually, happen. It should not be kept a secret.

c). The initiative proposals would allow abortions until birth.

To start, it said by the petitioners in the second paragraph of every initiative proposal that such extends coverage for "prenatal care, childbirth, postpartum care, birth control, abortion care, miscarriage care, and respectful birthing conditions". And the preliminary comment to these are that the scope includes "but it not limited" to these.

The trial court skipped another important statement as to how long abortions would be allowed, under the proposals, which is until birth. The fourth bullet point (for 2024-085) (D74 p. 4) of this variation recites a time frame, but it does not

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apply. For 2024-078 there is no time frame (p.5), for 2024-080 a time period of 24 weeks is stated (p.5), for 2024-082 24 weeks (p.6), for 2024-086 Fetal Viability (p.7), and also 2024-087 for Fetal Viability. However, these passages of time are not limits on when abortion can be banned because it can be allowed, after Fetal Viability, if a treating health care professional states the abortion is needed to protect the life or physical or mental health of the mother. (See par.4 of 2024-085, D37, for example)[3].

This gigantic loophole means that abortion can be performed even later than Fetal Viability or 24 weeks and until birth. This further exception is so broad it covers every circumstance. Still another loophole that consumes any limit as to when an abortion can be performed is created by the very broad constitutional right created by paragraphs 2 and 3 of each proposal. Still, other loopholes include enshrining a constitutional "right to reproductive freedom". Also see paragraph 3, in the broadest of ways, using expansive language such as "all matters relating to" and "but not limited to" (part of paragraph 2 of all variations), decreeing an assumption that all laws are "presumed invalid" (par.3 line 4) that there must be a "compelling" governmental interest for limited purposes(par. 3). Furthermore, all attempted laws are further trumped by that person's "autonomous decision making" (par.3 last line). Civil and criminal immunity is added to protect anyone even assisting in the process. (par.5).

Thus, the combination of all the above conditions, presumptions, exceptions, barricades against "infringement" of unrestricted rights, and broad constitutional

[3] The trial court's rendition in its summary restatement omits the term "mental" before "health". By doing so, voters are even more caught off guard as to the dynamic sweep of abortion rights ushered in by these proposals.

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declarations equate with meaning abortion is allowed until birth. The voters should be so informed and the Secretary said so, but not the trial court.

The trial court regrettably makes it sound like only the circumstance of protecting the life or health of the mother is a reason for banning abortion after Fetal Viability, which is definitely not the case.

d. The trial court summaries skip comment about how longstanding Missouri law protecting the unborn would be nullified.

Some specific passages were cited in this Brief and are further included as part of the Appendix (App.A27-50). There are probably another fifteen (15) more. The trial court failed to disclose to the voting public that such would be nullified.

Even partial birth abortions will be now allowed as identified by the Secretary of State in his summary statements The trial court failed to include this fact about which voters should be educated.

e. No medical license is required nor is there potential of being subject to medical malpractice.

According to the language of the initiative petitions, abortion can be performed without requiring a medical license or potentially being subject to medical malpractice.

As earlier stated, paragraph 5 , second sentence of initiative Petition 2024-085, says "nor shall any person assisting a person in exercising their right to reproductive freedom…" be penalized, prosecuted, or otherwise subjected to adverse action for doing so". Paragraph 3 declares there shall be no denial, interference, delay, or otherwise restriction (of this right). A civil suit for medical negligence would be an adverse action, but the text outlaws this potential relief.

Anyone may assist a person. There is no requirement that a license be obtained, but the summary statements of the trial court do not educate the voters accordingly.

Thus, the statement of the Secretary that the proposal allows for…abortions… "without requiring a medical license…" is correct for a variety of reasons.

Voters should be alerted in the ballot summaries of these facts.

Omission of these inevitable consequences, was error and these should be the subject of summaries as already defined by the Secretary of State.

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CONCLUSION

The ballot summaries prepared by the Secretary of State accurately set forth a summary of the various ballot proposals of the plaintiff, and were not deceptive, misleading, incorrect, unfair, or confusing, and the trial court did not claim such was the case. Its holding, which is subject to de novo review, furthermore, only asserts that parts are argumentative or doesn't describe the purposes or probable effect of the initiatives (but doesn't say which). This unclear, unsupported conclusion is insufficient to support the court's Judgment.

The trial court should have acknowledged the statutory and constitutional role of the Secretary of State to craft the language, and his discretion to do so. The court should have exercised "restraint and trepidation" and deferred to the Secretary even if it believed its language is better than that of the Secretary. "Best is not the test", especially when the burden of proof to show otherwise has not been met.

Passages used by the Secretary of State and commented upon by the trial court were not argumentative and are true. The trial court wrongfully rejected language for unclear and wrong reasons, and then created biased, misleading, and wrong summary statements itself, compounding its errors by omitting many important features of the petitions about which the voting public should be advised.

The Judgment of the trial court should be reversed and overruled, and the court should order the ballot language of the Secretary of State restored and certified.

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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ANNA FITZ-JAMES,	)	
	)	
Respondent,	)	
	)	
vs.	)	WD86595
	)	
JOHN ASHCROFT, MISSOURI SECRETARY OF STATE,	)	
	)	
Appellant.	)	
	)	

CERTIFICATE OF SERVICE

On October 11, 2023, a copy of the foregoing was sent by electronic mail via the Missouri eFiling System to all counsel of record.

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