

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DR. ANNA FITZ-JAMES,)
Respondent,)
v.) Cause No. WD86595
JOHN R. ASHCROFT)
MISSOURI SECRETARY OF STATE)
Appellant.)

BRIEF OF THE LEAGUE OF WOMEN VOTERS OF MISSOURI AS *AMICUS CURIAE*

MICHAEL WOLFF
Mo. Bar No. 27633
Wolff Law, LLC
77 Aberdeen Place
St. Louis, MO 63105
(314) 691-4377
mike@mikewolff-law.com

NINA MCDONNELL
Mo. Bar No. 71283
McDonnell Appeals, LLC
222 S. Central Ave.
Clayton, MO 63105
(314) 896-4009
nina@mcdonnellappeals.com

LESLYE M. WINSLOW
Mo. Bar No. 49713
LMW Law LLC
9529 Erie Drive
St. Louis, MO 63123
(573) 230-5874
lmwdem@gmail.com

ATTORNEYS FOR *AMICUS CURIAE* LEAGUE OF WOMEN VOTERS OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

IDENTITY AND INTERESTS OF *AMICUS CURIAE* 7

STATEMENT OF FACTS 9

STATEMENT OF CONSENT 9

ARGUMENT 10

 I. RELEVANT LAW 10

 a. *Missouri’s Initiative Provision* 10

 b. *Missouri Statutes* 12

 II. ARGUMENT 15

 a. *The Petition(s) for Constitutional Amendment*..... 15

 b. *The Secretary of State’s Summary Statement* 18

 c. *Analysis of the Secretary’s Summary Statement*..... 20

 d. *Omissions from the Secretary’s Summary Statement*..... 26

 i. *Miscarriage Care*..... 27

 ii. *Birth Control Access*..... 29

 e. *The Circuit Court’s Certified Summary Statement*..... 31

CONCLUSION..... 33

CERTIFICATE OF SERVICE AND COMPLIANCE 35

TABLE OF AUTHORITIES

CASES

Brown v. Carnahan, 370 S.W.3d 637 (Mo. banc 2012) 11-15, 26-28

Buchanan v. Kirkpatrick, 615 S.W.2d 6 (Mo. banc 1981)..... 13

Dobbs v. Jackson Women’s Health Org., 142 S.Ct. 2228, 2234 (2022)..... 30

Gonzales v. Carhart, 550 U.S. 124 (2007) 24

Griswold v. Connecticut, 381 U.S. 479 (1965) 30

Missourians to Protect the Initiative Process v. Blunt, 799 S.W. 2d 848 (Mo. banc 1990) 11

State Board of Registration for the Healing Arts v. Southworth, 704 S.W.2d 219 (Mo. banc 1986) 22

State ex rel. Humane Soc’y of Missouri v. Beetem, 317 S.W.3d 669 (Mo. App. 2010) 13

STATUTES

§ 116.010, RSMo..... 12

§ 116.190, RSMo..... 13

§ 116.334, RSMo..... 12, 14, 15, 25

§ 188.015, RSMo..... 29

§ 188.017, RSMo..... 28

§ 188.030, RSMo..... 28

§ 558.011, RSMo..... 28

§ 565.300, RSMo..... 24

18 U.S.C. § 1531 (2003) 24

Chapter 116, RSMo..... 12

Chapter 334, RSMo..... 22

Chapter 335, RSMo..... 22

RULES

Rule 103.08..... 35

Rule 55.03..... 35

Rule 84.06..... 35

Western District Special Rule 26..... 9, 35

Western District Special Rule 41..... 35

CONSTITUTIONAL PROVISIONS

Mo. Const., art. I, § 1..... 10

Mo. Const., art. I, § 2..... 10

Mo. Const., art. I, § 3..... 10

Mo. Const., art. III, § 50..... 10

U.S. Const. art. VI, cl. 2..... 25

OTHER SOURCES

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Adverse Events Summary Through 12/31/2018” 2 (2019)..... 20

Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *Obstetrics & Gynecology* 215 (2012)..... 20

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Missouri Initiative Petition No. 2024-085..... 15-18, 31

National Academies of Sciences, Engineering, and Medicine, *The safety and quality of abortion care in the United States* 51-88 (2018)..... 20

Sajadi-Ernazarova, Karima R., & Christopher L. Martinez, *Abortion Complications*, StatPearls (May 23, 2022), <https://www.ncbi.nlm.nih.gov/books/NBK430793> 20-21

The American College of Obstetricians and Gynecologists Guide to Language and Abortion 2 (2022)..... 24

Verbatim Stenotype Transcription of the Debates of the 1943-1944 Constitutional Convention of Missouri, Vol. 2..... 11

Yvonne Lindgren, *Dobbs v. Jackson Women’s Health and the Post-Roe Landscape*, 35 *Journal of the American Acad. of*

IDENTITY AND INTERESTS OF AMICUS CURIAE

The League of Women Voters of Missouri¹ is a chapter of the national organization formed in 1920 as the 19th Amendment granted women the right to vote. The League is a nonpartisan organization whose fundamental purpose is to educate and empower voters.²

The League works to secure democracy's promise through voter education, issue advocacy, and citizen outreach. Current members are focused on securing a participatory democracy for the 21st century – a democracy where citizens are actively engaged in shaping governmental policies that affect their lives and where the government solicits and values citizen involvement. Members believe a strong democracy is where citizens are involved in their communities, participate in public policy debates, know what's on the ballot, and have a voice in every election. To nurture and sustain a healthy democracy, the League advocates for government transparency and the citizen's right to know and understand what they are voting on in each election.

Since its origin more than a century ago, the League has worked to maintain its reputation for nonpartisan efforts. Members of local Leagues

¹ *League of Women Voters of Missouri*, League of Women Voters, <https://my.lwv.org/missouri> (last visited October 17, 2023).

² *About Us*, League of Women Voters, <https://my.lwv.org/missouri/about> (last visited October 17, 2023).

across Missouri work to ensure that all eligible citizens are registered to vote, to educate the citizenry on election processes, and to provide clearly written guides that include pro and con effects of ballot issues. The League uses a variety of means to achieve this goal including print publications, public candidate and issue forums, speaker presentations, and online information to educate voters so they are empowered to make informed choices at the polls, regardless of their political beliefs.

The issues in this case go to the essence of the League’s purpose—to ensure that voters have adequate information to make their electoral choices. The Secretary of State’s summary statements will deceive voters and deprive them of their right to fair and impartial ballot language.

The League urges this Court to affirm the trial court’s judgment and revision of the summary statements.

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STATEMENT OF FACTS

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Amicus adopts the statement of facts in Respondent's brief.

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STATEMENT OF CONSENT

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This brief is filed with the consent of all parties and, pursuant to Special Rule 26, a certificate of consent accompanies this brief.

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ARGUMENT

The League of Women Voters of Missouri submits this *amicus curiae* brief (1) in support of Plaintiff’s challenge to the sufficiency and fairness of the summary statement portion of the Secretary of State’s official ballot title for the Right to Reproductive Freedom Initiative Petition; and (2) to request this Court to affirm the judgment of the trial court.³

I. RELEVANT LAW

a. Missouri’s Initiative Provision

The Missouri Constitution—every word of which must be adopted by the voters—is the People’s Constitution. Mo. Const. art. I, §§ 1, 2, 3. This has been especially true since 1908, when Missourians amended their constitution to provide for the Initiative, a form of direct democracy empowering the people themselves to enact constitutional and statutory provisions. Mo. Const. art. III, § 50.

The Initiative Provision is a “sacred right to engage in the direct enactment” by the people, “preserving for liberty loving Missourians, the greatest degree of democratic representation and participation in

³ Plaintiff filed six cases challenging the summary statement on six versions of the Right to Reproductive Initiative. Following a motion by Plaintiff, the six cases were consolidated into Cause No. 23AC-CC03167. This brief addresses the language used in Cause No. 23AC-CC03167, but its legal analysis of the summary statements prepared by the Secretary of State is applicable to all six cases.

government.” *Verbatim Stenotype Transcription of the Debates of the 1943-1944 Constitutional Convention of Missouri*, Vol. 2, 394 (statement of Mr. Wood); 384 (statement of Mr. Phillips).

Delegates to the 1943-44 Constitutional Convention studied the 1908 constitutional amendment and voted to retain the Initiative in our present-day Constitution that the voters approved in 1945. Delegates considered the Initiative Provision a “check” on their government and a “guarantee of freedom.” *Id.* at 402 (statement of Mr. McCluer). As explained by Mr. Parker, “If for no other good it is a wonderful good threat for the legislature to do the things they ought to do, that the people think they ought to do.” *Id.* at 408.

The Supreme Court of Missouri recognizes that:

Nothing in our constitution so closely models participatory democracy in its pure form. Through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the people. The people, from whom all constitutional authority is derived, have reserved the “power to propose and enact or reject laws and amendments to the Constitution.” [Mo. Const., at. III, sec. 49].

Brown v. Carnahan, 370 S.W.3d 637, 645 (Mo. banc 2012) (quoting

Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 848, 827

(Mo. banc 1990)).

b. Missouri Statutes

To safeguard this sacred right and the power of the people, the voters must necessarily be informed—and not misled—by the language they read on the ballot. The legislature, in Chapter 116, RSMo, has enacted laws to facilitate and regulate the process for submitting citizen-led initiative petitions, so voters will understand what they are voting to include or exclude from their constitution.

The law sets standards for the “official ballot title”—what the voters see on the ballot—and it consists of a summary statement and a fiscal note summary. § 116.010(4). The summary statement, prepared by the secretary of state, must be a “concise statement not exceeding one hundred words” and “shall be in the form of a question using language that is neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.” § 116.334.1.

Missouri courts enforce this provision by requiring that a summary statement “be adequate and state the consequences of the initiative without bias, prejudice, deception, or favoritism.” *Brown v. Carnahan*, 370 S.W.3d 637, 654 (Mo. banc 2012). The language must “fairly and impartially summarize the purposes of the measure so that voters will not be deceived or misled,” and must “accurately reflect the legal and probable effects of the proposed initiative.” *Id.*

Any citizen of Missouri may challenge the summary statement, as here, as insufficient or unfair. § 116.190.1-3. Such challenge must include a request for a different summary statement. § 116.190.3. Under section 116.190, “insufficient means inadequate, especially lacking adequate power, capacity, or competence’ and ‘unfair means to be marked by injustice, partiality, or deception.” *Brown*, 370 S.W.3d at 653 (quoting *State ex rel. Humane Soc’y of Missouri v. Beetem*, 317 S.W.3d 669, 673 (Mo. App. 2010)).

“Requiring fairness and sufficiency of an initiative’s summary statement” reflects the “procedural safeguards in the initiative process” that not only promote understanding by the people, but also serve to “prevent a self-serving faction from imposing its will upon the people without their full realization of the effects of the amendment.” *Id.* (quoting *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 11-12 (Mo. banc 1981)).

Here, the “self-serving faction” is Missouri’s Secretary of State. When reading the language of the Secretary’s ballot summary statement and comparing it to the citizen-submitted petition, it is difficult to imagine a summary statement more unfair, distorted, misleading, and argumentative. In the 115 years Missouri has had the Initiative Provision, there are cases where the secretary’s language has been challenged and, in some cases, courts have provided corrective action. None of those cases are as egregious

in violating constitutional and statutory standards as the Secretary's summary statement in this case.

The pragmatic yet idealistic standards in the constitution, laws, and cases of Missouri relating to ballot titles rely on elected officials to keep faith with the voters. The official must put aside his own preferences, ideologies, and partisan positions when performing his duty to prepare the ballot language for the people. Respondent has failed in his duty. The courts are the people's only recourse to ensure that a sufficient and fair summary is on the ballot, so they may make informed decisions on changes to their constitution.

The Initiative Provision process, adopted by the voters in 1908, empowered future voters to change their constitution. Current voters must be able to trust their elected officials to give them honest and unbiased information about the measures they are voting on. Our democracy is built on this trust. The Secretary's summary statement, set forth in full on pages 18-19, below, shows a betrayal of that trust.

It was fitting and necessary for the trial court to revise the summary statement "using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure," as the law requires. § 116.334.1; *Brown*, 370 S.W.3d at 654. This Court should affirm

the judgment and order of the trial court and its certification of its summary statement language.

II. ARGUMENT

The standards for a summary statement are simple. The summary statement must be 100 words or less and be in the form of a question using language neither intentionally argumentative nor likely to create prejudice for or against the proposed measure. § 116.334.1. The statement must be fair, impartial, and sufficient. *Brown*, 370 S.W.3d at 669.

a. The Petition(s) for Constitutional Amendment

In six actions filed, Plaintiff Dr. Anna Fitz-James is challenging summary statements prepared by the Secretary of State for a ballot title for a constitutional amendment on reproductive freedom. For the purposes of the arguments in this brief, we have set forth in full one version of the petitions, Secretary of State No. 2024-085, Cause No. AC-CC03167, an example that contains provisions addressing all three issues that differentiate between and among the various versions.

The Example, Petition No. 2024-085

For purposes of the Argument in this *amicus* brief, we have chosen the proposed constitutional amendment which has provisions barring the government from prohibiting abortion prior to fetal viability, specifying the parental consent the government may require for pregnant minors, and

specifying that the amendment would not require government funding for abortion care.

This version of the petition for a constitutional amendment on reproductive freedom, No. 2024-085, is simple; it contains 607 words:

Be it resolved by the people of the state of Missouri that the Constitution be amended:

Section A, Article I of the Constitution is revised by adopting one new Section to be known as Article I, Section 36 to read as follows:

Section 36. 1. This Section shall be known as "The Right to Reproductive Freedom Initiative."

2. The Government shall not deny or infringe upon a person's fundamental right to reproductive freedom, which is the right to make and carry out decisions about all matters relating to reproductive health care, including but not limited to prenatal care, childbirth, postpartum care, birth control, abortion care, miscarriage care, and respectful birthing conditions.

3. The right to reproductive freedom shall not be denied, interfered with, delayed, or otherwise restricted unless the Government demonstrates that such action is justified by a compelling governmental interest achieved by the least restrictive means. Any denial, interference, delay, or restriction of the right to reproductive freedom shall be presumed invalid. For purposes of this Section, a governmental interest is compelling only if it is for the limited purpose and has the limited effect of improving or maintaining the health of a person seeking care, is consistent with widely accepted clinical standards of practice and evidence-based medicine, and does not infringe on that person's autonomous decision-making.

4. Notwithstanding subsection 3 of this Section, the general assembly may enact laws that regulate the provision of abortion after Fetal Viability provided that under no circumstance shall the Government deny, burden, or restrict an abortion that in the good faith judgment of a treating health care professional is needed to protect the life or physical or mental health of the pregnant person.

5. No person shall be penalized, prosecuted, or otherwise subjected to adverse action based on their actual, potential, perceived, or alleged pregnancy outcomes, including but not limited to miscarriage, stillbirth, or abortion. Nor shall any person assisting a person in exercising their right to reproductive freedom with that person's consent be penalized, prosecuted, or otherwise subjected to adverse action for doing so.

6. Notwithstanding this Section, the general assembly may enact laws that require a health care professional, before providing an abortion to a minor, obtain consent from a parent or guardian of the minor, provided that such law shall permit the health care professional to provide the abortion without such consent if, in the good faith judgment of a health care professional:

(1) obtaining consent may lead to physical or emotional harm to the minor;

(2) the minor is mature and capable of consenting to an abortion; or

(3) obtaining consent would not be in the best interest of the minor.

7. The Government shall not discriminate against persons providing or obtaining reproductive health care or assisting another person in doing so.

8. Nothing in this Section requires government funding of abortion procedures.

9. If any provision of this Section or the application thereof to anyone or to any circumstance is held invalid, the remainder of those provisions and the application of such provisions to others or other circumstances shall not be affected thereby.

10. For purposes of this Section, the following terms mean:

(1) "Fetal Viability", the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures.

(2) "Government",

a. the state of Missouri; or

b. any municipality, city, town, village, township, district, authority, public subdivision or public corporation having the power to tax or regulate, or any portion of two or more such entities within the state of Missouri.

Missouri Initiative Petition No. 2024-085.

b. The Secretary of State's Summary Statement

The Secretary of State's Summary Statement for No. 2024-085 reads:

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 Secretary's summary statement ranges from argumentative conjecture to political rhetoric to outright falsehood. It cannot be described as fair, impartial, or sufficient. It is biased, prejudicial, deceptive, misleading, and inaccurately reflects the legal and probable effects of Plaintiff's initiative petition. Each of the summary statement's sentences fails Missouri's Constitution and its laws. The circuit court was correct in rewriting the summary statement to conform to the law.

To assist this Court, each of the four sentences of the Secretary's summary statement are analyzed below, with the second and third discussed together. Next, the omissions are examined. The topics the Secretary left *out*

of his summary statement further demonstrate the unfairness and inadequateness of the statement, and its prejudicial nature.

c. Analysis of the Secretary’s Summary Statement

1. *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?*

The Secretary’s use of the word “dangerous” to describe abortion care is argumentative, prejudicial, and misleading. Abortion is one of the most studied medical interventions in the United States. *See generally* National Academies of Sciences, Engineering, and Medicine, *The safety and quality of abortion care in the United States* 51-88 (2018). The risk of death from a legal abortion is significantly lower than death from colonoscopies, plastic surgery, dental procedures, and tonsillectomies. *Id.* at 75. Medication abortion is safer than taking penicillin, Tylenol, and Viagra. Bixby Center for Global Reproductive Health, *Analysis of Medication Abortion Risk and the FDA report “Mifepristone U.S. Post-Marketing Adverse Events Summary through 12/31/2018”* 2 (2019).

In short, it is argumentative and contrary to the medical literature to refer to abortion as “dangerous.” Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *Obstetrics & Gynecology* 215, 216 (2012); Sajadi-

Ernazarova, Karima R., and Christopher L. Martinez, *Abortion*

Complications, StatPearls (May 23, 2022)

<https://www.ncbi.nlm.nih.gov/books/NBK430793/>.

Because the minimal risk of complications increases as a pregnancy progresses, the probable effect of legalizing abortion would be in fact to make abortion safer for Missourians, who currently must have abortions at later gestations due to the costs, travel expenses, and appointment wait times associated with seeking abortion care out of state. *Id.*

The Secretary's statement's claims that abortions will be "unregulated" and "unrestricted" "from conception to live birth" belies the plain language of the initiative provision and is intentionally argumentative. It is designed to create prejudice by attempting to deceive and mislead voters by inaccurately reflecting the legal and probable effects of the initiative proposal.

Contrary to the claim abortion will be "unregulated," Paragraph 3 of the initiative sets out how the government may regulate abortion care prior to fetal viability: the Government may only delay or restrict reproductive freedom if it "demonstrates that such action is justified by a compelling governmental interest achieved by the least restrictive means." It defines a governmental interest as compelling "if it is for the limited purpose and has the limited effect of improving or maintaining the health of a person seeking care, is consistent with widely accepted clinical standards of practice and

evidence-based medicine,” and respects the person seeking such care’s “autonomous decision-making.”

Paragraph 4 specifically authorizes the state to “enact laws that regulate the provision of abortion after Fetal Viability,” except in cases where a “treating health care professional” believes in good faith that an abortion past Fetal Viability “is needed to protect the life or physical or mental health of the pregnant person.”

The plain language of the initiative provision directly contradicts the summary statement’s claim that abortion care would be unregulated and unrestricted “from conception to live birth.” The provision provides when and how the state can regulate abortion. The Secretary’s claim to the contrary is pure deception designed to misinform Missourians and prejudice them against the initiative.

Finally, the first sentence of the summary statement falsely claims that the initiative will allow abortions to be performed “without a medical license.” This claim misleads voters by ignoring the initiative provision’s five mentions of “health care professionals” in paragraphs 4, 6, and 10(a). In Missouri, “health care professionals” are licensed and regulated. Chapters 334 and 335, RSMo. The State’s interest in requiring the licensure of health care professionals is longstanding and compelling. *State Board of Registration for the Healing Arts v. Southworth*, 704 S.W.2d 219, 221 n.3 (Mo. banc 1986).

The summary statement's first sentence is unfair in that it is deceptive and demonstrates partiality, and it is insufficient because it is clearly not an accurate summary. It utterly fails to acknowledge even the plain language of the initiative provision and misrepresents the provision entirely. The trial court was right to reject the Secretary's summary statement as unfair, prejudicial, and insufficient, and it was right to certify its own summary statement. This Court should affirm the trial court's judgment and summary statement.

2. *Do you want to amend the Missouri Constitution to nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion?*
3. *Do you want to amend the Missouri Constitution to 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?*

Sentences 2 and 3 of the Secretary's summary statement cruelly conflate third trimester abortion procedures needed by women who are losing wanted pregnancies with early abortions desired by women who do not want to be pregnant. Those who wish to end their pregnancies prefer to do so as early as possible. 74 Lawrence B. Finer et al., *Timing of steps and reasons for delays in obtaining abortions in the United States*, *Contraception* 343 (2006).

Nationwide, when abortion was a federally protected right, 92% of

pregnancies were terminated within the first 13 weeks. National Academies of Sciences, Engineering, and Medicine, *supra*, at 5.

“Partial birth abortion” is “graphic, inflammatory language” and “is not a medical term . . .” *The American College of Obstetricians and Gynecologists Guide to Language and Abortion* 2 (2022). The term was first coined by the National Right to Life Committee in 1995. Julie Rovner, ‘*Partial-Birth Abortion*’: *Separating Fact from Spin*, National Public Radio, Feb. 21, 2006, <https://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin>.

The political term “partial birth abortion” refers to a procedure called intact dilation and evacuation, which was banned by federal law 20 years ago. 18 U.S.C. § 1531 (2003). The ban that was upheld in *Gonzales v. Carhart*, 550 U.S. 124 (2007). In Missouri, the procedure was banned in 1999, and *still* is today. § 565.300, RSMo.

Despite a federal ban, a state ban, and the initiative provision’s specific language providing that the state can restrict abortion care after fetal viability, the Secretary’s summary statement alludes to or calls it by name three times (“from conception to live birth,” “partial-birth abortion,” and “to end the life of their unborn child at any time.”). His chosen language is designed to deceive voters into believing that a “yes” vote on the initiative provision will lead to abortion procedures that have been illegal for decades,

even when abortion was a federally protected right. Even if, somehow, the initiative provision did permit elective abortions past viability—which it does not—federal law is supreme to that of the state. U.S. Const., art. VI, cl. 2.

The statutory standard requires the summary statement to be written “using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.” § 116.334.1, RSMo. The use of the term “partial-birth abortion,” as well as the summary statement’s language suggesting abortions would be legal in Missouri “at any time” during a pregnancy up “to live birth” is intentionally argumentative and is designed to sow prejudice against the initiative provision by purposefully misleading and deceiving voters. This Court should affirm the trial court’s judgment and its certification of its own summary statement.

4. *Do you want to amend the Missouri Constitution to require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding?*

The Secretary’s proposed summary statement suggests that the government could be required to use taxpayer funded abortion care because the initiative provision provides for protection against governmental discrimination for those persons providing or obtaining an abortion. This false statement is directly contradicted by paragraph 8 of the initiative provision, which provides that “nothing in this Section requires funding of abortion procedures.” The secretary’s use of the word “potentially” is an

attempt, at best, to lessen the statement's falsehood that taxpayer funding might be required for abortions under the provision. The plain language of the provision makes it clear: the amendment would not require the government to fund abortion procedures.

The fourth sentence of the summary statement violates the Supreme Court of Missouri's principle that the summary statement "accurately reflect the legal and probable effects of the proposed initiative." *Brown*, 370 S.W.3d at 654. A requirement of taxpayer funding would be neither legal nor probable under the proposed initiative. The secretary's summary statement fails to "fairly and impartially summarize the purposes of the measure so that voters will not be deceived or misled." *Id.* The League urges this Court to affirm the trial court's judgment and order.

d. Omissions from the Secretary's Summary Statement

The summary statement is unfair, prejudicial, and insufficient in not only what it includes, but also because of what it excludes. The initiative petition is concerned with reproductive rights including prenatal care, childbirth, postpartum care, birth control, miscarriage care, and respectful birthing conditions. Yet, any Missourian reading only the Secretary of State's summary statement would conclude that Plaintiff's initiative provision concerns only abortion. The exclusion of every other reproductive right addressed in the initiative petition exposes the Secretary's summary

statement as “self-serving” to his personal beliefs and his attempt to impose his “will upon the people without their full realization of the effects of the amendment,” the very evil the initiative process is supposed to safeguard against. *Brown v. Carnahan*, 370 S.W.3d 637, 653 (Mo. banc 2012).

i. Miscarriage care

League members are very concerned with maternal mortality rates in Missouri and pleaded that this initiative protects care for miscarriages and dangerous ectopic pregnancies. One in 50 pregnancies is ectopic. Yvonne Lindgren, *Dobbs v. Jackson Women’s Health and the Post-Roe Landscape*, 35 Journal of the American Acad. of Matrimonial Lawyers 276 (2022). An ectopic pregnancy occurs when a fertilized egg implants outside the uterus. *Id.* at 275-276. It cannot be carried to term. *Id.* at 276. Left untreated, an ectopic pregnancy can be fatal. *Id.* In fact, ectopic pregnancies kill more women during the first trimester than any other pregnancy-related cause. *Id.* The treatment for an ectopic pregnancy is abortion. *Id.*

An incomplete natural miscarriage may cause infection and hemorrhaging. *Id.* Left untreated, an incomplete miscarriage can be fatal. *Hidden Dangers of Miscarriages Scar Would-Be Moms*, NBC News (Sept. 28, 2014, 4:39 AM), <https://nbcnews.com/health/womens-health/hidden-dangers-miscarriage-scar-would-be-moms-n212646>. Incomplete natural miscarriages are not preventable and are usually the result of fetal defects. *Id.*;

Miscarriage, Mayo Clinic, <https://mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/symptoms-causes/syc-20354298> (last visited October 17, 2023). The treatment for an incomplete natural miscarriage is abortion. Lindgren, *supra*, at 276.

But performing or inducing an abortion in Missouri is currently a class B felony, punishable by a prison term of five to fifteen years. § 188.017; § 558.011. The only exception is “in cases of medical emergency.” § 188.017.2. The medical emergency exception is an affirmative defense. § 188.017.3. That means a doctor who performed an abortion based on his or her professional judgment and good faith belief that the patient’s life depended on it could be arrested, charged, and forced to trial to prove to a jury that the abortion was a result of a true medical emergency. Doctors and hospitals may also lose their licenses. § 188.030.4-5, RSMo. As a result, doctors in Missouri have waited to treat ectopic pregnancies until patients’ vital signs were unstable or were experiencing significant blood loss, a significant danger to patients. Lindgren, *supra*, at 278 n.2.

Plaintiff’s initiative petition removes these penalties for health care professionals, hospitals and other third parties. Yet, the Secretary’s summary statement fails to disclose this information to voters. By purposefully omitting this, the summary statement is deceptive and misleading and fails to accurately describe the legal effect of the provision, as required by

Missouri law. *Brown*, 370 S.W.3d at 364. The trial court was right in rejecting the Secretary's summary statement and certifying its own. This Court should affirm the trial court's judgment and order.

ii. Birth Control Access

Missourians overwhelmingly support access to birth control, regardless of their political persuasion. Michele Munz, *Survey shows Missourians don't know if birth control is legal*, St. Louis Post-Dispatch (June 21, 2023). A recent survey found that 82% of Republicans, 90% of Democrats, and 85% of Independents support persons aged 18-35 having access to all forms of birth control. *Id.* An overwhelming majority also support legislation to make birth control more affordable and accessible (74% of Republicans, 85% of Democrats, and 87% of Independents). *Id.* Despite widespread support for birth control, one in four Missourians believe birth control pills are illegal, more than half believe emergency contraception is illegal, and 40% believe IUDs are illegal. *Id.*

The fear and confusion surrounding the legality of contraception is justified given that Missouri's abortion ban can be read to outlaw contraception. § 188.015(1)(a-b). Such a reading is not simple conjecture. After the state's trigger law went into effect after the U.S. Supreme Court's *Dobbs* decision, a Missouri hospital system interpreted it to prohibit emergency contraception and stopped providing emergency contraception to

sexual assault victims. Lindgren, *supra*, at 278. Former Attorney General Eric Schmidt's office had to clarify that the law does not prohibit Plan B or other forms of contraception. *Id.*

Even with the former attorney general's statement, which was not an official opinion, the right to access birth control in Missouri is not absolute. Although the principal opinion in *Dobbs* suggests otherwise, a reading of all of the *Dobbs* opinions leaves the impression that other reproductive rights may lose protection of the precedents of the Supreme Court of the United States. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2234 (2022).

Specific to Plaintiff's initiative petition here, the federal constitutional protection for the use of birth control may be at risk. Justice Clarence Thomas specifically wrote in his separate opinion in *Dobbs* that *Griswold v. Connecticut*, 381 U.S. 479 (1965)—which protects the rights of married persons to obtain contraceptives—should be re-examined. *Id.* at 2301 (Thomas, J., concurring). If Justice Thomas is prescient, the issue of protecting birth control, like abortion care under *Dobbs*, would be left to the state.

This constitutional amendment, if enacted by the people, would protect access to birth control from legislative action, which Missouri survey respondents rightly understand to be a real threat. The summary statement should inform Missourians that the initiative provision, if approved, would

protect the availability of birth control. The omission of this information is unfair in that it is deceptive and misleading and is insufficient because it is incompetent in failing to even mention the protection of access to birth control.

Although there are various ways the Secretary of State can write a summary statement consistent with the law and cases, it need not include all details to be sufficient. The Secretary's summary statement, however, is deeply flawed. Its many prejudicial elements add up to an overall impression so misleading that a voter could misunderstand the scope of the initiative and believe it would bar all restrictions on abortion care in Missouri. The circuit court was right to reject the Secretary's summary statement as unfair, prejudicial, and insufficient, and to certify its summary statement.

e. The Circuit Court's certified summary statement

Following briefing and a hearing, the trial court certified the following summary statement for Initiative No. 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;

- 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 governmental funding of abortion is not required?

The language certified by the trial court is neither argumentative nor misleading. It does not inject partiality and it accurately described the legal and probably effects of the initiative petition. This proposed language represents the sort of language the Secretary *should* have used, had his purpose in writing his version been to provide Missourians with the information needed to make an informed decision at the polls. Writing a fair and sufficient summary statement is the duty of the Secretary of State. He has failed in that duty utterly. Instead, he offered deceptive, misleading, false, and prejudicial language clearly designed to ensure confusion and misinformation.

The trial court rightly rejected the Secretary's summary statements and certified its own summary statements that comply with the constitutional and statutory law of Missouri. The League of Women of Missouri urges this Court to affirm the trial court's order and judgment and its certified summary statements.

CONCLUSION

Amicus curiae League of Women Voters of Missouri respectfully requests this Court to affirm the judgment and order of the trial court and its certified summary statements.

Respectfully submitted,

/s/ Michael A. Wolff

Michael A. Wolff, No. 27633
Wolff Law LLC
77 Aberdeen Place
St. Louis, MO 63105
314-691-4377
mike@mikewolff-law.com

/s/ Nina McDonnell

Nina McDonnell, No. 71283
McDonnell Appeals LLC
222 S. Central Av. Suite 1004
Clayton, MO 63105
314-896-4009
nina@mcdonnellappeals.com

/s/ Leslye M. Winslow

Leslye M. Winslow, No. 49713
LMW Law LLC
9529 Erie Drive
St. Louis, MO 63123
573-230-5874
lmwdem@gmail.com

ATTORNEYS FOR *AMICUS CURIAE*
LEAGUE OF WOMEN VOTERS OF
MISSOURI

CERTIFICATE OF SERVICE

Under Rule 103.08, I certify that on October 18, 2023, a copy of the foregoing was submitted by electronic mail to Assistant Attorney General Jason Lewis at jason.lewis@ago.mo.gov; Assistant Attorney General Joshua Divine at joshua.divine@ago.mo.gov; Deputy Solicitor General Samuel Freedlund at samuel.freedlund@ago.mo.gov; and Missouri Secretary of State John Ashcroft at john.r.ashcroft@sos.mo.gov, via the Missouri eFiling System.

/s/ Nina McDonnell
Nina McDonnell

CERTIFICATE OF COMPLIANCE

Under Rule 84.06(c), I certify that this brief includes the information required by Rule 55.03 and complies with the limitations Rule 84.06(b) and Special Rules 26 and 41. This brief was prepared with Microsoft Word for Windows, uses Century Schoolbook 13-point font, and does not exceed the word limit for an appellant’s brief in this Court. The word-processing software identified that this brief contains 5,368 words, not including the cover, table of contents, table of authorities, signature block, certificate of service, certificate of compliance. It is in searchable PDF form.

/s/ Nina McDonnell
Nina McDonnell