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WD86595

IN THE MISSOURI COURT OF APPEALS

Western District

DR. ANNA FITZ-JAMES,

Respondent,

v.

JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE,

Appellant.

On Appeal from the Circuit Court of Cole County, Missouri,

The Honorable Jon E. Beetem, Circuit Judge

BRIEF OF *AMICUS CURIAE* SENATOR CINDY O'LAUGHLIN IN SUPPORT OF APPELLANT JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus is the Honorable Cindy O'Laughlin, Majority Leader of the Missouri Senate. Senator O'Laughlin appears individually and with all parties' consent. She has a vested interest in this case as the Majority Leader because the Missouri General Assembly has regulated abortion since 1825 when it first prohibited abortion. RSMo. § 188.026.1(3); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2285 & n.69 (2022). More recently, the General Assembly enacted the "Right to Life of the Unborn Child Act," RSMo. § 188.017, which bans abortions except in cases of medical emergency to protect the right to life of pregnant women and their unborn children as well as the health, safety, and welfare of pregnant women and unborn children. Respondent's proposed constitutional amendment would override two centuries of abortion statutes. The proposal would also divest the General Assembly of any power to regulate abortions in the future to protect the health, safety, and welfare of unborn children, who have a protectable right to life under Missouri law. RSMo. § 1.205. And it would strip the General Assembly of power to regulate abortions in the future to protect the health, safety, and welfare of pregnant mothers, since any mother's belief that the regulation limited her choices would automatically invalidate the regulation unless the regulation satisfied an "impossible" or "super strict" scrutiny requirement.

Amicus will show that the Secretary's summary statements are sufficient and fair because they properly account for the proposal's impact on current law and the limits the proposal would place on the General Assembly's constitutional authority to regulate abortions. The Secretary's statements accurately describe the scope of the proposed constitutional amendments with neutral language employed by the General Assembly and courts across the country.

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INTRODUCTION

The Circuit Court's decision to rewrite every last word of the Secretary of State's ballot title comes just three years after another court did the same to a legislatively-referred redistricting measure. Despite this Court's 2020 reversal of most of the redistricting rewrite, the decision below goes even further, reaching a new high-water mark for judicial interference in the initiative process. It comes on a petition fraught with risk; for half a century, no policy issue has divided the public more than abortion. Indeed, public interest is hardly recent: Missouri began to specifically prohibit abortion about two centuries years ago, just four years after statehood. The shock of *Roe v. Wade* in 1973 altered Missouri politics, and for years, Missourians elected General Assemblies that legislated to expressly protect the "right to life" of the "unborn child" in the womb. But the questions of whether these decades of policy were just or fair, or of whether the General Assembly's legislation properly framed, described, and defined the rights of women and their unborn children, were not before the Circuit Court and are not now before this Court.

Yet the Circuit Court did in fact join the debate. It entered not as an advocate for the petitions, but instead, as an advocate for its own view of what constitutes neutral and polite debate. Its aim, foreign to our election law and constitution, was to deaden public reaction to the massive changes the petitions would impose on society and on the legislative power of the General Assembly. Thus, the Circuit Court found that the *actual text* of current law that would be nullified is itself "problematic" and cannot be referenced. Similarly banned is a direct quote from the *petition's own text.* Apparently, the General Assembly's, the U.S. Supreme Court's, and many other courts' uncouth references to the "right to life" or "unborn children" must now be

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censured by courts. This misconceives the judicial role. Under Section 116.190, RSMo., courts are to protect the *election process* by carefully removing words that *falsely convey a measure's purpose* and thereby cause prejudice. Courts are *not* to protect their ideal of what is proper in political debate by replacing concrete descriptions with euphemisms, or by excising phrases and even core provisions that threaten to trigger insufficiently polite discussion.

The primary drafter must remain the Secretary of State. Courts simply cannot use the ballot title process to do policy battle with coordinate branches of government, whether it is to disagree with the Secretary for his work that falls within the legal standard, or to sanitize the actual text of the law of the state, lawfully enacted by the legislature. For these reasons, and as discussed more fully below, the Secretary's ballot title should be reinstated.

JURISDICTIONAL STATEMENT

This appeal concerns the Secretary of State's summary statements for six ballot initiatives designed to amend Missouri's Constitution to overturn Missouri's abortion laws. On September 25, 2023, the Cole County Circuit Court entered judgment for Respondent, deleting the entirety of the Secretary's summary statements pursuant to RSMo. § 116.190 and completely rewriting the summary statements to appear on petitions and voters' ballots. Appellant filed a timely notice of appeal in this Court the same day. This Court has jurisdiction. *See Boeving v. Kander*, 493 S.W.3d 865, 872–73 (Mo. App. W.D. 2016); Mo. Const. art. V, § 3. On October 5, 2023, the Secretary filed a motion to transfer to the Supreme Court, arguing among other things that this case likely falls within the exclusive jurisdiction of the Missouri Supreme Court. *See* Mo. Const. art. V, § 3; RSMo. § 477.070. The Supreme Court has yet to decide that motion, so this Court retains jurisdiction.

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STATEMENT OF FACTS

Amicus adopts and incorporates Appellant Ashcroft's statement of facts.

POINTS RELIED ON

I. The trial court erred in entering a judgment deleting and rewriting the Secretary of State's entire summary statements for Ballot Initiatives 2024-078, 2024-080, 2024-082, 2024-085, 2024-086, and 2024-087, because the court failed to make the necessary findings that the deleted phrases in the Secretary's statements were insufficient or unfair and that the edits extended no wider than necessary to correct these deficiencies, in that the court never discussed whether the deleted phrases were insufficient or unfair and the limited reasoning the court did provide did not satisfy the insufficient or unfair standard.

i. *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 81 (Mo. App. W.D. 2008)

ii. *Pippens v. Ashcroft*, 606 S.W.3d 689, 713 (Mo. App. W.D. 2020)

iii. *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999)

iv. RSMo. § 116.190.3

II. The trial court erred in entering a judgment deleting and rewriting the Secretary of State's summary statements for Ballot Initiatives 2024-078, 2024-080, 2024-082, 2024-085, 2024-086, and 2024-087, because the Secretary's statements were accurate, sufficient, and fair, in that the Secretary's statements focused on the central purpose of the Initiatives, incorporated neutral language used in judicial

opinions and Missouri statutes, gave voters fair notice of the impact of the Initiatives, and discussed the legal and probable effects of the Initiatives on Missouri law.

i. *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 457 (Mo. App. W.D. 2006)

ii. *Pippens v. Ashcroft*, 606 S.W.3d 689, 713 (Mo. App. W.D. 2020)

iii. *Stickler v. Ashcroft*, 539 S.W.3d 702, 717 (Mo. App. W.D. 2017)

iv. *Billington v. Carnahan*, 380 S.W.3d 586, 595 (Mo. App. W.D. 2012)

v. RSMo. §§ 1.205, 188.015, 188.017, 188.020, 188.026, 188.027, 188.056, 188.057, 188.058, 565.300

III. The trial court erred in entering a judgment rewriting the Secretary of State's summary statements for Ballot Initiatives 2024-078, 2024-080, 2024-082, 2024-085, 2024-086, and 2024-087, because the court's rewritten statements were insufficient and unfair, in that the statements failed to account for the "impossible" or "super strict" scrutiny threshold constraining the Government's power to regulate abortion, mischaracterized Missouri's current laws, and omitted mention of healthcare professionals' discretion to override a legislatively enacted 24-week ban, fetal viability ban, or parental consent requirement.

i. *Hill v. Ashcroft*, 526 S.W.3d 299, 328 (Mo. App. W.D. 2017)

ii. *Pippens v. Ashcroft*, 606 S.W.3d 689, 713 (Mo. App. W.D. 2020)

iii. RSMo. §§ 1.205, 188.017, 188.028

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ARGUMENT

The Cole County Circuit Court committed two grave errors that this Court should not repeat. First, the Circuit Court deleted the entirety of the Secretary of State's proposed summary statements without finding that all parts of the statements were insufficient or unfair, and even though the statements were *not* insufficient or unfair. Then the Circuit Court replaced the Secretary's statements with new ones that *actually were* insufficient and unfair. Given the wide deference and latitude owed to the Secretary's summary statements, this Court should reinstate them.

I. The Circuit Court failed to make necessary findings to delete Secretary's statements and draft new ones.

The Circuit Court exceeded the limits of its authority in rewriting the entire summary statements, deleting references to certain parts of the initiatives, and adding new information, without finding that every overhauled portion of the Secretary's statement was insufficient or unfair.

When courts are called upon to examine a Secretary's summary statement, "they must act with restraint, trepidation, and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course." *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 81 (Mo. App. W.D. 2008) (quoting *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. 1990) (en banc)). "Courts are understandably reluctant to become involved" in these matters because they implicate the political process and separation of powers concerns. *Id.*; *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827. Thus, courts review summary statements "in a manner that gives discretion to the Secretary." *Sedey v. Ashcroft*, 594 S.W.3d 256, 263 (Mo. App. W.D. 2020). The "burden" is firmly fixed on the statement's challenger to show that the challenged language is

"insufficient or unfair" before the court can modify it. *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999).

Even when courts identify deficiencies, they cannot "modify the language of the existing summary more broadly than necessary to address the specific deficiencies." *Pippens v. Ashcroft*, 606 S.W.3d 689, 713 (Mo. App. W.D. 2020). Even if the court's amended language "is more specific, and even if that level of specificity might be preferable, whether the summary statement prepared by the Secretary of State is the best language for describing the referendum is not the test." *Bergman*, 988 S.W.2d at 92. The court may only modify the language when it is "insufficient or unfair." RSMo. § 116.190.3; *Cures Without Cloning*, 259 S.W.2d at 83.

The court must proceed word-by-word and provision-by-provision, make findings of insufficiency and unfairness for each challenged phrase, and then modify the existing language no wider the necessary to correct those deficiencies. *See, e.g.*, *Pippens*, 606 S.W.3d at 713; *Sedey*, 594 S.W.3d 256; *Boeving v. Kander*, 493 S.W.3d 865 (Mo. App. W.D. 2016). Absent those findings, the court must keep the original as written by the Secretary. *See, e.g.*, *Mo. Mun. League v. Carnahan*, 303 S.W.3d 573, 588 (Mo. App. W.D. 2010); *Stickler v. Ashcroft*, 539 S.W.3d 702, 717 (Mo. App. W.D. 2017) ("Because . . . the Secretary's summary statement was not unfair or insufficient, the circuit court had no reason to rewrite it."). A court's entire overhaul of a summary is rarely, if ever, permitted; more often, the appellate court concludes that the lower "court was not authorized to re-write the entire summary statement." *Cures Without Cloning*, 259 S.W.2d at 83.

The Circuit Court failed to abide by these well-established principles and exercise judicial restraint. It deleted the entirety of the Secretary's statements without finding that each of the existing provisions was "insufficient or unfair"

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and without constraining its revisions to correct those unmentioned deficiencies. RSMo. § 116.190.3. In fact, the words "insufficient or unfair" do not appear once in the lower Court's opinion. It re-wrote the summary statement, and it transformed the substance of the statement—omitting critical provisions of the ballot initiatives referenced by the Secretary and adding minor details. Now the rewritten statements bear no resemblance to the Secretary's original versions. In doing so, the Circuit Court exceeded the boundaries of its limited role.

II. This Court should uphold the Secretary's statements because they were sufficient and fair.

The Circuit Court should have upheld the Secretary's statements because they sufficiently and fairly described the ballot initiatives. Every single one of the Secretary's statements included the following language:

> 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?

Each of the statements also included one of the following provisions regarding lawmakers' ability to regulate abortion:

> Do you want to amend the Missouri Constitution to: . . .

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- 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 total ban") . . . .
- 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 ("the 24-week ban") . . . .
- 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 ("the fetal viability ban")

The Circuit Court's limited reasoning for deleting each of these provisions was inadequate. These statements are sufficient and fair.

a. The Secretary's statements accurately describe the central features of the ballot initiatives.

This Court has explained that "[t]he summary statement should inform voters of the 'central feature[s]' of the initiative or referendum proposal." *Stickler v. Ashcroft*, 539 S.W.3d 702, 709 (Mo. App. W.D. 2017). The Secretary's summary does just that. As the Circuit Court acknowledged, the "proposals will have the greatest immediate impact on abortion." Judgment at 3. The proposals focus on creating a right for any women, including a minor, to obtain an abortion at any stage in pregnancy; overturning Missouri law, specifically the Missouri "Right to Life of the Unborn Child Act," RSMo. § 188.017; imposing nearly impossible standards for the Government to regulate abortion or discriminate on that basis; and protecting those who obtain abortions and those who administer them (including unlicensed professionals) from any

adverse actions. The Secretary's summary of these key provisions was accurate and sufficient.

b. The Secretary's chosen language is not "problematic."

The Secretary's language also fairly describes the ballot initiatives. The Circuit Court erroneously concluded that many phrases in the Secretary's statements were "problematic in that they are either argumentative or do not fairly describe the purposes or probable effect of the initiative." Judgment at 2. But the Secretary's language is not "problematic."

i. "from conception to live birth"

The Circuit Court concluded that the phrase "from conception to live birth" in the Secretary's first bullet point was "problematic." Judgment at 2. But it is not. This phrase accurately and fairly describes the scope of the ballot initiative to give "voters sufficient and fair notice." *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 457 (Mo. App. W.D. 2006). The ballot initiatives do not impose any timing restrictions on abortions unless voters enact the limited 24-week or fetal viability ban. The absence of timing restrictions is a significant divergence from current law. *Pippens*, 606 S.W.3d at 708. Even before the Right to Life of the Unborn Child Act went into effect, Missouri severely restricted when women could obtain abortions. *See, e.g.*, RSMo. § 188.056 (eight-week ban); *id.* § 188.057 (fourteen-week ban); *id.* § 188.058 (eighteen-week ban). Timing restrictions have become an expectation for voters even when Missouri allowed more liberal use of abortion. Voters need to know about the extent of the law and its divergence from existing law to have sufficient notice. *Missourians Against Human Cloning*, 190 S.W.3d at 457; *Pippens*, 606 S.W.3d at 712. The Secretary's use of the phrase "from conception to live birth" accomplishes that goal.

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This language is valid for another reason. It captures that the initiatives also overturn longstanding Missouri law stating that "unborn children have protectable interests in life" "*from the moment of conception until birth* at every stage of biological development." RSMo. § 1.205 (emphasis added); *see also State v. Emerich*, 13 Mo. App. 492, 495 (1883), *affirmed*, 87 Mo. 110 (1885) ("[T]he child is, in truth, alive from the moment of conception."); RSMo. § 188.026. The General Assembly enacted Section 1.205 in 1986 and determined that other Missouri laws should be read *in pari materia* with this statute beginning in 1988. RSMo. § 1.205.2. The Missouri Supreme Court has since affirmed that this statute must be read *in pari materia* with other Missouri statutes. *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89, 92 (Mo. 1995) (en banc); *State v. Knapp, Inc.*, 843 S.W.2d 345, 347-48 (Mo. 1992) (en banc). Likewise, the Missouri General Assembly has codified that "[t]he state of Missouri has interests that include . . . [p]rotecting unborn children throughout pregnancy and preserving and promoting their lives from conception to birth." RSMo. § 188.026.5(1). The right of unborn children to life from "conception until birth" is a pervasive feature of Missouri law—a right that would be destroyed by the proposed constitutional amendment. And the consistent use of this phrase by the General Assembly and the courts indicate that this language is neutral and fair. *Stickler*, 539 S.W.3d at 717 & n.14. The Secretary rightly relied on this language when crafting his summary statement.

ii. "without requiring a medical license or potentially being subject to medical malpractice"

The first bullet point also discusses the unavailability of adverse actions against abortionists by mentioning that the law would allow people to perform abortions "without requiring a medical license or potentially being subject to medical malpractice." This references three specific elements in every initiative: **first**, that no person who obtains an abortion or assists another in

obtaining an abortion "shall be penalized, prosecuted, or otherwise subjected to adverse action"; **second**, that this immunity from adverse action extends to all those "assisting a person" in obtaining an abortion and also to all "health care professional[s]"—not just physicians or those with a medical license; and **third**, the absence of any medical licensing requirement in the initiatives. The Circuit Court deleted any reference to the unavailability of adverse actions or a medical licensing requirement of healthcare professionals even though these are key parts of the initiatives. The Secretary's statement is worthy of inclusion since it discusses the legal consequences or probable effects of the proposed initiative. *Pippens*, 606 S.W.3d at 701.

This language is also sufficient and fair because it notifies voters of a major change from the current law. *Missourians Against Human Cloning*, 190 S.W.3d at 457; *Pippens*, 606 S.W.3d at 712. Since 1979, Missouri law has only permitted *physicians* with a medical license to perform or induce abortions. RSMo. § 188.020 ("No person shall perform or induce an abortion except a physician."). The proposal would allow *anyone* to perform abortions without facing prosecution or adverse action. The proposal would dramatically impact existing law, so voters need to know about this change when they sign petitions and cast ballots. *Pippens*, 606 S.W.3d at 708. This language "appropriately highlighted this dramatic change," and it was not insufficient or unfair. *Fitzpatrick v. Ashcroft*, 640 S.W.3d 110, 126 (Mo. App. W.D. 2022).

iii. "nullify longstanding Missouri law protecting the right to life"

The Secretary's use of the phrase "nullify longstanding Missouri law protecting the right to life" also is not "problematic" because the "right to life" is statutorily enshrined in *those exact terms*. *See* RSMo. § 188.017 ("Right to Life of the Unborn Child Act"); *id*. § 188.010 (stating the general assembly will "[d]efend the right to life of all humans, born and unborn"); *id*. § 1.205 (stating

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that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state").

As the Supreme Court of Missouri has made clear: "References to current law to provide context to a summary statement do not render the summary statement unfair or prejudicial." *Brown v. Carnahan*, 370 S.W.3d 637, 660 (Mo. 2012) (en banc). The Secretary's reference to the "longstanding Missouri law protecting the right to life" was a reference to the text of these laws enshrining the "right to life." The reference to the "longstanding" nature of these laws also is not argumentative, given that Missouri law has protected an unborn child's "rights" to all the same privileges as other citizens, in those terms, at least as early as 1986. *See* RSMo. § 1.205. In fact, the first prohibition of abortion in Missouri was enacted almost two centuries ago in 1825. RSMo. § 188.026.1(3). Missouri courts have recognized that life begins at conception at least as early as 1883: "[T]he child is, in truth, alive from the moment of conception . . . ." *State v. Emerich*, 13 Mo. App. 492, 495 (1883), *affirmed*, 87 Mo. 110 (1885); RSMo. § 188.026.1(2). As this Court has determined, "[w]here a ballot measure's adoption would directly ***nullify*** or substantially alter existing legal rules, reference to the measure's effect on existing law may often be necessary to adequately inform voters of the legal and probable effects of the proposal." *Pippens*, 606 S.W.3d at 708 (quotation omitted) (emphasis added); *see also id.* at 709 (holding that the statement must "explicitly refer" to existing law to be fair and sufficient). Incorporation of the existing law's name is by no means unfair—and in fact is *necessary* to inform Missourians on the measure's "effect" of "nullify[ing]" the existing "Right to Life of the Unborn Child Act" and other laws protecting the right to life. *Id.* at 708.

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iv. "partial birth abortion"

Just as the Secretary fairly references the lack of timing restrictions, *see supra* Part II.b.i., the Secretary rightly mentions the absence of any regulations on abortion methodology under the ballot initiatives' proposed regime by stating that the law would "nullify Missouri's longstanding law protecting the right to life, including but not limited to partial-birth abortion." In fact, the ballot initiatives presume that any restrictions on abortion methods, including partial birth abortions, are "invalid," and the ballot initiatives expressly forbid prosecutions for abortions under any circumstances. In doing so, the proposed initiatives dramatically depart from Missouri law, which has long criminalized partial birth abortions as a form of infanticide. RSMo. § 565.300.3 ("A person commits the offense of infanticide if he or she causes the death of a living infant with the purpose to cause said death by an overt act performed when the infant is partially born or born."); *id.* § 188.026(25)-(26). The term "partially born" is not argumentative—it is a codified, defined term under Missouri law. RSMo. § 565.300.1(3) (defining the term); *id.* § 188.026(26) (discussing "Missouri's ban on the partial birth abortion method" in "section 565.300"). The Secretary "appropriately highlighted this dramatic change" from current law criminalizing partial birth abortions, while using fair, statutorily defined language. *Fitzpatrick*, 640 S.W.3d at 126.

v. "require the government not to discriminate against persons providing or obtaining an abortion"

The Secretary's third bullet point asks voters if they wanted to "require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding?" ("non-discrimination provision"). The non-discrimination provision mirrors the text of each ballot

initiative: "The Government shall not discriminate against persons providing or obtaining reproductive health care or assisting another person in doing so . . . ." The Circuit Court, however, deleted any reference to the non-discrimination provision upon concluding that it "is ancillary and does not warrant inclusion in the summary statement." Judgment at 4. This was an invalid reason to delete the Secretary's chosen language.

While the Secretary's summary statements "'need not set out the details of the proposal,' nothing precludes the summary statements from including such details." *Sedey*, 594 S.W.3d at 272 (quoting *Stickler*, 539 S.W.3d at 709). "[T]he test is not whether the summary statements are 'the best utilization of the allotted space.'" *Id.* (quoting *Bergman*, 988 S.W.2d at 92). "The test is whether the language used is, itself, insufficient and unfair." *Id.* The inclusion of some legal consequences or details over others "does not render the language used insufficient or unfair." *Id.*; *Billington v. Carnahan*, 380 S.W.3d 586, 595 (Mo. App. W.D. 2012) (concluding that the decision of which details to include falls within the discretion of the Secretary).[1]

And here, even if the ancillary nature of a provision could render a statement insufficient or unfair, the non-discrimination provision would not. It is not merely ancillary. It's a significant feature of every single ballot initiative that seriously restricts the Government's actions and regulatory scope. Particularly where the Secretary mirrored the proponent's actual text,

[1] The Circuit Court made a similar point when arguing that some of the Secretary's statements must be deleted because the summary discusses some "possible" outcomes that were not "probable" outcomes. Judgment at 2 n.1. The Court did not identify which outcomes qualify as merely "possible." But the Court erred to the extent it relied on this reasoning. The Secretary's inclusion of some possible outcomes does not render statements insufficient or unfair. *Billington*, 380 S.W.3d at 591 (finding that the summary need not "include every possible consequence" but can include some).

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the Circuit Court was not empowered to scratch it from the summary statement.

vi. "potentially including tax-payer funding"

The Circuit Court also deleted the phrase "potentially including tax-payer funding" in the non-discrimination provision as "problematic." Judgment at 2-3. But the reference to tax-payer funding is not insufficient or unfair. Taxpayers inevitably fund the Government. And since the Government cannot, under any circumstances, discriminate in its healthcare spending under the ballot initiatives, *see supra* Part II.b.v., tax-payers will inevitably foot the bill for abortions. Thus, this is an accurate, fair explanation of the law's effect that average voters will not misconstrue. *See Pippens*, 606 S.W.3d at 701-02. Even if "other language might have better explained" the funding, "that does not mean the language used by the Secretary of State was unfair or insufficient." *Fitzpatrick*, 640 S.W.3d at 127.

vii. "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 Circuit Court also wrongly concluded that the language of the total ban is "problematic." Judgment at 2-3. That language is copied directly from the ballot initiatives, which define the "Government" as "the state of Missouri" or "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." Then the initiatives specify that the "Government," as defined, can "under no circumstance" "deny, burden, or otherwise restrict an abortion," and any governmental "denial, interference, delay, or restriction" of a person's ability

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to obtain an abortion is "presumed invalid," effectively barring the Government from imposing regulations. It's unclear how this copy-paste could be "problematic." That such language triggered the Circuit Court's censure, however, casts serious doubt on its own fairness in reviewing the summary—a topic explored more fully in Section III.

viii. "including a minor"

The Circuit Court deleted the phrase "including a minor" in the 24-week and fetal viability bans upon finding this language "problematic." Judgment at 2-3. But this phrase actually abided by this Court's mandate to "accurately reflect both the legal and probable effects of the propos[al]." *Pippens*, 606 S.W.3d at 701 (quoting *Shoemyer v. Sec'y of State*, 464 S.W.3d 171, 174 (Mo. 2015)).

The impact of these initiatives on minors is not merely probable—it is inevitable. The ballot initiatives treat minors the same as adults, and apart from a few initiatives that allow the General Assembly to enact an easily-avoided parental consent "requirement," the initiatives do not hinder minors at all from obtaining abortions. Indeed, one of the initiatives' clear and salient purposes is to provide minors with a sweeping right to do so. Thus, the Secretary's phrase is in no way "intentionally unfair or misleading." *Sedey*, 594 S.W.3d at 263; *see also Pippens*, 606 S.W.3d at 702.

In fact, the inclusion of this information accomplishes the central goal of summary statements to inform voters "what the proposal is about." *Sedey*, 594 S.W.3d at 263; *see also Pippens*, 606 S.W.3d at 702; *Stickler*, 539 S.W.3d at 702. This is pertinent information a voter would want to know and would not automatically presume at the voting box. Missouri law differentiates the rights afforded to and restrictions imposed on minors and adults; voting, marriage, and healthcare are just a few examples. A voter would naturally assume that

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this abortion law would also treat adults and minors differently. The Secretary's statement responds to that assumption to adequately "give notice" of the measures and inform "those interested or affected by the proposal." *United Gamefowl Breeders Ass'n of Mo. v. Nixon*, 19 S.W.3d 137, 140 (Mo. 2000) (en banc).

ix. "unborn child"

The Circuit Court also deleted the phrase "unborn child," deeming it "problematic." Judgment at 2-3. But the Circuit Court cannot strike language it thinks is "value-laden," *Stickler v. Ashcroft*, 539 S.W.3d 702, 717 (Mo. App. W.D. 2017), or because it finds "more specific or even more preferable language," *Billington*, 380 S.W.3d at 596; *Asher v. Carnahan*, 268 S.W.3d 427, 431-32 (Mo. App. W.D. 2008) (concluding that "[i]f charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions" and so the law permits "a wide range of acceptable ballot summaries for any particular proposed amendment to the constitution."). After all, the court is not called upon "to act as a political arbiter between opposing viewpoints in the initiative process." *Missourians Against Human Cloning*, 190 S.W.3d at 456.

Instead, when the Secretary is tasked with drafting summary statements on a "contentious" topic like abortion, over which there has been a "long and bitter disagreement in this country," the court must recognize the difficulty of the Secretary's job to craft unbiased language. *Stickler*, 539 S.W.3d at 718 (noting the Secretary's difficult task in crafting a statement on a right-to-work initiative due to the contentious debate surrounding the topic). Context and other sources of law can indicate that the language is unbiased. *Id.*

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"Unborn child" is not a biased term but rather a term of art in Missouri law. The General Assembly expressly defined this term in RSMo. § 1.205 for use in legislative enactments. As previously stated, the Missouri Supreme Court reads this statutory definition of "unborn child" *in pari materia* with other statutes discussing "persons." *See Connor*, 898 S.W.2d at 92; *Knapp*, 843 S.W.2d at 92. And the phrase "unborn child" has been used again and again in statutes passed by the General Assembly. *See, e.g.*, RSMo. §§ 188.010, 188.015(10), 188.027, 563.031.

The prevalence of this term in judicial opinions also indicates that it is fair. *Stickler*, 539 S.W.3d at 717 & n.14. The phrase "unborn child" has been used as recently as 2022 in the Supreme Court—*Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)—and as recently as July 2023 in the Eighth Circuit Court of Appeals—*Janis v. United States*, 73 F.4th 628 (8th Cir. 2023). The Missouri Supreme Court's decisions are rife with this term. *See Connor*, 898 S.W.2d 89; *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. 2015) (en banc); *State v. Smith*, 456 S.W.3d 849, 853 (Mo. 2015) (en banc); *Tendai v. Mo. State Bd. of Registration for Healing Arts*, 161 S.W.3d 358 (Mo. 2005) (en banc); *LeSage v. Dirt Cheap Cigarettes & Beer, Inc.*, 102 S.W.3d 1 (Mo. 2003) (en banc); *see also State v. Holcomb*, 956 S.W.2d 286 (Mo. App. W.D. 1997).

The use of "unborn child" again and again in Missouri law and in judicial opinions shows that it is not "problematic" but rather an accurate description of the persons affected by this ballot initiative. *Stickler*, 539 S.W.3d at 717 & n.14.

x. "end the life"

Likewise, the phrase "end the life" is appropriate because Missouri statutes describe the act of abortion in this way, *see, e.g.*, RSMo. § 188.015(1) (defining abortion as a certain act "to destroy the life"); *id.* § 188.027.1(2)

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(finding that the "life of each human being begins at conception" and that "[a]bortion will terminate the life of a separate, unique, living human being"); *id*. § 1.205 (describing that unborn children have "protectable interests in life" from "conception until birth"), and Missouri courts describe the deaths of unborn children in other contexts, read *in pari materia* with these abortion statutes, in this way, *see, e.g.*, *Connor*, 898 S.W.2d at 92 (wrongful death statute includes death of unborn child); *State v. Knapp*, 843 S.W.2d 345, 350 (Mo. 1992) (en banc) (involuntary manslaughter statute includes death of unborn child); *Holcomb*, 956 S.W.2d at 290 (first degree murder statute includes death of unborn child); *State v. Rollen*, 133 S.W.3d 57, 63 (Mo. App. E.D. 2003) (second degree murder statute includes death of unborn child). "End the life" is not an unfair or argumentative term but a valid description of abortion under Missouri law. *Stickler*, 539 S.W.3d at 717 & n.14.

xi. "at any time"

The phrase "at any time" in the 24-week and fetal viability ban is fair for the same reasons that the phrase "from conception to live birth" is. *See supra* Part II.b.i. The phrase informs voters that the right to obtain an abortion persists even if the State enacts a 24-week or fetal viability ban and significantly constrains the State's power to regulate abortion. *Pippens*, 606 S.W.3d at 704 (stating that a summary must account for "significant limitation[s] on the scope of the restriction"). The average voter would expect a strict abortion ban under a 24-week or fetal viability ban. This language responds to that assumption by informing voters that the right continues to operate and allow for abortions after 24 weeks or fetal viability notwithstanding restrictions if a healthcare professional makes certain findings. Ballot Initiatives 85, 86, 87. Those findings are virtually impervious to outside scrutiny, as even an opinion rendered in the final days or hours of a

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pregnancy that an abortion is needed to "protect" the "mental health" of the mother is sufficient to sidestep the supposed ban. *Id.* Further, that opinion need only be given in subjective "good faith," whatever that entails; it cannot be questioned under any objective standard. *Id.*

c. Conclusion

The Secretary fairly and accurately summarized the purpose and goals of the initiatives as well as their effects on Missouri law. Given that the Secretary's statements are not insufficient or unfair, this Court is obliged to accept them. This Court should look no further than the plain language of the Secretary's statements.

III. This Court cannot adopt the Circuit Court's rewritten statements.

But even if the Court concluded that the Secretary's statements are insufficient or unfair, it should not look at the Circuit Court's rewritten statements. Under this Court's *de novo* review of the Circuit Court, *Mo. Mun. League*, 303 S.W.3d at 580, this Court does not defer in any way to the Circuit Court's rewritten statements; it only defers to the Secretary's. *Sedey*, 594 S.W.3d at 263. After all, this Court "steps into the circuit court's shoes" on review. *Pippens*, 606 S.W.3d at 713 (quoting *Boeving*, 493 S.W.3d at 882). And even if the Circuit Court's statements were somehow entitled to the same deference as the Secretary's, this Court could not uphold them because they are insufficient or unfair.

a. Statements fail to mention restrictions on government regulation.

When overhauling the Secretary's statements, the Circuit Court added new bullet points. One asks voters if they would like to "allow regulation of reproductive health care to improve or maintain the health of the patient."

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Judgment at 4. But this statement is misleading and deeply unfair. The statement implies that the new regulations grant the State a new permissive power to regulate to improve or maintain health of a patient. Yet the State has always had that police power. In reality, the initiatives severely *restrict* the Government's preexisting power to regulate, and for the first time ever, *forbid* regulation *even when* it is expressly "to improve or maintain the health of the patient" in every situation where the patient's "autonomous decision-making" would at all be restricted. Thus, any health-safety-welfare regulation is automatically invalid if it forecloses an abortion that a patient would want. Judgment at 4. The proposed amendment *only* permits regulation if

> the Government demonstrates that such action is justified by a compelling government 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.

In requiring proof of "a compelling government interest achieved by the least restrictive means," the initiatives subject governmental regulation to strict scrutiny—the "most rigorous and exacting standard of constitutional review." *Dotson v. Kander*, 464 S.W.3d 190 (Mo. 2015) (en banc) (quoting *Miller v. Johnson*, 515 U.S. 900, 920 (1995)). And the strict scrutiny threshold here is much harder to meet than the typical strict scrutiny case because the law itself narrowly defines what qualifies as a compelling government interest. The Government can *only* satisfy this standard by showing that the regulation "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

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standards of practice and evidence-based medicine, and does not infringe on that person's autonomous decision-making." Thus, the typical means-end analysis of strict scrutiny does not apply at all if a health regulation would interfere with a patient's own desires. That is not strict scrutiny, it is no scrutiny at all, and therefore automatic invalidation. Even if some health and safety regulation exists that would in no case interfere with an individual patient's desire (and this may be a null set), the strict scrutiny analysis that remains would present an extremely difficult burden for the Government to satisfy—a high burden that the Circuit Court's summary statement does not capture.

As this Court has stated, even in the typical strict scrutiny case (not this regime of impossible scrutiny or super strict scrutiny), when "it is not presently clear whether strict scrutiny applies . . . it is important for voters to be notified in the Summary Statement that the initiative expressly applies strict scrutiny to such challenges." *Hill v. Ashcroft*, 526 S.W.3d 299, 328 (Mo. App. W.D. 2017) (holding that since the law was unclear on applicability of strict scrutiny to collective bargaining regulations, the summary statement had to account for initiative's application of strict scrutiny).

Strict scrutiny does not currently apply to legislative restrictions on abortion. One of these initiatives, if enacted, would create a sea change. Voters therefore need to know about the new, impossible-scrutiny and heightened-strict-scrutiny standards to make an informed vote. *Id*. The Circuit Court's failure to disclose it or address any of the limits on governmental regulation renders the statements insufficient and unfair. *Id*.

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b. Statements misstate current law and thereby mislead voters.

This statement on the availability of regulations fails for another independent reason. The statement asks voters if they want to amend the Constitution to "allow regulation of reproductive health care." Judgment at 4. The Missouri Constitution already empowers the legislature to regulate in this sphere. *See* Mo. Const. art. III. This statement inaccurately suggests that the legislature does not currently possess this authority. Thus, this statement cannot stand. *Mo. Mun. League*, 364 S.W.3d at 588 (holding that where the Missouri Constitution already required "just compensation" for property takings, the summary statement could not suggest that the new proposal would "require" just compensation for takings).

Likewise, the Circuit Court misconstrued the current law in Missouri as a "ban on abortion." Judgment at 4. But Missouri does not have a total abortion ban. Rather, the "Right to Life of the Unborn Child Act" sets "limitations on abortions" and allows them "in cases of medical emergency." RSMo. § 188.017. The Circuit Court's statement "is likely to mislead voters" to think that the current law emits no exceptions, and the new proposal would allow for abortions in medical emergencies for the first time. *Boeving*, 493 S.W.3d at 875. Thus, the Court should revert to the Secretary's original. *Id.*

c. Statements fail to identify almost unfettered veto power of healthcare professionals over 24-week and fetal viability regulations.

The Circuit Court's statements are insufficient and unfair for another reason. Several ballot initiatives would empower the Missouri General Assembly to regulate abortions after "24 weeks," or in the alternative, after "fetal viability." Ballot Initiatives 80, 82, 85, 86, 87. But the General Assembly's power to regulate in these circumstances is severely restricted, and

critically, is subject to the unilateral veto of *any healthcare professional*, not just a treating *physician*. Specifically, the initiatives state that when issuing restrictions after 24 weeks and fetal viability,

> under no circumstance shall the Government deny, burden, or otherwise 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 or is of a nonviable pregnancy.

Id. And healthcare professionals' veto power over "fetal viability" restrictions goes even further. The ballot initiatives leave the *very definition* of "fetal viability" entirely within the discretion "of a treating health care professional"—not the legislature. Ballot Initiatives 85, 86, 87. Fetal viability is defined as "the point in the 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." *Id.*

The Circuit Court failed to account for this "significant qualification" on the General Assembly's regulatory authority after 24 weeks or fetal viability. *Seay v. Jones*, 439 S.W.3d 881, 891 (Mo. App. W.D. 2014). Instead, the Circuit Court proposed summaries that ask voters if they would want to "allow abortion to be restricted or banned after Fetal Viability [or 24 weeks] except to protect life or health of the woman," without any reference to the unfettered discretion of the healthcare professional to decide whether to terminate the pregnancy. Judgment at 4-7. The Circuit Court provided limited information, such that "a voter reading the summary statement would expect that" their elected representatives would have the power to regulate abortion procedures without these limitations. *Seay*, 439 S.W.3d at 890. But in reality, any legislative power to enact regulations "is significantly colored by the fact that

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[a single unilateral healthcare professional] could wholly extinguish it." *Id.* Thus, this information is especially "significant to voters to know," and it must be provided for in the summary statement. *Seay*, 439 S.W.3d at 891; *Pippens*, 606 S.W.3d at 704 (stating that a summary must account for "significant limitation[s] on the scope of the restriction").

This statement is also misleading because it implies that Missouri lawmakers do not currently have the power to restrict or ban abortion after fetal viability or 24 weeks of pregnancy, when lawmakers, in fact, already have that authority. The summary statement as it is written "would lead voters to believe that, should the amendment pass," Missouri law will now empower the legislature to regulate abortion for the first time. *Seay*, 439 S.W.3d at 892. This unfairly misleads voters on the proposal's effect. *Billington*, 380 S.W.3d at 592.

d. Statements fail to note almost unfettered veto power of healthcare professionals over parental consent requirement.

The Circuit Court made the same error when summarizing the parental consent requirement in some of the proposed initiatives. Judgment at 4. Granted, the parental consent provision is so narrow and hypothetical that the Circuit Court was not obligated to include it. But when the Circuit Court did decide to include the potential parental consent provision, it should have included the significant constraint on the General Assembly because the statement as written unfairly depicts the General Assembly's power to regulate as more expansive than it is. *Pippens*, 606 S.W.3d at 704.

The ballot initiatives allow the Missouri General Assembly to require minors to obtain parental consent before exercising their otherwise unlimited right to obtain an abortion. But importantly, the Missouri General Assembly's power is subject to an even more extreme veto than the fetal viability and 24-

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week provisions. The initiatives mandate that the legislature make exception for any

> health care professional to provide the abortion without [parental] 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.

This required exception swallows the rule and effectively nullifies any parental consent legislation. The healthcare professional can decide to override the Assembly simply because he or she thinks the minor is "mature." This "significant limitation" must be included when discussing legislative power to require parental consent. *Pippens*, 606 S.W.3d at 704.

But this gaping exception is nowhere mentioned in the Circuit Court's revised statements. The Circuit Court's statements merely ask voters if they would like to "allow the General Assembly to enact a parental consent requirement for abortion with an alternative authorization procedure." Judgment at 4. "[A]lternative authorization procedure" will lead voters to believe that the law will still ensure parents' consent; this language does not remotely encapsulate what these initiatives really do: grant unilateral power to a single healthcare professional to override the interests of parents and the interests of the people of Missouri expressed through their elected representatives and decide, based on the professional's own unconstrained judgment, that a child is "mature" enough to obtain an abortion without parental approval. And if this hole were not already wide enough, the petitions contain an even broader exception that all but obliterates the supposed rule: if the professional thinks for any reason (or for no reason at all) that the child should have an abortion, and that her parents will disapprove, this alone could support a decision that parental consent is not in the child's "best interest."

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The ability to easily procure an outside veto on the consent requirement means that consent is at best a courtesy. The Circuit Court's summary of the parental consent regulation does not account for the massive, concentrated veto power of one treating healthcare professional over the people's representatives. This is a radical departure from the current law. *See* RSMo. § 188.017 (Right to Life of Child Unborn Act); *id*. § 188.028 (listing strict consent requirements for minors before Right to Life of Child Unborn Act). The Circuit Court's failure to mention this significant limitation when raising the narrow parental consent provision amounts to an insufficient and unfair summary statement. *Pippens*, 606 S.W.3d at 708.

CONCLUSION

This Court should reverse the judgment of the Cole County Circuit Court and reinstate the Secretary's summary.

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Respectfully submitted,

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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. This brief was filed with the consent of the parties pursuant to Rule 26. This brief complies with the limitations of Rule 84.06(b) and Rule 55.03 and contains 9049 words, excluding the cover page, signature blocks, and certificate of service.

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