SC100742

IN THE SUPREME COURT OF MISSOURI

MARY ELIZABETH ANNE COLEMAN, KATHLEEN ANNE FORCK, HANNAH SUE KELLY and MARGUERITE ANN "PEGGY" FORREST
Respondents,

v.

JOHN R. ASHCROFT,
Respondent,

MISSOURIANS FOR CONSTITUTIONAL FREEDOM and
DR. ANNA FITZ-JAMES,
Intervenors-Appellants.

From the Circuit Court of Cole County, Missouri
The Honorable Christopher K. Limbaugh, Circuit Judge

BRIEF OF RESPONDENTS COLEMAN, FORCK, KELLY AND FORREST

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INTRODUCTION

Proposed Amendment 3[1] is a proposal to repeal Missouri's ban on abortion that does not disclose to voters that it will repeal Missouri's ban on abortion. It illegally induces Missouri voters to do more than they wish to. To protect voters from fraud in the initiative petition process, the Missouri Constitution and Missouri statutes required that voters be told IP 2024-086's true effects before signing to support it. Mo. Const. art. III, § 50; 116.050 RSMo. Initiative Petition 2024-086 defrauded potential signers by failing to disclose *any* of the many, many provisions of Missouri law it proposes to repeal, even its headliner: Missouri's current ban on abortion. By hiding its profound effects from signers, the drafters of IP 2024-086 illegally misled Missouri voters.

In addition, the constitutional "single subject rule" prohibits combining more than one subject in a single measure, because tying up multiple subjects within a single vote makes it impossible for voters to express their will about one subject (*e.g.*, abortion) without affecting others. Mo. Const. art. III, § 50; art. XII, § 2(b). Amendment 3 asks Missouri voters to legalize, protect, and fund abortions within a measure that simultaneously proposes to legalize, protect, and/or fund on different terms the vast category of "all [other] matters relating to reproductive health care." The list of such "matters" will expand indefinitely in the courts, but it immediately includes seven named areas of regulation and a slate of other acts that are currently prohibited in Missouri, like

[1] "Amendment 3" is the ballot designation given by Defendant Secretary of State Ashcroft to Initiative Petition 2024-086 upon its August 13, 2024, certification. Plaintiffs-Respondents will refer throughout their brief to the initiative petition as "IP 2024-086" and the constitutional amendment it proposes as "Amendment 3."

gender transition therapies for children, reproductive technologies like cloning and IVF for stem cell research, and genital mutilation of a female child.

Missouri voters naturally have widely varying levels of support for the diverse subjects of Amendment 3. Unfortunately, the will of voters on any of the myriad other issues is particularly obscured, where, as here, all the proposed changes are eclipsed by Amendment 3's effects on one enormously familiar and controversial issue, abortion. This lawsuit does not challenge the rights of Missouri voters to make each of the changes proposed by Amendment 3, but it does insist that the Missouri Constitution protects voters from being forced to say "yes" or "no" to all of them at the same time. Mo. Const. art. III, § 50; art. XII, § 2(b).

Defendant Secretary of State John Ashcroft is tasked with enforcing the laws that prevent manipulating voters as IP 2024-086 has done, by refusing to certify petitions that have violated them. 116.150; 116.050; 116.040 RSMo. Defendant did not refuse to certify IP 2024-086, instead placing it on the November 2024 ballot as "Amendment 3." *See* Ex. 1, Certification of Secretary of State. This certification was a legal error subject to judicial review. 116.150; 116.200 RSMo.

Plaintiffs-Respondents, Missouri citizens, timely filed a legal challenge to the Secretary of State's erroneous certification of IP 2024-086 in the Cole County Circuit Court on August 22, 2024. Proponents of Amendment 3, Missourians for Constitutional Freedom and Dr. Anna Fitz-James, intervened to defend the Secretary's certification. The Circuit Court reviewed Plaintiffs' claims on an expedited basis pursuant to Section 116.200.1 RSMo, holding a trial and issuing a judgment on September 6, 2024.

The Circuit Court determined that Defendant Ashcroft's certification of Amendment 3 for inclusion on the ballot was erroneous, because IP 2024-086 had not satisfied the disclosure requirements of Section 116.050.2(2), because it failed to inform voters of *any* of Missouri's current laws that it would repeal, even its admitted and acknowledged effects on Missouri's abortion laws. *Coleman v. Ashcroft*, No. 24AC-CC07285 (Cole Cty. Sept. 6, 2024). The Circuit Court held Plaintiffs' other claims for relief in the trial court moot, and deferred execution of the injunctive relief Section 116.200 requires until Tuesday, September 10, 2024, in order to provide for appellate review. *Id.* at 10.

Judicial review of the Secretary of State's certification is the last and only line of defense protecting Missouri voters from fraud enabled by the mistakes of the Secretary of State. *See Halliburton v. Roach*, 130 S.W. 689 (Mo. 1910) (interpreting predecessor statutes to Section 116.200.1 RSMo). Moreover, pre-election review[2] of Plaintiffs' claims that IP 2024-086 is legally insufficient is favored, because "regardless of the meritorious substance of a proposition, if the prerequisites of [the Missouri Constitution pertaining to the procedure and form of an initiative petition] are not met, the proposal is not to be on the ballot." *Cady v. Ashcroft*, 606 S.W.3d 659, 666 (Mo. App. W.D. 2020) (quoting *Mo.*

[2] Current Missouri statutory law provides for this review to protect Missouri voters and the initiative petition process, but simultaneously allows the Secretary of State to narrow the window for such review to a maximum of 35 days. 116.150.3 RSMo. This year, the law allowed him to leave only 28 days for the parties and the Court to accomplish meaningful review of IP 2024-086, including any appeal. Although Plaintiffs-Respondents timely filed their Petition, at trial there remained only six days for Missouri courts to judge their claims. Today, there remains one.

Elec. Cooperatives v. Kander, 497 S.W.3d 905, 913 (Mo. App. W.D. 2016) (quoting *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 828 (Mo. banc. 1990))) (quoted by Circuit Court, *Coleman* at 2-3). Accordingly, Missouri law provides a *pre-election* remedy for the insufficiency of a proposal: an injunction preventing state officials from including the proposal on the ballot. 116.200.2 RSMo.

Plaintiffs-Respondents, Missouri citizens and registered voters in the state of Missouri, therefore ask the Supreme Court of Missouri to affirm the holding of the Circuit Court to the effect that IP 2024-086 is legally insufficient and, no later than September 10, 2024, to order execution of the Circuit Court's injunction compelling Defendant Ashcroft to reverse his certification and prohibiting all other officers from printing proposed Amendment 3 on the ballot in Missouri's November 5, 2024, General Election.[3] 116.200.1; 116.200.2 RSMo.[4]

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[3] Plaintiffs incorporate by reference all claims and relief sought in their Petition, filed in Cole County Circuit Court on August 22, 2024. Petition, *Coleman v. Ashcroft*, No. 24AC-CC07285 (Cole Cty. Sept. 6, 2024) (hereinafter "Petition").

[4] As stated in their Petition, filed in this Court on August 22, 2024, and incorporated herein by reference, Plaintiffs further allege that IP 2024-086's violations of various Missouri statutory and constitutional provisions were sufficient to mislead signers of the Initiative Petition to such a degree that, in the event that disposition of this matter is deferred until after an election in which Amendment 3 is on the ballot, the results of any such election would be invalid. 115.593 RSMo. Petition ¶ 14.

Likewise, to the extent their pre-election claims are not fully adjudicated prior to September 10, 2024, Plaintiffs have fully preserved below in their Petition, in briefing, and at trial, and incorporate herein by reference, their claim that Section 116.200.1 RSMo, to the extent it limits the time for appeal of the legal sufficiency of an initiative petition to the very brief time following the secretary of state's certification decision, violates Articles III and XII of the Missouri Constitution, which reserve to the people the power to enact or reject amendments to the Constitution by initiative petition, and is therefore invalid. Petition, Count III; Plaintiffs' Trial Brief, Point II, *Coleman v. Ashcroft*, No. 24AC-CC07285 (Cole Cty. Sept. 6, 2024).

ARGUMENT

I. IP 2024-086 Is Insufficient Because It Failed Substantially to Comply With the Disclosure Requirements of Section 116.050 RSMo and Article III, Section 50, of the Missouri Constitution.

The Cole County Circuit Court considered the merits of Plaintiffs' Petition in a trial on September 6, 2024, and concluded that IP 2024-086 had violated the laws governing the initiative petition process in at least one way. *Coleman v. Ashcroft*, No. 24AC-CC07285 (Cole Cty. Sept. 6, 2024) (hereinafter, *Coleman*). Specifically, the Court found that IP 2024-086 was legally insufficient for inclusion on the ballot because it did not disclose to signers a single provision of Missouri law that it would repeal, even Missouri's current ban on abortion, as required by Section 116.050.2(2) RSMo. The Circuit Court identified several provisions of Missouri abortion law that would be repealed by IP 2024-086 that were not disclosed in the "full and correct text of the measure" as required by Section 116.050.2(2) RSMo. For the reasons the Circuit Court identified, and/or because of many other illegal omissions the Court did not reach,[5] this Court should affirm the Circuit Court's judgment.

Standard of review. Because this case was submitted on stipulated facts, the standard of review is *de novo*. *Cady v. Ashcroft*, 606 S.W.3d 659, 665 (Mo. App. W.D. 2020).

A. The Missouri Constitution and Missouri Election Statutes Require Initiative Petitions to Disclose in Their "Full and Correct Text" Any Provisions of Missouri's Constitution and Statutes They Will Repeal.

[5] "The judgment of the trial court can be affirmed on any grounds supported by the law and evidence." *Legends Bank v. State*, 361 S.W.3d 383, 386 (Mo. banc 2012).

"[I]t obviously would be a fraud on the signers of an initiative petition to procure their signatures on the inducement that it proposes a constitutional amendment greatly in their interest, when in fact it makes other undisclosed changes greatly to their detriment." *Moore v. Brown*, 165 S.W.2d 657, 663 (Mo. banc 1942). To prevent such fraud, the secretary of state's certification that a proposed ballot measure is "sufficient" requires him to enforce constitutional and statutory provisions that dictate what an initiative petition must tell voters.

Among several disclosure requirements that protect potential signers, Article III, Section 50 of the Missouri Constitution requires that each initiative petition include "the full text of the measure." Mo. Const. art. III, § 50. The "full text of the measure" in turn must identify every constitutional provision an initiative "undertakes to amend." *Halliburton v. Roach*, 139 S.W. 689, 695, 699 (Mo. 1910) (quoted in *Coleman* at 3). As the Circuit Court noted, "a proposed amendment by the initiative must disclose what integrally related provisions of the Constitution it is changing, and … the initiative petition will be legally insufficient if that showing is not made." *Coleman* at 3 (quoting *Moore*, 165 S.W.2d at 661).

Statutes implementing and safeguarding the initiative petition process include additional disclosure requirements to protect Missouri voters from being deceived by artful or confusing drafting. Among other requirements, each initiative petition must contain or attach a "full and correct text" of the proposed measure that identifies "all sections of existing law or of the constitution which would be repealed by the measure." 116.050.2(2)

RSMo. These disclosures are requirements in order for an initiative petition to be found legally "sufficient." 116.040 RSMo.[6] [7] Section 116.050 RSMo requires:

> **116.050.** 1. Initiative and referendum petitions filed under the provisions of this chapter shall consist of pages of a uniform size. Each page, excluding the text of the measure, shall be no larger than eight and one-half by fourteen inches. **Each page of an initiative petition shall be attached to or shall contain a full and correct text of the proposed measure.** Each page of a referendum petition shall be attached to or shall contain a full and correct text of the measure on which the referendum is sought.
>
> 2. The **full and correct text** of all initiative and referendum petition measures shall:
>
> > (1) Contain all matter which is to be deleted included in its proper place enclosed in brackets and all new matter shown underlined;
> >
> > **(2) Include all sections of existing law or of the constitution which would be repealed by the measure; and**
> >
> > (3) Otherwise conform to the provisions of Article III, Section 28 and Article III, Section 50 of the Constitution and those of this chapter.

116.050 RSMo (emphases added).

Like all statutory provisions, Section 116.050 RSMo's subdivisions establishing the components of the "full and correct text" of a particular measure are distinct and must be interpreted as imposing different requirements. In particular, Section 116.050.2(1)

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[6] Petitions may be found "sufficient" only if they complied with Sections 116.040 (providing a format for each page of an initiative petition, to which the "full and correct text" must be attached), 116.050 (specifying the attachment of the "full and correct text") and 116.080 (specifying the inclusion of the official ballot title) RSMo.

[7] On pages 25 and 26 of their Petition, Plaintiffs mistakenly referred to Sections 116.040 and 116.050 as Sections 188.040 and 188.050, inadvertently replacing the Elections statutory chapter number (116) with the Abortion chapter number (188). Citations elsewhere in the Petition were correct, including in the headings and the prayer for relief, and Intervenor-Defendants noted the error in their Answer ¶¶ 95-101, so there was no prejudice to them, but the mistake was corrected in Plaintiffs' Trial Brief and herein, and Plaintiffs apologize to all parties and the Court for any confusion.

RSMo requires that the "full and correct text" lay out the precise textual changes a measure will effect, while Section 116.050.2(2) RSMo requires the "inclusion" of all sections of existing laws it will repeal. 116.050 RSMo. "[A]ll provisions of a statute must be harmonized and every word, clause, sentence, and section thereof must be given some meaning.' Courts may not interpret statutes to render any provision a nullity because doing so would not give effect to the plain language of the statute.'" *State v. Knox*, 604 S.W.3d 316, 322 (Mo. 2020) (quoted in *Coleman* at 4). "Since subsection 2(2) cannot be interpreted to be a nullity, its identification of repealed provisions must refer to something that cannot be satisfied by the mere recitation of textual changes required in subsection 2(1)." *Coleman* at 4.

B. A "Disclaimer" Satisfies the Disclosure Requirement of Section 116.050.2(2).

The disclosure requirements of Section 116.050.2(2) RSMo and Article III, Section 50, can be satisfied by the inclusion of a "disclaimer" listing repealed and amended provisions by citation just above or below where the proposal lists the proposed new text and deletions. Examples include the "Clean Missouri" Initiative Petition, IP 2018-048, which was enacted in 2018, after it had been circulated attaching a "full and correct text" that began with the disclaimer:

> NOTICE: You are advised that the proposed constitutional amendment may change, repeal, or modify by implication or may be construed by some persons to change, repeal or modify by implication, the following Articles and Sections of the Constitution of Missouri: Article I, Section 8 and the following Sections of the Missouri Revised Statutes: Sections 105.450 through 105.496 and Sections 130.011 through 130.160. The proposed amendment revises Article III of the Constitution by amending Sections 2, 5, 7, and 19 and adopting three new sections to be known as Article III Sections 3, 20(c), and 20(d).

Ex. 4, *available at* https://www.sos.mo.gov/CMSImages/Elections/ Petitions/2018-048.pdf.

IP 2006-08 ("Stem Cell Research") (enacted in 2006 as Amendment 2), began its "full and correct text" with the disclaimer:

> NOTICE: You are advised that the proposed constitutional amendment may change, repeal, or modify by implication or may be construed by some persons to change, repeal or modify by implication, the following provisions of the Constitution of Missouri - Sections 2, 10, 14, and 32 of Article I; Section 1 of Article II; Sections 1, 21, 22, 23, 28, 36, 39, 40, 41, and 42 of Article III; Sections 1, 14, 36(a), 37, 37(a), 39, and 52 of Article IV; Sections 5, 14, 17, 18, and 23, and subsection 17 of Section 27 of Article V; Sections 18(b), 18(c), 18(d), 18(k), 18(m), 19(a), 20, 31, 32(a), and 32(b) of Article VI; Section 9(a) of Article IX; Sections 1, 6, 11(a), 11(d), and 11(f) of Article X; and Section 3 or Article XI.

Ex. 5, *available at* https://www.sos.mo.gov/elections/2006petitions/ppStemCell.

The Hancock Amendment (Amendment 5 on the ballot on November 4, 1980) concluded its "full and correct text" with the disclaimer:

> NOTICE: You are advised that the proposed constitutional amendment changes, repeals, or modifies by implication, or may be construed to change, repeal, or modify by implication, in addition to the provisions of the Constitution which are specifically added, the following provisions of the Constitution of Missouri - Article II; Sections 1, 38(b), 46, 46(a), 47, 48, and 51 of Article III; Sections 15, 22, 23, 24, 28, and 30(a) of Article IV; Sections 18(c), 18(d), 19, 25, and 26(f) of Article VI; Sections 1(a) and 3(b) of Article IX; and Sections 1, 4(d), 10(b), 11(a), 11(f), and 12(a) of Article X.

Ex. 6; *Buchanan v. Kirkpatrick*, 615 S.W.2d 6 (Mo. banc. 1981) appx. I.

Of disclaimers, the Circuit Court held: "The drafters of each of these amendments had no reason other than compliance with Section 116.050 RSMo and Article III, Section 50, to inform potential signers of the enormously broad impacts, both direct and implied,

of their proposed measures." *Coleman* at 5. Further, "[t]heir inclusion of long lists of affected laws was *mandatory* in order to protect potential signatories and comply with Section 116.050.2(2) RSMo and Article III, Section 50." *Id.* (citing *State ex rel. Scott v. Kirkpatrick*, 484 S.W.2d 161, 164 (Mo. banc 1972) (interpreting the requirements of Article III, Section 50 as "mandatory and not directory")).

The Circuit Court explained: "The phrase 'repeal by implication' or 'implied repeal' refers to the impact on an earlier law of a measure that 'is so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force.'" *Coleman*, No. 24AC-CC07285, at 4 n.3 (quoting *Ritter v. Ashcroft*, 561 S.W.3d 74, 95-96 (Mo. App. W.D. 2018) (citing *Knight v. Carnahan*, 282 S.W.3d 9, 19 (Mo. App. W.D. 2009) (citing Black's Law Dictionary definition of "repeal" to interpret Section 116.050 RSMo))).

C. IP 2024-086 Included No Disclaimer Nor Any Equivalent Disclosures.

The circulated "full and correct text" of IP 2024-086 included no disclaimer, nor any comparable list of repealed provisions, identifying *zero* "sections of existing law or of the constitution which would be repealed by the measure." 116.050 RSMo. It read, in its entirety:

> NOTICE: The proposed amendment revises Article I of the Constitution by adopting one new Section to be known as Article I, Section 36.
>
> *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, interfere with, delay, or otherwise restrict an action 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. The Government shall not discriminate against persons providing or obtaining reproductive health care or assisting another person in doing so.

7. 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.

8. 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.

Ex. 2 (emphasis in original). A voter reading this "full and correct text" of Amendment 3 would have no reason to suspect it would make significant changes to existing Missouri laws. Intervenors at oral argument indeed argued that they intentionally left voters with this impression, because disclosures "would confuse voters." *Coleman* at 7.

D. Article III, Section 50 of the Missouri Constitution and Section 116.050.2(2) Together Require Initiative Petitions to List *All* Repeals, Explicit And Implied.

Courts interpreting Section 116.150.2(2) RSMo consistently require that initiative petitions disclose to voters provisions that will be repealed both expressly and by implication. Most recently, in *Ritter v. Ashcroft*, the Court of Appeals considered whether the "Clean Missouri" initiative petition[8] had adequately disclosed those constitutional provisions the proposal would repeal. 561 S.W.3d 74 (Mo. App. W.D. 2018). The Court

[8] *Ritter v. Ashcroft*, 561 S.W.3d 74 (Mo. App. W.D. 2018) considered the "Clean Missouri" Initiative Petition whose substantial disclaimer appears *supra*, so it is not supportive of Appellants' claim that they "substantially complied" with Section 116.050.2(2) by disclosing nothing.

cited its earlier decision in *Knight v. Carnahan* to define "repeal" as used in Section 116.150 RSMo:

> [t]he abrogation or annulling of a previously existing law by the enactment of a subsequent statute which declares that the former law shall be revoked and abrogated (which is called 'express' appeal), or which contains provisions so contrary or irreconcilable with those of the earlier law that only one of the two statutes can stand in force (called 'implied' repeal).

282 S.W.3d 9, 19 (Mo. App. W.D. 2009) (citing Black's Law Dictionary). Although both *Ritter* and *Knight* found that the "repeals" before them were mere limitations or modifications of existing law, so not subject to disclosure under Section 116.050.2(2) RSMo, the two judgments agreed that Section 116.050.2(2) requires disclosure of both "express" and "implied" repeals:

> By its plain meaning, section 116.050 does, however, require the inclusion of those sections impliedly repealed because provisions in the measure are "so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force."

Knight, 282 S.W.3d at 19 (citing Black's Law Dictionary).

To identify an "implied" repeal, which is by definition not explicit in the text of an Initiative Petition, *Ritter* asked whether the proposed provisions were in "direct conflict" or if the new law "negated" the earlier law. *Ritter*, 561 S.W.3d at 96. *Knight* and *Ritter* both cited this Court's decision in *Buchanan v. Kirkpatrick*[9], 615 S.W.2d 6, 15 (Mo. banc 1981), which framed the "repeals" that must be disclosed under Article III, Section 50 in

[9] In *Buchanan v. Kirkpatrick*, 615 S.W.2d 6 (1981), the drafters of the Hancock Amendment had included a disclaimer that identified more than 20 constitutional and statutory provisions the proposed Amendment would repeal. *See supra*. It therefore does not support any claim that Appellants "substantially complied" by including no disclosures.

terms of "irreconcilable repugnance." 615 S.W.2d at 15 (citing *Moore v. Brown*, 165 S.W.2d 657 (Mo. banc 1942)).

As *Ritter* and *Knight* noted, interpreting "repeal" to include such *implied* repeals reflects the "plain and ordinary meaning" of the word "repeal," as set forth in Black's Law Dictionary. *Knight*, 282 S.W.3d at 19. This plain and ordinary meaning also reflects this Court's longstanding doctrine that to "repeal" includes to "repeal[] … by implication": "When two statutes are repugnant in any of their provisions, the later act, *even without a specific repealing clause*, operates to the extent of the repugnancy to repeal the first." *Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 37 (Mo. banc 2015) (quoting *Cnty. of Jefferson v. Quiktrip Corp.*, 912 S.W.2d 487, 490 (Mo. banc 1995)) (emphasis added); *see also, e.g., Morrow v. City of Kansas City*, 788 S.W.2d 278, 281 (Mo. banc 1990) (same); *Colabianchi v. Colabianchi*, 646 S.W.2d 61, 63 (Mo. banc 1983) (same); *City of Kirkwood v. Allen*, 399 S.W.2d 30, 34 (Mo. banc 1966) (same). Under long-established Missouri law, a subsequent enactment that directly contradicts and supersedes an earlier provision—*i.e.*, is "repugnant" to it—"repeals" the earlier provision. *Id.* Because the proposal here would directly contradict and supersede Missouri's prohibition on abortion and other statutory restrictions, it is "repugnant" to them and thus would "repeal" them. *Id.*

As the Circuit Court found, Amendment 3 "repeals" at least one entire area of Missouri law so directly that its impact satisfies any applicable legal standard: Amendment 3 would repeal Missouri's existing prohibition on abortion except in cases of medical emergency. 188.017.2 RSMo ("Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman, except in cases of medical

emergency."); *Coleman* at 9 ("There are many more of these examples to be found in chapter 188 that show the contradictions between Amendment 3 and Missouri's current statutes). But that is not all—Amendment 3 goes much farther than that. To determine its impact on existing laws, it is unavoidable that this Court consider the tremendous scope of Amendment 3.[10]

E. Amendment 3 Is "Repugnant" To, and Thus "Repeals" Specific, Identifiable Provisions of Missouri Law.

IP 2024-086 proposes to voters a constitutional amendment that would have profound impact, immediate, permanent, and expanding over time, on a wide range of Missouri constitutional provisions and statutes. Contrary to the Appellants' arguments, many of these effects are both identifiable and direct—including, most obviously, the proposal's direct repeal of Missouri's prohibition on abortion. *See Coleman* at 6-9. Section 116.050's obligatory disclosure requirements do not allow Appellants to choose whether disclosing these effects would "confuse" voters. 116.050 RSMo; *Coleman* at 7.

1. Subsection 2 Creates an Open-Ended Super-Right.

Subsection 2 of proposed "Amendment 3" sets forth a new "fundamental right to reproductive freedom," which would inhere in every "person"[11] (lacking definition, so

[10] However, the Court may affirm the holding of the District Court by considering only the Amendment's impact on abortion, since that was a sufficient basis for the Court's judgment that IP 2024-086, by disclosing nothing, was in "blatant violation" of Section 116.050.2(2). *See Coleman* at 8-9.

[11] Lacking definition, "person" here presumably includes minors and "may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations." 1.020(12) RSMo.

presumably including minors). Ex. 2, Amend. 3 subs. 2. Declining to limit this new right to identified subjects or decisions, the proposed amendment provides only that the new "right to reproductive freedom" includes "mak[ing] and carry[ing] out decisions" in "*all matters relating to* reproductive health care." *Id.* (emphasis added). "[M]atters relating to reproductive health care," in turn, *"includ[e] but [are] not limited to"* "prenatal care, childbirth, postpartum care, birth control, abortion care, miscarriage care, and respectful birthing conditions." *Id.* (emphasis added).

Amendment 3's use of the terms "all matters relating to" and "including but not limited to" intentionally leaves Missouri voters (in this election) and Courts (evermore) to "fill in the blanks" regarding what will be protected under the heightened standard set forth in its next provision. However, although these phrases do make the outer limits of the Amendment's scope difficult to discern,[12] they do not make *all* of Amendment 3's various effects uncertain or "speculative," as Appellants urged in the Circuit Court. Instead, they make **certain** and **explicit** that "all matters relating to reproductive freedom" is a category that **will exceed** what is named in the Amendment.

This Court has already held that the phrase "including but not limited to" "evidences an **intent to avoid statutory constraints on the evolution of"** a particular category. *Sermchief v. Gonzales*, 660 S.W.2d 683, 689 (1983) (interpreting an "open-ended definition of professional nursing") (emphasis added). By using "including but not limited

[12] Unclear drafting is not a defense to disclosure requirements, as Appellants argued in the Circuit Court. It is the reason for them. *See, e.g.*, *Moore v. Brown*, 165 S.W.2d 657, 663 (Mo. banc 1942) (disclosure requirements prevent "fraud on the signers").

to," Amendment 3 explicitly anticipates applications that have "heretofore not [been] considered." *Id.* So, it is not at all ambiguous, uncertain, confusing, or speculative to conclude that Amendment 3 *requires* voters and this Court to consider (and vote for) *everything that is within* "all matters relating to reproductive health care," not just the seven named areas of protection.

Moreover, the phrase "all matters relating to" requires the broadening of Amendment 3's "right to reproductive freedom" even beyond the realm of the mainly medical categories currently listed in subsection 2. "This Court **must** assume that every word contained in a constitutional provision has effect, meaning, and is not mere surplusage." *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 206 (Mo. banc 2008) (emphasis added). So, it is certain, and not at all ambiguous, that "all matters relating to" expands the scope of "reproductive freedom" beyond just "health care."

As an example, it is not at all "speculative" but instead a required use of a voter's or a Court's interpretive skills, to conclude that genital mutilation of a female child, an exercise of autonomy that Missouri law currently identifies as a felony, is a "matter" "relating to" a woman's "reproductive health care." So, Missouri's law banning the practice will be unconstitutional under Amendment 3. *See* 568.065 RSMo. Similarly, even if "reproductive health care" could be interpreted to exclude gender transition surgery and gender-related medical treatments, such treatments indisputably fall within the sweep of "*all matters relating to* reproductive health care," so they will be protected under

Amendment 3, reversing our current ban on gender transition surgeries on children.[13] 191.1720 RSMo.

2. Amendment 3 Operates By Condemning Laws to "Death by Adjudication."

Subsection 3 of Amendment 3 sets forth a highest-ever-in-the-law standard of judicial protection for its newly established and unlimited-in-scope "right to reproductive freedom." By forcing judges to apply this new legal standard, Amendment 3 avoids listing in the text of the constitution (or revealing to the voters) the many, many laws it will reverse or preclude. Instead, it decrees that Missouri courts must begin a campaign of "judicial

[13] It is very easy to find expansive definitions of "reproductive health" and "reproductive care" from credible sources to fill in what the drafters of Amendment 3 leave out, *i.e.*, future inclusions in "all matters relating to reproductive health care." As long ago as 1994, the United Nations' Cairo Conference defined "reproductive health" as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in **all matters relating to the reproductive system and to its functions and processes**." U.N. Cairo Conference, *Programme of Action of the International Conference on Population and Development* ¶ 7.2, at 43, Report A/CONF.171/13 (Sept. 5-13, 1994) (emphasis added), https://tinyurl.com/3u2rt725. Not surprisingly, thirty years later, court filings from "reproductive care" providers describe "compassionate reproductive health care" as "including abortions, birth control, STI testing and treatment, cancer screenings, and LGTBQ wellness services including transgender/non-binary care." Brief of Amici Curiae Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, et al., *Cedar Park Assembly of God of Kirkland, Washington v. Kreidler*, No. 23-35560, at 5 (9th Cir. Jan. 29, 2024). In between, the academic literature relating to gender transitions has moved past the transitions themselves into a burgeoning industry in "reproductive health care" aimed at supporting or repressing "reproduction" in "transgender and gender diverse" individuals. *See, e.g.*, B.P. Jones, et al., *Uterine Transplantation in Transgender Women*, 126(2) *BJOG: An International Journal of Obstetrics & Gynaecology* 152 (2019) [published by the Royal College of Obstetricians and Gynaecologists]; Trevor MacDonald, et al., *Transmasculine Individuals' Experiences with Lactation, Chestfeeding, and Gender Identity*, 16 BMC Pregnancy and Childbirth 106 (2016). Only a bit of research is necessary, then, to predict, without a hint of "speculation," that gender transition treatments and procedures *at least* will be legalized, protected, and even funded within Amendment 3's protections for "all matters relating to reproductive care."

sterilization" of all laws, existing or future, that attempt to limit this new, limitless "right to reproductive freedom." In effect, subsections 2 and 3 of proposed Amendment 3 load a gun (the super-rigorous standard of "strict-scrutiny-PLUS") and aim it at innumerable Missouri laws (everything within the new, limitless category of "reproductive freedom"), but require Missouri's judges to pull the trigger.

a. Amendment 3 Defines a New "Strict-Scrutiny-PLUS" Legal Standard.

Specifically, under Amendment 3, Missouri courts will be required to invalidate all laws and regulations that limit any person's exercise of reproductive freedom (including a child's) unless the governmental action meets the standards of strict scrutiny currently applied to the (now-lesser) fundamental rights like life and speech and religion, *PLUS an additional thumb on the scale* in favor of "reproductive freedom." Following adoption of Amendment 3, while other fundamental rights are protected by "strict scrutiny," whereby any infringement must be narrowly tailored to serve a compelling government interest, *only* in the area of "reproductive freedom," the list of "compelling interests" that can justify a governmental action will be limited to "*the interests of the person seeking reproductive health care*," and *without limiting that person's* "*autonomous decision-making.*" Ex. 2, Amend. 3 subs. 3 (emphases added).[14]

[14] A third requirement for a governmental regulation to be supported by a "compelling interest" under "strict-scrutiny-PLUS" is that the government's interest in the person seeking care be "consistent with widely accepted clinical standards of practice and evidence-based medicine." Ex. 2, Amend. 3 subs. 3.

The legal regime established in subsection 3 of Amendment 3 for judicial sterilization of any government action that touches on the exercise of reproductive freedom should therefore be described as "strict-scrutiny-PLUS." It places "reproductive freedom" in the constitutional firmament ahead of life, liberty, property, due process, equal protection, speech, religion, assembly, association, and every other right in the history of Missouri or the United States.

b. Under Strict-Scrutiny-PLUS, "Reproductive Freedom" Trumps All Other Interests.

By narrowing the "interests" available to government in regulating "reproductive freedom" to *only* those of the person seeking care, Amendment 3 makes explicit that no one, and especially not Missouri voters, will be able to affect or impose upon an individual's right to "reproductive freedom" in any way. The "PLUS" part of "strict-scrutiny-PLUS" is the specific prohibition of the Government ever limiting any person's "reproductive freedom" to protect the interest of *anyone else*.

Those whose interests the Government is prohibited from considering under Amendment 3 would include not only a woman's unborn child (however and for whatever purpose conceived, male or female, healthy or well, pre-sentient or feeling pain, whether just before birth or frozen as an embryo, etc.), but also a partner/other parent of an unborn child, and even the parents of a minor child seeking "reproductive health care" such as abortion, sterilization, genital mutilation, gender transition surgery, or hormone-blocking drugs. Simply put, under Amendment 3, the Government may not consider *anything* (even

another person's *life*) more important than any person's (including a minor's) right to "reproductive freedom."

After this provision of Amendment 3 "repeals" Missouri's current requirement for parental consent before a minor may obtain an abortion, 188.017 RSMo, Missouri courts will be required to protect the "autonomous decision-making" of a pre-teen seeking permanent, life-altering changes to her body from the interests of her parents. Missouri courts will be required to defer to the "autonomous decision-making" of a teenager seeking an abortion who objects to the current Missouri laws requiring parental consent and a waiting period. Missouri courts will be forced to invalidate laws like Missouri's existing constitutional provision that bans human cloning and in vitro fertilization solely for the purpose of stem cell research. Missouri courts will be forced to invalidate, at least as applied prior to "Fetal Viability," Missouri's current law prohibiting mothers from aborting their unborn child because that child has Down syndrome or simply has an undesired gender. 188.038.2 RSMo.

These are just several of the more obvious examples of changes to existing, current Missouri law that **will be**[15] imposed by the judicial sterilization regime established by Amendment 3's creation of a virtually unassailable right to an undefined and unlimited good ("matters relating to reproductive health care").

[15] Because of the Amendment's use of the phrase "including but not limited to," it is not necessary for these subjects to be *named* for the Court to be certain that they are within the scope of Amendment 3. Structurally "not limited," the Amendment explicitly includes a host of unnamed subjects. *See supra* Section I.E.1. Identifying them by the terms of the Amendment is not, as Appellants argued in the trial court, "speculation." It is simply the interpretation Amendment 3 requires by its use of open-ended terms.

c. Subsections 2 and 3 Alone Repeal Both Constitutional and Statutory Provisions.

The drafters of Amendment 3 do not deny that "death by adjudication" for many of Missouri's laws is a central purpose of Amendment 3. "[T]he purpose of the initiative is to allow some current laws to be challenged." Trial Br. of Fitz-James at 18, *Fitz-James v. Ashcroft*, 23AC-CC03167 (Cole Cnty., Sept. 25, 2023); *see also* Respondents' Br. of Fitz-James at 63 ("removing Missouri's ban on abortions" "is an accurate description of the purpose and probable effects of the initiatives"), *Fitz-James v. Ashcroft*, 678 S.W.3d 194, 217 (Mo. App. W.D. 2023), *reh'g and/or transfer denied* (Nov. 3, 2023); *Fitz-James*, 678 S.W.3d at 212 (Court of Appeals citing Fitz-James's admission that providing for a legal attack on Section 188.205 RSMo, the Missouri law that prohibits the use of taxes to pay for abortions, is one intended effect of Amendment 3).

Among those existing provisions that will be instantly "presumed invalid" under the "judicial sterilization" regime set up by subsections 2 and 3 of Amendment 3 is at least one constitutional provision "relating to" "reproductive health care." Article III, Section 38(d), of the Missouri Constitution currently prohibits the cloning of human beings and the production by in vitro fertilization of human blastocysts solely for the purpose of stem cell research. Mo. Const. art. III, § 38(d). No such limitations on "reproductive freedom" will be effective under the new Amendment 3, because both place the interests of unborn children and society over the "reproductive freedom" of those seeking to reproduce via cloning or IVF.

Also largely obviated by subsections 2 and 3 of Amendment 3 would be Section 188.026 RSMo, the "Missouri Stands for the Unborn Act," which articulates the findings of the Missouri General Assembly regarding the State's varied interests in regulating abortion and related technologies. Those State interests include, in addition to protecting the pregnant woman, protecting unborn children, encouraging childbirth, preserving the integrity of the medical profession, and avoiding burdens on the public. 188.026 RSMo. The same section expressly prohibits abortions known to be sought because of a Down syndrome diagnosis. 188.026.2 RSMo. ("No person shall perform or induce an abortion on a woman if the person knows that the woman is seeking the abortion solely because of a prenatal diagnosis, test, or screening indicating Down Syndrome or the potential of Down Syndrome in an unborn child."). After adopting Amendment 3, Missouri government would be free to consider regulations serving none of these interests except the mother's. Similarly obviated would be Section 1.205 RSMo, which provides 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, subject only to the Constitution of the United States," and articulates a protectable interest for "natural parents of unborn children" (half of whom are fathers not receiving the "care" in question) in "the life, health, and wellbeing of their unborn child." 1.205 RSMo.

Further, Amendment 3's enunciation of a "right to reproductive freedom" without age limitations for all "persons" that "Government" may not "restrict" would repeal by implication Missouri's bans on sex-change operations on minors, 191.1720 RSMo, and the

genital mutilation of a female child, 568.065 RSMo. Both such procedures, with or without the consent of a parent, are comprehended within the vast definition of "reproductive freedom," which Missouri government will no longer be able to abridge.

3. Amendment 3 Demolishes Missouri's Abortion Laws.

After establishing "reproductive freedom" as the most protected right in the history of federal or state law, Amendment 3 establishes still another new judicial standard, actually slightly lower than the protection afforded to other exercises of "reproductive freedom," which applies only to regulation of abortion. According to subsection 4, regulations of abortion will not need to satisfy the standards of "strict-scrutiny-PLUS," as long as they (1) only regulate abortions sought after a new-to-the-law standard for "Fetal Viability," and (2) permit abortions at any and all stages of pregnancy for any reason related to the health of the mother, including mental health. Both an unborn child's "viability" and the effects of an abortion on the "health" of the mother may be determined by any "treating health care professional," rather than by a physician. Ex. 2, Amend. 3 subs. 4, 8(1).

Though they apply to a tiny proportion of abortions a lower level of legal protection than other subsections provide for the rest of the universe of "reproductive freedom," the abortion-related provisions of Amendment 3 protect abortion more strenuously and completely than any previous legal standard, including federal law for nearly 50 years under *Roe v. Wade*, 410 U.S. 113 (1973). And, because Missouri currently has so many laws protecting the unborn and vulnerable women affected by abortion, it is in this area of

the law that the proposed Amendment's repeal effects are most obvious, as the Circuit Court held. *Coleman* at 5-9.

Adoption of the constitutional amendment proposed by IP 2024-086 would in fact directly or indirectly repeal basically all of Missouri's statutes that have any effect of limiting or delaying access to abortions, even for minors or for discriminatory reasons or by means of "partial-birth" procedures, including most directly eight sections of Missouri law that prohibit most abortions at various gestational ages or for various reasons:

- Section 188.017 RSMo, the "Right to Life of the Unborn Child Act," prohibiting an abortion of an unborn child at any time during pregnancy, except in cases of medical emergency;
- Section 188.056 RSMo, prohibiting an abortion of an unborn child at eight weeks gestational age or later, except in cases of medical emergency;
- Section 188.057 RSMo, prohibiting an abortion of an unborn child at fourteen weeks gestational age or later, except in cases of medical emergency;
- Section 188.058 RSMo, prohibiting an abortion of an unborn child at eighteen weeks gestational age or later, except in cases of medical emergency;
- Section 188.375 RSMo, prohibiting an abortion of a late-term pain-capable unborn child, which is an unborn child at twenty weeks gestational age or later, except in cases of medical emergency;

- Section 188.030 RSMo, prohibiting an abortion of an unborn child who is viable, as determined by a physician, except if the mother has a serious physical (but not mental) health condition;
- Section 188.038 RSMo, prohibiting abortions for discriminatory reasons, specifically because of the race or sex of the unborn child, or because the unborn child has been diagnosed with Down Syndrome or the potential for Down Syndrome; and
- Section 565.300 RSMo, the "Infant's Protection Act," which prohibits partial-birth abortion.

Subsection 8 of Amendment 3 would replace the legal definition of fetal "viability" in Missouri with a more demanding standard for whether a child can survive outside the womb, and dissolve Missouri's requirement that a viability determination be made by a physician "licensed to practice medicine in this state by the state board of registration for the healing arts." *Compare* 188.015 RSMo (defining "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems" and "physician" as "any person licensed to practice medicine in this state by the state board of registration for the healing arts") *and* 188.030 RSMo (laying out a physician's responsibilities for determining viability and other care related to post-viability abortions), *with* Ex. 2, Amend. 3 subs. 8(1) ("Fetal Viability" is "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."). The scope of "health care professional" is unknown, but would presumably extend to nurses and physician's assistants, or even social workers, in addition to physicians. Also to be repealed, directly or by implication, in whole or in part by proposed Amendment 3 are Missouri statutes providing for parental consent and notification and informed consent and a waiting period prior to an abortion. 188.027; 188.028 RSMo.

a. Amendment 3 Leaves the Door to Abortion Regulation Barely Cracked.

In the Circuit Court, Appellants argued that subsection 4 of Amendment 3 leaves intact *some* of Missouri's current near-total ban on abortion at any stage of pregnancy laid out in Section 188.017 RSMo. This argument is specious. Between subsections 3, 4, 5, and 6, Amendment 3 legalizes and protects[16] abortions virtually without restrictions (only allowing restrictions that serve the autonomy and health of the mother, and no other interests) up to the point of Fetal Viability. It then expands that no-regulation zone significantly by moving Fetal Viability later in pregnancy than current statute provides and allowing any "treating health care professional" to determine viability. Then it burdens any regulations of abortion after viability with a mandatory maternal health exception that provides for any woman to receive an abortion at any point in pregnancy as long as a "treating health care professional" deems it "needed to protect" her health, defined as

[16] And funds. *Fitz-James v. Ashcroft*, 678 S.W.3d 194, 212 (Mo. App. W.D. 2023), *reh'g and/or transfer denied* (Nov. 3, 2023) (noting that the drafters admitted that a legal attack on Section 188.205 RSMo, the Missouri law that prohibits the use of taxes to pay for abortions, is one intended effect of subsection 6's nondiscrimination provision).

broadly as possible to include even "mental health." The World Health Organization describes "mental health" as "a state of mental well-being that enables people to cope with the stresses of life, realize their abilities, learn well and work well, and contribute to their community." https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response. So, Amendment 3 leaves the State of Missouri able to protect from abortion only those unborn children who have somehow made it to gestational maturity without burdening their mother's wellbeing. There is no comparison (or coexistence, as Appellants attempted to persuade the Circuit Court) between Amendment 3's comprehensive protection of abortion and Missouri's current ban.

b. Everyone Agrees That Amendment 3 Repeals Missouri's Current Abortion Laws.

Both the Cole County Circuit Court and Missouri Court of Appeals included the fact that Amendment 3 would "remove[s] Missouri's ban on abortion" in their approved official ballot title. *Fitz-James v. Ashcroft*, Order, 23AC-CC03167 (Cole Cnty., Sept. 25, 2023) (certifying ballot title language stating that the initiative petition will "remove Missouri's ban on abortion"); *Fitz-James*, 678 S.W.3d at 215 n.10, and 217 (affirming aforementioned language, slightly amended, and using the word "repeal" interchangeably with "remove"). Intervenor-Defendant Anna Fitz-James similarly admits that proposed Amendment 3 will repeal at least Missouri's ban on abortion, and that failing to adopt Amendment 3 would leave intact Missouri's abortion statutes, in her proposed "fair ballot language" submitted in her recent lawsuit:

> A "yes" vote establishes a constitutional right to make decisions about reproductive health care, including abortion and contraceptives, with any

> governmental interference of that right presumed invalid; **removes Missouri's ban on abortion;** allows regulation of reproductive health care to improve or maintain the health of the patient; requires the government not to discriminate, in government programs, funding, and other activities, against persons providing or obtaining reproductive health care; and allows abortion to be restricted or banned after Fetal Viability except to protect the life or health of the woman.
>
> A **"no" vote will continue the statutory prohibition of abortion in Missouri.**

Ex. 3, Petition ¶ 34, *Fitz-James v. Ashcroft*, 24AC-CC06970 (proposing new "fair ballot language") (emphases added). And, most importantly to this litigation challenging his erroneous certification, *Defendant* makes Amendment 3's effect on abortion laws the *only* subject of *his* proposed "fair ballot language:"

> A "yes" vote will **enshrine the right to abortion** at any time of pregnancy in the Missouri Constitution. Additionally, it will **prohibit any regulation of abortion**, including regulations designed to protect women undergoing abortions and prohibit any civil or criminal recourse against anyone who performs an abortion and hurts or kills the pregnant women.

Missouri Secretary of State, 2024 Ballot Measures, (Aug. 13, 2024), https://www.sos.mo.gov/elections/petitions/2024BallotMeasures (quoted in Ex. 3, Petition ¶ 17) (emphases added). The Circuit Court noted the Court of Appeals' determinations regarding the ballot summary as persuasive support for his conclusion that the repeal of Missouri's "laws that ban abortion" "should have been included in the full text of the initiative petition itself." *Coleman* at 9.

4. Subsection 5 Repeals Laws Holding Abortion Providers Accountable, Even to Their Patients.

In subsection 5, Amendment 3 takes away civil, criminal and administrative penalties against those whose actions in assisting others to receive "reproductive health

care" harm or kill others: "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." Ex. 2, Amend. 3 subs. 5. The Circuit Court rightly found this provision to directly conflict with Missouri's current law imposing criminal penalties on anyone who "performs or induces an abortion." *Coleman* at 8.

On its face, subsection 5 also deprives families of those who suffer and die at the hands of abortionists or other "reproductive health care" providers of recourse to courts or law enforcement.[17] In so doing, it partially repeals statutory criminal laws such as those prohibiting involuntary manslaughter, to the extent that it is currently a crime to cause the death of a woman or girl during a harmful, dangerous abortion procedure. *See, e.g.*, 565.024

[17] This narrowing of access to the courts for civil and criminal actions has less obvious, more fundamental constitutional implications. Article I, Section 2, of the Missouri Constitution provides, among other things, that all persons are created equal and are entitled to equal rights and opportunities under the law. Mo. Const. art. I, § 2 ("Equal Protection Clause"). That provision is repealed in part by Amendment 3's proposal, in subsection 5, to eliminate the legal rights of those injured, or whose family members are injured, in the course of "exercising their right to reproductive freedom," leaving intact the rights of those injured in other ways. The same provision repeals in part the Missouri Constitution's "Open Courts" provision in Article I, Section 14, by closing the doors to the courts of justice to persons injured or who died in the course of "exercising their right to reproductive freedom," as well their family members, who currently would have medical malpractice and wrongful death actions. *See* Mo. Const. art. I, § 14 ("Open Courts" Provision). Article I, Section 10, which provides "[t]hat no person shall be deprived of life, liberty or property without due process of law," would similarly be repealed, directly or by implication, in part by Amendment 3's proposed limitation, in subsection 5, on any penalty for, prosecution of, or other adverse action against any "person assisting a person in exercising their right to reproductive freedom with that person's consent." Persons injured or who died in the course of "exercising their right to reproductive freedom," as well as their family members, will no longer be afforded the "due process" from the State of Missouri currently guaranteed them by the Missouri Constitution. *See* Mo. Const. art. I, § 10 ("Due Process Clause").

RSMo. Similarly, harmed parties will no longer have available malpractice, 538.210 RSMo, and other claims such as those reportedly about to be invoked in St. Louis against a hospital that lost a couple's last remaining frozen embryo. https://people.com/couple-accuses-hospital-losing-their-embryo-after-spending-70k-on-ivf-8700978.

5. Subsection 6 Repeals Laws Denying Access to Single Sex Bathrooms and Sports Teams to Transgender Individuals and Missouri's Law Prohibiting Public Funding of Abortion.

Subsection 6 of Amendment 3 mandates "The Government shall not discriminate against persons providing or obtaining reproductive health care or assisting another person in doing so." Ex. 2, Amend. 3 subs. 6. This provision is likely to be used to force courts to invalidate any laws that purport to assign bathrooms or team membership based on biological sex characteristics, because such laws "discriminate" against those whose gender was assumed by means of "reproductive health care."

More immediately, the drafters admitted to the Court of Appeals that this provision aims at forcing repeal of Section 188.205 RSMo, Missouri's current statute prohibiting the use of public funds to pay for abortion. *Fitz-James*, 678 S.W.3d at 212. It is likely to expand state funding from abortion to all types of "reproductive health care," as left open and undefined in Amendment 3, alongside maternity care.

F. Judicial Refraction is Not a Defense to Section 116.050's Disclosure Requirements.

Proponents of Amendment 3 have argued and will continue to argue that their proposed monumentally impactful legal regime change actually "repeals" nothing. This is because its major operation, which is the application of a new legal standard ("strict-

scrutiny-PLUS") to "all matters relating to reproductive health care including but not limited to" whatever they can get a judge to include in the future, does not *expressly* change existing laws; it merely sentences dozens of current and future laws to death by adjudication. Because Amendment 3 does not name these statutes, the argument goes, but simply marks them and readies the gallows, they did not have to inform Missouri voters what is going to happen. There are several important problems with this argument.

First, it reveals the drafters' intentions, which is to keep Missouri voters on a "need to know"[18] basis in their own initiative petition process. They do not deny that this Amendment is intended to take out existing Missouri laws, nor assert that they have tried to inform voters of what they are doing, or that the true impact of their Amendment would be unimportant to voters, or that voters would embrace the consequences of Amendment 3 if they knew them. Instead, they argue that they are perfectly allowed to keep voters in the dark, in order not to "confuse" them. *Coleman* at 7. This alone evinces an intent to subvert, rather than fulfill, the purpose of the initiative petition process, which is to exercise the informed will of Missouri voters. It is also, as the Circuit Court precisely held, "not an exception to the requirements of 116.050 RSMo." *Coleman* at 7.

Second, it demonstrates that the drafters know that Amendment 3 is a fraud on Missouri voters. If the drafters truly believed that 50%-plus-1 of Missouri voters shared their desire to bring about a "*Roe-v.-Wade*-PLUS" regime that binds Missouri law across an undefined, but already enormous, range of issues, they would have no reason to hide

[18] "Defendants argued on the record that [they included no disclaimer] because it would confuse voters." *Coleman* at 7.

those effects from signatories and voters. They would be shouting them from the rooftops. Instead, they are going through the charade of "determining the will of the voters" by petition while intentionally keeping those voters uninformed. Allowing drafters to dupe voters if they just use judges as hitmen and undertakers rather than changing laws directly would completely subvert the purpose of Missouri's disclosure requirements for initiative petitions, which is precisely to prevent "fraud on the signers of an initiative petition" that purports to do one thing while it "in fact it makes other undisclosed changes greatly to their detriment." *Moore v. Brown*, 165 S.W.2d 657, 663 (Mo. banc 1942).

Third, the structure of Section 116.050 RSMo directly contradicts Appellants' argument that it only requires disclosure of those "repeals" that jump out from the text of the Amendment. A separate subsection of Section 116.050 RSMo, subsection 2(1), provides for the "full and correct text of the measure" to include all the "matter which is to be deleted" and "all new matter." 116.050.2(1) RSMo. Immediately thereafter, subsection 2(2) requires that the same "full and correct text" "[i]nclude all sections of existing law or of the constitution which would be repealed by the measure." 116.050.2(2) RSMo. "[E]very word, clause, sentence, and section thereof must be given some meaning. Courts may not interpret statutes to render any provision a nullity because doing so would not give effect to the plain language of the statute." *State v. Knox*, 604 S.W.3d 316, 322 (Mo. 2020) (quoted in *Coleman*, No. 24AC-CC07285, at 4). As the Circuit Court held, "since subsection 2(2) cannot be interpreted to be a nullity, its identification of repealed provisions must refer to something that cannot be satisfied by the mere recitation of textual changes required in subsection 2(1)." *Coleman*, No. 24AC-CC07285, at 4. Subsection 2(2) of

Section 116.050 only makes sense as a separate requirement if its "identification" of provisions that will be repealed refers to the repeal of provisions that are not already identified in the text as required by subsection 2(1). Put simply, it cannot be the case, as Appellants have argued, that Section 116.050.2(2) only requires identification of provisions directly and explicitly repealed in the text of the Amendment, because the *only* distinctive purpose of subsection 116.050.2(2) is to require identification of those changes that are *not* within the text.

Finally, and most clearly demonstrative that IP 2024-086 violated *at least* Section 116.050, it simply is not true that all the changes Amendment 3 effects are indirect or rely on the uncertain future action of judges. As the Circuit Court clearly held:

> That argument holds water with regard to some attenuated and not directly related statutes and provisions, but certainly not all of them. Just a cursory glance at Missouri statutes in chapter 188 compared to the ballot language defeats defendant-intervenors' arguments that passage of Amendment 3 would not result in a repeal of Missouri statutes or that it's too confusing to determine which statutes would be repealed.

Coleman at 8.

As the Circuit Court concluded, **it is simply not necessary in this case to consider the outward limits of necessary disclosures under Section 116.050,** because there were ample "directly related" statutes that would be repealed to find that IP 2024-086 had failed substantially to comply with Section 116.050. This Court is similarly free to identify only the most obvious omissions on the part of the drafters of IP 2024-086.

For example, in subsection 8, Amendment 3 directly provides a new definition of Fetal Viability that contradicts and renders nugatory one that is currently in effect in

Missouri. 188.015(12) RSMo. The two provisions cannot co-exist. *Knight v. Carnahan*, 282 S.W.3d 9, 19 (Mo. App. W.D. 2009) (citing Black's Law Dictionary to identify "express" and "implied" repeal). They are "irreconcilably repugnant." *Ritter v. Ashcroft*, 561 S.W.3d 74, 95 (Mo. App. W.D. 2018) (applying 116.050 RSMo to require disclosure of those provisions in "direct conflict with or irreconcilably repugnant" to existing law) (quoting *Buchanan*, 615 S.W.2d at 15). There is no standard for "repeal" that is not met by the effect of Amendment 3's proposed new definition of "Fetal Viability" on the pre-existing Missouri law defining precisely the same thing in a different way. *See, e.g.*, *Halliburton*, 130 S.W. at 693 (rejecting a petition as insufficient when it had attempted to, without "one word … suggested" regarding existing law, "enact a law dividing the senatorial districts in a different way to that in which they are divided under the present existing law").

Similarly, the standard for "Fetal Viability" set forth in Amendment 3 directly conflicts with and is "irreconcilably repugnant to" existing Missouri law requiring that a physician determine the viability of an unborn child. *Compare* Ex. 2, Amend. 3 subs. 4, *with* 188.030 RSMo; *see also Buchanan*, 615 S.W.2d at 15; *Ritter*, 561 S.W.3d at 95; *Knight*, 282 S.W.3d at 19.

The same statute prohibits all abortions following viability with an exception for maternal health conditions that are limited to grave physical conditions diagnosed by a physician. 188.030 RSMo. The maternal health exception included in Section 188.030 RSMo is in direct conflict with Amendment 3's capacious maternal health exception that takes in even mental health and may be determined by any "treating health care

professional." Ex. 2, Amend. 3 subs. 4. Under Amendment 3, a nurse may rule that a later-term abortion is permitted, citing only a vague threat to the mother's "mental health." This is a catch-all providing legal abortion at all stages. The new maternal health exception applicable to all abortions after Fetal Viability cannot co-exist with existing Missouri law laid out in Section 188.130 RSMo. *See Buchanan*, 615 S.W.2d at 15; *Ritter*, 561 S.W.3d at 95; *Knight*, 282 S.W.3d at 19.

Finally, as noted above, all the parties to this lawsuit and three reviewing courts so far agree that, whatever else it does, Amendment 3 "removes Missouri's ban on abortion." Even the drafters do not have the temerity to deny that repealing Missouri's current abortion law is a certain and intentional effect of subsections 2, 3, 4, and 5 of Amendment 3. Respondents' Br. of Fitz-James at 63 ("removing Missouri's ban on abortions" "is an accurate description of the purpose and probable effects of the initiatives"), *Fitz-James v. Ashcroft*, 678 S.W.3d 194 (Mo. App. W.D. 2023), *reh'g and/or transfer denied* (Nov. 3, 2023). Amendment 3 directly conflicts, intentionally upends, and replaces Missouri's currently effective abortion law.[19] They cannot co-exist. They are "irreconcilably

[19] Similarly immediate and "irreconcilable" is Amendment 3's operation in rendering Article III, Section 38(d), of the Missouri Constitution "presumptively invalid." The words "cloning" and "IVF" are certainly within the unnamed matters covered by the Amendment ("all matters related to reproductive health care"), and the bans on cloning and IVF for the purpose of stem cell research are unquestionably "restrictions." That places this constitutional provision within the set of laws that Amendment 3 requires be immediately "presumed invalid." Mo. Const. art. III, § 38(d); Ex. 2, Amend. 3, subs. 3. Rendering a constitutional provision that cannot otherwise be amended except by extraordinary measures "presumptively invalid" is a "direct conflict." The drafters of Amendment 3 should not be permitted to evade the requirements of Article III, Section 50, and Section 116.050 RSMo that they inform voters of this immediate and certain impact simply because they strategically chose not to list cloning and IVF by name.

repugnant." *Buchanan*, 615 S.W.2d at 15; *see also Ritter*, 561 S.W.3d at 95; *Knight*, 282 S.W.3d at 19. So much is conceded and agreed upon by all the parties in court filings and official summaries of Amendment 3, as well as public statements.

G. The Circuit Court Found that Some Effects of Amendment 3 Are Certain.

Appellants make much of the Amendment's intentional vagueness both in denying the Amendment's effects on existing laws and in arguing that it does not exceed a single subject. The Circuit Court paraphrased their argument: "[W]hile Amendment 3 could affect any number of statutes and constitutional provisions, the true identity of what those statutes and provisions are can and will only be fully determined by future litigation of those laws." *Coleman*, 24AC-CC07285, at 7. Because the Amendment does not *identify* specific laws it is aiming to repeal, according to Appellants, they do not have to *disclose* such repeals under Section 116.050 RSMo or Article III, Section 50.

However, as the Circuit Court implicitly held in rejecting this argument, "unnamed" and "unknown" are not coextensive. Put another way, a subject or effect is not indiscernible just because the drafters chose not to name it.[20] Amendment 3's impact on a significant number of Missouri's laws is so clear, despite the Amendment's lack of explicitness, that

[20] Some interpretation of the probable effects of the amendment is necessary in order for each voter to decide whether to vote in favor of Amendment 3. Indeed, Amendment 3's use of vague terms and categories, rather than specific identification of covered subjects, makes it more important, not less, for voters to have the benefit of the disclosures required by Section 116.050 RSMo and Article III, Section 50, of the Constitution. Amendment 3's ambiguity is not an excuse to evade disclosures, as Appellants suggested at trial, but instead is precisely what the disclosure laws aim to prevent.

they qualify as "repeals" under any definition adopted by the Court. *Id.* at 7. As such, they should have been disclosed in the Amendment's "full and correct text." *Id.*

Also rejected by the Circuit Court was the Appellants' argument that Section 116.050 does not require disclosure of any repeal or obviation of an existing statute if such repeal relies on an intervening interpretation of Amendment 3 by a court. *Id.* at 8. The Circuit Court rightly held that there were enough statutes "directly related" to Amendment 3 that it was not credible to argue that Amendment 3 would not result in their "repeal." *Id.* As examples of the "most basic of statutes that would be repealed" by Amendment 3, the Circuit Court identified two sections of Amendment 3 that would repeal particular provisions of Section 188.017.2 RSMo, Missouri's current abortion restriction:

> Amendment 3 states in pertinent part:
>
> 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.
>
> Missouri statute 188.017.2 RSMo states in pertinent part:
>
> Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board.
>
> ***
> Amendment 3 provides in pertinent part:
>
> 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.
>
> Missouri statute 188.017.2 RSMo states in pertinent part:
>
> Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman, except in cases of medical emergency.

Coleman at 8-9.

These are just two examples of what the Circuit Court described as Appellants' "purposeful[][21] deci[sion] not to include even the most basic of statutes that would be repealed, at least in part, by Amendment 3." *Id.* (referencing all of Chapter 188 of Missouri's statutes, which regulates abortion, with particular mention of Missouri's current "abortion ban" in Section 188.017 RSMo). The Court further held there were "many more of these examples to be found in chapter 188 that show the contradictions between Amendment 3 and Missouri's current statutes." *Id.* at 9. Finally, the Circuit Court held that IP 2024-086's "failure to include any statute or provision that will be repealed, especially when many of these statutes are apparent, is in blatant violation of the sufficiency requirements under 116.050.2(2)." *Id.* at 9.

H. No "Ferreting" Is Required to See the Difference Between Substantial Compliance and *No* Compliance.

In the Circuit Court, Appellants pointed out that, when reviewing whether the drafters of the Hancock Amendment had complied with Article III, § 50, in *Buchanan v.*

[21] "Defendants argued on the record that [the decision not to include a disclaimer] was made because it would confuse voters in that Amendment 3 would eventually have some type of effect on all sorts of laws. That theory, of course, is not an exception ot the requirements of 116.050 RSMo." *Coleman* at 7.

Kirkpatrick, 615 S.W.2d 6, 15 (Mo. banc 1981), this Court cited *Moore v. Brown*, 165 S.W.2d 657 (Mo. banc 1942), as "not requir[ing] the makers of an initiative petition to 'ferret out' and to list all the provisions which could possibly or by implication be modified by the proposed amendment." *Buchanan*, 615 S.W.2d at 15. This argument is a straw man. Neither Respondents nor the Circuit Court have suggested that discerning whether IP 2024-086 complied with Section 116.050 RSMo requires any "ferreting." On the contrary, both Respondents and the Circuit Court have found only that IP 2024-086's failure to disclose even "direct conflicts," which *Buchanan* does require, 615 S.W.2d at 15, and indeed their complete lack of *any* disclosures makes their violation of Section 116.050.2(2) absolutely "blatant." *Coleman* at 9.

Moreover, the Courts do not require strict compliance with Section 116.050 (requiring disclosure of both statutory and constitutional repeals), as they do with Article III, Section 50 of the Constitution (requiring disclosure of repealed constitutional provisions[22]). The standard the drafters of Amendment 3 must meet to satisfy Section 116.050 is "substantial compliance." *Knight v. Carnahan*, 282 S.W.3d 9, 15 (2009). However, notably missing from Appellants' arguments is one establishing that they *did*

[22] Respondents do continue to allege that IP 2024-086 also violated Article III, Section 50, by failing to disclose its repeal of Article III, Section 38(d)'s bans on human cloning and in vitro fertilization for the purpose of stem cell research. *See supra* note 20. Article III, Section 50, requires strict compliance with its requirement that initiative petitions disclose repeals of constitutional provisions, so this Court could hold that IP 2024-086 legally insufficient for this reason alone. However, the Circuit Court found sufficient violations of Section 116.050 RSMo to make ruling on this constitutional violation unnecessary. *Coleman* at 7-8.

substantially comply with Section 116.050.2(2).[23] That is because, even though this Amendment causes an enormous amount of devastation to existing laws, its drafters disclosed NO repeals. In other words, there was *no* compliance. As this Court observed in enforcing another formal requirement for initiative petitions, "[t]his is not an instance wherein there was or was not a substantial compliance but one where there was no compliance whatever." *State ex rel. Scott v. Kirkpatrick*, 484 S.W.2d 161, 163 (Mo. banc 1972) (holding that lack of any enacting clause made argument that petition had substantially complied impossible to consider).

Because compliance with Section 116.050 RSMo in this case was nonexistent, this Court, like the Circuit Court, needs only to find that Amendment 3 will effect one or several significant repeals of existing laws in order to conclude that IP 2024-086 is legally insufficient to be on the November ballot. No "ferreting" is required, nor any determination of the actual frontiers of Amendment 3's proposed monumental legal changes. ***Any omission* of a significant repeal indicates that the drafters here did not substantially**

[23] In their Trial Brief and before the Circuit Court, Appellants did argue that the summary statement's inclusion of the phrase "remove Missouri's ban on abortion" made additional disclosures regarding abortion repeals unnecessary for "substantial compliance." Intervenors' Trial Br. at 15. This Court considered and rejected the argument that "substantial compliance with constitutional provisions considered as a whole is sufficient" in a case considering whether an initiative petition could be considered to have "substantially complied overall" even though it had not complied at all with one requirement. *State ex rel. Scott v. Kirkpatrick*, 484 S.W.2d 161, 163 (Mo. banc 1972). That case also rejected the claim, also made by Appellants, that the reliance of signatories to an initiative petition outweighs the interests of the entire state in having a constitutionally valid initiative petition process. *Id.* Moreover, as the Circuit Court held, statutory provisions must not be interpreted as a "nullity," so satisfaction of the requirements for a valid summary statement cannot also satisfy the requirements of Section 116.050.2(2). *See Coleman* at 4 (citing *State v. Knox*, 604 S.W.3d 316, 322 (Mo. banc 2020)).

comply with Section 116.050.2(2) RSMo. Since the reversal of the "abortion ban" is so significant to Missouri voters, failing to disclose that effect, alone, is sufficient for this Court to hold that IP 2024-086 did not "substantially comply" with the provisions of Section 116.050. This was precisely the holding of the Circuit Court. *Coleman* at 7-8.

In sum, even if the Court does not hold that Amendment 3's intentional and inevitable extermination of dozens of Missouri laws by means of judicial sterilization triggers the disclosure requirements of Section 116.050 and Article III, Section 50, Plaintiffs urge the Court to find, like the Circuit Court, that Amendment 3 directly conflicts with existing statutes defining fetal viability, 188.030; 188.015(12) RSMo, and setting forth maternal health justifications for post-viability abortions, 188.030 RSMo, while prescribing an entirely new legal regime applicable to regulation of abortion that, according to all parties, is irreconcilable with Missouri's current "ban on abortion," the Right to Life of the Unborn Child Act, 188.017 RSMo. Thus, at the *very* least, "substantial compliance" with Section 116.050 required that the "full and correct text" of IP 2024-086 include a notice that Amendment 3 would repeal these provisions. 116.050 RSMo.

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"Substantial compliance" with the requirements of Section 116.050 RSMo, including but not limited to "conform[ing] to the provisions of … Article III, Section 50 of the Constitution and those of … chapter [116]," is necessary for an initiative petition to be "sufficient." 116.040 RSMo. IP 2024-086 made **no attempt** to comply with the disclosure requirements of Article III, Section 50 and Section 116.050 by including on each page of the initiative petition offered for signatures a "full and correct text" of the measure that

includes "all sections of existing law or of the constitution which would be repealed by the measure." 116.150.2(2) RSMo; *Coleman* at 9. Accordingly, Defendant's certification of IP 2024-086 as "sufficient" for inclusion on the ballot of Missouri's November 5, 2024, General Election, was erroneous and illegal.

Plaintiffs therefore ask this Court to affirm the judgment of the Circuit Court compelling Defendant to reverse his certification of IP 2024-086 because it does not comply with the requirements of the Missouri Constitution and Missouri statutes governing the sufficiency of initiative petitions. 116.200.1 RSMo. Plaintiffs further ask that the Supreme Court order execution of the Circuit Court's stayed injunction "enjoining the secretary of state from certifying the measure and all other officers from printing the measure on the ballot," as provided by Missouri law in the case of reversal. 116.200.2 RSMo.[24] Plaintiffs further ask that the Court grant a declaratory judgment specifying that IP 2024-086 is permanently legally insufficient for inclusion on this or any future Missouri ballot because, by failing to list each of the statutes and constitutional provisions that would be repealed, directly or by implication, in its putative "full and correct text," it failed to satisfy the requirements of Article III, Section 50 of the Missouri Constitution and Missouri Revised Statutes Sections 116.040 and 116.050.

[24] In the case the Secretary's reversal of certification is too late for removal from the ballot, Plaintiffs ask the Court to prohibit by injunction, writ of mandamus, and/or writ of prohibition the Secretary of State and any other officer from counting any votes cast on Amendment 3.

II. IP 2024-086 Violates the Missouri Constitution's Single Subject Rule.

In the alternative or as additional grounds for the Supreme Court to affirm the Circuit Court's reversal of the Defendant's certification,[25] the Supreme Court should hold that IP 2024-086 violates the Missouri Constitution's single subject rule.

A. The Single Subject Rule Promises Voters One Proposal At a Time.

Article III, Section 50, and Article XII, Section 2(b) of the Missouri Constitution set out the Constitution's single subject rule, requiring that every initiative petition proposing to amend the Constitution "shall not contain more than one amended and revised article of this constitution, or one new article **which shall not contain more than one subject and matters properly connected therewith**." Mo. Const. art. III, § 50; Mo. Const. art. XII, § 2(b) (emphasis added).[26]

The purpose of the single subject rule is to protect voters by "prevent[ing] 'logrolling,' a practice familiar to legislative bodies whereby unrelated subjects that individually might not muster enough support to pass are combined to generate the necessary support." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 830 (Mo. banc. 1990) (citing *Moore v. Brown*, 165 S.W.2d 657, 662 (Mo. banc 1942)). "The prohibition is intended to discourage placing voters in the position of having to vote

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[25] "The judgment of the trial court can be affirmed on any grounds supported by the law and evidence." *Legends Bank v. State*, 361 S.W.3d 383, 386 (Mo. banc 2012).

[26] The Constitution further specifies that the Defendant and the people are bound by these provisions in attempting to amend the Constitution and in submitting any proposed initiative petition to the people by certification for inclusion on the ballot. Mo. Const. art. III, § 53; Mo. Const. art. XII, § 1.

for some matter which they do not support in order to enact that which they earnestly support." *Id.*

Because it capitalizes on the motivation of voters on one subject over others, logrolling is particularly likely where, as here, many issues are joined in one measure with a high-profile, highly motivating, get-out-the-vote issue like abortion. Such a tactic thumbs its nose at the single subject rule, which "is the constitutional assurance that within the range of a subject and related matters **a measure must pass or fail on its own merits**." *Id.* (emphasis added).

B. Amendment 3 Illegally Binds Together More Than One Subject.

To the extent its scope is presently discernible, Amendment 3 is teeming with subjects, and it is overt in its ambitions of future expansion. By including abortion as one of many subjects, both named and to be identified later, the drafters have designed a proposal that makes a host of legal changes, none of which "must pass or fail on its own merits." *Blunt*, 799 S.W.2d at 830.

1. Amendment 3 Creates a "Super-Right" To "Reproductive Freedom."

Subsection 2 of Amendment 3 proposes to establish a "fundamental right to reproductive freedom" that is unassailable by "Government": "The Government shall not deny or infringe upon a person's fundamental right to reproductive freedom." *Id.* IP 2024-086 describes this new super-right as "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." Ex. 2, Amend. 3 subs. 2 (emphases added).

a. "Including But Not limited To" And "All Matters Relating To" Intentionally Make The Scope of Amendment 3 Neither "Identifiable" nor "Narrow."

Missouri courts applying the single subject rule look for a measure to have a single "readily identifiable and reasonably narrow central purpose."[27] *Blunt*, 799 S.W.2d at 831. The language Amendment 3 uses in Subsection 2 alone defeats any claim that the purpose of the amendment is either "narrow" or "identifiable."

Specifically, Subsection 2 makes explicit that "all matters relating to reproductive freedom" is a category that will exceed the scope of what is identified in the Amendment. The Missouri Supreme Court has held that the phrase "including but not limited to" "evidences an **intent to avoid statutory constraints on the evolution of"** a particular category. *Sermchief v. Gonzales*, 660 S.W.2d 683, 689 (1983) (interpreting an "open-ended definition of professional nursing") (emphasis added). By using "including but not limited to," Amendment 3 explicitly anticipates applications that have "heretofore not [been] considered." *Id.* That is, applications that are not, at present, "readily identifiable."

Moreover, the phrase "all matters relating to" requires[28] the broadening of Amendment 3's "right to reproductive freedom" even beyond the realm of the mainly

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[27] Defendants in this lawsuit disagree so strongly about the main effects of Amendment 3 that they engaged in two rounds of litigation disputing the question. *See, e.g.*, Ex. 3, Petition, *Fitz-James v. Ashcroft*, 24AC-CC06970. The disagreement of those supporting the provision's certification as to its "central purpose" is indicative that it illegally has more than one. *Blunt*, 799 S.W.2d at 832.

[28] 'This Court must assume that every word contained in a constitutional provision has effect, meaning, and is not mere surplusage." *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 206 (Mo. banc 2008).

medical categories currently listed in subsection 2. For example, genital mutilation of a female child, an exercise of autonomy that Missouri law currently identifies as a felony, is a "matter" that may not be includible in a category limited to "health care," but is certainly one of "all matters relating to" a woman's reproductive health care. So, Missouri's law banning the practice will very likely be illegal under Amendment 3. *See* Section 568.065 RSMo. Similarly, even if "reproductive health care" could be interpreted to exclude gender transition surgery and gender-related medical treatments, such treatments indisputably fall within the sweep of "*all matters relating to* reproductive health care," so they will almost certainly be protected under Amendment 3, reversing our current ban on gender transition surgeries on children. § 191.1720 RSMo. Applied to the already "not limited" category of "reproductive health care," "all matters relating to" makes the size of Amendment 3's "umbrella" even greater, defying any court's attempt to find it "reasonably narrow." *Fitz-James v. Ashcroft*, 678 S.W.3d 194, 215-16 (Mo. App. W.D. 2023), *reh'g and/or transfer denied* (Nov. 3, 2023) (holding that Amendment 3's "reproductive health care" is an "umbrella" covering "multiple topics").

It is very easy to find expansive definitions of "reproductive health" and "reproductive care" from credible sources to fill in what the drafters of Amendment 3 leave out, *i.e.*, future inclusions in "reproductive health care." As long ago as 1994, the United Nations' Cairo Conference defined "reproductive health" as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes." U.N. Cairo Conference, *Programme of Action of the International Conference on Population and*

Development ¶ 7.2, at 43, Report A/CONF.171/13 (Sept. 5-13, 1994), https://tinyurl.com/3u2rt725. Not surprisingly, thirty years later, court filings from "reproductive care" providers describe "compassionate reproductive health care" as "including abortions, birth control, STI testing and treatment, cancer screenings, and LGTBQ wellness services including transgender/non-binary care." Brief of Amici Curiae Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, et al., *Cedar Park Assembly of God of Kirkland, Washington v. Kreidler*, No. 23-35560, at 5 (9th Cir. Jan. 29, 2024). In between, the academic literature relating to gender transitions has moved past the transitions themselves into a burgeoning industry in "reproductive health care" aimed at supporting or repressing "reproduction" in "transgender and gender diverse" individuals. *See, e.g.*, B.P. Jones, et al., *Uterine Transplantation in Transgender Women*, 126(2) *BJOG: An International Journal of Obstetrics & Gynaecology* 152 (2019) [published by the Royal College of Obstetricians and Gynaecologists]; Trevor MacDonald, et al., *Transmasculine Individuals' Experiences with Lactation, Chestfeeding, and Gender Identity*, 16 BMC Pregnancy and Childbirth 106 (2016).

Only a bit of research is necessary, then, to predict that gender transition treatments and procedures *at least* are "matters relating to reproductive care," probably along with all manner of follow up "reproductive" support for transgender individuals. The articles have already been written. Imagination supplies only even more controversial, and less publicly supported, judicial extensions of Missouri's newest, highest right to "all matters relating to reproductive health care."

The above political, academic, and legal sources, not all of which are even recent, combined with the Missouri Supreme Court's holding in *Sermchief* and common sense intuition, all confirm that the phrase "all matters relating to reproductive health care including but not limited to …" is intended to be a constitutional (and therefore permanent) "Trojan Horse," allowing the introduction into the Missouri Constitution, at the rank of highest right under the law, whatever new technology or behavior can be credibly described as a "matter related to" "reproduction" in any way. Because subsection 2 of Amendment 3 provides for its "right to reproductive freedom" to expand indefinitely in scope into the future, the Amendment cannot be said to have a "reasonably narrow" or "readily identifiable" single subject in the present. *Blunt*, 799 S.W.2d at 831.[29]

b. Even The Presently Identified Subjects of Amendment 3 Are Too Diverse To Share a "Reasonably Narrow" or "Readily Identifiable" "Central Purpose."

Meanwhile, even the seven examples of "matters related to reproductive health care" the drafters named in Amendment 3 are exceedingly varied and not sufficiently related to one another to be the subject of a single ballot proposal. As the Court of Appeals

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[29] Florida's November ballot will include a constitutional amendment that deals forthrightly with voters by proposing change on a single, "readily identifiable" subject:

> Limiting government interference with abortion – Except as provided in Article X, Section 22, no law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient's health, as determined by the patient's health care provider.

https://initiativepetitions.elections.myflorida.com/InitiativeForms/Fulltext/Fulltext_2307_EN.pdf. When the votes are counted, Florida voters will have made clear their will on *abortion*.

held when crafting the ballot title summary for Amendment 3: "multiple topics—including ones that may also be controversial (such as contraceptives)—are also addressed in the proposed amendments, such that 'reproductive health care' is not being used as a euphemism for abortion, but instead an umbrella under which multiple topics[30] are included." *Fitz-James*, 678 S.W.3d at 215-16.

In fact, in addition to abortion, which is the subject of around 100 statutory provisions on its own, the *named* subjects included in "reproductive health care" are the subject of at least these current statutory provisions in Missouri:

- Pre-natal care: 1.205.4; 178.697.4; 188.325.2; 191.729; 191.737.2; 191.915.2; 191.923.3; 208.009.1; 208.151.1(16); 208.151.1(23); 208.662.3; 210.030.1; 217.151.2; 454.1515(a) RSMo.
- Childbirth: 143.161.3; 188.026.5; 188.325.1; 191.331.1; 191.737.1; 191.925.1; 192.016.1; 193.085.1; 193.087.1; 193.165.1, 7; 194.200; 208.151.1(17), (28); 208.662.5; 210.839.6; 217.151.2; 376.406; 454.618.3 RSMo.
- Post-partum care: 191.940.3; 208.152.7; 208.285 RSMo.
- Birth control: 167.611; 170.015.1; 188.033; 188.038.3; 188.325; 191.975; 208.1070; 376.1199; 595.120 RSMo.
- Miscarriage care: 192.990; 194.375 to 194.390; 194.387 RSMo.

Unnamed but already known to be within the scope of "all matters relating to reproductive health care" are Missouri's constitutional provisions banning cloning and in vitro fertilization for the purpose of stem cell research, Mo. Const. art. I, § 38, and Missouri's

[30] "Topic" is a synonym for "subject." W. Statsky, West's Legal Thesaurus/Dictionary 722 (1985) ("The theme or topic acted upon (subject of the legislation).").

prohibitions on genital mutilation of a female child and gender transition surgeries for children. § 568.065; § 191.1720 RSMo. Each of these laws and constitutional provisions was properly the subject of their own legislative or initiative petition process.

By proposing to impose a new standard for validity to these and every future law touching any "matter relating to reproductive health care," Amendment 3's aspirations are too various to constitute a "reasonably narrow" single subject. That is especially obvious because voters are likely to have different views on each of these myriad issues, making it unconstitutional to force voters to cast a vote for or against *all* of them in order to express their will on one (*e.g.*, abortion). *Blunt*, 799 S.W.2d at 830.

c. Voters' Views On The Many Subjects of Amendment 3 Vary *Widely*.

Indeed, understandably and predictably, polls of all Americans and of likely Missouri voters reveal very different levels of support for different "matters related to reproductive health care," "all" of which will be constitutionally legalized, protected, and/or funded within Amendment 3.

For example, Gallup's Values and Beliefs polls have identified that **birth control** is among the most supported reproductive issues, favored by 88% of Americans, but **human cloning** is on the opposite end of the spectrum, with 84% of Americans believing it is "morally wrong." Jeffrey M. Jones, Gallup, *Fewer in U.S. Say Same-Sex Relations Morally Acceptable* (June 16, 2023), https://news.gallup.com/poll/507230/fewer-say-sex-relations-morally-acceptable.aspx; Gallup, *Gallup Poll Social Series: Values and Beliefs* (May 1-24, 2023), https://news.gallup.com/file/poll/507239/230619MoralIssues.pdf.

An August 2023 poll of likely Missouri voters conducted by Saint Louis University found that "Sixty-three percent of Missouri voters opposed allowing **minors 'to receive gender transition medical care** like hormone therapy or medication that can temporarily prevent the effects of puberty,' and 73% of voters opposed **minors being allowed to have 'gender-affirming surgery.'**" Saint Louis University, SLU/YouGov Poll: *Voters Weigh in on 2024 Presidential election, Education, LGBTQ Issues* (Aug. 23, 2023), https://www.slu.edu/news/2023/august/slu-poll.php. The same poll showed that "Sixty-seven percent of voters oppose allowing **transgender student-athletes to play sports teams** that match their gender identity." *Id.*

Probably no poll is necessary (and apparently none has been done) to determine Americans' views on protecting the approximately 513,000 (in 2012) women and girls in the United States who were at risk for **female genital mutilation/cutting** (FGM) or its consequences. *See* Howard Goldberg, et al., *Female Genital Mutilation/Cutting in the United States: Updated Estimates of Women and Girls at Risk, 2012.* Public Health Rep. 340, 340-347 (Mar.-Apr. 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4765983/. A 2020 "poll has shown that majority of Nigerians (88 percent) are in support of a legislation to end Female Genital Mutilation in Nigeria." https://www.noi-polls.com/post/female-genital-mutilation-poll.

These numbers support the intuition of the drafters of the Missouri Constitution in including the single subject rule: combining multiple subjects in one law makes it possible to smuggle into the Constitution legal protections that do not have the will of the voters. Most of the protections Amendment 3 would place in the Missouri Constitution would be

very unlikely to get there on their own merits. *See Blunt*, 799 S.W.2d at 830. The advantage of "logrolling," by attaching these issues to abortion, the most motivating social issue of the modern era, is obvious and strong. Missouri voters are protected by their Constitution from being forced to vote on these other issues as the cost of expressing their will on abortion. This constitutional protection is meaningless, however, unless this Court compels the Defendant Secretary of State to enforce it.

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In sum, not only does subsection 2 of Amendment 3 by its use of open terms repel identification of a "reasonably narrow" purpose, but the danger of "placing voters in the position of having to vote for some matter which they do not support in order to enact that which they earnestly support," *Blunt*, 799 S.W.2d at 830, is at its highest here, where Amendment 3 intentionally binds multiple other subjects to abortion, the most controversial topic of our time.

2. Amendment 3's Regulation of "Government" Raises More Than One Subject.

Subsections 2, 3, 4, and 6 of Amendment 3 propose to bind the hands of "Government," which it defines 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." Ex. 2, Amend. 3 subs. 8(2). Simply regulating more than one branch of government, each of which is governed under a separate article of the Missouri Constitution, suggests that an initiative petition has illegally comprehended more than one

subject. *Blunt*, 799 S.W.2d at 831 ("The organizational headings of the constitution are strong evidence of what those who drafted and adopted the constitution meant by 'one subject.'"). In its limitation on all actions of "Government" as broadly defined therein, Amendment 3 commingles regulation of entities and individuals subject to at least five separate articles of the Missouri Constitution:

- Article III: Legislative Department
- Article IV: Executive Department
- Article V: Judicial Department
- Article VI: Local Government
- Article VII: Public Officers

"When a proposal deals with matters that were previously the subject of an article other than the one being amended, the Court must scrutinize the proposal to see if all matters included relate to a readily identifiable and reasonably narrow central purpose." *Blunt*, 799 S.W.2d at 831. Amendment 3 purports to limit the activities of all three branches of state government as well as every decision-making authority subsidiary to the State, in every action they might take affecting an infinitely expanding super-right ("all matters relating to reproductive health care") that affects every human being. Its regulation of all forms of government is further evidence that IP 2024-086 greatly exceeds a single "readily identifiable and reasonably narrow central purpose." *Id.*

3. Subsection 3 Establishes a Program of Judicial Sterilization of Existing Laws.

After tying the hands of "Government" in subsection 2 in all future actions related to an unlimited area ("reproductive freedom") that comprehends many subjects of existing and possible regulation, in subsection 3, proposed Amendment 3 would repeal or repeal by implication[31] the wide array of *existing* statutes, constitutional provisions, and government enforcement activities in these areas. It does so by creating a new category of judicial review applicable to all laws that "den[y], interfere[] with, delay[], or otherwise restrict[]" the new "right to reproductive freedom," applying a new, strict-scrutiny-PLUS judicial standard and narrowing by fiat the interests the State of Missouri may cite to justify any such laws. Ex. 2, Amend. 3 subs. 3.

The drafters of Amendment 3 admit that "death by adjudication" for many of Missouri's laws is "the purpose" of Amendment 3: "[T]he purpose of the initiative is to allow some current laws to be challenged." Trial Br. of Fitz-James at 18, *Fitz-James v. Ashcroft*, 23AC-CC03167 (Cole Cnty., Sept. 25, 2023); *see also* Respondents' Br. of Fitz-James at 63 ("removing Missouri's ban on abortions" "is an accurate description of the purpose and probable effects of the initiatives"), *Fitz-James v. Ashcroft*, 678 S.W.3d 194 (Mo. App. W.D. 2023), *reh'g and/or transfer denied* (Nov. 3, 2023); *Fitz-James*, 678

[31] The phrase "repeal by implication" or "implied repeal" refers to the impact on an earlier law of a measure that "is so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force." *Ritter v. Ashcroft*, 561 S.W.3d 74, 95-96 (Mo. App. W.D. 2018) (citing *Knight v. Carnahan*, 282 S.W.3d 9, 19 (Mo. App. W.D. 2009) (citing Black's Law Dictionary definition of "repeal" to interpret Section 116.050 RSMo)).

S.W.3d at 211-12 (Court of Appeals citing Fitz-James's admission that providing for a legal attack on Section 188.205 RSMo, the Missouri law that prohibits the use of taxes to pay for abortions, is one intended effect of Amendment 3).

Highly indicative of regulation of more than one subject is the profusion of Missouri laws currently in effect regulating just the *named* subjects of proposed Amendment 3 (leaving out those subjects that will eventually be judged "matters relating to reproductive health care"). Each of Missouri's existing provisions related to "matters relating to reproductive health care," partially listed *supra*, will be subject to review (with likely reversal of many) under "strict-scrutiny-PLUS," as will all of Missouri's laws regulating abortion prior to the Amendment's new definition of "Fetal Viability."

4. Amendment 3 *Also* Legalizes Abortion.

In subsection 4, IP 2024-086 changes the subject again and proposes yet another new legal standard on regulations of abortion after a newly identified point in pregnancy called "Fetal Viability." After "Fetal Viability" as defined in subsection 8 of the amendment, Amendment 3 eschews the "strict scrutiny-PLUS" applied in subsection 3, and purports to allow regulation of abortion. This allowance is illusory, however, for two reasons: (1) subsection 8 moves the point of "Fetal Viability" later in pregnancy than current Missouri law provides, and provides for any "treating health care professional" to judge viability, and (2) subsection 4 requires that any regulation of abortion after Fetal Viability must include an exception allowing abortions at any stage of pregnancy so long as a "treating health care professional" deems it necessary for the health of the mother, including her "mental health." *Compare* Section 188.030 RSMo (laying out exception to

ban on abortions after viability for serious physical (but not mental) health conditions diagnosed by a physician), *with* Ex. 2, Amend. 3 subs. 4 (establishing exception to all regulations of abortion following Fetal Viability for any abortion "that in the good faith judgment of a treating health care professional is needed to protect the life or physical or mental health[32] of the pregnant person").

The mere existence of subsection 4 illustrates Amendment 3's most fundamental violation of the single subject rule; namely, that abortion is a "single subject" on its own. The national debate about abortion is unique, and IP 2024-086 acknowledges its distinction from other reproductive issues by exempting in subsection 4 abortion regulations from subsection 3's otherwise-applicable new standard of review. Abortion is the subject of approximately 100 separate provisions of Missouri law that would become subject to a new legal standard of review under subsection 4 of Amendment 3 (two new standards, in fact – one prior to Fetal Viability and one after). Similarly, redefining "Fetal Viability," which has nothing to do with gender identity, sterilization, contraceptives, or other subjects included in "reproductive freedom," is only necessary because abortion is an area of law unto itself. To mash together the full scale of "reproductive health care" into a single ballot initiative that the public (and the Defendant) definitely identifies as an abortion law,[33] is sufficient on its own to run afoul of the single-subject rule.

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[32] The World Health Organization describes "mental health" as "a state of mental well-being that enables people to cope with the stresses of life, realize their abilities, learn well and work well, and contribute to their community." https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response

[33] From proponents and opponents, it is hard to find discussion of Amendment 3 as anything other than a measure expanding access to abortion. *See, e.g.*, ***Missouri Abortion-***

5. Subsection 5 Strips Private Entities of Existing Constitutional Rights and Causes of Action.

Subsection 5 of Amendment 3 has sweeping, controversial implications and constitutes its own "subject," or even two. The text begins:

> 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.

Ex. 2, Amend. 3 subs. 5. Under this section, which does not limit itself to regulation of "Government," and thus will bind private parties, a Catholic school would not be able to terminate ("penalize" or take "adverse action") the employment of a religion teacher who

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rights Amendment *Faces Last-minute Legal Challenges*, Associated Press, Aug. 26, 2024, https://apnews.com/article/abortion-missouri-ballot-constitution-9b2bf89fb7ef2c5cee54988070197995; Matthew Cullen, *Arizona and* ***Missouri Will Vote on Abortion*** *in November*, NY Times (Aug. 13, 2024), https://www.nytimes.com/2024/08/13/briefing/arizona-missouri-abortion-measures-cease-fire-talks.html; ***Missouri to Vote on Abortion Measure*** *in November*, MSNBC (Aug. 29, 2024), https://www.msnbc.com/morning-joe/watch/missouri-to-vote-on-abortion-measure-in-november-218231877809; Rashard Rose & Owen Dahlkamp, ***Abortion Rights Measures*** *Will Be on November Ballots in Missouri and Arizona*, CNN (Aug. 13, 2024), https://www.cnn.com/2024/08/12/politics/arizona-missouri-abortion-rights-measure-november-ballot/index.html; Rebecca Shabad & Lindsey Pipia, ***Abortion Rights Initiative*** *Will Appear on Missouri's November Ballot*, NBC News (Aug. 13, 2024), https://www.nbcnews.com/politics/2024-election/abortion-rights-initiative-missouri-november-ballot-rcna166430; Gabrielle Hays & Shrai Popat,*Advocates in Missouri Work to Put* ***Abortion Access on the Ballot*** *this Election Cycle*, PBS News (July 4, 2024), https://www.pbs.org/newshour/show/advocates-in-missouri-work-to-put-abortion-access-on-the-ballot-this-election-cycle; Kacen Bayless, ***Missourians Will Vote on Abortion Rights*** *in November After Ballot Measure Certified*, Kansas City Star (Aug. 13, 2024), https://www.kansascity.com/news/politics-government/article290978395.html; Hannah Demissie & Oren Oppenheim, ***Abortion Access Initiative*** *Will Be on Missouri's Ballot in November, Could Overturn the State's Abortion Ban*, ABC News (Aug. 13, 2024), https://abcnews.go.com/Politics/abortion-access-initiative-missouris-ballot-november-overturn-states/story?id=112810271 (emphases added).

has an abortion while teaching about the importance of pro-life commitments. A crisis pregnancy center would not be able to terminate the employment of a counselor who has an abortion—the one act that the center exists to prevent. Attempts to impose this type of law are not novel—the City of St. Louis passed a similar law that was successfully challenged in federal court. *Our Lady's Inn v. City of St. Louis*, 349 F. Supp. 3d 805, 821 (E.D. Mo. 2018) ("the forced inclusion of individuals who do not share Our Lady's Inn's commitment against abortion would significantly affect the ability of Our Lady's Inn to advocate for its services and encourage women to forgo abortion."); *see also Slattery v. Hochul,* 61 F.4th 278, 288 (2d Cir. 2023) (holding that similar law in New York violated First Amendment because it "force[d] [the plaintiff] to employ individuals who act or have acted against the very mission of its organization"). The obviously controversial nature of this type of law demonstrates that it deserves its own attention from voters, instead of being slipped into an "abortion amendment."

The text of subsection 5 continues:

> 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.

Ex. 2, Amend. 3 subs. 5. This provision changes the scope of a multitude of civil and criminal statutes, including those defining involuntary manslaughter, medical malpractice, wrongful death, and anything that currently protects the rights of individuals injured or killed seeking "reproductive healthcare," and their families. This provision dissolves malpractice and even wrongful death actions against abortion providers. For an example of a claim that would no longer be justiciable after adoption of Amendment 3, see Charlotte

Philipp, *Couple Accuses Hospital of Losing Their Embryo After Spending 70K on IVF*," People (Aug. 24, 2024), *available at* https://tinyurl.com/2p9jykw7. In narrowing access to the courts in the case of injury, subsection 5 alone changes the scope of at least three constitutional provisions. *See supra* note 18.

6. Subsection 6's "Antidiscrimination" Provision Will Have At Least Two Effects That Are "Subjects" Unto Themselves.

In subsection 6, IP 2024-086 goes back to regulating "Government," setting forth a nondiscrimination provision: "The Government shall not discriminate against persons providing or obtaining reproductive health care or assisting another person in doing so." Ex. 2, Amend. 3 subs. 6. Like other provisions using the unlimited term "reproductive health care," this provision will have unknown future impact, but its presently identifiable implications are certain to include forcing access for transgendered persons (individuals "obtaining reproductive care") into bathrooms, locker rooms, and sports competitions that heretofore "discriminated" between individuals on the basis of genetic reproductive sex traits.

Subsection 6 has also already been interpreted to have implications for state employers and benefit programs, likely requiring them to alter their distribution of benefits related to *at least* contraception, reproductive technologies, abortion, childbirth, childcare, and gender-related treatments. *Fitz-James*, 678 S.W.3d at 212 ("A probable effect of the nondiscrimination clause is to prevent the government, when carrying out its function of providing services and funding, from discriminating against persons based on their reproductive choices."). In other words, state employers and benefit programs are likely to

be required to cover abortion, fertility treatments, gender transition treatments, and anything else that can be construed as "reproductive health care," in their insurance plans alongside maternity care, because denying such benefits would constitute discrimination against someone exercising their right to reproductive freedom. Moreover, the drafters admitted to the Court of Appeals that a legal attack on Section 188.205 RSMo, the Missouri law that prohibits the use of taxes to pay for abortions, is one intended effect of subsection 6's nondiscrimination provision. *Fitz-James*, 678 S.W.3d at 211.

C. Amendment 3 Has No "Central Purpose."

By including within the scope of Amendment 3 a dizzying array of explicit and implicit current and future subjects, regulating all manner of public and private entities in an area of undefined scope ("all matters relating to reproductive health care"), IP 2024-086 directly violates the single subject rule imposed by Missouri Constitution article III, Section 50, and article XII, Section 2(b). Courts considering whether an initiative satisfies the single subject rule look for a single "readily identifiable and reasonably narrow" "central purpose" that "knit[s] all the diverse provisions together." *Blunt*, 799 S.W.2d at 831; *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 (Mo. banc 1981). Amendment 3 has no such single purpose.[34] Its drafters might propose that that purpose is "reproductive

[34] Florida's November ballot includes an abortion rights proposal that has an unmistakable "central purpose":

> Limiting government interference with abortion – Except as provided in Article X, Section 22, no law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient's health, as determined by the patient's health care provider.

freedom," but it is not sufficient to identify a purpose whose scope is deliberately undetermined. "If multiple matters may be lumped together under excessively general headings, the single subject restriction of article III, § 50 would be rendered meaningless." *Blunt*, 799 S.W.2d at 832. As demonstrated in the foregoing paragraphs, "reproductive freedom" as (not) defined and delimited in Amendment 3 is neither "identifiable" nor "narrow."

Moreover, despite its title referring to "reproductive freedom," the central purpose of Amendment 3 certainly appears to many to be the regulation of abortion.[35] At the very least, it would be hard to find a consensus on any subject other than abortion. Defendant Secretary of State and the courts who reviewed and ultimately drafted the official ballot title summary for IP 2024-086 certainly had strikingly different ideas about the central purpose of IP 2024-086. *Fitz-James v. Ashcroft*, Order, 23AC-CC03167 (Cole Cnty., Sept. 25, 2023) (redrafting ballot title summary statement for IP 2024-086 proposed by Secretary of State Ashcroft); *Fitz-James*, 678 S.W.3d at 217 (affirming aforementioned language, slightly altered). The Court of Appeals disagreed that the main topic was abortion, but specifically held that that term "reproductive health care" was an "umbrella," including "multiple topics," including more than one that was controversial. *Fitz-James*, 678 S.W.3d at 215-16. So, they may each be utterable in a single phrase, but "reproductive health care"

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https://initiativepetitions.elections.myflorida.com/InitiativeForms/Fulltext/Fulltext_2307_EN.pdf.

[35] The public discussion on Amendment 3 as reflected in mainstream media is represented *supra* note 34.

and its associated "right to reproductive freedom," are not "reasonably narrow" or "readily identifiable" sufficient to satisfy the single subject rule.

On the same day as he certified IP 2024-086 as sufficient to be included on the ballot in November, Defendant Ashcroft set forth "fair ballot language" identifying abortion as the central, and only, purpose of the Amendment:

> A "yes" vote will **enshrine the right to abortion** at any time of pregnancy in the Missouri Constitution. Additionally, it will **prohibit any regulation of abortion**, including regulations designed to protect women undergoing abortions and prohibit any civil or criminal recourse against anyone who performs an abortion and hurts or kills the pregnant women.
>
> A "no" vote will **continue the statutory prohibition of abortion** in Missouri.
>
> If passed, this measure may reduce local taxes while the impact to [sic] state taxes is unknown.

Missouri Secretary of State, 2024 Ballot Measures, (Aug. 13, 2024), https://www.sos.mo.gov/elections/petitions/2024BallotMeasures (quoted in Ex. 3, Petition ¶ 17) (emphasis added). If this interpretation were valid, it would indicate that the central purpose of Amendment 3 is to regulate abortion.

Anna Fitz-James, Intervenor-Defendant and credited with drafting IP 2024-086, filed a lawsuit objecting to Defendant's characterization of IP 2024-086. *See* Ex. 3, Petition, *Fitz-James v. Ashcroft*, 24AC-CC06970. Fitz-James rightly objects to Secretary Ashcroft's identification of protecting abortion as the central purpose of IP 2024-086, but she fails to identify a different one. Instead, she summarizes the effects of IP 2024-086 multiple times, always acknowledging regulation of abortion as one of several effects, but never identifying anything that could be described as a central purpose:

> The Amendment establishes a state constitutional right to reproductive freedom, which would safeguard Missourians from government interference in their decisions about reproductive health care—including prenatal care, childbirth, postpartum care, birth control, abortion care, miscarriage care, and respectful birthing conditions. It also allows the general assembly to enact restrictions needed to improve or maintain the health of the person seeking care and to regulate abortion care after fetal viability. It also prohibits discrimination for providing or obtaining reproductive healthcare.

Ex. 3, Petition ¶ 2. Interestingly, Fitz-James's own proposed "fair ballot language" straddles the fence between "it's about abortion" and "it's about everything else." It provides that a "yes" vote will have a wide array of effects (including "remov[ing] Missouri's ban on abortion"), but a "no" vote will only affect abortion rights:

> A "yes" vote establishes a constitutional right to make decisions about reproductive health care, including abortion and contraceptives, with any governmental interference of that right presumed invalid; removes Missouri's ban on abortion; allows regulation of reproductive health care to improve or maintain the health of the patient; requires the government not to discriminate, in government programs, funding, and other activities, against persons providing or obtaining reproductive health care; and allows abortion to be restricted or banned after Fetal Viability except to protect the life or health of the woman.
>
> A "no" vote will continue the statutory prohibition of abortion in Missouri.

Ex. 3, Petition ¶ 34 (proposed new "fair ballot language"). In other words, even the drafter fails to identify a "central purpose" that "knit[s] all the diverse provisions" of Amendment 3 together.

Significantly, in the debate over the "central purpose" of Amendment 3, Fitz-James's attempt to move beyond abortion is not supported by her "partners." (See list of partners here: https://moconstitutionalfreedom.org/endorsers-supporting-organizations/.) The Missouri Foundation for Health, a named partner, has disseminated the message that

proposed Amendment 3 puts "abortion access" back on the ballot, without mentioning any other effects: "#Abortion access will be on the ballot this November in #Missouri. The Right to Reproductive Freedom amendment (amendment 3) would re-legalize abortion in the state." https://tinyurl.com/3wjhs4xm. Another partner of Fitz-James and Missourians for Constitutional Freedom, Planned Parenthood Great Rivers Action, tells supporters: "It's official: Abortion is on the ballot in November! Here's what's next: We must mobilize voters across the state to vote YES on Amendment 3 to end Missouri's total abortion ban." https://tinyurl.com/9auzw7ef. Similarly, another Amendment 3 partner, Access MO - Access for all Missourians, writes: "We're taking our power back and ending the extreme abortion ban. Share today to make sure fellow Missourian's know to Vote Yes On 3 on Nov 5!" #EndTheBanMO #VoteYesOn3." https://tinyurl.com/yhz9k4nu. Judge Mike Wolff, a former member of the Missouri Supreme Court who has represented the League of Women Voters in lawsuits over Amendment 3, has told news outlets that under Amendment 3, Missouri "would essentially be back to where we were with *Roe v. Wade*."[36] Hannah Falcon, KFVS, *Multiple Lawsuits Filed Against Missouri's Abortion Question as November Ballot Set to Be Finalized Tuesday*, https://tinyurl.com/5se9pyu9 (updated Aug. 26, 2024 at 7:00 p.m. CDT). So, if Appellants believe that the subject of Amendment 3 is not primarily abortion, they seem to have failed to tell their allies.

[36] The State of Florida will vote this November on a proposed amendment that actually would move the state to the legal position it was in under *Roe v. Wade* by establishing a new legal standard *on abortion alone*. The text of that measure is actually shorter than its ballot summary. *See supra* notes 30 and 35.

"The failure of [parties supporting an Amendment] to agree on the identification of a central purpose is a strong indicator of the proposal's multiplicity." *Blunt*, 799 S.W.2d at 832 (comparing the disparate "central purposes" identified by the Secretary of State and the proponents of the amendment, both appellants defending the amendment). The parties jointly defending Amendment 3 in this case have litigated twice the central purpose of the Amendment. *See, e.g.*, Ex. 3, Petition, *Fitz-James v. Ashcroft*, 24AC-CC06970. And the statements of the drafter's "partners" agree with the Secretary of State's position in that litigation.

If the purpose of IP 2024-086 were "readily identifiable," there would be no need for litigation to identify it. There would be no daylight between the drafter's account of the Amendment's purpose and the accounts of her partners. Most importantly, it would be possible, simply by reading its text, to "readily identify" a "reasonably narrow" "central purpose," including whether any single issue falls within or outside its ambit. The parties would not have to argue before this Court over whether whole categories of regulation (transgender issues, state funding, employment discrimination claims, insurance, malpractice) come within its scope. Its drafters, at least, would be able to point to guardrails or signposts that signal what comes within its "reasonably narrow" and "readily

identifiable" purpose. They have not and cannot or will not, as their public statements[37] and briefing in other cases make clear.[38]

Moreover, Defendants can point to no cases in which Missouri courts have judged that a proposal like Amendment 3 covers only one subject. Missouri courts have not approved, or even considered, another proposed initiative petition that approaches Amendment 3 in its open-ended scope or in its combining of one "headliner" proposal (abortion) with other controversial topics that voters support to markedly different degrees.

Instead, the cases consider measures dealing with tobacco taxes, legalizing recreational marijuana, and ending animal combat for entertainment. *See, e.g.*, *Comm. for a Healthy Future v. Carnahan*, 201 S.W.3d 503, 511 (Mo. banc 2006) (tobacco cessation amendment can include both a tax and its expenditure); *United Gamefowl Breeders Ass'n of Missouri v. Nixon*, 19 S.W.3d 137, 140 (Mo. banc 2000) (ban on implements relates to central purpose of prohibiting fighting involving animals); *Sweeney v. Ashcroft*, 652 S.W.3d 711, 729 (Mo. App. W.D. 2022) (legalization of marijuana can have both

[37] *See* Tweet/X post of Jamie Corley (@JamieHCorley), X/Twitter (Aug. 21, 2024) (author of alternative abortion initiative petition publicly asking drafters of Amendment 3 to clarify whether Amendment 3's "right to reproductive health care" includes "gender-affirming care," since the words "reproductive health care" "could include any intervention related to the human reproductive system, including gender affirming care for adults and minors") *available at* https://x.com/JamieHCorley/status/1826266391046984008.

[38] The Circuit Court held, in the context of its holding under Section 116.050, that Appellants "essentially argue that, with their initiative petition, the only possible way to figure out what statutes this would effect and/or repeal can only be truly determined by future litigation challenging a particular statutes constitutionality." *Coleman* at 8. Respondents view this as supportive of the argument that the Amendment includes an undefined, and therefore not narrow or identifiable, set of subjects.

prospective and retrospective effects). If the Court of Appeals had approved in 2022 as addressing "one subject" a proposal making all the proposed legal changes regarding marijuana and also regulating under a different standard "all matters relating to controlled substances including but not limited to methamphetamines, marijuana, and acetaminophen," then *Sweeney* would be relevant to this case. Similarly, we could point to helpful precedent if the Supreme Court in *Carnahan* had approved a measure introducing a tobacco tax as number 3 in a slate of 6 provisions (most of them not taxes) that purport to regulate, at all levels of government, "all matters relating to leafy commodities, including but not limited to cut flowers, tobacco, and arugula."

There is just no helpful case. That is because proposed Amendment 3 is novel in its attempt to attach unlimited other subjects to a single, enormous issue that is so controversial that it eclipses all others in the minds of voters, the media, and even the Secretary of State.

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The disagreement of its supporters, the conflict between the courts, the drafters, and Defendant, the lack of precedent approving similar measures, and especially a careful reading of its wide-ranging text all strongly support a finding that IP 2024-086 lacks a "readily identifiable and reasonably narrow" "central purpose," as required by the Missouri Constitution's single subject rule. Mo. Const. art. III, § 53; Mo. Const. art. XII, § 1; *Blunt*, 799 S.W.2d at 831; *Buchanan*, 615 S.W.2d at 13. Uniquely in this case, the confusion over whether Amendment 3 is an "abortion amendment" or something much, much broader is indicative of precisely the "logrolling" effect the single subject rule seeks to prevent: Missouri voters cannot be asked to express their will on abortion *and* on all the other areas

comprehended by Amendment 3 in the same measure. *Blunt*, 799 S.W.2d at 830. The process is too confused by multiple subjects, and especially by strong views related to abortion *and* some of the other subjects of Amendment 3, to yield an accurate measure of the will of Missouri voters. Put differently, "[t]hese provisions are so diverse as to defy being connected to a single central purpose." *Id.* at 832.

Plaintiffs therefore ask the Supreme Court to compel Defendant to reverse his certification of IP 2024-086 because it does not comply with the requirements of the Missouri Constitution. § 116.200.1 RSMo; Mo. Const. art. III, §§ 50 & 53; Mo. Const. art. XII, §§ 1 & 2(b). Plaintiffs further ask that the Court order execution of the Circuit Court's injunction "enjoin[ing] the secretary of state from certifying the measure and all other officers from printing the measure on the ballot," as provided by Missouri law in the case of reversal. § 116.200.2 RSMo.[39] Plaintiffs further ask for a declaratory judgment specifying that IP 2024-086 is permanently legally insufficient for inclusion on this or any future Missouri ballot because, by including more than one subject, it violates multiple articles of the Missouri Constitution. Mo. Const. art. III, §§ 50 & 53; Mo. Const. art. XII, §§ 1 & 2(b).

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

[39] In the case the Secretary's reversal of certification is too late for removal from the ballot, Plaintiffs ask the Court to prohibit by injunction, writ of mandamus, and/or writ of prohibition the Secretary of State and any other officer from counting any votes cast on Amendment 3.

A. Affirm the judgment of the Circuit Court on September 6, 2024 and either lift the stay on an injunction or issue an injunction by September 10, 2024 against inclusion of Petition 2024-086 on any Missouori ballot;

B. find and hold that Initiative Petition 2024-086 is permanently legally insufficient for inclusion on any Missouri ballot;

C. grant a declaratory judgment specifying that IP 2024-086 is permanently legally insufficient for certification under Section 116.150 RSMo, because it fails to satisfy the requirements for sufficiency set forth in Sections 116.050 and 116.040 RSMo by failing to include in its putative "full and correct text" those laws and constitutional provisions that would be repealed, directly or by implication, in the event of adoption of the Initiative Petition's proposed constitutional amendment;

D. grant a declaratory judgment specifying that IP 2024-086 is permanently legally insufficient for certification under Section 116.150 RSMo because it violates Article III, Section 50, and Article XII, Section 2(b), of the Missouri Constitution, by including more than one subject;

E. if judgment takes place after it is too late for IP 2024-086 to be removed from the ballot, grant a declaratory judgment that Missouri Revised Statute Section 116.200.1 is unconstitutional and invalid to the extent that it limits a citizen's right to challenge the legal sufficiency of an initiative petition to "[a]fter the secretary of state certifies a petition as sufficient;"

F. pursuant to Section 116.200.1 RSMo, compel Defendant Secretary of State Ashcroft by injunction, writ of mandamus, and/or writ of prohibition to reverse his erroneous certification of IP 2024-086 for inclusion on the ballot of Missouri's November 5, 2024, General Election;

G. pursuant to Section 116.200.2 RSMo, "enjoin the secretary of state from certifying [Amendment 3] and all other officers from printing the measure on the ballot;"

H. in the case of reversal under Section 116.200.1 too late for removal from the ballot, prohibit by injunction, writ of mandamus, and/or writ of prohibition the Secretary of State and any other officer from counting any votes cast on Amendment 3;

I. if the Court grants judgment after it is no longer possible to remove IP 2024-086 from the ballot, pursuant to a determination that the timeline for appeal set forth in Section 116.200.1 is unconstitutional and has deprived Plaintiffs of their right to meaningful pre-election review of the secretary of state's certification of IP 2024-086, prohibit by injunction, writ of mandamus, and/or writ of prohibition the Secretary of State or any other officer from counting the votes cast on Amendment 3;

J. in the event this Court's determination takes place after Missouri's November 5, 2024, General Election, void by injunction, declaratory judgment, writ of mandamus, and/or writ of prohibition the results of the electorate's vote on the permanently legally insufficient IP 2024-086;

K. award Plaintiffs their costs; and

L. grant such further relief as is just and proper.

September 9, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a true and correct copy of the foregoing was filed electronically and served by operation of the Court's electronic filing system this 9th day of September, 2024, on all registered parties, and that I signed the original and that it otherwise contains the information required by Rule 55.03 and includes information on how the brief was served on other parties, Mo. R. Civ. P. I also certify that the foregoing brief complies with the limitations in Rule 84.06(b), Mo. R. Civ. P., and that the brief contains 21,696 words.

/s/ *Timothy Belz*