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No. WD86595

In the

Missouri Court of Appeals for the Western District

ANNA FITZ-JAMES,

Respondent,

v.

JOHN R. ASHCROFT,

Appellant.

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

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal concerns the summary statements prepared by the Secretary of State for six initiative petitions designed to overturn abortion laws in Missouri through constitutional amendment. On September 25, 2023, the trial court entered judgment finding that the summary statement for each was insufficient or unfair under § 116.190, RSMo, and rewrote entirely new summary language, top to bottom, to appear on voters' ballots. D74, at 1–7; App. 1–7. Appellants filed a timely notice of appeal the same day. D75. The Secretary filed the notice of appeal in this Court in light of this Court's ruling in *Boeving v. Kander*, 493 S.W.3d 865, 872–73 (Mo. App. W.D. 2016), that at least some appeals in ballot title challenges belong in this Court despite the legislature's determination that parties should "appeal to the supreme court," § 116.190.4, RSMo; App. 9. On October 5, 2023, the Secretary filed a motion to transfer to the Supreme Court, arguing among other things that this case likely falls within the exclusive jurisdiction of the Missouri Supreme Court. *See* MO. Const. art. V, § 3; § 477.070, RSMo. That motion has not yet been ruled on as of the filing of this brief—although the Supreme Court did call for a response—so the Secretary files this brief per the Court's scheduling order.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Under the six initiative petitions Respondent filed, "any" government action that would interfere with "autonomous decision-making" is per se invalid, without exception. "Any" other government action that would "delay" a woman's ability to obtain abortion (but somehow not interfere with "autonomous decision-making") "shall be presumed invalid" as a matter of constitutional law. D23, at 4. Had this rule been in place in 2018, the health department would not have been able to make the emergency decision to shut down an abortion clinic after discovering that the physician on staff had been inserting moldy equipment into women for months during abortions. *See* D31.

On September 26, 2018, health inspectors visited an abortion clinic unannounced in Columbia, Missouri. They found equipment containing a "blackish gray substance" identified as "mold" as well as another substance that the clinic staff identified as "most likely bodily fluid." D31, at 6–7. Clinic staff admitted that they had "identified the problem" of mold "a couple of months previously" but that the physician had "continued to use the machine on patients *after* they identified the issue." *Id*. at 7–8 (emphasis added) (parenthetical omitted). At the time, the clinic performed "an average of 14 cases per month," *id.* at 4, meaning that this moldy equipment had been used on potentially as many as 40 or more women. The health department was forced to shut the clinic down temporarily.

A picture of the moldy equipment appears on the following page.

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

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Had Respondent's proposed rule been in place, health inspectors could not have temporarily closed the clinic. Because closing the clinic would interfere with "autonomous decision-making," closure would have been prohibited per se, no matter the health justification. Even assuming the decision somehow would not have interfered with "autonomous decision-making," it still would have been "presumed invalid" because the closure could have led to "delay" in performing abortions. Health inspectors would have had to spend weeks or months putting on evidence to satisfy scrutiny even stricter than strict scrutiny. *See* Tr. 19–20 (Respondent's counsel arguing that "the state has an opportunity to prove that the restriction withstands scrutiny"). Of course, under that timeline, no official could ever respond to a health emergency because no official could muster sufficient evidence to overcome the presumption of invalidity fast enough. While the circumstance would call for immediate, emergency action, the petitions at best would allow them to respond only after lengthy litigation and delay, after dozens or hundreds of additional women had been harmed.

In the summary statements, the Secretary quite properly described this state of affairs—where the state can *never* regulate in any way that would interfere with "autonomous decision-making," not even for health reasons—as "dangerous, unregulated, and unrestricted." *See* D25. Similarly, when Respondent proposed a constitutional amendment that would allow regulation after fetal viability, but not if *any* health care professional determines that abortion would have any minimal benefit to physical or mental health, D23, at 13, the Secretary determined that this exception was so capacious that it would permit abortion through all nine months of pregnancy, *see* D25 ("from conception

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to live birth"). And when Respondent proposed a measure to require that the government treat the decision to abort just as favorably as the decision to give birth (which is subsidized by taxpayer dollars), *see, e.g.*, D23, at 4 ("The Government shall not discriminate against persons . . . obtaining reproductive health care . . ."), the Secretary concluded that this could "potentially" lead to taxpayer support of abortion, D25.

If the Secretary's language seems striking, it is because Respondent's petitions are striking. These petitions seek to invalidate Missouri's ban on partial-birth abortion. They seek to create a right to obtain abortion for discriminatory purposes, such as sex-selection abortion or abortion because the father is of a different race than the mother. And they seek to immunize individuals who perform abortions in unsafe circumstances without medical licenses. Respondent complains about the Secretary's language, but it is Respondent who chose to advance a series of maximalist petitions far beyond what *Roe v. Wade* ever permitted.

By law, the trial court was supposed to give substantial deference to the Secretary. Instead, without any explanation at all, the trial court summarily declared that fourteen phrases were "problematic," and it entirely rewrote every word of every summary statement. D74, at 2 & n.1; App. 2. The phrases the trial court found insufficient or unfair are exactly the same phrases Respondent complained about at trial, in exactly the same order. *Compare* D74, at 2–3; App. 2–3, *with* Tr. 35–36. Then, aggravating that error, the trial court adopted verbatim some of the phrasing advocated by Respondent, which hides the ball about the extraordinarily important legal consequences of the petitions (such as overturning the ban on partial-birth abortion). For example, the trial court's language

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incorrectly states that the Missouri Constitution will "declare government funding of abortion is not required." Finally, the trial court determined that even though the initiative petitions (by Respondent's own admission) immediately concern abortion, the Secretary of State also needed to mention peripheral topics.

The trial court's decision is wrong for many reasons. This brief highlights three. First, under the deferential standard the trial court was supposed to apply, the Secretary's language satisfies statutory requirements (Points I–V). Second, because abortion plainly is the central purpose of the initiative petitions, the trial court was wrong to hold that the Secretary needed to mention peripheral topics (Point VI). And third, even if some of the language were inadequate or insufficient, the trial court had no authority to rewrite every word of every summary statement, from top to bottom (Point VII). Indeed, in doing so, the trial court performed an executive function, placing serious stress on fundamental principles of separation of powers, and the trial court's own language is both insufficient and unfair.

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STATEMENT OF FACTS

I. Statutory background

Any citizen who wishes to place a question on the ballot to amend the Missouri Constitution must submit a petition of proper form to the Secretary of State. § 116.332 RSMo. At that point, the Secretary drafts a statement of 100 words or fewer to summarize for voters the legal effect the initiative would have. § 116.334.1, RSMo; App. 11. The purpose of this summary statement "'is to give interested persons notice of the subject of a proposed [law] to prevent deception through use of misleading titles.'" *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006) (quoting *Union Elec. Co. v. Kirkpatrick*, 606 S.W.2d 658, 660 (Mo. banc 1980)). Only after the Secretary certifies the summary statement can a petitioner collect signatures to qualify a petition for the ballot. *See* § 116.334.2, RSMo; App. 11.

II. Respondent submits six petitions to alter abortion law in Missouri.

As relevant here, Respondent Anna Fitz-James submitted six initiative petitions that she acknowledged at trial "would have the greatest impact immediately on abortion." Tr. 36; *see also* D74, at 3; App. 3 (trial court judgment) ("the proposals will have the greatest immediate impact on abortion"). These initiative petitions have various provisions, some of which appear in multiple petitions or all of them.

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A. All petitions declare that "any" action that interferes with "autonomous decision-making" is invalid per se, without exception, and "any" other action that would delay abortion (but somehow not interfere with decision-making) is "presumed invalid."

After the title paragraph, all petitions have identical second and third paragraphs. These provisions would

1) create a "fundamental right to reproductive freedom" defined 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";

2) declare, "Any denial, interference, delay, or restriction of the right to reproductive freedom shall be presumed invalid"; and

3) allow governmental action to overcome that presumption only by "demonstrat[ing] that such action is justified by a compelling governmental interest achieved by the least restrictive means." D23, at 2–16.

Critically, although the last of these provisions purports to use the familiar language of strict scrutiny, the rest of the provision redefines strict scrutiny to narrow immensely what counts as a "compelling interest." The text creates a new form of scrutiny, ultrastrict scrutiny, stating that

> 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.
>
> D23, at 2–16.

In other words, the government can never interfere with "autonomous decision-making." "Any" action that would do so will always be invalid per se, without exception. Likewise, under the "widely accepted clinical standards" clause, government could only

ever impose health regulations where clinics already are widely in compliance with those proposed regulations.

B. Some provisions permit regulation of late-term abortion—unless any healthcare provider determines that abortion would have any positive effect (however minimal) on physical or mental health.

One initiative petition has no provision allowing any regulations of late-term abortions at all. D23, at 4 (deleting ¶¶ 4, 6). That petition presumes invalid any regulation on abortion through all nine months of pregnancy. *Id.*

The five other initiative petitions state in their fourth paragraphs, "Notwithstanding subsection 3"—the subsection entirely prohibiting "any" regulation that interferes with "autonomous decision-making"—the legislature may enact regulations "after Fetal Viability" (in three petitions), D23, at 4, 13, 16, or "after 24 weeks of gestation" (in two petitions), *id.* at 7, 10. But all these petitions have an exception: the legislature cannot regulate these late-term abortions at all (not even subject to strict scrutiny) if any undefined "health care professional" determines that abortion would have any minimal benefit to the "physical or mental health of the pregnant person." D23, at 2, 7, 10, 13, 16.

C. All petitions give complete immunity to individuals performing abortions, include no text authorizing government to require medical licensure, and prohibit the government from discriminating against abortion compared to childbirth.

The fifth paragraph in each petition (fourth paragraph in petition 2024-078) gives persons performing abortions complete immunity: "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." D23, at 2, 7, 10, 13,

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16. The provision includes no language allowing the State to require that the person performing the abortion (and thus "assisting") be a licensed medical professional accountable through medical malpractice law.

Another paragraph in each petition states, "The Government shall not discriminate against persons providing or obtaining reproductive health care or assisting another person in doing so." D23, at 2, 4, 7, 10, 13, 16. At trial, Respondent said this provision would prohibit the State from blocking "insurance coverage for abortion." Tr. 14–15.

D. Two of the six petitions allow the legislature to require parental consent in limited circumstances.

Four of the petitions give the legislature no authority at all to require physicians to obtain parental consent. D23, at 4, 10, 13, 17 (deleting ¶ 6). Two petitions allow the legislature to "enact laws that require a health care professional, before providing an abortion to a minor, obtain [sic] consent from a parent or guardian of the minor." D23, at 2, 7. But neither of these provisions applies to persons performing abortions who are not "health care professionals." And both these provisions include capacious exceptions: a health care professional need not obtain consent if the health care professional subjectively determines that the minor is "mature," that "obtaining consent may lead to physical or emotional harm to the minor," or that "obtaining consent would not be in the best interest of the minor." *Id.*

E. Two of the six provisions state that government funding need not be required.

Finally, four of the petitions include no language ensuring that government will not be forced to subsidize abortion through taxes. *See*, *e.g.*, D23, at 4, 7, 10, 13. At trial,

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Respondent forthrightly acknowledged that under these four petitions, Missouri's "current statute, which forbids funds for abortion, could be challenged." Tr. 16.

Just two petitions (2024-085 and 2024-087) include text mentioning government funding. These state, "Nothing in this Section requires government funding of abortion procedures." D23, at 2, 16. The petitions do not explain whether this provision is consistent with what Respondent characterized as the prohibition—which appears in all six petitions—against the State blocking "insurance coverage for abortion." Tr. 14–15.

III. The Secretary certifies summary statements for each petition.

Following submission of these petitions, the Secretary certified summary statements for each.

1. Every summary statement includes the same first two paragraphs. D25, at 1–6. In light of the petition language stating that the government never can do anything (even impose a health-and-safety regulation) that would interfere with a "person's autonomous decision-making," that "any" government action that somehow does not interfere with autonomous decision-making but would "delay" abortion "shall be presumed invalid," and that no person may ever be penalized for performing an abortion (even if they lack a medical license), the Secretary stated in summary that the petitions would

- allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;
- nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion. D25, at 1–6.

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2. The Secretary included additional language for the five petitions that mention limited legislative authority to regulate late-term abortions and to require parental consent. *Id.* But in light of the limitations preventing regulating late-term abortions if any healthcare professional determines that abortion would have any minimal benefit to physical or mental health, and in light of the language preventing regulations requiring consent if any healthcare professional determines that the minor is "mature," that "obtaining consent may lead to physical or emotional harm to the minor," or that "obtaining consent would not be in the best interest of the minor," the Secretary stated in summary that the respective petitions would

- allow for laws to be enacted regulating abortion procedures after 24 weeks, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time [Petitions 2024-080 and 2024-082];
- allow for laws to be enacted regulating abortion procedures after Fetal Viability, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time [Petitions 2024-085, 2024-086, and 2024-087]. D25, at 2–6.

3. Every statement also includes a summary of the discrimination provision in the petitions, as well as a statement about taxpayer funding. D25, at 1–6. In light of the petition text requiring government to treat abortion as favorably as childbirth, each summary states that the petitions would

- require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding. D25, at 1–6.

4. Finally, one petition includes summary language about the effect of the petition on local governments. D25, at 1. It states that the petition would

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- prohibit any municipality, city, town, village, district, authority, public subdivision, or public corporation having the power to tax or regulate or the state of Missouri from regulating abortion procedures. *Id.*

IV. The trial court summarily rejects every word of every summary statement and entirely rewrites every one, at times adopting language supplied by Respondent.

Unhappy with these statements, Respondent sued with respect to each of the six summary statements, D2, and the trial court consolidated all six cases into one trial.[1] D10. At trial, Respondent listed 14 phrases in the summary statements that she thought were insufficient or inadequate, such as "partial-birth abortion," "at any time," and "potentially including tax-payer funding." Tr. 35–36. Without any analysis, the trial court listed the same phrases Respondent complained about at trial, in exactly the same order, and summarily declared them to be inadequate or insufficient. D74, at 2–3; App. 2–3. The trial court acknowledged that the consequences outlined in the Secretary's statements were "theoretically possible" but declared in a single line, without analysis, that they might not be "probable." D74, at 2 n.1; App. 2.

The trial court stated that it was declining to provide any explanation for its ruling because the "Secretary's proposals were not sent until 6:43 pm on September 18, 2023 notwithstanding the request of the Court for each side to bring their proposed judgments in

[1] In its August 7, 2023 consolidation order, the trial court ordered that the lead case (challenging the summary statement for IP 2024-085) be Count I, and that all other initiatives be assigned sequential Counts (*i.e.*, Count II for 2024-078, Count III for -080, Count IV for -082, Count V for -086, and Count VI for -087). D10. The trial court also consolidated *Kelly v. Fitzpatrick*, No. 23AC-CC04802, a challenge to the State Auditor's fiscal note summaries. D14. All cases were heard the same day, although the trial court issued two judgments, one for the challenges to the summary statements and one for the challenge to the fiscal notes. *See, e.g.*, D74; App. 1–7.

electronically editable form to the September 11, 2023 hearing." *Id.* In fact, at the September 11 hearing, the court expressly changed the deadline for proposed judgments from September 11 to September 18. Tr. 84. The Secretary complied with that deadline.

The trial court then concluded that the Secretary erred by not discussing aspects of "reproductive freedom" beyond abortion. D74, at 3; App. 3. The trial court acknowledged that "the proposals will have the greatest immediate impact on abortion" but nonetheless concluded that the Secretary needed to discuss other topics. D74, at 3; App. 3.

The Court then entirely rewrote the language of every summary statement. In all six petitions, the trial court stated that the petition would

- establish a right to make decisions about reproductive health care, including abortion and contraceptives, with any governmental interference of that right presumed invalid;
- remove Missouri's ban on abortion;
- allow regulation of reproductive health care to improve or maintain the health of the patient. D74, at; App. 4–7.

At trial, Respondent forthrightly declared that "proponents [of petitions] shouldn't be writing summary statements." Tr. 54–55. But the third bullet point written by the trial court is substantively identical to a phrase written by Respondent. *Compare* D74, at 4; App. 4, *with* D2, at 8 (Second Amended Petition) ("allow regulation of reproductive health care to improve or maintain patient health") *and* D20, at 7 (same).

In five petitions, the trial court rewrote the summary language to state that the petition would

- allow abortion to be restricted or banned after [Fetal Viability/24 weeks] except to protect life or health of the woman. D74, at; App. 4–7.

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In two petitions, the trial court stated that the petition would

- allow General Assembly [sic] to enact a parental consent requirement for abortion with an alternative authorization procedure. D74, at 4–7; App. 4–7.

And in two petitions, the trial court stated that the petition would

- declare government funding of abortion is not required. D74, at 4–7; App. 4–7.

This last bullet point is identical to one drafted by Respondent. D2, at 9.

The same day the trial court issued its order, the Secretary filed a notice of appeal. D75.

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POINTS RELIED ON

I. The trial court erred in summarily holding that the ballot titles were insufficient or unfair in their description of the limits the petitions would place on government action, because those bullet points fairly and sufficiently summarize the petitions on this issue, in that the petitions would per se ban all actions that interfere with "autonomous decision-making" and presume "invalid" "any" other regulation that might "delay" abortion.

- *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012)
- *Fitzpatrick v. Ashcroft*, 640 S.W.3d 110 (Mo. App. W.D. 2022)
- *Hill v. Ashcroft*, 526 S.W.3d 299 (Mo. App. W.D. 2017)

II. The trial court erred in summarily holding that the ballot titles were insufficient or unfair in their description of the effect of the petitions on existing law, because those bullet points fairly and sufficiently summarize the petitions on this issue, in that the petitions are designed to overturn Missouri's abortion laws, including restrictions that have been on the books for 200 years.

- *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012)
- *Fitzpatrick v. Ashcroft*, 640 S.W.3d 110 (Mo. App. W.D. 2022)
- *Hill v. Ashcroft*, 526 S.W.3d 299 (Mo. App. W.D. 2017)

III. The trial court erred in summarily holding that the ballot titles were insufficient or unfair in their description of the limited authority the petitions would allow the legislature to retain for abortions after 24 weeks or fetal viability, because those bullet points fairly and sufficiently summarize the petitions on this issue, in that the petitions include exceptions so capacious as to remove nearly all authority from the legislature.

- *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012)
- *Fitzpatrick v. Ashcroft*, 640 S.W.3d 110 (Mo. App. W.D. 2022)
- *Hill v. Ashcroft*, 526 S.W.3d 299 (Mo. App. W.D. 2017)

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IV. The trial court erred in summarily holding that the ballot titles were insufficient or unfair in their description about discrimination and taxpayer funding, because those bullet points fairly and sufficiently summarize the petitions on those issues, in that the petitions themselves include very similar language, Respondent conceded that four petitions could require taxpayer funding of abortion, and Respondent conceded that the other two petitions that appear to limit taxpayer funding could nonetheless require government funding of abortion through public health insurance.

- *State ex rel. Humane Soc'y of Missouri v. Beetem*, 317 S.W.3d 669 (Mo. App. W.D. 2010)
- *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012)
- *Fitzpatrick v. Ashcroft*, 640 S.W.3d 110 (Mo. App. W.D. 2022)
- *Hill v. Ashcroft*, 526 S.W.3d 299 (Mo. App. W.D. 2017)

V. The trial court erred in summarily holding that one ballot title was insufficient or unfair in its description of the effect it would have on local government, because those bullet points fairly and sufficiently summarize the petitions on this issue, in that the petition presumes all restrictions invalid.

- *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012)
- *Fitzpatrick v. Ashcroft*, 640 S.W.3d 110 (Mo. App. W.D. 2022)
- *Hill v. Ashcroft*, 526 S.W.3d 299 (Mo. App. W.D. 2017)

VI. The trial court erred in holding that the ballot titles were insufficient or unfair for mentioning only abortion and not topics like prenatal care, because those bullet points fairly and sufficiently summarize the petitions on this issue, in that summary statements need only describe a petition's "central feature," which is abortion.

- *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012)
- *Archey v. Carnahan*, 373 S.W.3d 528 (Mo. App. W.D. 2012)
- *Boeving v. Kander*, 493 S.W.3d 867 (Mo. App. W.D. 2016)
- *Hill v. Ashcroft*, 526 S.W.3d 299 (Mo. App. W.D. 2017)

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VII. The trial court erred in rewriting the ballot summaries in their entirety, because the trial court should have addressed any perceived insufficiencies by making the smallest changes possible within the existing language supplied by the Secretary, in that it exceeded the trial court's authority and the appropriate judicial role for the trial court to engage in a complete re-write of the ballot title (without any analysis whatsoever), and the trial court's substitute language is itself both insufficient and unfair.

- *Prentzler v. Carnahan*, 366 S.W.3d 557 (Mo. App. W.D. 2012)
- *Sedey v. Ashcroft*, 594 S.W.3d 256 (Mo. App. W.D. 2020)
- *Cures Without Cloning v. Pund*, 259 S.W.3d 76 (Mo. App. W.D. 2008)
- *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 225 (1994)

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ARGUMENT

In assessing the Secretary's language, the trial court failed to apply due deference. The summary language, of course, must "state the consequences of the initiative without bias, prejudice, deception, or favoritism." *Brown v. Carnahan*, 370 S.W.3d 637, 654 (Mo. banc 2012). But "there are many appropriate and adequate ways of writing the summary ballot language." *Asher v. Carnahan*, 268 S.W.3d 427, 432 (Mo. App. W.D. 2008). Indeed, "ten different writers would produce ten different versions." *Id.* at 431. For that reason, the test is "*not* whether alternate ballot language might be better." *Fitzpatrick v. Ashcroft*, 640 S.W.3d 110, 126 (Mo. App. W.D. 2022) (emphasis added).

Because courts serve only a "limited function" under § 116.190; App. 9, courts must defer to the Secretary unless the language is so deficient that "'it likely creates prejudice.'" *Prentzler v. Carnahan*, 366 S.W.3d 557, 562 (Mo. App. W.D. 2012) (citation omitted). The standard is so deferential that a statement can even be inaccurate so long as it is not so inaccurate that it causes prejudice. *E.g.*, *Hill v. Ashcroft*, 526 S.W.3d 299, 308 (Mo. App. W.D. 2017) (allowing a statement "to encompass matters not included in the [petition] measure"). One reason the Secretary must receive deference (other than the separation of powers concerns) is that the Secretary's language goes through multiple rounds of approval and is not drafted by the party who submitted the petition. Unlike "a legislature-proposed ballot initiative," where the legislature "writes the ballot title as well as the proposed amendment without any review of the ballot title by the executive department," "the ballot summary of a citizen-proposed initiative petition is written by the secretary of state and

reviewed by the attorney general." *Dotson v. Kander*, 464 S.W.3d 190, 194 & n.4 (Mo. banc 2015).

Rather than afford the Secretary the deference due, the trial court did just the opposite. Even though Respondent, as "[t]he party challenging the language of the summary statement" had "the burden to show that the language is insufficient or unfair," *Hill*, 526 S.W.3d at 308, the trial court deferred to Respondent. At trial, Respondent argued that fourteen phrases were inadequate or insufficient. *See, e.g.*, Tr. 35–36. The phrases the trial court found inadequate or insufficient are exactly the same phrases Respondent complained about at trial, in exactly the same order. *Compare* D74, at 2–3; App. 2–3, *with* Tr. 35–36. And the trial court adopted several bullet points substantively identical (or entirely identical) to misleading bullets Respondent drafted. *Compare* D74, at 4–7; App. 4–7, *with* D2, at 8–9 (Second Amended Petition).

The trial court got it wrong on every bullet point. The Secretary's language satisfies the statutory requirements (Points I–V). The Secretary had no obligation to mention peripheral topics not central to the petitions (Point VI). And even assuming some aspects of the Secretary's language were deficient, the trial court had no authority to rewrite every word of every summary statement, from top to bottom (Point VII). This Court should reverse and reinstate the Secretary's language.

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I. The trial court erred in summarily holding that the ballot titles were insufficient or unfair in their description of the limits the petitions would place on government action, because those bullet points fairly and sufficiently summarize the petitions on this issue, in that the petitions would per se ban all actions that interfere with "autonomous decision-making" and presume "invalid" "any" other regulation that might "delay" abortion.

Standard of Review: "Where the parties simply argue the fairness and sufficiency of the summary statement or fair ballot language based upon stipulated facts, joint exhibits, and undisputed facts, the only question on appeal is whether the trial court drew the proper legal conclusions, which we review *de novo*." *Fitzpatrick*, 640 S.W.3d at 125 (alterations accepted).

Preservation: All issues on appeal are fully preserved for this Court's review. The Secretary fully defended the fairness and sufficiency of the summary statements in their entirety and each aspect of each summary statement Respondents challenged in their lawsuit. *E.g.*, D21; D22.

Argument: The Secretary stated in summary that each petition would "allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice." D25, at 1–6. The trial court's generic, one-sentence conclusion (without any analysis) that these phrases "are either argumentative or do not fairly describe the purposes or probable effect of the initiative[s]" is incorrect. D74, at 2; App. 2.

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A. The petitions impose a constitutional straitjacket on the legislature, eliminating almost entirely any authority to pass any regulations, including health-and-safety regulations.

With respect to the Secretary's statements that the petitions would "allow for dangerous, unregulated, and unrestricted abortions," D25, at 1–6, the Secretary's summary statement correctly summarized the "legal and probable consequences of the initiative[s]." *Brown*, 370 S.W.3d at 654. Each petition creates a presumption that "[a]ny" government action that causes "denial, interference, delay, or restriction" of abortion is invalid. *E.g.*, D23, at 2. And then each petition states that this presumption *never* can be rebutted for governmental action that would at all interfere with a "person's autonomous decision-making." *Id.*

It is thus unclear whether the legislature could ever pass *any* regulation. By definition, regulations are restrictive. It is difficult to imagine a relevant regulation that would never interfere with "autonomous decision-making." But even assuming some such regulation exists, the petitions hamstring the ability of the legislature even to pass those. "Any" regulation that somehow does not interfere with autonomous decision-making, but does delay, restrict, or interfere with access to abortion "shall be presumed invalid." Government can only overcome that scrutiny if it meets ultrastrict scrutiny. The government must "demonstrate that such action is justified by a compelling governmental interest achieved by the least restrictive means," and the petition eliminates almost all interests that would be "compelling" under regular strict scrutiny. *E.g.*, D23, at 2, 4, 7, 10, 13, 16. "[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." *Id.* No other interest is compelling. *See id.*

It is often said that "strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984). Respondent's inartful language, creating ultrastrict scrutiny, makes it difficult to imagine any governmental action regulating abortion that could ever stand.

Certainly it would not allow for emergency health measures, where time is too short for litigation to overcome the automatic presumption. As explained in the summary of argument, health inspectors in 2018 were forced to immediately shut down a clinic in Columbia, Missouri, after learning that the physician had been using "mold"-infested equipment, filled with "bodily fluid," on women *for months*. D31, at 6–8.[2] In 2018, a federal district court denied a request for a preliminary injunction following these "instances of moldy and rusty equipment observed by DHSS [Department of Health and Senior Services] during a September 26, 2018 inspection of the Columbia health center." D73, at 4–5 (Order denying preliminary injunction). Had Respondent's petitions been in effect in 2018, health inspectors would not have been permitted to act. Because shutting down the clinic would necessarily interfere with "autonomous decision-making," the initiative petitions would have blocked health inspectors from protecting women. Even assuming shutting down the clinic on an emergency basis would somehow not have

[2] This evidence was admitted as part of the joint stipulated facts and exhibits, and at no point did Respondent object to the evidence on relevance or any other ground. Tr. 6–7, 50.

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interfered with "autonomous decision-making," it certainly would have "delay[ed]" the ability to obtain abortion, so that action would have been presumed unlawful, and health inspectors would have been able to take action only after weeks or months of litigation—after dozens or hundreds of women had been harmed.

Nonemergency action is likewise on the chopping block under each of Respondent's petitions. Consider, for example, the need for States that allow elective abortion to regulate chemical[3] abortions more stringently than surgical abortions. Although chemical abortions are more convenient for the abortion clinic, it is universally recognized that women who receive chemical abortions are "expected to have a higher rate of ongoing complications." D32, at 5 (physician affidavit). If anything, "higher" understates the situation. "The overall incidence of adverse events was fourfold higher in the medical compared with surgical abortion cohort (20.0% compared with 5.6%, P<.001)." *Id.* at 10–11 (quoting Niinimaki, *Immediate Complications after Medical Compared with Surgical Termination of Pregnancy*, Obstetrics and Gynecology, Vol. 114, No. 4, at p. 795 (October 2009)). "[T]he risk of severe bleeding with chemical abortion is five times higher than from surgical abortion." *All. for Hippocratic Med. v. Food & Drug Admin.*, No. 23-10362, 2023 WL 2913725, at *7 (5th Cir. Apr. 12, 2023).

[3] Abortions performed by pill are interchangeable referred to as "chemical," "medical," and "medication" abortions. To avoid confusion given that Missouri law permits abortions in "medical emergencies," § 188.015(7); App. 16; § 188.017, RSMo; App. 18, this brief uses the term "chemical" abortion, though the source quoted in this paragraph uses the term "medical."

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One aspect of chemical abortions that make them so much more likely to result in serious complications is that adverse events typically happen when the woman is at home and no medical professionals are present. Unlike with surgical abortions where complications tend to "be immediate" and can be treated by the physician performing the abortion, D32, at 4, chemical abortion "takes days to weeks to complete," and thus complications typically occur while the woman is away from the abortion clinic,, *id.* at 5. Indeed, women often do not take the abortion pill until they have arrived at home. "Patient safety is most at risk *at the time* of complications," i*d.* at 4 (emphasis added), so women who obtain chemical abortions necessarily face greater risks.

For that reason, Missouri requires physicians who perform chemical abortions to prearrange for backup physicians to address complications if needed. § 188.021.1–2, RSMo; App. 21; 19 C.S.R. 10-15.050; App. 34–35. Because chemical abortion "takes days to weeks to complete" and there is no way to know when complications will occur, D32, at 5, Missouri law requires clinics that provide chemical abortions to ensure that "an OB/GYN is on-call and available twenty-four hours a day, seven days a week (24/7) to treat complications." Missouri Admin. Code 19 C.S.R. 10-15.050(2)(E); App. 35. This regulation is consistent with the position of the pro-choice American College of Obstetricians and Gynecologists, which declares, "Clinicians who wish to provide medical abortion services either should be trained in surgical abortion or should be able to refer to a clinician trained in surgical abortion." D32, at 15.

But a probable consequence of Respondent's petitions is that Missouri could not regulate chemical abortions more stringently than surgical abortions even though it is

universally recognized that chemical abortions are riskier. This regulation certainly increases the cost for clinics to provide chemical abortions, and so it likely interferes with "autonomous decision-making," making it per se invalid under Respondent's petitions.

Further restricting legislative authority, each petition prohibits any regulation that is not "consistent with widely accepted clinical standards." D23, at 2, 4, 7, 10, 13, 16. This puts the proverbial fox in charge of the henhouse. If, for example, Planned Parenthood Federation of America—the umbrella organization for the largest organization of abortion clinics in America by far—decides not to adopt a standard, Missouri officials would be hard pressed to prove that any regulation the State would impose is "widely accepted" among abortion clinics. In other words, the State could impose regulations only when abortion clinics are already in compliance with those regulations, and could not do so when abortion clinics are not. That reduces legislative authority to a simple rubber stamp of approval.

At trial, Respondent half-heartedly suggested that some health-and-safety regulations discussed in this brief would stand. Tr. 54. Respondent of course has an incentive to portray her petitions as less far-reaching than they in fact are, but history reveals that health-and-safety regulations would be immediately challenged—as they were before the U.S. Supreme Court overturned *Roe v. Wade*. Missouri's complication plan requirement was challenged in federal court. *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, 322 F. Supp. 3d 921 (W.D. Mo. 2018). Missouri prevailed at the preliminary injunction stage. *See id.* But the level of scrutiny at the time was the "undue burden" standard of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992),

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see Williams, 322 F. Supp. 3d at 928, which was substantially *less* strict than strict scrutiny. *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2138 n.2 (2020) (Roberts, C.J., concurring) ("*Casey* expressly disavowed any test as strict as strict scrutiny.") (internal quotation marks omitted), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228 (2022). If Respondent succeeds in putting in place a level of scrutiny much, much stricter, there is no doubt these health-and-safety regulations will immediately be challenged.

Across the country, abortion clinics have very recently challenged health-and-safety requirements. They have challenged the requirement that persons performing abortions be licensed physicians. *Planned Parenthood of the Great Northwest and Hawaiian Islands v. Wasden*, 406 F. Supp. 3d 922 (D. Idaho 2019); *Little Rock Family Planning Services v. Rutledge*, 397 F. Supp. 3d 1213 (E.D. Ark. 2019); *June Med. Servs., LLC v. Gee*, 306 F. Supp. 3d 886, 890 (M.D. La. 2018). They have challenged requirements that abortion drugs be prescribed in person, that women receive basic information to ensure informed consent, and even that abortion clinics report complications. *June Med. Servs.*, 306 F. Supp. 3d at 890 (all three); *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc) (informed consent); *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (en banc) (informed consent). The list goes on and on. Respondent's petitions would spur challenges to Missouri's longstanding health-and-safety regulations.

Indeed, one clause in each petition seems squarely aimed at Missouri's longstanding laws prohibiting persons from performing abortions if they are not physicians carrying

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medical malpractice insurance. *See, e.g.*, D23, at 2. Missouri law forbids "any person who is not a physician" to perform an abortion. § 188.080, RSMo; App. 28. It requires that any person who performs abortions maintain "medical malpractice insurance with coverage amounts of at least one million dollars per occurrence and three million dollars in the annual aggregate." § 188.043.1; App. 27. And it ensures that physicians performing abortion are subject to "civil liability for medical malpractice" just like all physicians. § 188.085; App. 29. But Respondent's petitions each state, "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." *See, e.g.*, D23, at 2. This apparently broad immunity provision includes no textual exception allowing the legislature to penalize persons for performing abortions if those persons are not licensed physicians or do not have malpractice insurance. The petitions thus threaten many laws.

There is in fact a deep irony here. For years, abortion advocates have criticized laws that make it more difficult for licensed physicians to perform abortions, arguing that these laws will simply force women to obtain unsafe, "back-alley" abortions from unlicensed individuals. Yet Respondent's petitions would likely permit unlicensed individuals to perform abortions.

The trial court did not deny that the language of Respondent's petitions put nearly every Missouri law (if not every law) related to abortion at risk. Indeed, it acknowledged that the Secretary's predictions were at the very least "theoretically possible." D74, at 2

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n.1; App. 2. It nonetheless chose to rewrite every word of every summary statement, however, by noting that "possible" is not necessarily "the same as probable." *Id.*

But there is nothing "theoretical" about the effect of the petitions. Given that the petitions would likely eliminate nearly all legislative authority—including authority to pass basic health and safety regulations or require medical licensure—it stands to reason that the petitions have the likely consequence or effect of permitting abortions in at least some unregulated, dangerous circumstances. The Secretary thus was not wrong to summarize the petitions as allowing "dangerous, unregulated, and unrestricted abortions …, without requiring a medical license or potentially being subject to medical malpractice." *See* D25, at 1–6. Ordinarily, "[a] statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision." *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). These petitions do the opposite. Worse, they make regulation per se invalid any time it would interfere with "autonomous decision-making." *See, e.g.*, D23, at 2. "Dangerous, unregulated, and unrestricted abortions" is the "legal and probable consequences of the initiative[s]." *Brown*, 370 S.W.3d at 654. The trial court should have upheld this summary.[4]

[4] At trial, Respondent complained that "'[d]angerous' means 'likely to cause problems or have adverse consequences.'" D20, at 13 (citing *Dangerous*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010)). That is exactly the probable effect of a constitutional provision that prohibits any health regulation that would at all interfere with "autonomous decision-making."

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B. The petitions would permit abortion "from conception to live birth."

No better is the trial court's (again unexplained) conclusion that the phrase "conception to live birth" is somehow insufficient or unfair. *See* D74, at 2; App. 2.

Start first with Petition 2024-078, the only petition that says nothing about allowing regulations for late-term abortions. *See* D23, at 4–5. Even assuming the trial court had a plausible reason to reject the "conception to live birth" language for the petitions that do mention legislative authority to regulate late-term abortions, there is no plausible reason for striking the language in the summary statement for Petition 2024-078.

The same is true for the rest of the petitions. Although each is designed to appear to permit legislative authority over late-term abortions, *see* D23, at 2, 7, 10, 13, 16 ("after 24 weeks" in some petitions, "after Fetal Viability" in others), the five petitions each include exceptions that swallow the rule. D23, at 2 , 7, 10, 13, 16. Although the provisions vary slightly, they state in substance that "under *no circumstance* shall the Government deny, burden, or restrict an abortion that in the good faith judgment of a treating health care professional is needed to protect the life or physical or mental health of the pregnant person." *E.g.*, D23, at 2 (emphasis added). This capacious exception permits abortion through all nine months of pregnancy.

One need not look far to see why this exception swallows the rule. Even under the less-stringent "undue burden" standard before *Dobbs*, abortion was permissible through all nine months. The companion case to *Roe v. Wade* decided the same day, *Doe v. Bolton*, 410 U.S. 179 (1973), was interpreted to create "a broad right to obtain an abortion at any stage of pregnancy provided that a physician is willing to certify that it is needed due to a

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woman's 'emotional' needs or 'familial' concerns." *Dobbs*, 142 S. Ct. at 2255 n.40 (citing *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187, 209 (6th Cir. 1997)). Respondent's petition is even more expansive than *Bolton*. It permits abortion if *any* healthcare professional who treats a patient—the professional need not even treat the patient for pregnancy—determines that an abortion would have *any* positive effect on mental or physical health.[5] *E.g.*, D23, at 2.

Because abortion necessarily involves substantial changes to the body—including weight gain and redistribution and significant hormonal changes—"health care professionals" will *always* be able to certify that abortion would have some positive effect on physical or mental health. An abortion necessarily prevents weight gain and changes in hormones that can alter mood. Under Respondent's petitions, simply asking a dermatologist to say that abortion might clear up acne would be a permission slip for abortion through all nine months of pregnancy.

That is why physicians who perform abortions have openly stated that they will *always* certify that abortion would have a medical benefit. As Warren Hern, a Colorado physician who "specializes in late-abortion services," has said, "I will certify that any pregnancy is a threat and could cause grievous injury to her physical health" because "[e]very pregnancy poses a 'serious health risk' to the mother." *E.g.*, Warren Hern,

[5] The provisions also permit the legislature to act only if there is a "significant likelihood" of sustained survival outside the womb, not a decent or moderate likelihood.

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Pregnancy Kills. Abortion Saves Lives., NY TIMES (May 21, 2019);[6] Robert Novak, *Daschle's Ploy*, WASHINGTON POST (May 19, 1997).[7]

So although Respondent stylizes her petition as a health exception, its substance permits abortions across all nine months. It includes no minimum threshold at all for health benefits or risks, and is thus sharply unlike Missouri's existing law, which permits abortion only when there is "a *serious* risk of *substantial* and irreversible physical impairment of a major bodily function." § 188.015(7), RSMo; App. 16; § 188.017, RSMo (emphasis added); App. 18.

In light of this capacious exception, the Secretary was not wrong to state that the "legal and probable consequences of the initiative[s]," *Brown*, 370 S.W.3d at 654, allow abortions during all nine months of pregnancy.

II. The trial court erred in summarily holding that the ballot titles were insufficient or unfair in their description of the effect of the petitions on existing law, because those bullet points fairly and sufficiently summarize the petitions on this issue, in that the petitions are designed to overturn Missouri's abortion laws, including restrictions that have been on the books for 200 years.

Standard of Review: "Where the parties simply argue the fairness and sufficiency of the summary statement or fair ballot language based upon stipulated facts, joint exhibits, and undisputed facts, the only question on appeal is whether the trial court drew the proper

[6] https://www.nytimes.com/2019/05/21/opinion/alabama-law-abortion.html; https://web.archive.org/web/20230624181403/https://www.nytimes.com/2019/05/21/opinion/alabama-law-abortion.html

[7] https://www.washingtonpost.com/archive/opinions/1997/05/19/daschles-ploy/cd9ab06a-fc62-4a7f-bafa-18c18aac4e1f/; https://web.archive.org/web/20231008010305/https://www.washingtonpost.com/archive/opinions/1997/05/19/daschles-ploy/cd9ab06a-fc62-4a7f-bafa-18c18aac4e1f

legal conclusions, which we review *de novo*." *Fitzpatrick*, 640 S.W.3d at 125 (alterations accepted).

Preservation: All issues on appeal are fully preserved for this Court's review. The Secretary fully defended the fairness and sufficiency of the summary statements in their entirety and each aspect of the summary that Respondents challenged in their lawsuit. *E.g.*, D21; D22.

Argument: The Secretary stated in summary for each petition that the petition would "nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion." D25, at 1–6. The trial court's one-sentence conclusion (without any analysis) that this phrase is "either argumentative or do[es] not fairly describe the purposes or probable effect of the initiative[s]," D74, at 2; App. 2, is incorrect.

As explained in Part I, the petitions would create a per se rule invalidating "[a]ny" governmental action that would interfere with "autonomous decision-making." *E.g.*, D23, at 2. The likely "legal and probable consequences," *Brown*, 370 S.W.3d at 654, of that include nullifying Missouri laws.

1. Consider Missouri's ban on partial-birth abortion. § 565.300, RSMo; App. 30. Congress has described partial-birth abortion as a "gruesome and inhumane procedure" that has a "disturbing similarity to the killing of a newborn infant." *Gonzales v. Carhart*, 550 U.S. 124, 141, 157 (2007). Despite the overwhelming consensus against this procedure, Respondent's petitions would nullify Missouri's ban on partial-birth abortion because that ban interferes with "autonomous decision-making"—namely, it prohibits women from "autonomously" picking that procedure. *See, e.g.*, D23, at 2.

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Perhaps recognizing too late the maximalist approach the petitions take, Respondent tried to walk this issue back at trial, stating that it is no problem if Missouri's ban is nullified, because partial-birth abortion is also regulated under federal law. Tr. 23. But Congress could of course repeal it, and the Department of Justice could choose not to enforce it when (as now) the presidential administration is closely allied with abortion rights advocates. And in any event, the existing federal ban is narrower than the Missouri ban. The federal ban applies only to partial-birth abortion when the child is partially born vaginally, 18 U.S.C. § 1531; App. 32, whereas Missouri's ban applies also to abdominal partial birth, § 565.300.2(3), RSMo; App. 30.

2. Next, consider Missouri's ban on abortions obtained for discriminatory reasons. § 188.038, RSMo; App. 25. Under Missouri law, a woman cannot obtain an abortion just because the father is black, just because the child is a girl and the father wants a boy, or just because the child is anticipated to have Down syndrome. *Id.* Missouri's law interferes with "autonomous decision-making" and is in place not for "the limited effect of improving or maintaining the health of a person" seeking abortion, D23, at 2–16, but instead because "inducing an abortion because of the sex of the unborn child is repugnant to the values of equality"; inducing an abortion because of Down syndrome "is likely to increase the stigma associated with disability"; and inducing abortion because of race is both "repugnant to the values of equality" and reinforces the "historical relationship of bias or discrimination by some family planning programs and policies towards poor and minority populations." § 188.038, RSMo; App. 25. It was accurate for the Secretary to say that the petitions would likely nullify this law. It was wrong for the trial court to strip out that language.

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3. Finally, both the trial court and Respondent acknowledged that the aim of Respondent's petitions is to nullify Missouri's law that prohibits elective abortions. D74, at 3; App. 3; Tr. 36. Complaining about the part of the summary statement that says the petitions would nullify "longstanding" Missouri law, Respondent says that these "laws are recent vintage." Tr. 22. But while the text of some statutes may have been altered in recent years, the policy behind those laws is 200 years old. Missouri has restricted abortion by statute since 1825, just four years after admission to the Union. Indeed, Missouri was the first State to pass such a statute (although States restricted abortion at common law before 1825). *See Dobbs*, 142 S. Ct. at 2285 & n.69. More recently, since August 1986 Missouri has had a consistent policy 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." § 1.205, RSMo; App. 8. While it is true that Missouri was prohibited from enforcing its ban against abortion while *Roe v. Wade* was on the books—a decision the Supreme Court said just last year "was egregiously wrong from the start," *Dobbs*, 142 S. Ct. at 2243—Missouri's policy against abortion has been constant for 200 years and cannot be described as anything other than "longstanding."

In light of all this, the Secretary's statement that the petitions would "nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion," was not inadequate or insufficient; it was completely on point.

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III. The trial court erred in summarily holding that the ballot titles were insufficient or unfair in their description of the limited authority the petitions would allow the legislature to retain for abortions after 24 weeks or fetal viability, because those bullet points fairly and sufficiently summarize the petitions on this issue, in that the petitions include exceptions so capacious as to remove nearly all authority from the legislature.

Standard of Review: "Where the parties simply argue the fairness and sufficiency of the summary statement or fair ballot language based upon stipulated facts, joint exhibits, and undisputed facts, the only question on appeal is whether the trial court drew the proper legal conclusions, which we review *de novo*." *Fitzpatrick*, 640 S.W.3d at 125 (alterations accepted).

Preservation: All issues on appeal are fully preserved for this Court's review. The Secretary fully defended the fairness and sufficiency of the summary statements in their entirety and each aspect of the summary that Respondents challenged in their lawsuit. *E.g.*, D21; D22.

Argument: For the same reasons the Secretary's statement was not insufficient or unfair for stating that the petitions would permit abortion from "conception to live birth," *see* Part I.B, the Secretary's statements that these petitions would "allow for laws to be enacted regulating abortion procedures [after 24 weeks/after Fetal Viability], while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time" was also sufficient. The petitions state that "under no circumstance" may the legislature regulate where any healthcare provider states that abortion could have any positive physical or mental effect. *See, e.g.*, D23, at 2. This exception swallows any rule that would ordinarily allow the legislature to regulate late-term abortions. The

Secretary's language was not unfair or insufficient for stating that these petitions have provisions "guaranteeing the right … to end the life of their unborn child at any time." D25, at 1–6.

The same is true for the language about minors. Only two of the petitions purport to give the legislature any authority to ensure parental consent when minors obtain abortion. D23, at 2, 7. So the language the Secretary included about minors is easily sufficient and adequate for the other four petitions, which treat minors exactly the same as adult women. As for the two petitions that do mention parental consent, again the exceptions are so capacious as to vitiate any meaningful legislative authority. *Id.* Those two petitions disallow regulations requiring consent if any healthcare professional determines that the minor is "mature," that "obtaining consent may lead to physical or emotional harm to the minor," or that "obtaining consent would not be in the best interest of the minor." *Id.* So the petitions would in fact allow minors to obtain abortions through all nine months of pregnancy. The Secretary's statements were thus not insufficient or unfair.

IV. The trial court erred in summarily holding that the ballot titles were insufficient or unfair in their description about discrimination and taxpayer funding, because those bullet points fairly and sufficiently summarize the petitions on those issues, in that the petitions themselves include very similar language, Respondent conceded that four petitions could require taxpayer funding of abortion, and Respondent conceded that the other two petitions that appear to limit taxpayer funding could nonetheless require government funding of abortion through public health insurance.

Standard of Review: "Where the parties simply argue the fairness and sufficiency of the summary statement or fair ballot language based upon stipulated facts, joint exhibits,

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and undisputed facts, the only question on appeal is whether the trial court drew the proper legal conclusions, which we review *de novo*." *Fitzpatrick*, 640 S.W.3d at 125 (alterations accepted).

Preservation: All issues on appeal are fully preserved for this Court's review. The Secretary fully defended the fairness and sufficiency of the summary statements in their entirety and each aspect of the summary that Respondents challenged in their lawsuit. *E.g.*, D21; D22.

Argument: The trial court similarly should have upheld the Secretary's language that the petitions would "require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding." D23, at 1–6.

1. The discrimination language is highly similar to the language in the actual petitions, which is this: "The Government shall not discriminate against persons providing or obtaining reproductive health care or assisting another person in doing so." *Compare id. with*, *e.g.*, D23, at 2. When the Secretary uses language "lifted directly from the initiative," the language is not unfair (unless the petition itself is inherently confusing). *State ex rel. Humane Soc'y of Missouri v. Beetem*, 317 S.W.3d 669, 673 (Mo. App. W.D. 2010). Of course, the Secretary is not required to use any of the petition's original language, but doing so is strong evidence that the language is sufficient.

The trial court's sole reason for removing this language was its conclusion that the language "would likely cause confusion." D74, at 3–4; App. 3–4. The trial court never explained why, and it is hard to see why.

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At trial, Respondent did not even press that argument. Respondent simply argued that the phrase "require the government not to discriminate" is less natural syntax than "prohibit government discrimination." D20, at 25. But the test is not whether "substitute language would provide more specificity and accuracy" or "might be preferable." *Missourians Against Human Cloning*, 190 S.W.3d at 457. The test is whether the language, after due deference to the Secretary, is so deficient as to cause prejudice. *Hill*, 526 S.W.3d at 308. Respondent's quibbling criticism that the Secretary chose an "awkward phrasing," D20, at 25, is far short of the mark. And the trial court's decision to strike this language just highlights how far the trial court deviated from the ordinary standard.

2. The phrase "potentially including tax-payer funding" was likewise justified. This is easiest to see with the four petitions that do not even purport to permit the government to refrain from subsidizing abortion. D23, at 4, 7, 10, 13, 16 (deleting ¶ 8 from first petition). As Respondent forthrightly conceded at trial, Missouri's "current statute, which forbids funds for abortion, could be challenged." Tr. 16. In an area as highly charged as abortion, where the abortion rights side has aggressively advocated for taxpayer funding of abortion in the last few years, the chances that somebody will raise the challenge that Respondent previewed is near 100 percent. Indeed, the New York Times recently described taxpayer funding of abortion as "one of the issues most important to Democratic voters." Katie Glueck, *Joe Biden Denounces Hyde Amendment, Reversing His Position*, NY TIMES (June 6, 2019).[8] The story describes how the demands for taxpayer-funded

[8] https://www.nytimes.com/2019/06/06/us/politics/joe-biden-hyde-amendment.html

abortions have increased so much that then-candidate Joseph Biden immediately abandoned has decades-long opposition to taxpayer-funded abortions within hours of receiving political scrutiny over the issue. *Id.* ("After two days of intense criticism, Joseph R. Biden Jr. reversed himself Thursday night on one of the issues most important to Democratic voters, saying he no longer supports a measure that bans federal funding for most abortions. As recently as Wednesday, Mr. Biden's campaign had said he supported the measure, known as the Hyde Amendment.").

Given Respondent's own admission that statutes forbidding taxpayer funding of abortion would be put at risk by these petitions, it was not wrong for the Secretary to state that these petitions would "potentially" lead to taxpayer funding of abortion. D23, at 1–6. If anything, the Secretary's language was an understatement, not an overstatement.

To be sure, two petitions do include some language about taxpayer funding. D23, at 2, 16. But that only reinforces the Secretary's conclusion that the four other petitions that do not have any such language could potentially require taxpayer funding of abortion. This "Court presumes every word, sentence, or clause in a [provision] has effect." *Mantia v. Missouri Dep't of Transp.*, 529 S.W.3d 804, 809 (Mo. banc 2017). That Respondent included the language in two petitions but not the four others is strong evidence of an intent to require government funding of abortion in those four petitions.

Even in the two petitions that discuss government funding, Respondent carefully drafted the language in a way that likely still requires taxpayer funding, as Respondent tacitly acknowledged. These two provisions state, "Nothing *in this Section* requires government funding *of abortion procedures*." D23, at 2, 16 (emphasis added). The text

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of these provisions creates the possibility that some other section of the Constitution will mandate government-funded abortions once "this section" requires government to treat abortion as favorably as childbirth, and the text of these provisions does nothing to protect taxpayers from funding activities that *facilitate* abortion, like paid time off for abortion and travel expenses for abortion. This is a live, hotly contested issue. At the federal level, the Hyde Amendment has prohibited federal funding of abortion procedures for nearly 50 years. Yet the U.S. Office of Legal Counsel concluded late last year that the "Hyde Amendment's prohibition barring the Department of Health and Human Services from expending covered funds for any abortion does not bar HHS from expending covered funds to provide transportation for women seeking abortions." 46 Op. O.L.C. ___, at 1 (Sept. 27, 2022) (slip op.).[9]

This case is thus not unlike *Susan B. Anthony List v. Driehaus*, 779 F.3d 628 (6th Cir. 2015). There, the court rejected a defamation claim by a political candidate against an advocacy organization that had accused him of voting for a bill "that includes taxpayer-funded abortion." *Id.* at 630. Although the bill did not include appropriations funding abortion, the court—no doubt aware of the way funds can be used to facilitate abortion indirectly—held that the advocacy organization's statement "appears to have at least some truth, to be substantially true, or to be subject to differing interpretations." *Id.* at 633.

At trial, Respondent argued that the antidiscrimination provision in the petitions would prohibit the State from blocking "insurance coverage for abortion." Tr. 14–15. That

[9] https://www.justice.gov/d9/2022-11/2022-09-27-hyde_amendment_application_to_hhs_transportation.pdf

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is a major concession because tens of thousands of individuals work for the State and are on state health insurance subsidized by tax dollars. Under Respondent's own argument, these petitions could be interpreted to force taxpayers to subsidize abortions through government health insurance coverage.

The same may be true for the special tax exemption Missouri law gives for persons who donate to pro-life pregnancy resource centers. § 135.630, RSMo; App. 12. If these petitions pass, organizations like Planned Parenthood will almost certainly point to the antidiscrimination provision and argue that their donors must likewise receive the benefit of special tax exemptions. The Secretary was not wrong to say that these petitions—all of them—could "potentially" lead to taxpayer support for abortion.

V. The trial court erred in summarily holding that one ballot title was insufficient or unfair in its description of the effect it would have on local government, because those bullet points fairly and sufficiently summarize the petitions on this issue, in that the petition presumes all restrictions invalid.

Standard of Review: "Where the parties simply argue the fairness and sufficiency of the summary statement or fair ballot language based upon stipulated facts, joint exhibits, and undisputed facts, the only question on appeal is whether the trial court drew the proper legal conclusions, which we review *de novo*." *Fitzpatrick*, 640 S.W.3d at 125 (alterations accepted).

Preservation: All issues on appeal are fully preserved for this Court's review. The Secretary fully defended the fairness and sufficiency of the summary statements in their entirety and each aspect of the summary that Respondents challenged in their lawsuit. *E.g.*, D21; D22.

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Argument: Similarly, the trial court offered no reason for removing the Secretary's language in one petition that the petition would "prohibit any municipality, city, town, village, district, authority, public subdivision, or public corporation having the power to tax or regulate or the state of Missouri from regulating abortion procedures." For the reasons expressed in Part I, Respondent's decision to draft maximalist petitions that would invalidate per se any law that interferes with "autonomous decision-making" and presume all other relevant laws invalid, *e.g.*, D23, at 2, would have an effect not only on the State government, but also local governments. It was not wrong for the Secretary to describe the "legal and probable consequences" on local governments. *Brown*, 370 S.W.3d at 654.

VI. The trial court erred in holding that the ballot titles were insufficient or unfair for mentioning only abortion and not topics like prenatal care, because those bullet points fairly and sufficiently summarize the petitions on this issue, in that summary statements need only describe a petition's "central feature," which is abortion.

Standard of Review: "Where the parties simply argue the fairness and sufficiency of the summary statement or fair ballot language based upon stipulated facts, joint exhibits, and undisputed facts, the only question on appeal is whether the trial court drew the proper legal conclusions, which we review *de novo*." *Fitzpatrick*, 640 S.W.3d at 125 (alterations accepted).

Preservation: All issues on appeal are fully preserved for this Court's review. The Secretary fully defended the fairness and sufficiency of the summary statements in their entirety and each aspect of the summary that Respondents challenged in their lawsuit. *E.g.*, D21; D22.

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Argument: The trial court similarly erred when it faulted the Secretary for focusing the summary statements on abortion, rather than other topics. D74, at 3; App. 3. The trial court expressly acknowledged that the petitions "will have the greatest immediate impact on abortion," but it faulted the Secretary for not mentioning other topics. *Id.* The trial court said that the focus on abortion "would cause a voter to believe that abortion is the only health care comprising the initiatives." *Id.*

The trial court overlooked well-settled authority holding that the summary statement "need not set out the details of the proposal to be fair and sufficient." *Brown*, 370 S.W.3d at 656. Rather, the summary statement need only convey the "primary objective" of a proposed initiative. *Archey v. Carnahan*, 373 S.W.3d 528, 533 (Mo. App. W.D. 2012). And because not all details of a ballot measure can be identified in 100 words or fewer, this Court has consistently held that the summary statement must address merely the "central features" of the measure. *Boeving*, 493 S.W.3d at 875 (citing *Seay v. Jones*, 439 S.W.3d 881, 891 (Mo. App. W.D. 2014)); *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 (Mo. banc 1981) ("central purpose"); *Hill*, 526 S.W.3d at 327 ("All the specifics of an initiative petition need not be identified in the summary, however, for the summary to be fair and sufficient."); *see also Sedey v. Ashcroft*, 594 S.W.3d 256, 269–71 (Mo. W.D. 2020) (holding that even in the absence of a central feature, a summary statement may still be sufficient if it "encompass[es] the proposed change" to the law).

By the trial court's own acknowledgment (as well as Respondent's), the central feature of the petitions is not prenatal care, miscarriage care, or contraception; it is abortion. D74, at 3; App. 3; Tr. 36. These petitions follow one year after the Supreme Court

overturned *Roe v. Wade*, triggering the laws in Missouri, *see* § 188.017.4, RSMo; App. 18, and many other States that greatly restrict abortion. Since that time, there has been a well-publicized, nationwide conversation about abortion that far exceeds any discussion of any other topic (such as prenatal care) potentially affected by Respondent's petitions. *Dobbs* reflected a sea change in constitutional doctrine, and these petitions would create another sea change, an avulsion that would create a right to abortion far beyond what *Roe v. Wade* had created. The extraordinary change these petitions would have on abortion law is the "central feature" of the petitions and the appropriate topic of the summary statements because these petitions primarily focus on this change in abortion law. Indeed, despite faulting the Secretary for focusing on abortion, the trial court's own language focuses almost exclusively on abortion, devoting just one word ("contraception") to every other aspect of what Respondent describes as "reproductive freedom." D74, at 4–7; App. 4–7.

Any effect the petitions would have on other aspects of what Respondent defines as "reproductive freedom" pales in comparison to the effect on abortion. Take contraception, for example, which the trial court wrote into the summary statements. Missouri courts recently declared that "[t]he decision whether or not to use contraception, to avoid procreation, is protected by and 'concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.'" *McQueen v. Gadberry*, 507 S.W.3d 127, 143 (Mo. App. E.D. 2016) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965)). Although the petitions would likely have some effect on topics other than abortion, there simply are no regulations or restrictions on "prenatal care, childbirth, postpartum care, birth control, … miscarriage care, [or] respectful birthing conditions" akin

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to the regulations surrounding abortion. D23, at 2–16. Nor is the public conversation about those topics anything close to the frequency or saliency of the conversation about abortion. Abortion is the central feature because the legal landscape around abortion would change drastically under these petitions, whereas the legal landscape around things like prenatal care would not. The Secretary made a considered decision in light of the word limits for initiative petitions to identify the one aspect of what Respondent describes as "reproductive freedom" that is plainly the primary focus of the petitions.

VII. The trial court erred in rewriting the ballot summaries in their entirety, because the trial court should have addressed any perceived insufficiencies by making the smallest changes possible within the existing language supplied by the Secretary, in that it exceeded the trial court's authority and the appropriate judicial role for the trial court to engage in a complete re-write of the ballot title (without any analysis whatsoever), and the trial court's substitute language is itself both insufficient and unfair.

Standard of Review: "Where the parties simply argue the fairness and sufficiency of the summary statement or fair ballot language based upon stipulated facts, joint exhibits, and undisputed facts, the only question on appeal is whether the trial court drew the proper legal conclusions, which we review *de novo*." *Fitzpatrick*, 640 S.W.3d at 125 (alterations accepted).

Preservation: All issues on appeal are fully preserved for this Court's review. The Secretary fully defended the fairness and sufficiency of the summary statements in their entirety and each aspect of the summary that Respondents challenged in their lawsuit. *E.g.*, D21; D22.

Argument: Finally, the trial court was wrong to entirely rewrite every single word of every single summary statement. In fact, the language the trial court used itself fails the

sufficiency and fairness test. The trial court adopted verbatim activist language pressed by Respondent, and the trial court's newly crafted language misstates the probable legal effect and consequences of the petitions.

A. The trial court had no authority to entirely rewrite every word of every statement, and the trial court's decision to do so places serious stress on fundamental principles of separation of powers.

Even if the trial court's determination about some language the Secretary used was incorrect, the trial court had no authority to completely rewrite everything from scratch. Trial courts are permitted to make only minor, incremental changes, using the base text supplied by the Secretary. And they must change as little as possible. Courts must use "a scalpel rather than a blunderbuss." *Heckler v. Chaney*, 470 U.S. 821, 852 (1985) (Marshall, J., concurring in the judgment). The trial court here did the opposite.

Both the Missouri Supreme Court and this Court have repeatedly stressed the "limited function" in reviewing ballot language for sufficiency and fairness. *E.g.*, *Prentzler*, 366 S.W.3d at 562. "When courts are called upon to intervene in the initiative process, they must act with restraint, trepidation, and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course." *Sedey*, 594 S.W.3d at 263 (citation omitted). "Courts are understandably reluctant to become involved in pre-election debates over legislative proposals." *Id*. "The courts should not insert themselves unnecessarily into the summary drafting process where it is not necessary for the protection of voters." *Hill*, 526 S.W.3d at 315.

This need for "restraint" and "trepidation" extends to the role of reviewing summary statement language. "Missouri courts have defined 'fair' and 'sufficient' 'in a manner that

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gives *discretion* to the Secretary.'" *Sedey*, 594 S.W.3d at 263 (emphasis added) (quoting *Billington v. Carnahan*, 380 S.W.3d 586, 591–92 (Mo. App. W.D. 2012)). For that reason, courts have authority only to "modify" the original summary statement; a court "[i]s not authorized to re-write the entire summary statement." *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 83 (Mo. App. W.D. 2008); *see also Pippens v. Ashcroft*, 606 S.W.3d 689, 713 (Mo. App. W.D. 2020) (citing *Cures Without Cloning* for the prospect that, "while [the] circuit court was authorized to change a single word of [the] summary statement to correct a deficiency, the court was not authorized to rewrite the entire summary statement.").

Courts thus must do as little as possible. "Modify" means "to change moderately or in minor fashion." *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1952 (2002) (defining "modify" as "to make minor changes"). "It might be good English to say that the French Revolution 'modified' the status of the French nobility—but only because there is a figure of speech called understatement and a literary device known as sarcasm." *Id.* at 228. Likewise, the trial court's decision to rewrite 100 percent of every summary statement cannot plausibly be described as merely "modifying" the summary statements.

For example, Respondent complains about the use of the term "dangerous." D20, at 13. As explained above, that language is accurate given the extraordinary, maximalist reach of Respondent's petitions. Indeed, given the far reach of these petitions, the "initiative's language and purpose are so [far reaching] that merely summarizing the initiative without explanation would be deceptive and misleading." *Missourians Against Human Cloning*, 190 S.W.3d at 457. Respondent contended at trial that the term is value

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laden, but it is certainly no more value laden than "puppy mill cruelty" or "fair share," both of which have been upheld. *Stickler v. Ashcroft*, 539 S.W.3d 702, 717–18 (Mo. App. W.D. 2017) (reversing trial court determination that the phrase "fair share" was a "value-laden" term); *State ex rel. Humane Soc'y of Missouri*, 317 S.W.3d at 673 ("puppy mill cruelty" not insufficient and unfair). But even if "dangerous" were "problematic," the remedy would be to excise that word, not rewrite everything.

That is what this Court has done in the past. In *Pund*, because "the [trial] court was not authorized to re-write the entire summary," this Court rectified an insufficiency by replacing the single word "repeal," which the Court determined was misleading, with the word "change." *Pund*, 259 S.W.3d at 83. In another case, where the Court determined that the term "employees" was too inaccurate given that the effect of the measure fell substantially on personal care attendants (who were not "employees"), the Court corrected the error simply by adding the phrase "or personal care attendant" after "employees." *Protect Consumers' Access to Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665, 672–73, 677 (Mo. App. W.D. 2015).

Not only did the trial court here decline to explain why it determined that certain phrases were "problematic," D74, at 2; App. 2, but the trial court rewrote *every single word* of every single statement. *Compare id.* at 3–7; App. 3–7, *with* D25, at 1–6. This was not consistent with the court's "limited function." *Prentzler*, 366 S.W.3d at 562. The trial court's rewrite "has 'modified' the [summary statements] only in the same sense that 'the French Revolution "modified" the status of the French nobility'—it has abolished them

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and supplanted them with a new regime entirely." *Biden v. Nebraska*, 143 S. Ct. 2355, 2369 (2023) (quoting *MCI*, 512 U.S. at 228).

The trial court's decision to rewrite every word of every statement places severe stress on the separation of powers. The legislature has clearly demarcated the scope of authority to prepare a ballot summary: it is the Secretary—rather than the judicial system—that is responsible for "prepar[ing] . . . a summary statement" of each initiative petition submitted to him. § 116.334.1, RSMo. The limited role of courts reviewing the Secretary's ballot summary is consistent with the oft-repeated rule that, "when the legislature has spoken on the subject, the courts must defer to its determinations." *Budding v. SSM Healthcare System*, 19 S.W.3d 678, 682 (Mo. banc 2000). By giving the Secretary authority to write summary statements (and the Attorney General authority to review those statements), the legislature made unequivocally clear that crafting summary statements for citizen-led petitions is an executive function, not a judicial one.

Any judicial action that encroaches onto an executive function necessarily places stress on "the separation of the powers of government." *See State Auditor v. Joint Comm. on Legislative Rsch.*, 956 S.W.2d 228, 231 (Mo. banc 1997). This separation is, "as oft stated, 'vital to our form of government.'" *Id.* (quoting *State on Information of Danforth v. Banks*, 454 S.W.2d 498, 500 (Mo. banc 1970)).

The trial court's remedy here—entirely taking over the Secretary's role to write summary statements—encroached on the separation of powers. *Pippens v. Ashcroft*, 606 S.W.3d 689, 713 (Mo. App. W.D. 2020) ("[W]hile [the] circuit court was authorized to change a single word of [the] summary statement to correct a deficiency, the court was not

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authorized to rewrite the entire summary statement."). Both the deferential standard of review and this Court's direction that trial courts cannot "re-write the entire summary statement" capture a clear line separating the executive from the judicial function: It is the Secretary who gets to write summary statements, and the trial court may only "modify" the statement through as small tweaks as possible.

B. The trial court's newly crafted summary statements defer to Respondent and are partial and misleading.

To make matters worse, while faulting the Secretary for perceived unfairness and insufficiency, the trial court chose language that will needlessly prejudice voters. The trial court's summary language is both inaccurate and contains partial terms.

1. The language is deeply inaccurate. Consider first the trial court's decision to state that the petitions would "remove Missouri's ban on abortion." *E.g.*, D74, at 4; App. 4. This language is both inaccurate and underinclusive.

It is inaccurate because Missouri does not have an abortion "ban." That language is an ACLU talking point. *See Reproductive Rights and Access*, ACLU of Missouri (2023) (inaccurately describing Missouri's laws as a "ban on abortion").[10] But it is deeply misleading. What Missouri has is a ban on *elective* abortion. Missouri *allows* abortions whenever there is "a serious risk of substantial and irreversible physical impairment of a major bodily function." § 188.015(7), RSMo; App. 16; § 188.017, RSMo; App. 18. By stating that the petitions would "remove Missouri's ban on abortion" rather than Missouri's "ban on *elective* abortion," the trial court's language misleads voters into believing that

[10] https://www.aclu-mo.org/en/issues/reproductive-rights-and-access

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Missouri law bans abortion even if necessary to save the life of the mother. Given that nearly all Americans support a medical emergency exception—and every state that bans elective abortions has a medical emergency exception—the trial court's language paints an extraordinarily prejudicial misimpression among voters. At the very least, this Court should insert the term "elective" before "abortion" in the second bullet point of each statement.

The language is also underinclusive because Respondent's petitions threaten not only Missouri's ban on elective abortion, but also all other forms of regulation. If these petitions pass, Missouri's laws about health and safety, medical licensure, malpractice insurance, and informed consent all will be in jeopardy. The trial court determined that the Secretary's language "would cause a voter to believe that abortion is the only" topic covered because the Secretary's language mentioned only abortion. D74, at 3; App. 3. But by mentioning only Missouri's "ban on [elective] abortion," the trial court's language "would cause a voter to believe that [a ban on abortion] is the only" existing law affected by the petitions. More accurate would be to say that the petitions would "remove Missouri's laws on abortion."

The most prejudicial omission from the trial court's understatement is the absence of any reference to partial-birth abortion. The partial-birth abortion ban is not a "ban on abortion"; it is a ban on a particularly "gruesome and inhumane procedure," *Carhart*, 550 U.S. at 141, deemed objectionable by an overwhelming majority of Americans. Indeed, in 2022, Congress very nearly enacted a sweeping abortion-rights bill, which passed the House and failed in the Senate by only two votes. *See* H.R. 3755, 117th Cong. (passed the

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House 218-211 on September 24, 2021); S. 4132, 117th Cong. (failed to pass the Senate 49-51 on May 11, 2022). That bill went far beyond *Roe v. Wade*; it would have mandated taxpayer funding for abortion and "wipe[d] 500 state laws off the books." *See* Melissa Quinn, *Senate Fails to Advance Bill Protecting Abortion Rights Ahead of Supreme Court Decision*, CBS NEWS (May 11, 2022) (quoting Senator Manchin (D-WV) explaining his reasons for opposing the bill).[11] Yet because partial-birth abortion is so deeply unpopular, the proponents of that sweeping abortion-rights bill felt the need to retain the federal partial-birth abortion ban despite pushing a bill that would jettison nearly every other restriction on abortion in America. *E.g.*, S. 4132 § 4(b) ("The provisions of this Act shall not supersede or apply to the procedure described in section 1531(b)(1) of title 18, United States Code [the statute creating the partial-birth abortion ban]."). The trial court's statement is thus wildly underinclusive. It gives voters no notice that the petitions would overturn the ban on partial-birth abortions, an exceptionally important legal consequence of the petitions.

Other aspects of the trial court's summary language are also inaccurate. The newly crafted summary statements say that the petitions "allow regulation of reproductive health care to improve or maintain the health of the patient," "allow abortion to be restricted or banned after [Fetal Viability/24 weeks] except to protect life or health of the woman," and "allow General Assembly [sic] to enact a parental consent requirement for abortion with an alternative authorization procedure." *E.g.*, D74, at 4; App. 4. But as explained above

[11] https://www.cbsnews.com/news/senate-abortion-bill-vote-womens-health-protection-act-supreme-court-draft-opinion-roe-v-wade/

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in Parts I and III, this description is deeply misleading. The petitions do not "allow regulation … to improve or maintain the health of the patient." Instead, "[a]ny" regulation that would interfere with "autonomous decision-making" is per se banned no matter how much it would "improve or maintain the health of" the woman. And the late-term-abortion and parental-consent provisions have such gaping exceptions that they leave hardly any residual authority at all. In short, the trial court's newly rewritten language paints an entirely inaccurate impression, misleading voters into believing that the petitions would allow the legislature to retain a substantial modicum of authority, when in fact the petitions almost entirely gut any democratic authority and create a legal regime much more permissive than *Roe v. Wade*.

The trial court's language about parental consent is even worse. The trial court's language vaguely states that the petitions would permit "an alternative authorization procedure" for minors to obtain abortions. D74, at 4; App. 4. But that calls to mind the procedure that existed in Missouri under *Roe v. Wade* where minors could obtain authorization *by going to court* and proving their case after an evidentiary hearing. § 188.028, RSMo; App. 22–24; *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510–11 (1990) (requiring States to adopt a judicial "bypass procedure"). The language misleads Missouri voters because it brings to mind a longstanding judicial bypass procedure while the actual petition language would enable any minor to obtain an abortion without parental consent if any healthcare provider (rather than a judge) determines the minor is "mature." *E.g.*, D23, at 2.

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Equally inaccurate is the trial court's statement that the petitions "declare government funding of abortion is not required." D74, at 4; App. 4. The trial court adopted this language verbatim from Respondent's trial briefing. D20, at 7, 37. As explained above in Part IV, Respondent has carefully crafted the petition language to state only that the government is not required to directly fund "abortion procedures," while leaving taxpayers vulnerable to lawsuits forcing them to fund activities that facilitate abortion, such as transportation for abortion or health insurance for abortion. Indeed, Respondent acknowledged at trial that the petitions would prohibit the State from blocking "insurance coverage for abortion." Tr. 14–15. Tens of thousands of Missourians are on state-subsidized employment health insurance plans. Nearly 1.5 million Missourians are enrolled in Medicaid.

2. Beyond inaccuracy, the trial court's language also includes partial terms. If the Secretary cannot use prejudicial language, it follows even more strongly that the courts cannot either. In *Hill*, this Court rejected an attempt by the plaintiffs to insert alternative language that included "partial terms that carry their own baggage." *Hill*, 526 S.W.3d at 320. But the trial court here did the opposite.

The trial court's most notable use of partial terms is its repeated use of the phrase "reproductive health care." That phrase is a known euphemism for abortion used by pro-choice advocates. For example, last year Planned Parenthood cautioned people away from using the term "abortion," telling them instead to use the term "health care." *How to Talk*

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About Abortion (July 22, 2022).[12] Similarly, the International Planned Parenthood Foundation said people should talk "about abortion under the framework of reproductive justice" and "avoid the word [abortion] completely" in certain contexts, opting instead for "healthcare." *How to Talk About Abortion: A Rights-Based Messaging Guide*, IPPF 4, 15–16 (Sept. 2015).[13] A pro-choice advocacy organization in Texas expressly acknowledges that phrases like "women's health care" and "reproductive choice" are "Euphemisms." *Abortion Forward Languague*, Trust, Respect, Access (2021).[14] The trial court's use of this euphemism is likely to mislead voters into believing that the petitions are principally about something other than abortion.

The trial court's decision to use this pro-choice euphemism is especially perplexing given the trial court's rejection of the term "right to life." D74, at 3; App. 3. Unlike "reproductive health care," the term "right to life" is an existing legal term in Missouri law. § 188.017, RSMo; App. 18. Respondent acknowledged that her petitions would most immediately target the law that prohibits elective abortions, D20, at 18; Tr. 36, but that law is entitled the "Right to Life of the Unborn Child Act." § 188.017.1, RSMo; App. 18; *see also* § 188.010 (stating that "that article I, section 2 of the Constitution of Missouri provides that all persons have a natural right to life"); App. 15."). It certainly cannot be partial for the Secretary to state that a petition would overturn "the right to life" given that "right to life" is a specifically defined right in Missouri law, just like it would not be argumentative

[12] https://www.plannedparenthood.org/blog/how-to-talk-about-abortion
[13] https://www.ippf.org/sites/default/files/2018-08/ippf_abortion_messaging_guide_web_0.pdf
[14] https://www.trustrespectaccess.com/press-resources (last visited Oct. 9, 2023)

to state that a petition would nullify the "freedom of speech" if a petition sought to excise Article I, Section 8 from the Missouri Constitution.

C. At the very least, a remand is necessary because the trial court's opinion is arbitrary and capricious because it is entirely unreasoned.

The trial court should never have rewritten all the summary statements in the first place, but it was especially incorrect to do so without any analysis whatsoever. The trial court expressly declined to provide any "analysis of [the Secretary's] phrases" beyond a single-sentence declaring the statements unlawful. D74, at 2 & n.1.

The trial court's sole justification for declining to provide any analysis is demonstrably incorrect. The trial court stated that it was declining to provide any explanation for its ruling because the "Secretary's proposals were not sent until 6:43 pm on September 18, 2023 notwithstanding the request of the Court for each side to bring their proposed judgments in electronically editable form to the September 11, 2023 hearing." *Id.* But in fact, at the September 11 hearing, the court expressly changed the deadline for proposed judgments from September 11 to September 18. 84. The Secretary complied with that deadline.

This Court should reinstate the Secretary's statements. But if this Court declines, the Court should at the very least remand to the trial court with directions to explain why the trial court determined that the fourteen statements were unlawful and why the trial court found it necessary to take the unprecedented step of entirely rewriting every word of ever statement.

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CONCLUSION

For the foregoing reasons, this Court should reverse and reinstate the Secretary's language.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 14,849 words, is in compliance with Missouri Supreme Court Rule 84.06(b) and Missouri Court of Appeals, Western District Rule 41, includes the information required by Rule 55.03, and includes information on how the brief was served on the opposing party. Pursuant to Rule 55.03(a), I hereby certify that the undersigned electronically signed the original version of this document.

/s/ Joshua M. Divine

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CERTIFICATE OF SERVICE

I hereby certify that, on October 11, 2023, a true and correct copy of the foregoing was filed with the Court's electronic filing system to be served by electronic methods on counsel for all parties entered in the case.

/s/ Joshua M. Divine

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