

No. WD83962

IN THE
MISSOURI COURT OF APPEALS
WESTERN DIVISION

BARBARA PIPPENS, *et al.*,
Plaintiffs-Respondents,
v.

JOHN R. ASHCROFT, *et al.*,
Defendants-Appellants.

**AMICUS BRIEF OF NATIONAL AND MISSOURI-BASED CIVIL RIGHTS
ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-RESPONDENTS**

On Appeal from the Circuit Court of Cole County, Missouri, Case No. 20AC-CC00206

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TABLE OF CONTENTS

| | <u>PAGE</u> |
|--|--------------------|
| INTEREST OF <i>AMICI CURIAE</i> | 8 |
| CONSENT OF THE PARTIES..... | 13 |
| STATEMENT OF JURISDICTION | 13 |
| STATEMENT OF FACTS..... | 13 |
| ARGUMENT..... | 14 |
| A. The Summary Statement’s Claim That Amendment 3 Provides Minority Protections Is Misleading Because It Does Not Disclose That Amendment 3 Would Weaken Protections for Missouri’s Communities of Color. | 15 |
| B. The Summary Statement Does Not Disclose That Amendment 3 Would Undermine Partisan Fairness..... | 22 |
| C. The Summary Statement Falsely Asserts That Amendment 3 Creates “Independent” and “Citizen-Led” Bipartisan Commissions and Does Not Disclose That It Eliminates the Non-Partisan State Demographer. | 26 |
| CONCLUSION | 35 |

TABLE OF AUTHORITIES

| | Page(s) |
|---|----------------|
| CASES | |
| <i>Badillo v. City of Stockton</i> , 956 F.2d 884 (9th Cir. 1992) | 22 |
| <i>Bartlett v. Strickland</i> , 556 U.S. 1 (2009) | 22 |
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| <i>Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm’rs</i> , 906 F.2d 524 (11th Cir. 1990) | 22 |
| <i>Gill v. Whitford</i> , 138 S. Ct. 1916 (2018), 2017 WL 3948432 | 25 |
| <i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018) | 25 |
| <i>Lieb v. Walsh</i> , 45 Misc. 3d 874 (N.Y. Sup. Ct. 2014) | 30 |
| <i>Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.</i> , 201 F. Supp. 3d 1006 (E.D. Mo. 2016), <i>aff’d</i> , 894 F.3d 924 (8th Cir. 2018) | 16 |
| <i>Nixon v. Kent Cnty.</i> , 76 F.3d 1381 (6th Cir. 1996) | 22 |
| <i>Rucho v. Common Cause</i> , 139 S. Ct. 2484 (2019) | 25 |
| <i>Shelby County v. Holder</i> , 570 U.S. 529 (2013) | 20 |

| | |
|---|--------|
| <i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986)..... | 20, 22 |
| <i>Whitford v. Gill</i> , 218 F. Supp. 3d 837 (W.D. Wis. 2016), <i>vacated and remanded on other grounds</i> , 138 S. Ct. 1916 (2018)..... | 25 |
| <i>Whitford v. Nichol</i> , 151 F. Supp. 3d 918 (W.D. Wis. 2015) | 25 |

CONSTITUTIONS

| | |
|---|--------|
| Alaska Const. art. VI, § 8 | 30, 32 |
| Ariz. Const. art. IV, pt. 2, § 1 | 29, 32 |
| Cal. Const. art. XXI, § 2..... | 29, 32 |
| Colo. Const. art. V, § 47 | 30, 32 |
| Haw. Const. art. IV, § 2..... | 30 |
| Idaho Const. art. III, § 2(2)..... | 32 |
| Mich. Const. art. IV | 29, 32 |
| Mo. Const. art. III, § 3 | passim |
| Mo. Const. art. III, § 7 | 28 |
| Mont. Const. art. V, § 14(2) | 32 |
| N.J. Const. art. IV, § 3 | 30 |
| Pa. Const. art. II, § 17(a-b) | 30, 32 |
| Wash. Const. art. II, § 43(1)–(3) | 30 |

STATUTES

| | |
|-----------------------------------|--------|
| 52 U.S.C. § 10301 | 18 |
| Cal. Gov. Code § 8252 | 29, 32 |
| Rev. Code Wash. § 44.05.050 | 32 |
| Wash. Rev. Code § 44.05.030 | 30 |

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| | |
|--|----|
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INTEREST OF *AMICI CURIAE*

Amici curiae are organizations that support a fair redistricting process, advocate on behalf of communities of color during redistricting, litigate racial, partisan, and prison-based gerrymandering cases, and work within Missouri’s communities of color to protect the right to vote and ensure everyone can have their voices heard. *Amici* strongly believe that free and fair elections—and by extension, fair districting plans—are the bedrock of our democracy. They have a significant interest in this case, given their longstanding concern and advocacy against the growth of extreme partisan control over redistricting—a pernicious tactic that deeply offends the constitutional principles that form the foundation of republican governments.

Amici are the following:

The A. Philip Randolph Institute-St. Louis Chapter (“APRI-St. Louis Chapter”) is dedicated to developing programs that will extend democracy to those who have been traditionally disfranchised or discouraged from participating in the political system, strengthening political alliances needed to assure democratic social change and projecting social and economic programs that will improve the lives of all Americans. To achieve these goals, the APRI-St. Louis Chapter believes in the creation of a broad based coalition of forces who believe in social progress for minorities, the poor and working people. The Labor Movement occupies a pivotal role in this alliance since it serves as a bi-racial organizational vehicle of working people and has a principled commitment to social change. The A. Philip Randolph Institute’s programs seek to enhance the role of all trade unionists and, as a civil rights organization, the Institute works hard to make sure African

Americans are part of the democratic process. The policies and programs of the A. Philip Randolph Institute and its affiliates have been governed by strict adherence to the political values and principles exemplified by our founder, A. Philip Randolph, 1889-1979.

AALDEF, founded in 1974, is a New York-based national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF has monitored elections through annual multilingual exit poll surveys since 1988. Consequently, AALDEF has documented both the use of, and the continued need for, protection under the Voting Rights Act of 1965. AALDEF has litigated cases that implicate the ability of Asian American communities of interest to elect candidates of their choice, including lawsuits involving equal protection and constitutional challenges to discriminatory redistricting plans.

The Brennan Center for Justice at New York University School of Law (“the Brennan Center”) is a not-for-profit, non-partisan think tank and public interest law institute that seeks to reform, revitalize, and when necessary, defend our country’s systems of democracy and justice.¹ It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to protect the right to vote and to ensure fair

¹ This brief does not purport to convey the position of New York University School of Law.

redistricting practices. The Brennan Center conducts empirical, qualitative, historical, and legal research on redistricting and electoral practices, monitors racial gerrymandering, partisan gerrymandering, and other redistricting suits in the nation’s courts, and regularly participates in redistricting and voting rights cases throughout the country.

Campaign Legal Center (“CLC”) is a leading nonpartisan, nonprofit election law organization. CLC litigates, develops policy, and advocates on a range of democracy issues, including by participating in voting rights cases across the country as both counsel for parties and as *amicus curiae*. CLC aims to ensure the protection of Americans’ voting rights to encourage widespread and equal participation in the democratic process. CLC has expertise in legal issues related to the fundamental right to vote protected by the Constitution and the rights protected by the Voting Rights Act. CLC advocates for the creation, protection, and implementation of independent redistricting reform measures—such as the one Missouri voters approved in 2018—around the country.

Dēmos is a dynamic “think-and-do” tank that powers the movement for a just, inclusive, multiracial democracy. Dēmos was founded in 2000, and has offices in New York, Boston, and Washington, D.C. The goals of removing barriers to political participation for Black and brown communities and ensuring full representation of America’s diverse citizenry are central to Dēmos’s mission. Dēmos deploys original research, advocacy, litigation, and strategic communications to protect voting rights and ensure that the voices of all citizens can be heard.

The Southern Coalition for Social Justice (“SCSJ”) is a 501(c)(3) nonprofit public interest law organization founded in 2007 in Durham, North Carolina. SCSJ partners with

communities of color and economically disadvantaged communities in the South to defend and advance their political, social, and economic rights through the combination of legal advocacy, research, organizing, and communications. Central to that mission is the guarantee of an equal right to vote for all citizens and the guarantee that each person's vote carries equal weight. One of SCSJ's primary practice areas is redistricting and voting rights. SCSJ frequently represents clients challenging statewide and local redistricting plans that violate the Equal Protection Clause of the Fourteenth Amendment or the Voting Rights Act of 1965, as well as state constitutional mandates on redistricting. SCSJ has represented individual and organizational clients in redistricting cases across the South, including Florida, Georgia, North Carolina, South Carolina, Tennessee, Texas, and Virginia. Amicus has also worked closely with organizations in North Carolina, Florida, and Virginia on redistricting reform that centers race equity and protects communities of color from discrimination in the redistricting process.

Missouri Jobs with Justice is a coalition of community, labor, student, and faith-based groups and individuals working to build transformative power for social, racial, and economic justice in Missouri. Jobs with Justice brings people together, connecting them to a strong, statewide movement and works to build long-term power while remaining agile and vigilant to quickly respond when immediate threats to our communities and values arise. Jobs with Justice organizes in workplaces, on campuses, in congregations, and in neighborhoods to win real change and concrete victories on the issues that matter the most for working families. With its affiliate Missouri Jobs with Justice Voter Action, Jobs with Justice organizes immediate and public actions by voters in response to the actions of their

elected officials under the belief that when voters know what their representatives are doing, they can respond in real-time to reward good leadership and public service, and challenge politics over good policy.

The Missouri Voter Protection Coalition (“MOVPC”) is a non-partisan statewide network of approximately 50 non-profit organizations who work to secure the right to vote for all eligible Missourians. Since 2006, coalition partners have collaborated to expand access to the ballot for Missouri voters and remove barriers that impede the right to vote, with particular focus on low-income communities, communities of color, young voters, seniors and other marginalized voters. MOVPC advances its mission through four areas of work, including: policy advocacy; legal advocacy and litigation; voter engagement and education; and coordination of the statewide election protection program. MOVPC’s members provided support for the Clean Missouri amendment in 2018 and engaged its members in advocacy during the 2020 legislative session opposing SJR 38, the legislation to place Amendment 3 on the ballot, including member testimony in opposition to the measure. MOVPC and its members have participated in strategic litigation to advance the right to vote in Missouri, including cases advocating for the rights of voters to cast ballots by mail without a notary during the COVID-19 pandemic, litigation challenging strict voter identification requirements, voter registration restrictions, and more.

The Organization for Black Struggle (“OBS”) is a Black-led group based in St. Louis, Missouri. Founded in 1980, it has been on the frontline of pushing democratic transformation and organizing across issues impacting the African American community. OBS is active in voter registration, voter education and voter protection to ensure

maximum voter participation as one of the critical ways to engage its base. It is a champion of voter rights especially for those marginalized by the current electoral system.

CONSENT OF THE PARTIES

Amici have received consent from counsel for Appellants and from counsel for Respondents to file this brief in accordance with Rule 84.05(f)(2) of the Missouri Rules of Civil Procedure and Special Rule 26 of the Rules of the Missouri Court of Appeals of the Western District. In addition to obtaining consent by both parties, *Amici* have filed a motion for leave to file this brief consistent with Rule 26 of this Court.

STATEMENT OF JURISDICTION

Amici adopt the Statement of Jurisdiction presented in Appellants' brief.

STATEMENT OF FACTS

Amici adopt the Statement of Facts presented in Respondents' brief.

ARGUMENT

I. The Circuit Court Did Not Err in Finding the Ballot Language Insufficient and Unfair Because the Language Drafted by the Legislature Did Not Disclose Key Changes Amendment 3 Would Make to the Redistricting Process.

The Circuit Court held that the summary statement for Amendment 3 is insufficient and unfair for several reasons, including because “it fails even to allude” to the fact that, if it became law, Amendment 3 would “wholesale repeal” the redistricting reforms that the Missouri electorate overwhelmingly approved when it voted for Amendment 1 in 2018.² A key component of those reforms are the robust protections that were added to the Missouri Constitution to safeguard the voting rights of communities of color. As currently written, the summary statement misleads voters into believing that Amendment 3 would provide people of color with additional voting-rights protections, when in reality, it would strip away the very protections added only two years ago. Amendment 3 also tells voters that it will prioritize key values such as “partisan fairness,” but it instead opens the door to increased partisan gerrymandering and, with it, more pathways to undermine the political power of Black, Latino, and Asian voters. *Amici* write to explain just how detrimental Amendment 3 would be to the voting rights for communities of color. *Amici* also write to discuss the significance of the repeal of the Nonpartisan State Demographer, and the summary statement’s false assertion that Amendment 3 would “create” new “independent”

² Circuit Court Slip Op. at 6.

and “citizen-led” commissions to draw district lines. For the reasons set forth below, the Court should affirm the judgment of the Circuit Court.

A. The Summary Statement’s Claim That Amendment 3 Provides Minority Protections Is Misleading Because It Does Not Disclose That Amendment 3 Would Weaken Protections for Missouri’s Communities of Color.

In 2018, Missouri voters chose to amend the Constitution to afford significant protections for the voting rights of communities of color. A “yes vote” on Amendment 3 would undermine these important safeguards, which are stronger than protections currently available under federal law.³ Yet the deceptive summary statement language drafted by the General Assembly makes no reference to this reversal of protections approved by the voters and gives the false impression that the amendment actually enhances, rather than weakens, protections for communities of color. Appellants maintain that the 50-word limit on the summary statement prevents them from including such “details.” But that is, at best, a reason for excluding any reference in the summary statement to “minority protections,” as it is blatantly misleading to reference minority voter protections while failing to disclose that Amendment 3’s impact on minority protections would be *exclusively negative*. The

³ If passed, Amendment 3 would replace the current language in the Missouri Constitution with the following: “The following principles shall take precedence over any other part of this constitution: no district shall be drawn in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color; and no district shall be drawn such that members of any community of citizens protected by the preceding clause have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice” S.J.R. 38, 100th Gen. Assemb., Reg. Sess. (Mo. 2020).

Circuit Court’s revised summary statement takes this into account by simply stating that Amendment 3 would “repeal rules for drawing legislative districts approved by voters in November 2018 and replace them with rules proposed by the legislature.”⁴

The heightened protections that voters are being asked to repeal are critical for fair treatment of communities of color in Missouri, a state whose history includes “generations of segregation and inequity,” and where the death of Michael Brown, Jr. in 2014 led to “Ferguson” becoming “synonymous with racial strife and inequality in the United States.”⁵ Voters should not be asked to make this decision without an understanding of what is at stake.

Indeed, the barriers that communities of color face in the political process in Missouri continue to be significant. For example, in finding that the electoral structure of the school board of the Ferguson-Florissant School District deprived Black voters of an equal opportunity to elect representatives of their choice, a federal court recently concluded that “once-formalized policies of racial segregation” are still “inscribed on the regional landscape” and a “racialized gap in wealth” “persists to the present day.”⁶

⁴ Circuit Court Slip Op. at 10.

⁵ City of St. Louis, *Equity Indicators Baseline Report* 15 (2019), <https://www.stlouis-mo.gov/government/departments/mayor/initiatives/resilience/equity/documents/upload/Equity-Indicators-Baseline-2018-Report-Documents.pdf>.

⁶ See *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1068–69 (E.D. Mo. 2016) (citations and quotations omitted), *aff’d*, 894 F.3d 924 (8th Cir. 2018).

Likewise, in 2019, the Urban League of Greater Kansas City released a report that included “Black/White and Hispanic/White Equality Indexes” in order to “capture empirical evidence of African-American and Latinx progress in economics, health, education, social justice, and civil engagement since the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.”⁷ The report found that, compared to the 100-point white index, the Black equality index stood at 73 points and the Latino index at 77.2 points, demonstrating persistent disparities between communities of color and white communities in Kansas City.⁸ Similarly, the City of St. Louis recently conducted an extensive assessment of indicators such as health and safety, education quality, and financial empowerment, and found that, on aggregate, it scored a 45.57 out of 100 on the equity scale.⁹

The enduring legacy of discrimination and stark racial disparities can still be mapped in Missouri. The Troost divide in Kansas City and the Delmar divide in St. Louis—boundaries that perpetuate racial division and segregation in these two cities¹⁰—

⁷ Gwendolyn Grant, Urban League of Greater Kan. City, *2019 State of Black Kansas City Equality Index* 13 (2019), <https://www.ulkc.org/2019-black-kc>.

⁸ *Id.* at 15, 25.

⁹ *Equity Indicators Baseline Report*, *supra* note 5, at 6 (2019).

¹⁰ *See, e.g.*, Briana O’Higgins, *How Troost Became a Major Divide in Kansas City*, KCUR (Mar. 27, 2014), <https://www.kcur.org/community/2014-03-27/how-troost-became-a-major-divide-in-kansas-city>; Chico Harlan, *In St. Louis, Delmar Boulevard Is the Line That Divides a City by Race and Perspective*, *The Wash. Post* (Aug. 22, 2014), https://www.washingtonpost.com/national/in-st-louis-delmar-boulevard-is-the-line-that-divides-a-city-by-race-and-perspective/2014/08/22/de692962-a2ba-4f53-8bc3-54f88f848fdb_story.html.

have not been bridged and relegated to history books. Enhanced protections for communities of color in redistricting were a long-standing need, one that the 2018 reforms centered and advanced. The Circuit Court correctly concluded that the summary statement for Amendment 3 is misleading, insufficient, and unfair because, among other things, it misleadingly suggests that the proposed amendment would add new protections for voters of color, and because it fails to disclose that a “yes vote” would strip out critical voting-rights protections for communities of color that were enshrined in the Missouri Constitution in 2018.¹¹

Importantly, the reforms approved by voters in 2018 accord communities of color protections stronger than those currently offered to voters under the federal Voting Rights Act.¹² Amendment 3 would do away with these much-needed, additional protections. It would, for example, eliminate the Missouri Constitution’s specific prohibition against redrawing districts maps “with the intent or result” of “diminishing” a minority group’s ability to elect representatives of its choice.¹³ It also would delete any reference to protections for language minorities.¹⁴ And it would remove the Missouri Constitution’s guarantee that districts will not be drawn to diminish the ability of a minority voter to vote

¹¹ See Circuit Court Slip Op. at 9 (describing some of the ways in which Amendment 3 “would significantly weaken” the Missouri Constitution’s “robust protections for minority voters”).

¹² Compare Mo. Const. art. III, § 3, with 52 U.S.C. § 10301.

¹³ See S.J.R. 38, 100th Gen. Assemb., Reg. Sess. (Mo. 2020).

¹⁴ See *id.*; see also Circuit Court Slip Op. at 9.

“in concert with other persons,” including in so-called “coalition districts” comprising members of different racial or language minorities who can combine their efforts to elect candidates of their choice.¹⁵ These are substantive changes that will alter the permissible redistricting outcomes, and thus constitute material information to a voter deciding whether to support Amendment 3.¹⁶

Non-Retrogression. Under the 2018 reforms, a legislative district map cannot be adopted if it would “diminish[]” a minority group’s ability to elect representatives of their choice.¹⁷ This provision articulates a “non-retrogression standard” by barring changes that would leave any of Missouri’s minority voters with less representation and political power than they had before. And, crucially, this safeguard protects against redistricting changes that may be difficult to challenge by means of a traditional vote dilution claim, such as where minority voters are not quite 50 percent of the citizen voting age population.¹⁸ This protection against retrogression, combined with protections against vote dilution discussed below, is vital for ensuring fair treatment of communities of color in Missouri.

¹⁵ See S.J.R. 38, 100th Gen. Assemb., Reg. Sess. (Mo. 2020).

¹⁶ Galen Bacharier, *Voters Approved Clean Missouri, but Lawmakers Want Them to Reconsider*, *The Missourian* (Mar. 18, 2019), https://www.columbiamissourian.com/news/state_news/voters-approved-clean-missouri-but-lawmakers-want-them-to-reconsider/article_4a4739e4-404d-11e9-b735-bfff863b5ed4.html.

¹⁷ Mo. Const. art. III, § 3.

¹⁸ See *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986); see also Nicholas Stephanopoulos, *The South After Shelby County*, U. Chi. Pub. L. & Legal Theory Working Paper No. 451, at 16–20 (2013).

The inclusion of this non-retrogression standard in the 2018 reforms was a significant win for voters of color and language minority voters. Currently, federal law provides no such protection.¹⁹ Because of the 2018 reforms, Black, Latino, and Asian voters in Missouri can look for the first time to their own state Constitution for robust representational protections during the redistricting process. If Amendment 3 becomes law, however, Missouri’s new heightened protections for voters of color would disappear. Changing the Missouri Constitution in this way would leave communities of color without critical retrogression-specific recourse.

Protections for Coalition Districts. Amendment 3 would also remove another critical protection for voters of color: the Missouri Constitution’s guarantee that districts will not be drawn to abridge the right of a minority voter in Missouri to vote “in concert with other persons,” including in a coalition district comprising members of different racial or language groups.²⁰ This provision, which the Missouri electorate enacted as part of 2018 reforms, accords minority voters in the State significant protections.²¹ It explicitly

¹⁹ Section 5 of the Voting Rights Act has a similar protection for those states that fall under the Act’s preclearance requirements, but Missouri has never been covered by Section 5 and, in any event, Section 5 is currently inoperative due to the U.S. Supreme Court’s ruling in *Shelby County v. Holder*, 570 U.S. 529 (2013).

²⁰ See Mo. Const. art. III, § 3.

²¹ This provision has been emulated in legislative proposals at the federal level. See Michael Li & Yuriy Rudensky, *Rethinking the Redistricting Toolbox*, 62 How. L. J. 713, 731 (2019) (discussing the inclusion of the same language currently in the Missouri Constitution in the Redistricting Reform Act of 2019, H.R. 1, 116th Cong. § 2413(a)(1)(C)(2019)).

recognizes a state-law right of voters from one racial or language minority group to join other like-minded local minority groups to form a coalition to elect the coalition's choice of candidate, even if each group could not command a majority on its own.²²

Coalition districts are particularly important for Missouri's Latino and Asian communities, which are growing quickly but do not form a compact majority-minority district on their own. Without this added protection in Missouri law, these communities would be especially vulnerable to being disempowered for discriminatory purposes. Importantly, the provision goes beyond settled federal law, as the federal circuits are split on whether multiple minority groups can form a coalition for purposes of enforcing Section 2 of the Voting Rights Act, and the Eighth Circuit Court of Appeals has yet to weigh in on the issue.²³ Missouri voters in 2018, by contrast, approved strong and unambiguous

²² See Matt Barreto, Christian Grose & Ana Henderson, *Coalition Districts and the Voting Rights Act*, Res. Brief (The Warren Inst. on Law & Soc. Policy, Berkeley, Cal.), May 2011, at 1, [www.law.berkeley.edu/files/Coalition\(1\).pdf](http://www.law.berkeley.edu/files/Coalition(1).pdf).

²³ Under Section 2 of the Voting Rights Act, districts cannot be drawn to divide or over-concentrate a minority population in a way that dilutes its voting strength, and a minority community that is "sufficiently large and geographically compact to constitute a majority" in a district can challenge a district map as dilutive. See *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). The U.S. Supreme Court, however, has expressly reserved the question of whether multiple minority groups can form a coalition for purposes of enforcing Section 2 of the Voting Rights Act. See *Bartlett v. Strickland*, 556 U.S. 1, 13–14 (2009). The Eighth Circuit has not yet weighed in, and the other Courts of Appeals are divided. One Circuit has declined to extend Voting Rights Act protection to coalition districts, while four other Circuits have either explicitly or implicitly indicated a willingness to permit Section 2 enforcement in coalition districts. Compare *Nixon v. Kent County*, 76 F.3d 1381, 1386–87 (6th Cir. 1996), with *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988); *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526–27 (11th Cir. 1990); *Badillo v. City of Stockton*, 956 F.2d 884, 890–91 (9th Cir. 1992); and *Bridgeport Coal. for Fair Representation v. City of Bridgeport*,

enhanced state-law protection to communities of color. Amendment 3 would strip away this protection under cover of silence if its summary statement is allowed to stand.

B. The Summary Statement Does Not Disclose That Amendment 3 Would Undermine Partisan Fairness.

When Missouri voters approved Amendment 1 in 2018, they enshrined partisan fairness into the Constitution as a key factor to be considered in drawing districts.²⁴ The summary statement is silent to the fact that Amendment 3 would upend the expressed preferences of Missouri voters and downgrade partisan fairness to be the *least* important redistricting criterion, opening the door to both partisan gerrymandering and racial discrimination. Specifically, Amendment 3 would revise Mo. Const. art. III, § 3 to require that the consideration of equal population apportionment, compliance with federal laws, compactness, and political subdivision conformity each “take precedence over partisan fairness and competitiveness.”²⁵

When electoral districts are redrawn every decade, political parties work to manipulate district lines in ways that box out their competition and maximize their own chances for reelection. By engaging in partisan gerrymandering, map drawers can draw

26 F.3d 280 (2d Cir. 1994), *vacated and remanded on other grounds*, 512 U.S. 1283 (1994).

²⁴ See Mo. Const. art. III, § 3(c)(1)(b).

²⁵ S.J.R. 38, 100th Gen. Assemb., Reg. Sess. (Mo. 2020); *see also* Circuit Court Slip Op. at 9 (“The Constitution also already requires legislative districts to be drawn on the basis of fairness and competitiveness. Far from strengthening, or even perpetuating, this requirement, [Amendment 3] would actually render these criteria *less* important by providing that every other consideration ‘shall take precedence over partisan fairness and competitiveness’” (citation omitted)).

maps to give an outsized advantage to one party over the other. Two gerrymandering tactics are most prevalent: (i) the “cracking” of like-minded voters, by spreading them among multiple districts to deny them a sufficiently large voting bloc in any single district; and (ii) the “packing” of like-minded voters, by concentrating them as much as possible into a single electoral district to reduce their influence on other districts. Communities of color are often key to both “packing” and “cracking.” Because communities of color tend to heavily favor Democrats, race is a convenient proxy for partisanship. And because of residential segregation, communities of color are an efficient means for locating large blocs of Democratic voters for packing or cracking.

The goal of either tactic is to maximize the number of “wasted votes” cast by supporters of a particular political party—either by scattering voters of a party into districts where their votes will likely have no influence on the outcome of an election, or by condensing voters of a party into a district where there already is a strong majority, making their additional votes unnecessary. A statistical measure known as the “efficiency gap” has been adopted to measure the degree to which a map has been gerrymandered using “packing” or “cracking.” In short, the smaller the efficiency gap, the less “cracking” and “packing” exists in a district map, meaning that fewer “wasted votes” are cast in an election.

The Missouri Constitution currently requires map drawers to ensure that the efficiency gap be as close to zero as practicable, meaning that each party’s seat share should

more or less match its statewide vote share.²⁶ By contrast, Amendment 3 would allow this figure to be as high as 15 percent.²⁷

Allowing an efficiency gap of 15 percent would open the door to virtually unlimited partisan abuses. Indeed, a 15-percent efficiency gap is nearly double the 8-percent threshold that scholars and experts consider a signal of gerrymandering.²⁸ Such a large gap would let Missouri adopt maps on par or even more egregious than some of the most notorious gerrymanders in recent history, such as the 2012 gerrymander of the Wisconsin state legislature, which produced an efficiency gap of 13 percent and was, at the time, the “28th largest score in modern American history (out of nearly 800 total plans),”²⁹ and the 2016 congressional gerrymander in Pennsylvania, which had an efficiency gap of 19 percent and was struck down as unconstitutional by state courts.³⁰ An efficiency gap of 15 percent, in short, is a fictional limit.

²⁶ See Mo. Const. art. III, § 3(c)(1)(b).

²⁷ See S.J.R. 38, 100th Gen. Assemb., Reg. Sess. (Mo. 2020).

²⁸ See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 887 (2015) (recommending a maximum eight percent efficiency gap for state house plans).

²⁹ *Whitford v. Nichol*, 151 F. Supp. 3d 918, 922 (W.D. Wis. 2015); see also *Whitford v. Gill*, 218 F. Supp. 3d 837, 861 (W.D. Wis. 2016) (recounting expert testimony that the 2012 efficiency gap in Wisconsin was “among the largest scores . . . seen anywhere”), *vacated and remanded on other grounds*, 138 S. Ct. 1916 (2018).

³⁰ *League of Women Voters v. Commonwealth*, 178 A.3d 737, 778, 825 (Pa. 2018). This map was ultimately replaced with one adopted by the state supreme court. See *League of Women Voters v. Commonwealth*, 181 A.3d 1083, 1087 (Pa. 2018) (per curiam).

Federal voting rights jurisprudence provides no recourse against partisan gerrymandering,³¹ so Amendment 3’s dilution of minority-voter protection, coupled with the enlargement of the permissible efficiency gap, leaves communities of color in Missouri particularly vulnerable.³² Because race and party affiliation are closely aligned in Missouri’s Black, Latino, and Asian communities, efforts to enact a partisan gerrymander are likely to target these communities, adjusting the percentage of heavily Democratic minority voters in a district to control just how Democratic or Republican a district is.³³

Wisconsin and North Carolina provide cautionary tales. In Wisconsin, partisan gerrymandering resulted in a decline in the number of Black-preferred representatives despite a significant increase in the number of Black state residents due to strategic packing.³⁴ In North Carolina, courts struck down as a partisan gerrymander a map for state

³¹ See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

³² See Br. of Amici Curiae NAACP Legal Def. & Educ. Fund, Inc. et al. Supporting Appellees at 28–33, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 3948432 (surveying legal difficulties facing minority voters marginalized by partisan gerrymanders).

³³ See Justin Mark Levitt, *Introducing “Clustering”: Redistricting in Geographic Perspective* 37–39, 46, 64–66 (2016) (Ph.D. dissertation, University of California, San Diego) (California Digital Library); see also Richard L. Hasen, *The Gerrymandering Decision Drags the Supreme Court Further into the Mud*, N.Y. Times (Jun. 27, 2019), <https://www.nytimes.com/2019/06/27/opinion/gerrymandering-rucho-supreme-court.html>.

³⁴ Rep. Gwen Moore, *The Burdens of Gerrymandering Are Borne by Communities of Color*, NBC News: Think (Nov. 6, 2017), <https://www.nbcnews.com/think/opinion/burdens-gerrymandering-are-borne-communities-color-ncna817446>; see also Olga Pierce & Kate Rabinowitz, *‘Partisan’ Gerrymandering Is Still About Race*, ProPublica (Oct. 9, 2017), <https://www.propublica.org/article/partisan-gerrymandering-is-still-about-race>; Kim Soffen, *How Racial Gerrymandering*

legislative districts that was previously rejected by a federal court because it was drawn with the intent to racially gerrymander.³⁵ As drawn, the proposed map did “not permit voters to freely choose their representative, but rather [permitted] representatives [to choose] voters based upon sophisticated partisan sorting.”³⁶ In other words, a racial gerrymander was remedied with a partisan one that was just as effective in suppressing the voice of communities of color. The challenged summary statement’s failure to disclose Amendment 3’s changes to the redistricting criteria approved by voters, and the pernicious effects that would follow, render it misleading and unfair.

C. The Summary Statement Falsely Asserts That Amendment 3 Creates “Independent” and “Citizen-Led” Bipartisan Commissions and Does Not Disclose That It Eliminates the Non-Partisan State Demographer.

“Nearly every aspect” of the summary statement’s suggestion that Amendment 3 would introduce “citizen-led independent bipartisan commissions” into Missouri’s redistricting procedure is “wrong or misleading.”³⁷ As the Circuit Court found, “[Amendment 3] will not ‘create’ anything—it simply renames two legislative commissions that already exist” and which until 2018 had sole responsibility for legislative

Deprives Black People of Political Power, Wash. Post (June 9, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/06/09/how-a-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them>.

³⁵ *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584, at *3 (N.C. Super. Ct. Sept. 3, 2019).

³⁶ *Id.*

³⁷ Circuit Court Slip. Op. at 8.

redistricting in Missouri.³⁸ Amendment 3 would not only restore map drawing power to those political commissions, it would completely eliminate the office of the Nonpartisan State Demographer (the central feature of Missouri’s recent effort to implement protections for communities of color), reduce partisan gerrymandering, and introduce greater independence into the redistricting process. The summary statement’s language is silent as to this change. The resulting structure could not be further from “citizen-led” or “independent.”

For decades, Missouri’s legislative maps were drawn by two political commissions, whose members were appointed by the Governor from pools of candidates nominated by the state’s two major political parties.³⁹ In 2018, a majority of Missourians severely limited the map-drawing powers of this commission system by voting in favor of establishing the office of the Nonpartisan State Demographer, who was to assume the role of legislative map drawing subject only to a supermajority override by the commissions.⁴⁰ Amendment 3 would eliminate this newly created office and return control over legislative map drawing to the legislative commissions that existed before 2018. And, although these commissions would be revived under new names and with more members, they are no more “citizen-led” or “independent” than they were before.⁴¹

³⁸ *Id.*

³⁹ Mo. Const. art. III, §§ 3, 7.

⁴⁰ Mo. Const. art. III, § 3.

⁴¹ *See* Fair Ballot Language (“The amendment . . . giv[es] redistricting responsibility to a bipartisan commission, renames them, and increases membership to 20 by adding

At the outset, the commissions revived by Amendment 3 would be far from “independent.” Calling a process “independent” suggests that it operates at arms-length from lawmakers and party officials.⁴² Missouri’s commissions plainly do not operate in that fashion. Rather, the redistricting commissioners are selected by the Governor from pools of nominees put forth by the state’s major political parties.⁴³ Amendment 3 again does nothing to change this procedure.

In contrast to the shallow promise of independence in the summary statement, several states have successfully established redistricting processes that could fairly be called “independent.” In California, for example, the process is exhaustive, with numerous checks and balances. Persons interest in serving on the commission must complete a detailed application and be publicly interviewed by a panel of three auditors (one Democrat, one Republican, and one who is independent or a member of a third party) appointed by the California State Auditor. The panel then by unanimous vote creates pools of qualified and disinterested applicants and then, after strikes from legislative majority and minority leaders, the California State Auditor randomly selects the first eight members of the commission from the list of screened applicants. Those appointed members in turn

four commissioners appointed by the Governor from nominations by the two major political party’s state committees.”)

⁴² See Circuit Court Slip Op. at 8 (“[U]se of the word ‘independent’ implies that the commissions’ members will be independent of the political process.”); see also D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671, 733 (2013).

⁴³ Mo. Const. art. III, §§ 3, 7.

appoint six other members from the same pre-screened applicant pools.⁴⁴ The commission is “independent from legislative influence and reasonably representative of [the] State’s diversity.”⁴⁵ In Michigan, a thirteen-member commission is chosen randomly from qualified applicant pools after legislative majority and minority leaders have each stricken up to five qualified candidates.⁴⁶ In Arizona, the commission on appellate court appointments screens and nominates a pool of candidates, from which house and senate majority and minority leaders each select a commissioner;⁴⁷ those four commissioners then select a fifth member.⁴⁸ Although lawmakers pick four of the members of the Arizona commission, they have no control over the pool of applicants.⁴⁹ And, in Colorado, a twelve-member commission is selected by a judicial panel.⁵⁰

In reality, the commissions described in Amendment 3 more closely resemble “*political*” commissions, not unlike the ones in New Jersey and Washington State, in which state legislators and other public officials directly appoint the members of the redistricting

⁴⁴ See Cal. Gov. Code § 8252.

⁴⁵ Cal. Const. art. XXI, § 2(c)(1).

⁴⁶ See Mich. Const. art. IV, § 6(2)(d)–(f).

⁴⁷ Ariz. Const. art. IV, pt. 2, § 1.

⁴⁸ *Id.*

⁴⁹ See *id.*

⁵⁰ Colo. Const. art. V, § 47.

commission.⁵¹ Not surprisingly, in many cases, members of political commissions are selected with an eye toward members' political loyalties.

Missouri's legislature is not the first to invoke the word "independent" strategically to describe measures that do nothing to further redistricting independence. In 2014, New York tried a similar tactic.⁵² There, the amendment put before the voters would have created a ten-member redistricting commission in which the State's four legislative leaders would select eight members, and the final two would be selected by those eight.⁵³ Ballot language described the process as "independent." But a court rejected that description, explaining that this appointment process could not possibly be described as independent since eight members would be "handpicked appointees of the legislative leaders and the two additional members are essentially political appointees by proxy."⁵⁴ Because legislative leaders still had substantial input into the commission's work, the New York court required the State Board of Elections to strike the word "independent" from its description of the commission on ballots.⁵⁵ For similar reasons, the word "independent"

⁵¹ N.J. Const. art. IV, § 3; Wash. Const. art. II, § 43(1)–(3); Wash. Rev. Code § 44.05.030; *see also* Alaska Const. art. VI, § 8; Haw. Const. art. IV, § 2; Pa. Const. art. II, § 17(a-b).

⁵² *See Lieb v. Walsh*, 45 Misc. 3d 874, 880–82 (N.Y. Sup. Ct. 2014).

⁵³ *Id.* at 878.

⁵⁴ *Id.* at 880.

⁵⁵ *Id.* at 881–82.

does not describe the redistricting process envisioned by Amendment 3, and thus should have no place in the summary statement.

Likewise, Amendment 3 does not create a commission that could fairly be described as “citizen-led.” A “citizen-led” redistricting process is one that excludes highly connected insiders and that safeguards redistricting outcomes against the conflicts of interest of mapmakers who would have an incentive to pick their voters.⁵⁶ These safeguards include limiting or restricting people involved in politics from serving as mapmakers. Some states, including Montana, restrict public employees, elected officials, and/or public officials from serving on redistricting commissions.⁵⁷ Others, like Arizona and Colorado, limit former candidates for public office, party officials, and/or campaign employees from serving on commissions.⁵⁸ Still others prohibit lobbyists from serving as commissioners.⁵⁹ Missouri’s existing redistricting framework imposes none of these limitations on membership in the commissions (nor does it need to because the commissions are no longer tasked with

⁵⁶ See Justin Levitt, Essay, *Weighing the Potential of Citizen Redistricting*, 44 Loy. L.A. L. Rev. 513, 532 (2011) (citizens’ commissions “attempt[] to address both the concern with self-interest and the need for a legitimate but flexible decision-making structure . . . by assigning the redistricting pen to a set of potentially partisan citizens not directly beholden to incumbent elected officials”).

⁵⁷ See Mont. Const. art. V, § 14(2); see also Alaska Const. art. VI, § 8; Idaho Const. art. III, § 2(2); Mich. Const. art. IV, § 6(1)(b); Pa. Const. art. II, § 17(a-b); Wash. Rev. Code § 44.05.050.

⁵⁸ Ariz. Const. art. IV, pt. 2, § 1(3); Colo. Const. art. V, § 47(2)(c); see also Cal. Const. art. XXI, § 2(c)(6); Cal. Gov. Code § 8252; Idaho Const. art. III, § 2(2); Mich. Const. art. IV, § 6(1)(b); Wash. Rev. Code § 44.05.050.

⁵⁹ Ariz. Const. art. IV, pt. 2, § 1(3); Cal. Gov. Code § 8252; Colo. Const. art V, § 47(2)(c); Mich. Const. art. IV, § 6(1)(b); Wash. Rev. Code § 44.05.050.

redistricting), and Amendment 3 would not implement even one new measure that would bring Missouri’s retooled process any closer to being “citizen-led.”⁶⁰ Therefore, the commissions reestablished by Amendment 3 would be no more “citizen-led” than the ones that existed in 2011. That year, a former Missouri Lieutenant Governor chaired the House Apportionment Commission and a former state representative and state Senate candidate chaired its Senate Apportionment Commission.⁶¹

By labeling the commissions “citizen-led” and “independent,” as well as omitting the fact that the office of the non-partisan state demographer will be eliminated, the summary statement deliberately obscures the political reality of Amendment 3 in favor of a description that appeals to voters. Recent nationwide polling indicates that over 60 percent of Republicans, Democrats, and independents favor a system in which independent commissions draw district lines.⁶² The results at the ballot box speak for themselves: in

⁶⁰ In Missouri, commissioners “shall be disqualified from holding office as members of the general assembly for four years following the date of the filing by the commission of its final statement of apportionment.” Mo. Const. art. III, § 3(e)(2). This rule does nothing to reduce pre-existing conflicts of interest that might infect the commission’s ability to perform its function impartially. Nor does this rule resemble efforts in other states to produce “citizen-led” commissions.

⁶¹ See *Office of Budget and Planning, Archived 2010-2012 Process House Apportionment Commission*, Mo. Office of Admin., <https://oa.mo.gov/budget-planning/redistricting-office/archived-2010-2012-process-information/house-apportionment> (last visited Aug. 24, 2020); *Office of Budget and Planning, Archived 2010-2012 Process Senate Apportionment Commission*, Mo. Office of Admin., <https://oa.mo.gov/budget-planning/redistricting-office/archived-2010-2012-process-information/2011-commission-members> (last visited Aug. 24, 2020).

⁶² See *New National Bipartisan Redistricting Poll* at 3, Campaign Legal Ctr. (Jan. 28, 2019), <https://campaignlegal.org/document/new-national-bipartisan-redistricting-poll>.

2018, large majorities of voters opted to create independent redistricting procedures in Colorado,⁶³ Michigan,⁶⁴ and (of course) Missouri.

In the context of accelerating nationwide partisanship, a “citizen-led” and “independent” process has even greater value. Across the country, partisan identities have grown stronger and more stable in recent years.⁶⁵ At the same time, voter data has grown far more granular and the technology to harness it more sophisticated, rendering partisan mapmaking easier to achieve than ever before. Mapmakers can now accurately predict the partisan leanings of voters by using a combination of census data, consumer data compiled and sold by businesses, voter information collected by political campaigns, political contribution history, precinct-level election results, and even analytic scores designed to predict voters’ particular political characteristics.⁶⁶ Mapmakers put that data to use in

⁶³ *Colorado Independent Redistricting Commissions*, <https://redistricting.colorado.gov/> (last visited August, 24, 2020).

⁶⁴ *Independent Citizens Redistricting Commission, Frequently Asked Questions*, The Off. of Sec’y of State Jocelyn Benson, https://www.michigan.gov/sos/0,4670,7-127-1633_91141-488602--,00.html (last visited Aug. 24, 2020).

⁶⁵ See Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 *Am. J. Pol. Sci.* 365, 365, 379–80 (2015) (showing the “observed rate of Americans voting for a different party across successive presidential elections has never been lower,” which indicates that each party has a reliable and predictable “base of party support that is less responsive to short-term forces”); see also Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 *Pub. Op. Q.* 405, 412–15 (2012) (showing that although *enthusiasm* for partisans’ own parties has remained relatively stable over time, empirical evidence shows that “partisans like their opponents less and less”).

⁶⁶ See Chris Evans, *It’s the Autonomy, Stupid: Political Data-Mining and Voter Privacy in the Information Age*, 13 *Minn. J.L. Sci. & Tech.* 867, 883–88 (2012); see also David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 *J. Econ.*

sophisticated software to create maps that reliably predict the projected partisan affiliation of voters.⁶⁷ With these tools available, it is unrealistic to expect politically appointed commissions to carry out their duties in a nonpartisan manner, and it is all the more pernicious to mislead voters to believe that a process is “citizen-led” and “independent” when it is not.

Recognizing that voters appreciate the value of a “citizen-led” and “independent” process, the Missouri General Assembly attempted to align its description of Amendment 3 with those valued characteristics without taking any steps to introduce such independence and citizen input into Missouri’s redistricting process. Those labels are plainly misleading because they misrepresent to the public that Amendment 3 will produce the fairer outcomes they prefer. They are even more objectionable in light of the fact that Amendment 3 will repeal the office of the Nonpartisan State Demographer, the most significant check against partisanship and the mistreatment of communities of color in Missouri’s political redistricting processes.

Persps. 51, 51, 58–61 (2014) (observing that, as recently as a decade or two ago, the techniques used by political campaigns “to predict the tendencies of citizens appear extremely rudimentary by current standards”).

⁶⁷ *See, e.g.*, AutoBound, <https://citygategis.com/products/autobound> (last visited Aug. 24, 2020).

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to affirm the judgment of the circuit court.

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CERTIFICATE OF COMPLIANCE

Pursuant to Mo. R. Civ. Proc. 84.06(c), I hereby certify that this brief complies with Mo. R. Civ. Proc. 55.03 and with the requirements and limitations set forth in Rule 84.06(b) and the Local Rules of the Court. This brief contains 8,004 words according to the Microsoft Word system used to prepare the brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief was filed in PDF format with the Missouri Court Electronic Filing System and served on counsel for all parties on August 25, 2020.

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