WD83962

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

BARBARA PIPPENS, et al.,
Plaintiffs/Respondents,

v.

JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE, et al.,
Defendants/Appellants.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Circuit Judge

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This appeal concerns the summary statement prepared by the General Assembly for Senate Joint Resolution 38, which proposes amendments to Article III of the Missouri Constitution and will appear on voters' ballots as Amendment 3 at the November 3, 2020 general election. On August 17, 2020, the trial court entered judgment finding that the summary statement was insufficient and unfair under § 116.190, RSMo, and certified entirely new summary language to appear on voters' ballots. D19, at 10. Appellants filed a timely notice of appeal on August 18, 2020. D20. This appeal presents no questions reserved for the exclusive jurisdiction of the Missouri Supreme Court, and jurisdiction properly lies in this Court. *See* MO. CONST. art. V, § 3; § 477.070, RSMo.

INTRODUCTION

Senate Joint Resolution No. 38 is a ballot proposal that, if enacted, will (1) prohibit lobbyist gifts to members of the Legislature and their employees; (2) reduce campaign contributions limits for candidates for state house of representatives and senate; (3) confer authority for redistricting on new independent bipartisan commissions made up of citizens; and (4) amend, clarify, and reorder the criteria used in redistricting. The Legislature's summary statement for SJR 38 reads:

> Shall the Missouri Constitution be amended to:
>
> - Ban all lobbyist gifts to legislators and their employees;
> - Reduce legislative campaign contribution limits; and
> - Create citizen-led independent bipartisan commissions to draw state legislative districts based on one person, one vote, minority voter protection, compactness, competitiveness, fairness, and other criteria.

D12, at 14-15. Within the 50-word limit, the summary statement fairly and sufficiently advises voters of the purpose and central features of the proposal.

The circuit court held that this ballot-summary language was insufficient and unfair in its entirety, and re-wrote the entire summary statement from beginning to end. D19, at 10. The circuit court's judgment was in error for at least six reasons.

First, the trial court erroneously held that the summary statement was required to state that SJR 38 would "repeal" provisions adopted by the voters through

Amendment 1 in 2018. No Missouri case holds that a summary statement must identify all preexisting laws or prior electoral outcomes that the proposal will affect, and this Court rejected virtually the same argument in *Hill v. Ashcroft*, 526 S.W.3d 299, 315 (Mo. App. W.D. 2017). The trial court's alternative language is insufficient and unfair because it misrepresents the effect of the proposal on existing law.

Second, the trial court erred in holding that the first bullet point is insufficient and unfair on the ground that proposal does not ban gifts from "unpaid lobbyists" and family members. To the contrary, the plain and ordinary meaning of "lobbyist," as understood by the average voter, is a person who is "employed and compensated for lobbying." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1326 (2002). The average voter would not consider a concerned citizen who expresses concern on public matters without pay to be a "lobbyist." And the average voter would not consider a gift from a family member to be a "lobbyist gift."

Third, the trial court erred in holding that the second bullet point is insufficient and unfair on the ground that the proposal reduces contribution limits only for senate candidates. To the contrary, the proposal reduces contribution limits for both house and senate candidates. It reduces the absolute dollar limit for senate candidates, and it also eliminates the biannual inflation adjustments that apply to limits for both house and senate candidates.

Fourth, the trial court erred in holding that the fourth bullet point's phrase "create citizen-led independent bipartisan commissions" is insufficient and unfair. The proposal will "create" new commissions because it will establish commissions whose authority, responsibility, and method of selection differ from preexisting commissions. And these commissions will be led by citizens, independent of control by state authorities, and composed of equal members of both political parties.

Fifth, the trial court erred in holding that the fourth bullet point is insufficient and unfair in its description of the criteria that the new redistricting commissions will apply. The trial disputed the extent to which the proposal will change preexisting standards for redistricting, but the summary appropriately does not address all the details of how the standards will change in under 50 words. Instead, the summary fairly and accurately summarizes the criteria that the new commissions will apply. And the circuit court's alternative summary gives less information about this central feature, because it does not mention any of the redistricting standards.

Sixth, even if there were any insufficiency in the summary language, the trial court erred by electing to re-write the proposed ballot summary from top to bottom, instead of addressing any perceived insufficiencies by making modifications within the prepared summary, and preserving the Legislature's summary language to the greatest possible.

STATEMENT OF FACTS

A. Provisions of Senate Joint Resolution 38.

In 2020, the General Assembly enacted Senate Joint Resolution No. 38 ("SJR 38"), which proposes an amendment to Article III of the Missouri Constitution. D12 (SJR 38, Truly Agreed and Finally Passed). The summary statement for SJR 38 reads as follows:

> Shall the Missouri Constitution be amended to:
>
> - Ban all lobbyist gifts to legislators and their employees;
> - Reduce legislative campaign contribution limits; and
> - Create citizen-led independent bipartisan commissions to draw state legislative districts based on one person, one vote, minority voter protection, compactness, competitiveness, fairness, and other criteria.

D12, at 14-15. If adopted by the voters, SJR 38 will make the following changes to Sections 2, 3, and 7 of Article III of the Constitution. D12, at 1.

1. Banning lobbyist gifts to legislators and their employees.

First, SJR will amend Article III, § 2(b) to prohibit gifts from lobbyists to legislators and their employees. Currently, Article III, § 2(b) provides that "n[o] person serving as a member of or employed by the general assembly shall accept directly or indirectly a gift of any tangible or intangible item, service, or thing of value from any paid lobbyist or lobbyist principal *in excess of five dollars per occurrence*." Mo. Const. art. III, § 2(b) (emphasis added). This provision contains

no limit on the number of "occurrence[s]" of gifts. *Id.* The five-dollar limitation on gifts is adjusted annually for inflation and "rounded to the nearest dollar." *Id.* Current law contains an exception for gifts from family members: "Nothing in this section shall prevent individuals from receiving gifts, family support or anything of value from those related to them within the fourth degree by blood or marriage." *Id.*

If adopted, SJR 38 will amend Article III, § 2(b) by eliminating the phrase "in excess of five dollars per occurrence," so that the first sentence of that subsection will read: "No person serving as a member of or employed by the general assembly shall accept directly or indirectly a gift of any tangible or intangible item, service, or thing of value from any paid lobbyist or lobbyist principal." D12, at 1. This change will both (1) eliminate the exception for lobbyist gifts of five dollars or less; and (2) eliminate the possibility of multiple "occurrences" of lobbyist gifts, by prohibiting all such gifts. In addition, SJR 38 will also eliminate the annual adjustment for inflation of the five-dollar exception. D12, at 2. SJR 38 does not change the exception for gifts from family members. *See id.*

2. Reducing campaign contribution limits to legislators.

Second, if enacted, SJR 38 will amend Article III, § 2(c) of the Constitution to reduce the campaign contribution limits for members of the Legislature. Currently, Article III, § 2(c) provides that "the amount of contributions made to or accepted by any candidate or candidate committee from any person other than the

candidate in any one election for the general assembly shall not exceed the following: (1) To elect an individual to the office of state senator, two thousand five hundred dollars; and (2) To elect an individual to the office of state representative, two thousand dollars." MO. CONST. art. III, § 2(c). Current law automatically adjusts these two limitations for inflation on a biannual basis: "Contribution limits set forth herein shall be adjusted on the first day of January in each even-numbered year hereafter by multiplying the base year amount by the cumulative Consumer Price Index and rounded to the nearest dollar amount, for all years after 2018." *Id.*; *see also id.* (defining "base year amount" as "the contribution limits prescribed in this section," *i.e.* $2,500 for state senators, and $2,000 for state representatives). This adjustment for inflation results in a gradual, continuous increase in the absolute dollar number for both contribution limits. On January 1, 2020, the two limits were adjusted upward to $2,559 for state senator, and $2,046 for state representative. *See* Missouri Ethics Commission, Contribution Limits for Candidates Effective January 1, 2020, *at* https://mec.mo.gov/WebDocs/PDF/CampaignFinance/-Contribution_Limits_for_Candidates_2020.pdf (visited Aug. 21, 2020).

If adopted, SJR 38 will amend these contribution limits in two ways. First, it will reduce the base contribution limit for candidates for state senator from $2,500 to $2,400. D12, at 2. Second, it will eliminate the provision in Section 3(c) that biannually adjusts for inflation the limits for both state representatives and state

senators. *See id.* Eliminating the biannual adjustments for inflation will undo the upward adjustment for inflation for both limits that occurred by operation of law on January 1, 2020, resulting in a reduction of the amount for state senator from $2,559 to $2,400, and the amount for state representative from $2,046 to $2,000. It will also create limitations that are numerically fixed at $2,400 and $2,000 for state senator and state representative, respectively—thus imposing an ongoing, biannual reduction of those limits compared to what they would have been if they remained subject to biannual inflation adjustments, as provided under current law.

3. Creating citizen-led independent bipartisan commissions to perform redistricting in Missouri.

Redistricting under current law. Under current law, the Constitution provides that the "nonpartisan state demographer" shall have principal responsibility for drawing legislative maps in Missouri. MO. CONST. art. III, § 3(a).

For state representative districts, within 10 days after the population of Missouri is reported for each decennial census, "the nonpartisan state demographer shall begin the preparation of legislative districting plans and maps" for state house districts. *Id.* § 3(c)(1). Within six months of the population reporting, "the nonpartisan state demographer shall make public and file with the secretary of state and with the house apportionment commission a tentative plan of apportionment and map of the proposed districts." *Id.* § 3(c)(3).

The "house apportionment commission" then reviews the map drawn by the

demographer. *Id.* The commission has authority to make changes to the demographer's map, but only if a supermajority of at least 70 percent the commission agrees on the changes: "The commission may make changes to the tentative plan of apportionment and map of the proposed districts received from the nonpartisan state demographer provided that such changes are consistent with this section and approved by a vote of at least seven-tenths of the commissioners." *Id.* If no supermajority of the house apportionment commission votes to change the demographer's map, the demographer's map becomes final: "If no changes are made or approved as provided for in this subsection, the tentative plan of apportionment and map of proposed districts shall become final." *Id.*

To select the "house apportionment committee," each "congressional district committee" of the two highest vote-getting political parties nominates two party members for each congressional district to the Governor, and the Governor selects one member from each two-person list of candidates provided. *Id.* § 3(c)(2).

Under current law, Senate redistricting follows the same procedures as House redistricting, with principal responsibility for redistricting conferred on the state demographer. Within 10 days of Missouri's population being reported in the census, "the nonpartisan state demographer … shall begin the preparation of senatorial districting plans and maps using the same methods and criteria" as apply to House districts. Mo. Const. art. III, § 7(a). Within six months, "the nonpartisan state

demographer shall file with the secretary of state and with the senatorial apportionment commission a tentative plan of apportionment and map of the proposed [senate] districts." *Id.* § 7(c). The "senatorial apportionment commission" may change the demographer's map only if a supermajority approves: "The commission may make changes to the tentative plan of apportionment and map of the proposed districts received from the nonpartisan state demographer provided that such changes are … approved by a vote of at least seventh-tenths of the commissioners." *Id.* If no supermajority votes to change the demographer's plan, it becomes final: "If no changes are made or approved as provided for in this subsection, the tentative plan of apportionment and map of proposed districts shall become final." *Id.*

The "senatorial apportionment commission" is selected by having each of the two major political parties select a list of 10 members of their party to submit to the Governor, and the Governor selects five members from each list, creating a 10-member commission with equal numbers from each party. *Id.* § 7(b).

Redistricting under SJR 38. If enacted, SJR 38 will change the process of redistricting by creating two new entities, called the "house independent bipartisan citizens commission" and the "senate independent bipartisan citizens commission." D12, at 4, 11. These entities will replace the nonpartisan state demographer and assume principal responsibility for redistricting the house and senate districts,

respectively. The new "independent bipartisan citizens commissions" differ from the pre-existing "apportionment commissions" in their authority, their responsibilities, and their manner of selection.

SJR 38 eliminates the role of the nonpartisan state demographer in redistricting for both house and senate districts. *See* D12, at 3-4. Instead, the newly created house independent bipartisan citizens commission "shall redistrict the house of representatives" using detailed criteria set forth in SJR 38. *Id.* at 4. Within five months of its appointment, the house commission "shall file with the secretary of state a tentative redistricting plan and map of the proposed districts" for the house of representatives. D12, at 9. The house commission then holds "public hearings … to hear objections and testimony from interested persons." *Id.* at 10. Within six months of its appointment, the house commission "shall file with the secretary of state a final statement of the numbers and boundaries of the districts together with a map of the districts." *Id.* "[N]o such statement shall be valid unless approved by at least seven-tenths of the members" of the independent bipartisan citizens commission. *Id.*

The senate independent bipartisan citizens commission has similar authority and follows similar procedures as the house commission. "The senate independent bipartisan citizens commission shall redistrict the senate using the same methods and criteria as those required" for house districts. D12, at 13. Within five months of its

appointment, the senate commission "shall file with the secretary of state a tentative redistricting plan and map of the proposed [senate] districts." *Id.* "[D]uring the ensuing fifteen days," the senate commission "shall hold public hearings … to hear objections or testimony of interested persons." *Id.* Within six months of its appointment, the commission "shall file with the secretary of state a final statement of the numbers and the boundaries of the districts together with a map of the districts." *Id.* "[N]o statement shall be valid unless approved by at least seven-tenths of the members." *Id.*

In addition to their new responsibilities and procedures, the manner of selection of the house and senate independent bipartisan citizens commissions differs from that of the previous apportionment committees. For the house committee, the Governor receives two nominees from each congressional district committee of the two major political parties, from which the Governor selects one from each list; and five nominees from the state committees of the two political parties, from which the Governor selects two from each list. D12, at 8. Likewise, for the senate committees, the Governor receives two nominees from each congressional district committee of the major parties, and chooses one from each list; and the Governor receives five nominees from the two political parties' state committees, and chooses two from each list. D12, at 12.

4. Adjusting the criteria for house and senate redistricting.

If enacted, SJR 38 will also adjust the criteria and methodologies for redistricting. Under current law, Section 3(c)(1) of Article III of the Constitution sets forth criteria for redistricting in the following "order of priority": total population, compliance with federal law including the Voting Rights Act, "partisan fairness," "competitiveness," contiguity, and compactness. MO. CONST. art. III, § 3(c)(1)a-e. Section 3(c)(1) provides specific methodologies for ascertaining partisan fairness and competitiveness. *Id.* § 3(c)(1)b. Section 3(c)(1) also provides that, "[n]otwithstanding any other provision of this Article, districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or diminishing their ability to elect representatives of their choice…." *Id.* § 3(c)(1)b. Article III, § 7 adopts the same criteria and methods for redistricting for senate elections. *Id.* § 7(a).

If enacted, SJR 38 will significantly adjust these criteria and methods for redistricting of both house and senate elections. The new criteria and methods will retain many of the principles in prior law, but they will be amended, clarified, and partially reordered. SJR 38 provides that "[t]he 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 abridgement 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." D12, at 5. This language replaces preexisting language about the rights of "racial or language minorities" in Section 3(c)(1). *Id.*

In addition, SJR 38 provides for consideration of redistricting criteria in the following order. First, districts shall be "as nearly equal as practicable in population, and shall be drawn on the basis of one person, one vote." *Id.* at 4. SJR 38 provides a new, specific definition for "nearly equal as practicable in population," defining it to constitute no more than one percent deviation from population unless necessary to preserve political communities, in which case three percent deviation is the maximum permitted. *Id.*

Second, SJR 38 leaves in place the preexisting requirement of compliance with federal law, including the Voting Rights Act. *Id.* at 4-5. Third, SJR 38 requires districts to be "as compact as may be," defining "compact districts" as "those which are square, rectangular, or hexagonal in shape to the extent permitted by natural or political boundaries." *Id.* at 6.

Fourth, SJR 38 requires consideration of preserving community boundaries. "To the extent consistent with the prior three criteria, SJR 38 requires that "communities shall be preserved." *Id.* The proposal provides specific new criteria for ensuring the preservation of political communities. "Districts shall satisfy this

requirement if district lines follow political subdivision lines to the extent possible," with a specific order of priority relating to county and municipal boundaries. *Id.*

After consideration of these four criteria, SJR 38 calls for consideration of partisan fairness and competitiveness: "Districts shall be drawn in a manner that achieves both partisan fairness and, secondarily, competitiveness, but the standards established [in the prior paragraphs] shall take precedence over partisan fairness and competitiveness." *Id.* at 7. SJR 38 provides specific new methods for calculating partisan fairness and competitiveness. *Id.*

In short, SJR 38 gives priority to preventing denial or abridgement of the right to vote based on race or color, or of denying the opportunity to elect chosen representatives based on race or color. *Id.* at 5. SJR 38 also requires consideration of redistricting criteria in the following order: (1) equality of population, with specific new standards for maximum population deviation; (2) compliance with federal law; (3) compactness to the extent possible; (4) preservation of political communities, with specific new guidance regarding the preservation of county and municipal boundaries; (5) partisan fairness, and (6) competitiveness. *Id.* at 4-7.

B. Legislative Enactment of SJR 38.

The Missouri Senate prepared a senate research summary for SJR 38 that indicated, through the use of headings, that the measure has three principal features: "Gift Ban," Campaign Contribution Limits," and "Redistricting." D11. After the

"Redistricting" heading are additional subheadings that provide more detail about the measure's redistricting provisions, including establishing redistricting criteria, setting a redistricting timeline, and regulating legal actions challenging redistricting plans. *Id.*

On May 10, 2020, the Missouri State Senate voted to approve SJR 38 and sent it to the Missouri House of Representatives for final approval and passage. D9, ¶ 16. On May 13, 2020, the Missouri House of Representatives truly agreed to and finally passed SJR 38. D9, ¶ 17; D12. The bill's title as finally passed reads that the bill will amend the Constitution by "regulating the legislature to limit the influence of partisan or other special interests." *Id.*

Under § 116.155, the General Assembly elected to include a summary statement for the measure, which "shall contain no more than fifty words, excluding articles." § 116.155.2, RSMo. As noted above, the summary statement reads:

> Shall the Missouri Constitution be amended to:
>
> - Ban all lobbyist gifts to legislators and their employees;
> - Reduce legislative campaign contribution limits; and
> - Create citizen-led independent bipartisan commissions to draw state legislative districts based on one person, one vote, minority voter protection, compactness, competitiveness, fairness, and other criteria.

D12, at 14-15. Each of the summary statement's bullet points address one of the three principal features of the measure as identified in the Senate research summary. D11.

On June 29, 2020, Secretary Ashcroft certified the official ballot title for SJR 38, which contains the General Assembly's summary statement and a fiscal note summary prepared by the State Auditor. D9, ¶ 23; D14. SJR 38 will appear on the November 2020 election ballot as "Amendment 3."

C. Procedural History

On May 18, 2020, Respondents filed their lawsuit challenging the General Assembly's summary statement under § 116.190, RSMo. D2. They contended the summary statement is not fair and sufficient, and they proposed that a new summary be certified in its place. *Id.* On August 7, 2020, the case was tried on stipulated facts and exhibits. D9. On August 17, 2020, the trial court entered judgment in favor of Respondents and ordered that the Secretary of State certify the following revised language to appear on voters' ballots:

> Shall the Missouri Constitution be amended to:
>
> • Repeal rules for drawing state legislative districts approved by voters in November 2018 and replace them with rules proposed by the legislature;
>
> • Lower the campaign contribution limits for senate candidates by $100; and

- Lower legislative gift limit from $5 to $0, with exemptions for some lobbyists?

D19, at 10.

Under Missouri Supreme Court precedent and the Revised Statutes, no changes to the ballot title can be made within eight weeks prior to the election. *Dotson v. Kander*, 435 S.W.3d 643, 645 (Mo. banc 2014); § 115.125.2. Eight weeks before the November 2020 election is September 8, 2020.

POINTS RELIED ON

I. **The trial court erred in holding that the ballot title for SJR 38 was insufficient and unfair for failing to include an explicit reference to Amendment 1 passed in 2018, because no reference to Amendment 1 was required for the ballot summary to be sufficient and fair, in that the ballot title is not required to refer to other legal provisions or past electoral outcomes that might be affected by the proposal, and such a reference would render the ballot title misleading and confusing to voters.**

- *Hill v. Ashcroft*, 526 S.W.3d 299 (Mo. App. W.D. 2017)
- *Cures v. Cloning v. Pund*, 259 S.W.3d 76 (Mo. App. W.D. 2008)

II. **The trial court erred in holding that the ballot title for SJR 38 was insufficient and unfair in its description of the proposal's prohibition against lobbyist gifts, because the first bullet point of the ballot summary fairly and sufficiently summarizes SJR 38 on this issue, in that SJR 38 will ban all lobbyist gifts under the plain and ordinary meaning of that phrase, and the pre-existing exception for gifts from family members is a minor detail in any event.**

- *Sedey v. Ashcroft*, 594 S.W.3d 256, 271 (Mo. App. W.D. 2020)
- *Hill v. Ashcroft*, 526 S.W.3d 299, 315 (Mo. App. W.D. 2017)

- *Protect Consumers' Access To Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665 (Mo. App. W.D. 2015)

III. **The trial court erred in holding that the ballot title for SJR 38 was insufficient and unfair in its description of the proposal's effect on legislative campaign contribution limits, because the second bullet point of the ballot summary fairly and sufficiently summarizes SJR 38 on this issue, in that the proposal will both reduce the absolute dollar limit on contributions to senate candidates and reduce contribution limits for both house and senate candidates by eliminating the biannual adjustment for inflation for both kinds of candidates.**

- *Sedey v. Ashcroft*, 594 S.W.3d 256, 271 (Mo. App. W.D. 2020)
- *Protect Consumers' Access To Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665 (Mo. App. W.D. 2015)
- *State ex rel. Kander v. Green*, 462 S.W.3d 844, 851 (Mo. App. W.D. 2015).
- *Cures Without Cloning v. Pund*, 259 S.W.3d 76 (Mo. App. W.D. 2008)

IV. **The trial court erred in holding that the ballot title for SJR 38 is insufficient and unfair in its statement that the proposal will create citizen-led independent bipartisan commissions to draw state legislative districts, because the third bullet point of the ballot summary fairly and accurately summarizes SJR 38 on this issue, in that the proposal will**

create new commissions that differ in their authority, responsibility, and manner of selection from pre-existing commissions, and those commissions are independent of control by state officials, led by citizens, and composed of equal members from the two major political parties.

- *Sedey v. Ashcroft*, 594 S.W.3d 256, 271 (Mo. App. W.D. 2020)
- *Hill v. Ashcroft*, 526 S.W.3d 299, 315 (Mo. App. W.D. 2017)
- *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573, 586 (Mo. App. W.D. 2010)
- *State ex rel. Humane Soc'y of Missouri v. Beetem*, 317 S.W.3d 669, 673 (Mo. App. W.D. 2010)

V. **The trial court erred in holding that the ballot title for SJR 38 is insufficient and unfair in its description of the criteria for redistricting, because the third bullet point of the ballot summary fairly and sufficiently summarizes SJR 38 on this issue, in that the proposal will adopt new criteria and methodologies for redistricting that are accurately summarized in the third bullet point.**

- *Sedey v. Ashcroft*, 594 S.W.3d 256, 271 (Mo. App. W.D. 2020)
- *Hill v. Ashcroft*, 526 S.W.3d 299, 315 (Mo. App. W.D. 2017)
- *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573, 586 (Mo. App. W.D. 2010)

- *State ex rel. Humane Soc'y of Missouri v. Beetem*, 317 S.W.3d 669, 673 (Mo. App. W.D. 2010)

VI. **The trial court erred in adopting entirely new language for the ballot summary for SJR 38, because the trial court should have addressed any perceived insufficiencies by making changes within the existing language supplied by the legislature, in that it exceeded the trial court's authority and the appropriate judicial role for the trial court to engage in a complete re-writing of the ballot title, and the trial court's substitute language is itself both insufficient and unfair.**

- *Sedey v. Ashcroft*, 594 S.W.3d 256 (Mo. App. W.D. 2020)
- *Hill v. Ashcroft*, 526 S.W.3d 299 (Mo. App. W.D. 2017)
- *Cures Without Cloning v. Pund*, 259 S.W.3d 76 (Mo. App. W.D. 2008)

STANDARD OF REVIEW

This Court's review of the circuit court's judgment, and the summary statement, is *de novo*. "Where, as here, the parties simply argue the fairness and sufficiency of the summary statement 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 [this Court] review[s] *de novo*." *Billington v. Carnahan*, 380 S.W.3d 586, 593 (Mo. App. W.D. 2012); *Brown v. Carnahan*, 370 S.W.3d 637, 653 (Mo. banc 2012) ("*de novo* review . . . is the appropriate standard of review when there is no underlying factual dispute that would require deference to the trial court's factual findings.").

ARGUMENT

The following principles are well-established and apply to all Points Relied On. The purpose of an official ballot title "'is to give interested persons notice of the subject of a proposed [law] to prevent deception through use of misleading titles. If the title gives adequate notice, the requirement is satisfied.'" *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2008) (quoting *Union Elec. Co. v. Kirkpatrick*, 606 S.W.2d 658, 660 (Mo. banc 1980)). A summary statement prepared by the General Assembly must be "a true and impartial statement of the purposes of the proposed measure in language neither intentionally argumentative nor likely to create prejudice either for or against the proposed

measure." § 116.155.2, RSMo. Courts have construed this requirement to mean that the summary statement "must be adequate and state the consequences of the initiative without bias, prejudice, deception, or favoritism." *Brown v. Carnahan*, 370 S.W.3d 637, 654 (Mo. banc 2012).

In reviewing a summary statement for a ballot measure, the burden is on the opponents of a summary statement to show that the language is "insufficient or unfair." § 116.190.3, RSMo. Courts afford deference to a prepared summary statement, recognizing that "ten different writers would produce ten different versions," and "there are many appropriate and adequate ways of writing the summary ballot language." *Asher v. Carnahan*, 268 S.W.3d 427, 431 (Mo. App. W.D. 2008). This deference is especially appropriate given the word limit governing summary statements. Whereas most summary statement challenges involve a 100-word limitation applicable to statements drafted by the Secretary of State, here the General Assembly has only 50 words. § 116.155.2, RSMo.

Summary statements should include enough information about the measure so that voters can "make an informed choice on whether to investigate the matter further." *Protect Consumers' Access To Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665, 671 (Mo. App. W.D. 2015). Thus, a summary statement "need not set out the details of the proposal to be fair and sufficient." *Id.* at 656. Rather, the summary statement should convey the "purpose" or "primary objective" of a

proposed initiative. *Archey v. Carnahan*, 373 S.W.3d 528, 533 (Mo. App. W.D. 2012). "Even if [a plaintiff's] substitute language would provide more specificity and accuracy in the summary 'and even if that level of specificity might be preferable,"' this is not the test. *Missourians Against Human Cloning*, 190 S.W.3d at 457 (quoting *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999)). "[T]the ballot title is not required to set out the details of the proposal or resolve every peripheral question related to it." *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573, 586 (Mo. App. W.D. 2010).

Because not all details of a ballot measure can be identified in the word limitation, Missouri courts have consistently held that the summary statement need only address the "central features" of the measure. *Boeving v. Kander*, 493 S.W.3d 865 (Mo. App. W.D. 2016) (citing *Seay v. Jones*, 439 S.W.3d 881, 891 (Mo. App. W.D. 2014)). But even when a measure contains multiple central features, the summary statement need not specifically identify each one. *See Sedey v. Ashcroft*, 594 S.W.3d 256, 271 (Mo. App. W.D. 2020) (affirming summary statement language that did not specifically identify one central feature because the language was broadly written to encompass that feature's change from current law). Nor does a summary statement need to specify the impact a measure will have on existing law. *Hill v. Ashcroft*, 526 S.W.3d 299, 315 (Mo. App. W.D. 2017) ("Missouri courts have never held that a summary statement prepared by the secretary of state must explain

the initiative's potential effect on existing or future statutes to be fair and sufficient.").

With these principles in mind, the General Assembly's summary statement for SJR 38 is fair and sufficient because it conveys the measure's purpose, identifies the measure's three central features, and summarizes the measure accurately and impartially.

Preservation. All issues on appeal are fully preserved for this Court's review. Appellants fully defended the fairness and sufficiency of the General Assembly's summary statement and each aspect of the summary that Respondents challenged in their lawsuit. D8; D18.

I. The trial court erred in holding that the ballot title for SJR 38 was insufficient and unfair for failing to include an explicit reference to Amendment 1 passed in 2018, because no reference to Amendment 1 was required for the ballot summary to be sufficient and fair, in that the ballot title is not required to refer to other legal provisions or past electoral outcomes that might be affected by the proposal, and such a reference would render the ballot title misleading and confusing to voters.

The trial court's principal holding was that the ballot summary for SJR 38 is insufficient and unfair because it "fails to inform voters that adopting SJR 38 would eliminate the legislative redistricting rules Missourians overwhelmingly adopted just

two years ago." D19, at 5. The trial court held that the "central feature" of SJR 38 is "the wholesale repeal of voter-approved rules for redistricting and replacing them with prior redistricting rules designed to benefit incumbent legislators." *Id.* at 6.

This holding was in error. To be fair and sufficient, a ballot summary is not required to refer to other provisions of law that it may amend. On the contrary, referring to prior electoral outcomes in this context would serve to generate voter confusion and would itself render the ballot summary insufficient and unfair.

First, the trial court's holding on this point contradicts binding authority, because this Court considered and rejected a virtually identical argument in *Hill v. Ashcroft*, 526 S.W.3d 299 (Mo. App. W.D. 2017). *Hill* considered a series of ballot proposals that would have amended Article I, § 29 of the Missouri Constitution to prohibit so-called "Right to Work" laws. *Id.* at 306. While the case was pending in the trial court, the Legislature enacted Senate Bill 19, a major "Right to Work" law. *Id.* at 307. Opponents argued, and the trial court held, that the ballot summaries for the proposals were insufficient and unfair because they did not advise voters of the principal legal effect of their adoption, *i.e.*, the abrogation of Senate Bill 19. *Id.* at 313. This Court rejected this argument on appeal, holding that the ballot summaries were sufficient and fair without referring to their effect on Senate Bill 19, regardless of whether the bill was enacted before or after the ballot language was adopted. *Id.* at 314.

In so holding, *Hill* noted that "the summary materials provided in the ballot title are intended to provide voters with enough information that they are made aware of the subject and purpose of the initiative and allow the voter to make an informed decision as to whether to investigate the initiative further." *Id.* Thus, it was not necessary to identify the principal law that would be abrogated or repealed by the initiatives in the summary statement, because "[i]t is commonly understood that constitutional amendments will supersede" previously enacted laws. *Id.* Though the proposals "may well override some of the provisions of SB19," it was "unnecessary for the summaries to include information regarding SB19 for voters to understand generally the impact of the Initiative Petitions." *Id.* *Hill* emphasized that "Missouri courts have never held that a summary statement … must explain the initiative's potential effect on existing or future statutes to be fair and sufficient." *Id.*

So also here. "Missouri courts have never held that a summary statement … must explain the initiative's potential effect on existing [provisions] to be fair and sufficient." *Id.* "It is commonly understood that constitutional amendments will supersede [prior amendments] that are in contravention with the amended constitutional provisions." *Id.* As in *Hill*, so also here, "[t]he courts should not insert themselves unnecessarily into the summary drafting process where it is not necessary for the protection of voters." *Id.* at 315.

In fact, such a requirement would create voter confusion in many cases,

including this case. Referring to a prior ballot initiative from a previous election cycle in a summary statement risks voter confusion because, unlike the current proposal, the full materials from the prior cycle are not directly available to the voter. Both the entire ballot proposal and the Secretary of State's summary are available to voters at the polling place, while proposals from prior election cycles are not. Voters may not recall what happened at the November 2018 election, and the summary statement does not provide any details of it.

The circuit court's revised language, which states that SJR 38 would "[r]epeal rules for drawing state legislative districts approved by voters in November 2018 and replace them with rules proposed by the legislature," D19, at 10, exemplifies these risks of voter confusion. The circuit court's revised language implies that SJR 38 would do much more than it actually does. Here, SJR 38 will not "repeal" the legislative redistricting rules contained in Amendment 1. It preserves most of those rules, while adjusting, clarifying, and reordering them. For example, it creates new bodies in charge of legislative redistricting, which the General Assembly's summary statement accurately identifies. SJR 38 adds the "one person, one vote" methodology, which again the General Assembly's summary statement identifies. It redefines and reorders some of the other redistricting criteria. SJR 38 generally preserves many of the same categories set forth in Amendment 1, while clarifying or enhancing them, including minority voter protections, compactness,

competitiveness, and fairness.

Moreover, there are numerous other central provisions of Amendment 1 that SJR 38 does not affect—including but not limited to a two-year limitation on lobbying by exiting legislators, prohibiting candidate contributions from federal PACs, subjecting legislative records to the Sunshine Law, and prohibiting political fundraising on state property. *See Ritter v. Ashcroft*, 561 S.W.3d 74 (Mo. App. W.D. 2018). By claiming that the measure will "repeal" Amendment 1's provisions, D19, at 10, the circuit court's summary statement will mislead voters to think that all these provisions and methods of redistricting will no longer be in effect.

This Court rejected this type of language in *Cures Without Cloning v. Pund*, 259 S.W.3d 76 (Mo. App. W.D. 2008). *Pund* considered a ballot proposal that would have replaced the definition of "human cloning" that had been adopted by the voters in a proposal during the previous election cycle. *Id.* at 82. The Secretary of State's proposed language stated that the new proposal would "*repeal* the current ban on human cloning or attempted cloning … approved by the voters in November 2006." *Id.* This Court held that the use of the word "repeal" was insufficient and unfair because it misstated the effect of the initiative, since its actual effect was to replace the current definition with a broader definition that would "expand the definition of cloning in order to increase the number of cases to which the ban on human cloning would apply." *Id. Pund* concluded that the word "repeal" in the summary statement

referring to a preexisting constitutional provision was unfair and insufficient because the "language does not fairly summarize any goal or effect of the initiative proposal and is inadequate to give clear notice of its purpose." *Id.*

As both *Hill* and *Pund* indicate, requiring the ballot summary to identify preexisting laws or prior electoral outcomes impacted by the proposal would open a Pandora's box that would make many ballot summaries difficult to administer. Most ballot proposals will have some impact on preexisting laws, and many will affect many preexisting laws. To require an enumeration of laws and prior electoral outcomes affected by the proposal would render ballot summaries lengthy, confusing, and unhelpful to voters.

As *Hill* noted, no court has held that the initiative's impact on previous electoral outcomes is a central feature of a proposal; rather, "summary statements are designed to identify for voters the purpose of proposed changes." *Sedey*, 594 S.W.3d at 269. This is necessarily done by examining the plain text of the measure. SJR 38's purpose is evident from the bill's final legislative title: "regulating the legislature to limit the influence of partisan or other special interests." Nothing about the circuit court's revised redistricting language conveys that purpose.

II. The trial court erred in holding that the ballot title for SJR 38 was insufficient and unfair in its description of the proposal's prohibition against lobbyist gifts, because the first bullet point of the ballot summary fairly and sufficiently summarizes SJR 38 on this issue, in that SJR 38 will ban all lobbyist gifts under the plain and ordinary meaning of that phrase, and the pre-existing exception for gifts from family members is a minor detail in any event.

The first bullet point of the legislature's ballot summary states that SJR 38 will "[b]an all lobbyist gifts to legislators and their employees." D19, at 2. The trial court held that the statement that the proposal will "ban ***all*** lobbyist gifts" is "objectively untrue," and "literally false," because the proposal will permit gifts from "unpaid lobbyists," and the proposal leaves in place the exception for gifts from family members. D19, at 6-7. This holding was in error. Under the plain and ordinary meaning of the language, gifts from "unpaid lobbyists" and gifts from family members are not "lobbyist gifts."

The ballot summary is intended for review by the ordinary voter, who speaks plain English, and it is not intended to employ technical or legalistic terms. *See Stickler v. Ashcroft*, 539 S.W.3d 702, 715 (Mo. App. W.D. 2017) (holding that employing "everyday, colloquial language" is neither unfair nor insufficient). In

ordinary English, a "lobbyist" is a political professional who is *paid and employed* to attempt to influence the legislature on behalf of someone else. Webster's Third New International Dictionary defines "lobbyist" as "a person *employed and compensated* for lobbying." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1326 (2002) (emphasis added). Under this definition, which reflects widespread understanding and usage, the phrase "unpaid lobbyist" is an oxymoron. Ordinary voters, using everyday language, do not describe a concerned citizen who contacts a legislator about matters of importance to him or her as an "unpaid lobbyist," and there is no widespread public concern about the corrupting influence of gifts from such "unpaid lobbyists." On the contrary, in ordinary parlance, a "lobbyist" is someone who is "employed and compensated" by a special interest to influence the legislature, *id.*—and the proposal properly addresses concerns about "lobbyist gifts" from that class of professional lobbyists. *Id.*

For similar reasons, ordinary voters using plain English do not think of family members as "lobbyists," even if they happen to be otherwise employed as lobbyists. Likewise, there is no widespread public concern about the corrupting influence of gifts from family members. On the contrary, if a legislator's spouse or other family member who happens to be a professional lobbyist gives the legislator a birthday present, no ordinary voter would describe that as a "lobbyist gift." When ordinary Missourians contemplate a "lobbyist," the image that comes to mind is one of a paid

political operative, not a concerned citizen advocating for a cause without compensation—let alone one's husband, wife, child, or other family member.

Accordingly, the first bullet point is not "literally false," D19, at 7, but it accurately summarizes the effect of the measure as ordinary voters using plain English would understand it. The proposal "bans all lobbyist gifts" because the putative "exceptions" that the trial court identified—gifts from family members, and from concerned citizens who are not paid or employed to influence the legislature—are not things that ordinary voters using ordinary English would describe as "lobbyist gifts." Even if the phrases "paid lobbyists" and "unpaid lobbyists" have some specialized *legal* usage, the summary language is not required to use legalese.

In any event, the failure to mention a single *de minimis* exception to the general ban on lobbyist gifts, such as exceptions to gifts from family members, does not render the ballot summary insufficient and unfair. Such an exception is a minor detail that need not be addressed in the summary statement. *Protect Consumers' Access*, 488 S.W.3d at 656 (holding that a summary statement "need not set out the details of the proposal to be fair and sufficient."). There is no support for the argument that a summary statement, especially one confined to 50 words, needs to address the universe of all possible exceptions to a general rule.

In the trial court, Respondents contended that the summary statement is insufficient and unfair "it is misleading and manipulative for the fifty-word summary

statement to devote any precious space" to summarizing this aspect of the measure. D2, ¶ 30. The trial court did not accept this argument, and it lacks merit in any event, for two reasons. First, the lobbyist gift ban is plainly a central feature of SJR 38. SJR 38's legislative title reads that the bill proposes to amend the Missouri Constitution by "regulating the legislature to limit the influence of partisan or other special interests." D12, at 1. A blanket prohibition on lobbyist gifts clearly promotes the bill's purpose of limiting partisan and special-interest influence in the legislature. Thus, the ban on lobbyist gifts was a central feature, and it was appropriate for the General Assembly to identify the lobbyist gift regulations in the summary statement.

Second, even if the ban were a mere detail, including it in the summary statement would not render the summary insufficient or unfair. This Court rejected a similar argument in *Sedey*, 594 S.W.3d at 272. In *Sedey*, the proposal's proponent argued that one feature of the proposal addressed in the ballot summary should have been excluded because it was a minor detail, not a "central feature." *Id.* This Court held that, regardless of whether the feature was central or minor, "nothing precludes the summary statements from including such details." *Id.* As here, "Sedey's true complaint is that she believes the summary statements failed to make the best use of the limited space by including some information she deems uninteresting details and excluding other information she deems central features." But, as this Court held, "the test is not whether summary statements are 'the best utilization of the allotted

space.'" *Id.* (quoting *Bergman*, 988 S.W.2d at 92). "Merely including information that the proponent"—or, as here, the opponent—"of the initiative petitions deems not to be 'terribly interesting' does not render the language used insufficient and unfair." *Id.*

Finally, even if the phrase "ban all lobbyist gifts" were inaccurate as the trial court held—which it is not—the trial court should have engaged in a much narrower remedy than re-writing the ballot summary from top to bottom. In *Sedey* and many other cases, this Court has corrected insufficiency and unfairness by preserving existing ballot-title language to the extent possible, while making limited changes to correct inaccuracies or identify key features. *See infra*, Point VI. Here, for example, the trial court could have corrected the perceived insufficiency by simply omitting the word "all," or replacing "all" with "most," in the first bullet point. Instead, the trial court reordered the bullet points, moving the first bullet point third, and then completely re-wrote it. D19, at 10.

In the process, the trial court introduced insufficiency and unfairness. In particular, the trial court's third bullet point states that SJR 38 will "[l]ower legislative gift limit [*sic*] from $5 to $0, with exemptions for some lobbyists." D19, at 10. By suggesting that SJR 38 would create "exemptions for some lobbyists," the trial court's bullet point incorrectly indicates that some "person[s] employed and compensated for lobbying" may give legislators gifts, which is untrue. WEBSTER'S

THIRD, at 1326. In addition, the trial court's reference to the $5 limitation already in effect was not necessary to render the summary fair and sufficient. *See supra* Point I; *Hill*, 526 S.W.3d at 315 ("Missouri courts have never held that a summary statement prepared by the secretary of state must explain the initiative's potential effect on existing or future statutes to be fair and sufficient.").

III. The trial court erred in holding that the ballot title for SJR 38 was insufficient and unfair in its description of the proposal's effect on legislative campaign contribution limits, because the second bullet point of the ballot summary fairly and sufficiently summarizes SJR 38 on this issue, in that the proposal will both reduce the absolute dollar limit on contributions to senate candidates and reduce contribution limits for both house and senate candidates by eliminating the biannual adjustment for inflation for both kinds of candidates.

The second bullet point of the summary statement states that SJR 38 will "[r]educe legislative campaign contribution limits." D12, at 14. The trial court held that this bullet point is unfair and insufficient because the proposal will reduce campaign contribution limits only for state senators, not state representatives, and because the trial court viewed the reduction for state senators as minor. D19, at 7. This holding was in error. The second bullet point fairly and sufficiently summarizes SJR 38's impact on legislative campaign contribution limits.

As discussed above, SJR 38 makes two changes to the pre-existing contribution limits set forth in Article III, § 2 of the Constitution. First, it reduces the absolute dollar limit on contributions to candidates for state senator from $2,500 to $2,400. D12, at 2. Second, it eliminates the provision of Article III, § 2 that adjusts the limits for both state representatives and state senators for inflation on a biannual basis, which creates a biannual increase in the absolute dollar amount for both limitations. *Id.* If adopted, the latter change will result in an immediate reduction of the inflation-adjusted limits that went into effect for both state representatives and senators on January 1, 2020, and it will also prevent those upward adjustments from recurring in the future.

It is perfectly accurate to say that these changes will "reduce" legislative contribution limits. D12, at 14. "Reduce" means "to diminish in size, amount, extent, or number: make smaller." WEBSTER'S THIRD, at 1905. To change senate limits from $2,500 to $2,400 unquestionably "diminish[es] in … amount" that limitation. *Id.* And the inevitable effect of the elimination of the biannual inflation adjustment is also to "diminish in … amount" and "make smaller" the amount of money that candidates for both house and senate receive per contribution. *Id.* In addition to the immediate reduction from the inflation-adjusted levels for January 1, 2020, if that inflation adjustment were left in place, the amount that candidates may receive in absolute dollars would increase every two years, on January 1 of even-

numbered years. MO. CONST. art. III, § 2. Without that adjustment, those amounts will remain frozen at their current absolute numbers indefinitely, which will "reduce" contribution limits from what their levels would be under current law, every two years into the future. D12, at 14.

For this reason, both of the trial court's criticisms of this bullet point were erroneous. The trial court was incorrect in holding that only senate contributions are "reduce[d]," because the latter change—eliminating the biannual upward adjustment for inflation—applies to both house and senate contribution limits. D12, at 2. And the trial court erred in holding that the changes were too "meager" to warrant mentioning in the ballot summary. D19, at 7. As this Court held in *Hill*, "nothing precludes the summary statements from including such details." *Sedey*, 594 S.W.3d at 272. Moreover, the purpose of the summary statement is to provide enough information to allow the voter to conduct further investigation about the proposal if he or she desires. *Hill*, 526 S.W.3d at 308. If a voter is concerned about the *degree* of the reduction, the ballot summary provides ample information to allow that voter to seek more information. "It is the responsibility of each voter to educate himself or herself about the proposed measure, and it is the role of those supporting or opposing the measure to articulate their views of its impact through the political process." *Id.*

In addition, even if SJR 38 only reduced campaign contributions to candidates

for state senate, not house candidates, the summary statement would still be sufficient and fair. The second bullet point states that SJR 38 will "[r]educe *legislative* campaign contribution limits." D19, at 2 (emphasis added). The second bullet point does not state that SJR 38 will reduce "*all* legislative campaign contribution limits," and it is indisputable that contribution limits for senate candidates constitute "legislative campaign contribution limits." *Id.* This is a central feature of SJR 38 because it directly advances the measure's stated purpose, which is evident from the bill's legislative title of reducing partisan and special-interest influence in the legislature. There is no support in Missouri case law for the proposition that a summary statement is unfair and insufficient for accurately summarizing a central feature of a ballot measure. Again, the summary need not specify every detail of the measure. If the voter wishes to know exactly which "legislative campaign contribution limits" will be reduced, and how they will be affected, the summary statement provides ample notice for them to seek more information. *Hill*, 526 S.W.3d at 308.

Finally, as discussed further below, *see infra* Point VI, the trial court erred in rewriting this bullet point entirely. The trial court retained only two full words ("campaign contribution") and a portion of a third word ("limit") from the General Assembly's already fair and sufficient summary statement. The court changed the verb "reduce" without finding that that word was insufficient; removed the word

"legislative," which is an accurate term to describe the elected offices affected; and added the amount by which contribution limits would be reduced or lowered without specifically finding that the absence of that detail was misleading, unfair, or insufficient. D19, at 10. In addition, the trial court's new bullet point is misleading because it does not mention the elimination of the inflation adjustment, so it incorrectly implies that the reduction in senate limits is the only change. In adopting this alternative, the circuit court exceeded its authority by engaging in a wholesale rewrite of the General Assembly's summary statement. *Pund*, 259 S.W.3d at 83 (holding that "[t]he circuit court has authority to modify the original summary statement," but "the court was not authorized to re-write the entire summary statement.").

IV. The trial court erred in holding that the ballot title for SJR 38 is insufficient and unfair in its statement that the proposal will create citizen-led independent bipartisan commissions to draw state legislative districts, because the third bullet point of the ballot summary fairly and accurately summarizes SJR 38 on this issue, in that the proposal will create new commissions that differ in their authority, responsibility, and manner of selection from pre-existing commissions, and those commissions are independent of control by state officials, led by citizens, and composed of equal members from the two major political parties.

The third bullet point of the summary statement advises voters that SJR 38 shall "*create citizen-led independent bipartisan commissions* to draw state legislative districts based on one person, one vote, minority voter protection, compactness, competitiveness, fairness, and other criteria." D12, at 14-15 (italics added). The trial court held that the first (italicized) phrase of this bullet point—"create citizen-led independent bipartisan commissions," *id.*—is insufficient and unfair because supposedly "[n]early every aspect of this statement is wrong or misleading." D19, at 8. This holding was in error. Advising voters that SJR 38 will "create citizen-led independent bipartisan commissions to draw state legislative

districts" is a fair, accurate, and sufficient summary of SJR 38's effect on the process of redistricting. The circuit court advanced three criticisms of this phrase, but on each point, the criticism is mistaken.

First, the trial court held that "SJR 38 will not 'create' anything – it simply renames two legislative commissions that already exist." D19, at 8. This is incorrect. As discussed above in the Statement of Facts, the new citizen-led independent bipartisan commissions differ from the preexisting "apportionment commissions" in their principal responsibilities, their authority, and their method of selection. Unlike the current apportionment committees, the new committees have primary authority and responsibility to draw legislative districts for the House and Senate in the first instance—a task currently assigned to the state demographer. D12, at 4, 13. Under current law, the apportionment commissions merely review the districts drawn up by the demographer, while the new independent bipartisan commissions have this responsibility in the first instance. *Id.* Similarly, the composition and the manner of selection of the new commissions differs from the current apportionment committees. D12, at 7-8, 11-12.

In ordinary parlance, a proposal that establishes commissions that are composed of different members, selected in a different manner, have different responsibilities, and perform different roles in the redistricting process, can fairly be said to "create" those commissions. To "create" means "to cause to be or to produce

by fiat or by mental, moral, or legal action, as: to invest with a new form, office, or rank: constitute by an act of law or sovereignty." *See* WEBSTER'S THIRD, at 532 (division omitted). Here, if enacted, SJR 38 will "cause to be" and "produce" the new commissions "by legal action," and it will "constitute" them "by an act or law or sovereignty" of amending the Missouri Constitution. *Id.* And even if one thinks that SJR 38 is actually re-casting the old commissions, at very least the proposal will "invest [them] with a new form." *Id.* Thus, in ordinary English, SJR 38 will "create" these commissions—it does not merely "rename" existing commissions, as the circuit court erroneously held. D19, at 8. In fact, to state that SJR 38 merely "renames" the commissions would itself be unfair and insufficient, because they new commissions have several significant differences from the old ones.

Respondents contended in the lower court that the Senate's research summary described SJR 38 as merely renaming existing commissions. For the reasons just discussed, the summary statement is more accurate than the research summary on this point. Nothing prevents the Legislature from presenting *more* accurate information to the voters in the summary statement than preliminary information prepared by legislative staffers. In any event, even if there were room to disagree on the question at which point a newly constituted commission becomes a "new" commission that is "created," the Legislature's statement is perfectly within the range of reasonableness permitted by law. "[T]en different writers would produce

ten different versions," and "there are many appropriate and adequate ways of writing the summary ballot language." *Asher v. Carnahan*, 268 S.W.3d 427, 431 (Mo. App. W.D. 2008).

Furthermore, even if the trial court thought the word "create" was incorrect, the proper remedy was not to re-write (and re-order) the third bullet point completely, as the trial court did. D19, at 10. The trial court's re-write of this bullet point did not retain any content from the original version. *See id.* But the trial court's concern—even if it were valid, which it is not—could have been addressed with a much narrower remedy, such as replacing "create" with "employ" in the bullet point drafted by the Legislature. D12, at 14; *see infra*, Point VI.

Second, the trial court held that it was insufficient and unfair for the third bullet point to describe the new commissions as "citizen-led," because "[t]he words 'citizen-led' imply use of a redistricting system like that in Michigan, where all citizens are qualified to apply for the commissions…." D19, at 8 (citing MICH. CONST. art. 4, § 6). Again, this is incorrect. The new commissions are "citizen-led" within the ordinary and natural meaning of that phrase, and thus the description is fair and accurate to the average voter. The word "citizen" means "a member of a state: one who is claimed as a member of a state," and (more specifically) "a civilian as opposed to a soldier, policeman, or other specialized servant or functionary of the state." WEBSTER'S THIRD, at 411. The new house and senate independent bipartisan

commissions are unquestionably led by "citizens" under this plain meaning of this term. *See* D12, at 4, 13. Notably in this context, the commissions are not led by public officials, *see id.*, and thus they are led by "citizens" in the specific sense of "civilians" who are not "other specialized servant[s] of the state," such as public officials. WEBSTER'S THIRD, at 411.

Furthermore, by citing provisions of the Michigan Constitution and procedures used for redistricting in Michigan, D19, at 8, the trial court erroneously attributed specialized legal knowledge to average voters. Most *lawyers* in Missouri—including the undersigned counsel—are likely unfamiliar with provisions of Michigan's Constitution and its redistricting procedures. The average voter's level of familiarity with such procedures is undoubtedly no greater, and thus the trial court's attribution of such knowledge to the average voter was erroneous.

The trial court also reasoned that the commissions are not "citizen-led" because they "will consist of partisan appointees nominated by each political party" instead of citizens at random. D19, at 8. But the fact that the two major political parties play a role in selecting the citizens on the commissions does not stop them from being "citizen-led." A citizen selected in part by a political party is still "a member of a state," and "a civilian as opposed to [an] … other specialized servant or functionary of the state." WEBSTER'S THIRD, at 411. Moreover, the summary statement alerts voters of the *partisan* composition of the commissions by

immediately using the word "bipartisan" immediately after "citizen-led," which alerts voters of the bipartisan involvement of political parties in the selection process. D12, at 14.

In addition, even if the phrase "citizen-led" were misleading or inaccurate in any way—which it is not—the trial court could have addressed that perceived insufficiency through a much narrower remedy, such as simply omitting the phrase "citizen-led." Instead, the trial court engaged in a wholesale rewrite of the entire bullet point and ballot summary, thus exceeding its authority. *See infra* Point VI.

Third, the trial court held that the third bullet point's use of the word "independent" is insufficient and unfair because it "implies that the commission's members will be independent of the political process." D19, at 8. On the contrary, describing the commissions as "independent" is a fair and accurate description of the commissions. The word "independent" means "not subject to control by others: not subordinate: self-governing." WEBSTER'S THIRD, at 1148. Under SJR 38, the commissions are "not subject to control by others," "not subordinate," and "self-governing." *Id.* Once constituted, the commissions elect their own leaders, conduct their own business, draw their own maps, and prepare their own final report, without any outside oversight or control from elected officials. *See* D12, at 9-10, 11-12.

The fairness and sufficiency of the word "independent" in this context draws further support from the fact that the phrase "*independent* bipartisan citizens

commissions" is repeatedly used in the proposal itself to identify and describe these commissions. *See, e.g.*, D12, at 4, 11. A summary statement is not insufficient and unfair if it uses language taken directly from the measure itself, even the measure's opponents would prefer different language. *State ex rel. Humane Soc'y of Missouri v. Beetem*, 317 S.W.3d 669, 673 (Mo. App. W.D. 2010) (holding summary statement's use of the term "puppy mill cruelty" was not insufficient and unfair when the term was "lifted directly from the initiative").

In addition, as with "citizen-led," the use of the word "bipartisan" immediately after "independent" fairly alerts the average voter that the political parties are involved in composing the commissions. D12, at 14. The trial court held that the word "independent" was misleading because it "implies that the commissions' members will be independent of the political process." D19, at 8. But the members' only involvement in "the political process" is the fact that they are nominated by committees of the two major political parties—a fact that the summary fairly notes through the use of the word "bipartisan." D12, at 14.

Moreover, while the trial court emphasized Michigan's redistricting procedures in criticizing the use of the word "citizen-led," when it came to the word "independent," the court overlooked the fact that many other States describe their similar redistricting commissions as "independent," just as SJR 38 does. In fact, the description of these parallel commissions in other States as "independent" is widely

used in public discourse and far more widespread among average voters than knowledge of any specific provision of the Michigan Constitution. For example, Arizona's redistricting commission is called the "Arizona Independent Redistricting Commission." The U.S. Supreme Court described the body's composition and upheld its constitutionality in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015). Like the Missouri commissions proposed under SJR 38, Arizona's commissions require multiple actors to be involved in members' nomination and appointment, and they are composed of members from the two major political parties. *Id.* at 2661. Many other States have similar commissions that widely described as "independent." *See* "Independent Redistricting Commissions," *Ballotpedia* (visited Aug. 21, 2020) *at* https://ballotpedia.org/Independent_redistricting_commissions (identifying similar "independent" redistricting commissions in 12 states).

Finally, even if there were any unfairness or insufficiency in the third bullet points use of the word "independent"—which there is not—the trial court could have addressed that perceived insufficiency through a narrower remedy, such as simply omitting that word from the ballot title. The trial court's decision to rewrite the bullet point from beginning to end, without retaining a single word of the original language, exceeded its authority and was in error. *See infra*, Point VI.

V. The trial court erred in holding that the ballot title for SJR 38 is insufficient and unfair in its description of the criteria for redistricting, because the third bullet point of the ballot summary fairly and sufficiently summarizes SJR 38 on this issue, in that the proposal will adopt new criteria and methodologies for redistricting that are accurately summarized in the third bullet point.

The third bullet point in the ballot summary states that SJR 38 will "[c]reate citizen-led independent bipartisan commissions to draw state legislative districts *based on one person, one vote, minority voter protections, compactness, competitiveness, fairness, and other criteria*." D12, at 14-15 (emphasis added). The trial court held that the latter (italicized) phrase in the third bullet point, which describes the criteria that the new commissions will use to perform redistricting, is insufficient and unfair because it supposedly "falsely suggests to voters the measure will introduce a number of new criteria to be considered in drawing legislative districts when consideration of most of those criteria is already mandated." D19, at 8. This holding was erroneous. The third bullet point's statement that the new commissions will conduct redistricting "based on" the listed criteria is a true, accurate, and fair summary of the proposal on that point.

As an initial matter, the trial court's conclusion that the bullet point "falsely

suggests" that the listed redistricting criteria will be entirely new and different from preexisting criteria, D19, at 8, is simply incorrect. The bullet point does not make any statement whether the listed criteria will be new or preexisting. It simply states that the new independent bipartisan commissions will "draw state legislative districts *based on*" the criteria listed in the bullet point. D12, at 15 (emphasis added). The summary makes no statement, one way or the other, about whether these criteria are the same, similar to, or different from criteria that are already used. *Id.* And neither Respondents nor the circuit court contended that the criteria listed in the bullet point—"one person, one vote, minority voter protection, compactness, competitiveness, fairness, and other criteria," *id.*—are *not* the criteria actually set forth for consideration in SJR 38. In fact, that list of criteria is a fair and accurate summary of the criteria provided for in the proposal. *See* D12, at 4-7.

Within the 50-word limitation, the summary statement was not required to identify, and could not possibly have identified, every similarity and/or difference between the new criteria and the previous criteria. On the contrary, as discussed above in Point I, there is no requirement that the summary statement recite the proposal's impact on preexisting laws at all. *Hill*, 526 S.W.3d at 315. Instead, by setting forth the criteria to be used in summary fashion, the summary properly advises the voter of the central feature and purpose of this aspect of the proposal, so that the voter can "make an informed choice on whether to investigate the matter

further." *Protect Consumers' Access*, 488 S.W.3d at 671.

The trial court also reasoned that the bullet point is misleading because SJR 38 "will actually *reduce* the relevance of many of the criteria." D19, at 8. On the contrary, the fact that SJR 38 clarifies and reorders the priority of some redistricting criteria, as discussed in detail in the Statement of Facts, does render the summary statement insufficient or unfair. The summary statement was not required to exhaustively specify the effects of the proposal on the prioritization of redistricting criteria already provided in Missouri law. *Hill*, 526 S.W.3d at 315. In fact, it could not possibly do so within the 50-word limit. *Id.* at 308 ("A summary statement is not intended to, *nor often can it*, give voters detailed information about the proposed measure.") (emphasis added). Again, all that was required is to notify the voter of the purpose and central features of the initiative, to give the voter sufficient information to seek more detailed information if the voter desires.

The trial court also held that "the Constitution already contains robust protections for minority voters," and that the bullet point is misleading because "SJR 38 would significantly weaken these protections." D19, at 9. This reasoning was incorrect on two points. First, the summary was not required to state whether the proposal would "strengthen" or "weaken" protections for minority voters as compared to existing law, and in fact it did not purport to do so. *Hill*, 526 S.W.3d at 315. Instead, the summary statement correctly states that one important criterion

that the new commissions will consider is "minority voter protection," without further comment. D12, at 15. SJR 38 provides that "no district shall be drawn in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," and that "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 own choosing." *Id.* at 5. It also provides that these minority-protection "principles shall take precedence over any other part of this constitution." *Id.* Accordingly, it is true and correct to say that the commissions shall "draw state legislative districts based on … minority voter protection" under SJR 38, as the third bullet point states. D12, at 15.

Second, the trial court's statement that SJR 38 will "significantly weaken" minority voter protections is incorrect. The trial court held that SJR 38 would "significantly weaken" those protections by eliminating current law's protection for "racial or language minorities," and replacing it with protection based on "race or color." D19, at 9. Neither Respondents nor the trial court identified any "language minorities" whose rights to vote would not also be protected under SJR 38's protection for "race or color." D12, at 5. There was no basis to conclude that SJR 38 would "significantly weaken" minority voter protections.

Finally, the trial court reasoned that "[t]he Constitution also already requires

legislative districts to be drawn on the basis of fairness and competitiveness," and that "SJR 38 would actually render these criteria *less* important by providing that every other consideration shall take precedence" over them. D19, at 8 (quotation omitted). But those criteria are still mandatory and must be considered, and SJR 38's reordering of the priorities for the various criteria is "detailed information about the proposed measure" of the proposal that could not possibly be summarized within the 50-word constraint. *Hill*, 526 S.W.3d at 308. SJR 38 explicitly requires both fairness and competitiveness to be considered in redistricting, D12, at 7, and so it is accurate for the summary statement to advise voters that redistricting will be based, in part, on "competitiveness, fairness, and other criteria." D12, at 15. In fact, the proposal's reference to "other criteria" specifically notifies the voter that there is more specific information about the use of redistricting criteria that is not set forth in detail in the summary statement.

Moreover, to the extent that SJR 38 lowers the prioritization of fairness and competitiveness, it also *elevates* the prioritization of other important redistricting factors—such as compactness and preservation of political communities—by requiring them to be considered earlier in the redistricting process. D12, at 4-6. If the summary statement were required to state that fairness and compactness will be reduced in priority, by the same logic it would be required to state that compactness and preserving community boundaries will be elevated in priority too. No summary

statement could provide this level of detail, and no summary statement is required to do so.

Finally, if the trial court thought that there was an unfairness and sufficiency in the language the legislature provided—which there was not—it should have adopted a narrower remedy of making minor changes within the language the legislature proposed, instead of rewriting the bullet point in its entirety. *See* D19, at 10; *see infra* Point VI.

VI. The trial court erred in adopting entirely new language for the ballot summary for SJR 38, because the trial court should have addressed any perceived insufficiencies by making changes within the existing language supplied by the legislature, in that it exceeded the trial court's authority and the appropriate judicial role for the trial court to engage in a complete re-writing of the ballot title, and the trial court's substitute language is itself both insufficient and unfair.

As noted above in each prior Point Relied On, the trial court in this case did not work within the language provided by the legislature for the summary statement to correct any perceived deficiencies. On the contrary, the trial court re-wrote the legislature's summary statement from top to bottom, reversing the order of the bullet points and completely rewriting each bullet point. D19, at 10. This was error. This Court has repeatedly emphasized the courts' more limited role in reviewing ballot

language for sufficiency and fairness, and it has consistently applied the more narrow remedy of making targeted changes within the preexisting language prepared by the Legislature or Secretary of State. In both principle and practice, this Court's cases instruct the circuit court to use "a scalpel rather than a blunderbuss." *Heckler v. Chaney*, 470 U.S. 821, 852 (1985) (Marshall, J., concurring in the judgment). The circuit court here did the opposite.

First, at the level of principle, both the Missouri Supreme Court and this Court have repeatedly emphasized the narrow and limited judicial role in reviewing ballot-summary language. This Court often reaffirms the Supreme Court's instruction that "[w]hen 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 (quoting *Pund*, 259 S.W.3d at 81 (quoting *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990))). "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.

The courts' "restraint, trepidation, and healthy suspicion" extends to its role in modifying ballot-summary language to prevent insufficiency and unfairness.

"Missouri courts have defined 'fair' and 'sufficient' 'in a manner that *gives discretion* to the Secretary,'" or, in this case, the Legislature. *Sedey*, 594 S.W.3d at 263 (emphasis added) (quoting *Billington*, 380 S.W.3d at 591-92). "The applicable question is not whether the summary drafted is the best summary." *Id.* On the contrary, even where the language drafted by the political branches "may not have been ideal," the courts lack authority to re-write it. *Id.* at 265. "If charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions." *Hill*, 526 S.W.3d at 322 (quoting *Asher v. Carnahan*, 268 S.W.3d 427, 431 (Mo. App. W.D. 2008)). To this end, this Court has aptly described the reviewing court's authority by stating that Chapter 116 "authorize[s] the courts *to modify* the language of a summary statement found to be insufficient or unfair," not to re-write it. *Seay*, 439 S.W.3d at 895 (emphasis added).

Simply put, it is not the court's role "to write a 'better' summary," *State ex rel. Kander v. Green*, 462 S.W.3d 844, 851 (Mo. App. W.D. 2015), and attempting to do so risks embroiling the courts in "partisan" battles. *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827.

For this reason, in *Pund*, this Court held that the lower court "was not authorized to re-write the entire summary statement" based on the finding that one part of it was insufficient and unfair. 259 S.W.3d at 83. In *Pund*, the Court held that the summary statement was insufficient and unfair because it stated that the new

initiative would "repeal" a ban on human cloning enacted by voters in the previous election cycle, when in fact the proposal would replace that definition with a broader definition. *Id.* The Court held that this insufficiency should be corrected by using a narrow remedy of replacing the word "repeal" with "change," so that the summary stated that the proposal would "*change* the current ban on human cloning or attempted human cloning…." *Id.* (emphasis added). And the Court held that it was error for the trial court to apply the broader remedy of "re-writ[ing] the entire summary statement." *Id.*

In practice, this Court has consistently followed these principles in addressing insufficiency and unfairness in ballot language. For example, in *Sedey*, this Court held that the ballot summary's incorrect statement that election judges would transfer provisional votes to the right ballot should be corrected by replacing it with the more general statement that the provisional voters would "have their votes counted on candidates and measures for which the voter is otherwise entitled to vote," while leaving the rest of the summary intact. *Sedey*, 594 S.W.3d at 267-68. Likewise, to eliminate inaccuracy, *Sedey* carefully amended a bullet point that stated that the proposal would "make voters' method of voting a public record" to state that the proposal would "make available, using public records, a list of all voters casting absentee ballots," while leaving the rest of the summary intact. *Id.* at 271-72.

Similarly, in *Seay*, this Court corrected the material omission of the fact that

the expanded voting was contingent on legislative funding, by simply adding language to the ballot summary to include that fact, while leaving the rest of the summary intact: "but only if the legislature and the governor appropriate and disburse funds to pay for the increased costs of such voting." *Seay*, 439 S.W.3d at 895.

Likewise, in *Protect Consumers' Access*, the Court held that the insufficiency of failing to notify voters that the proposal related to MO HealthNet services could be remedied merely by inserting a reference to MO HealthNet into the summary; the Court expressly "decline[d] to go further and require that the services being provided are described as 'healthcare' services, as requested by Plaintiffs." 488 S.W.3d at 671-72. *Protect Consumers' Access* also held that the inaccuracy of referring to "employees," when personal care attendants who were not employees were included in the proposal, could be corrected "by including in the Summary Statement a separate reference to personal care attendants," without further changes. *Id.* at 672. The Court thus added the phrases "or personal care attendant" and "under the MO HealthNet Program" to the ballot summary, while leaving the rest of the language intact. *Id.* at 673.

Other cases are in accord with this narrow approach to revising ballot-title language. Perhaps most notably, *Pund* itself rectified an insufficiency by replacing the single word "repeal" with the word "change." *Pund*, 259 S.W.3d at 83. To be

sure, there may be extraordinary cases where the summary is so misleading in its entirety as to require a complete re-write. *Cf. Missourians Against Human Cloning*, 190 S.W.3d at 457 ("There may well be a situation where an initiative's language and purpose are so absurd or unsupportable that merely summarizing the initiative without explanation would be deceptive and misleading."). But under this Court's cases, that is a last resort. This Court consistently prefers to use "a scalpel rather than a blunderbuss" when correcting insufficient and unfair ballot language. *Heckler*, 470 U.S. at 852. The circuit court here took the opposite approach, and it erred in doing so.

Moreover, the circuit court's approach was also erroneous because it interjected unfairness and insufficiency into the ballot title by adopting language that will needlessly prejudice voters against the proposal. In *Hill*, this Court rejected the insertion of alternative language that includes "partial terms that carry their own baggage either positive or negative within some members of the citizenry." 526 S.W.3d at 320. "The Secretary of State must attempt to draft neutral language that is fair and impartial and avoid phrases" that will "immediately prejudice a voter for or against the initiative." *Id.* *A fortiori*, the reviewing court must do so as well. *Id.* But here, the trial court's alternative language departs from this principle of neutrality and adopts "partial terms that carry their own baggage" and will "immediately prejudice a voter … against the initiative." *Id.*

Among other things, the trial court's alternative language reorders the bullet points to place the third one first, and then redrafts that bullet point to incorrectly state that a "yes" vote on the measure will "repeal" Amendment 1 passed in 2018. D19, at 10. The order of the other two bullet points are reversed as well, and redrafted completely to understate the effect of the other provisions of SJR 38, as discussed in further detail above. *Id.* These changes will naturally "prejudice a voter … against the initiative," and the trial court exceeded its authority in adopting them. 526 S.W.3d at 320.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Circuit Court of Cole County and certify the original summary statement for Senate Joint Resolution 38.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed electronically pursuant to Rule 103 through Missouri Case Net, on this 21st day of August, 2020, to be served electronically on all counsel of record.

/s/ D. John Sauer

CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and this Court's Local Rule 41 in that excluding the cover, table of contents, table of authorities, certificates, and signature blocks, the brief contains 13,806 words.

/s/ D. John Sauer