No. WD83962

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

BARBARA PIPPENS, *et al.*,
Respondents,

v.

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

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

RESPONDENTS' BRIEF

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SUMMARY OF CASE

When the legislature summarizes a ballot measure it must provide "a true and impartial statement of the purposes of the proposed measure in language . . . no[t] likely to create prejudice [] for . . . the measure." § 116.155, RSMo. The summary here does not satisfy those requirements.

The legislature's summary had three bullet points. The first was untrue because it told voters the measure would ban "all" lobbyist gifts to legislators and their employees, but it would not. The second was neither true nor impartial because it stated the measure would "reduce legislative campaign contribution" limits when it would not reduce limits on the vast majority of legislative campaigns and would reduce Senate contribution limits by only 4%. The third was neither true nor impartial; it inaccurately represented several aspects of the proposed changes to the redistricting process and did so in argumentative language likely to create prejudice for the measure. Nor did it reference in any way the measure's central feature – the repeal of the 2018 voter-approved Amendment 1.

The issues with the first two bullets are straightforward and easily remedied. The problems with the third bullet point are far more profound—they go to the heart of Missouri's electoral process—and require more detailed analysis.

As with most things in life, context is important. Just two years ago, Missourians invoked their right to "propose and enact amendments to the constitution by the initiative, independent of the General Assembly." Mo. Const. art. III, § 49. They passed

"Amendment 1," which made a number of changes to the Constitution, including restrictions on lobbyist gifts to legislators and campaign contribution limits.

But Amendment 1 also addressed redistricting. Its "main innovations" were to "alter the substantive standards which guide the drawing of new [legislative] districts, and to provide for a non-partisan official" to manage the process. *Ritter v. Ashcroft*, 561 S.W.3d 74, 94 (Mo. App. 2018). By adopting Amendment 1, Missourians chose to "substantially modify the [redistricting] procedure." *Id.* at 80.

They did this in the midst of a national debate about partisan gerrymandering. Indeed, Missouri's effort was so noteworthy that when the United States Supreme Court historically concluded partisan gerrymandering does not present a federally justiciable controversy, Amendment 1 received special mention. The Court observed "the States . . . are actively addressing the issue on a number of fronts" and pointed out that Missouri voters "overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

Before the 2018 changes could be fully implemented and a state demographer chosen, however, the General Assembly proposed Senate Joint Resolution 38 ("SJR 38") to authorize a vote to undo them. *See* D12; Respondents' Appendix (App.) at A1-15. As discussed below, SJR 38 will—if adopted—undo the redistricting scheme Missourians adopted in Amendment 1 and return to a process

substantially similar to the old one, but with new criteria for how maps will be drawn.

The question for this Court is not whether SJR 38 is a good idea – that's for the voters to decide. Instead, this Court must decide whether the General Assembly is being straight with voters about what SJR 38 will do. Petitioners welcome a fair debate on the merits.

But they ask that the summary given to voters fairly and sufficiently describe what would happen if the legislature's plan is adopted – that's exactly what § 116.155 requires. The trial court correctly found the legislature's summary was likely to create prejudice, misleading, and deceptive and thus certified a new one. This Court should affirm.

STATEMENT OF FACTS

Petitioners are dissatisfied with the State's statement of facts. Rule 84.04(f). Because SJR 38 proposes to amend sections 2, 3, and 7 of Article III of the Missouri Constitution – which we just amended in 2018 – some historical context is necessary to fully understand the issues on appeal.

I. The Pre-2018 Landscape

Before 2018, Article III addressed only the process for drawing legislative districts. It did not restrict lobbyist gifts or campaign contributions.[1]

[1] In 2016, voters had established campaign contribution limits in Article VIII, § 23.

Back then, two reapportionment commissions (they had no official names) – one for the House of Representatives and one for the Senate – were tasked with drawing legislative district maps. Mo. Const. art. III, §§ 2, 7 (as amended Nov. 2, 1982); App. at A23-26.[2]

The Congressional District Committees of the two major parties nominated two members of their party to serve on the House commission. *Id.* § 2; App. at A23-25. The nominees had to be residents of the Congressional District and there could be no more than one per legislative district. *Id.* The Governor then selected one person per Congressional District per party to serve on the House commission. *Id.* The State Committee of each of the two major parties nominated 10 people to serve on the Senate commission. *Id.* § 7; App. at A25-26. The Governor then selected five appointees from each party, creating a commission of 10. *Id.* The Constitution set no other qualifications or limitations on who could be nominated, but barred commission members from holding office for four years after completing the redistricting process. Mo. Const. art. III, §§ 2, 7 (as amended Nov. 2, 1982); App. at A23-26.

The Constitution gave little guidance on how the commissions were to draw maps. It required the House commission to draw districts as nearly equal in population as possible and said they should be contiguous and compact. *Id.* § 2; App. at A23-25. The Senate commission was to draw districts as equal in population as possible and not cross county lines except under limited

[2] A copy of the pre-2018 Missouri Constitution is included in the Appendix to Respondents' Brief. *See* App. at A23-28.

circumstances. *Id.* § 7; App. at A25-26 . But there was no priority assigned to those criteria. *See id.* §§ 2, 7; App. at A23-28. Partisan makeup of the districts was not addressed. *See id.* Nor were there provisions protecting minority voters. *See id.*

To finish their work, the commissions had to agree to their respective maps by a 70% vote. *Id.* If the commissions couldn't agree, six appellate judges were selected to draw the maps. *Id.*

II. Amendment 1

In 2018, Amendment 1 "substantially modified" this system. *Ritter*, 561 S.W.3d at 85. It also imposed limits on lobbyist gifts to legislators and employees of the General Assembly, Mo. Const. art. III, § 2(b); App. at A29-30, and lowered campaign contribution limits for General Assembly candidates, *id.* § 2(c); App. at A30.

Amendment 1 prohibited gifts in excess of $5.00 from "paid" lobbyists to legislators and their staff, with an exception for gifts from anyone related to a legislator or staff within the fourth degree of blood or marriage. *Id.* § 2(b); App. at A29-30. Contribution limits were set at $2,000 for House candidates and $2,500 for Senate candidates.[3]

Amendment 1 established a nonpartisan state demographer—rather than the commissions—to draw the initial maps. Mo. Const. art. III, § 3; App. at A30-33. It included a process to choose the demographer. *Id.* State residents apply to the State Auditor for the

[3] For context, Article VIII then imposed a $2,600 contribution cap for all legislators. Mo. Const. art. VIII, § 23.3(1)(a).

position. *Id.* The Auditor evaluates the applications and delivers a list of names to the Senate majority and minority leaders. *Id.*

If the Senate leaders agree on a name, that person is the demographer. *Id.* If they cannot agree, each leader may remove applicants from the list. *Id.* The Auditor then conducts a random lottery of the individuals left on the list to select the demographer. *Id.* The demographer may serve two five-year terms, cannot have served in a partisan position during the prior four years, and cannot serve in the General Assembly for four years following presentation of her most recent redistricting map. *Id.*

Amendment 1 also established criteria by which the demographer is to draw the maps and their relative priority. After minority voter protection, partisan fairness has the highest priority. *Id.* These criteria also require that districts be drawn so as not to create "efficiency gaps" where voters of one party or the other waste their votes. *Id.* Instead, districts should be competitive for both major parties. *Id.*

Districts cannot 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, whether by themselves or by voting in concert with other persons." *Id.* When drawing the maps, the demographer must also consider contiguousness, political boundaries, and compactness. *Id.*

While Amendment 1 gave the demographer initial map-drawing authority, it did not do away with the commissions. They

are still selected and appointed as they were before 2018. But, rather than initially drawing legislative maps, the commissions are instead allowed to override and change the demographer's maps by a supermajority vote. *Id.* If the commissions fail to make changes, the demographer's maps become final. *Id.*

Commission members are still prohibited from holding office in the General Assembly for four years after the final statement of redistricting is filed with the Secretary of State. *Id.*

III. SJR 38's Proposed Changes

On May 13, 2020, the General Assembly passed SJR 38. If approved, SJR 38 will change sections 2, 3, and 7 of Article III. *See* D12; App. at A1. Specifically, SJR 38 would alter the restrictions on lobbyist gifts and campaign contributions while eliminating the demographer-led redistricting process, replacing it with a system substantially similar to the pre-2018 system and re-prioritizing the map-drawing criteria.

With respect to lobbyist gifts, SJR 38 would delete the current $5.00 limit on gifts from paid lobbyists, reducing it to $0. D12:P1 (§ 2, line 8-11); App. at A1.[4] It would leave in place current language limiting the ban to "paid lobbyists." *Id.* And it would not remove the exception for gifts from anyone related to a legislator or employee "within the fourth degree by blood or marriage." D12:P2 (§ 2, line 14-17); App. at A2.

[4] SJR 38 contains line numbering that is consistent across pages within each constitutional section being modified.

SJR 38 would reduce the campaign contribution limit for senate campaigns from $2,500 to $2,400. D12:P2 (§ 2, line 30-31); App. at A2. It would also eliminate a provision requiring bi-annual adjustments for inflation. D12:P2 (§ 2, line 37-41); App. at A2. However, SJR 38 would not change the current $2,000 campaign contribution limit for House campaigns. D12:P2(§ 2, line 32-33); App. at A2.[5] The General Assembly consists of 163 Representatives and 34 Senators. Mo. Const. art. III, §§ 3(c), 5; App. at A31, A34.

SJR 38 would delete all of subdivisions (a) and (b) of Article III, § 3 – the provisions that create the post of nonpartisan state demographer. D12:P3-4 (§ 3, line 1-32); App. at A3-4. It would also excise any other references to the demographer from Article III, §§ 3 and 7. *See* D12:P3-14; App. at A3-14. SJR 38 would further eliminate nearly all of current Article III, § 3(c)(1)(a)-(b), which set the criteria that guide redistricting. D12:P4 (§ 3, line 43-98); App. at A4.

> In particular, SJR 38 would delete the requirement that:
>
> Notwithstanding 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

[5] As discussed in Section II.B, the State *conceded* below that SJR 38 would not reduce the limits for House campaigns. The State's brief now tries to insert information from outside the record on this important point. That's improper for the reasons discussed below.

> representatives of their choice, whether by themselves or by voting in concert with other persons.

D12:P5 (§ 3, line 58-62); App. at A5. SJR 38 would replace this language with:

> The following principals 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 draw 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:P5 (§ 3, line 62-70); App. at A5. SJR 38 would leave in place the current mandate that districts be drawn to comply with the U.S. Constitution and federal law. D12:P5 (§ 3, line 55-58); App. at A5.

SJR 38 would likewise deprioritize "partisan fairness" and "competiveness" as map drawing criteria. D12:P5-6 (§ 3, line 130-160); App. at A5-6. It would instead prioritize drawing maps "on the basis of one person, one vote"; making districts "as nearly equal as practicable"; not abridging the right to vote "on account of race or color"; drawing contiguous and compact districts; and not crossing political subdivision boundaries. D12: P4-6(§ 3, line43-129); App. at A4-6. These criteria "shall take precedence over partisan fairness and competitiveness." D12:P6 (§ 3, line 130-133); App. at A6.

And the concepts of partisan fairness and competitiveness criteria would also be redefined. Instead of requiring an efficiency gap—a measure for partisan imbalance—as close to zero as possible, SJR 38 would allow an efficiency gap of up to 15%. D12:P7 (§ 3, line 149-152); App. at A7. In short, SJR 38 would move the criteria Missourians chose to elevate to the top of the priority list in 2018 to the bottom, resulting in greater tolerance for partisan-favorable redistricting outcomes.

Finally, SJR 38 would vest map-drawing authority back into two commissions appointed by the governor upon nominations from the Congressional District Committees and State Party Committees. D12:P7-8 (§ 3, line 161-186); App. at A7-8; D12:P11 (§ 7, line 9-34); App. at A11. SJR 38 proposes to rename the existing commissions the "house independent bipartisan citizens commission" and the "senate bipartisan citizens commission." *Id.*; D11:P2; App. at A17; D15:P1; App. at A19. It would increase the size of the House committee by 4 members and the Senate committee by 10 members (based on the current number of Congressional Districts), but the selection process remains essentially the same. *Id.*

SJR 38 also would not impose extensive limitations on who can serve on the commissions. The State Party and District Committees must choose members of their party, as the Constitutional currently requires. D12:P8 (§ 3, line168-170); App. at A7-8; D12:P11 (§ 7, line 13-19); App. at A11. District Committees must choose individuals who are residents of their district, which is currently the law. D12:P11 (§ 7, line 9-34); App. at A11. And there

cannot be more than one nominee per legislative district per party (as is true now in the House redistricting process). D12:P7-8 (§ 3, line 161-186); App. at A7-8.

There is no affirmative requirement of geographic diversity. *See* D12:P8 (§ 3, line 161-186); App. at A7-8; D12:P11 (§ 7, line 9-25); App. at A11. Nor is there any language in SJR 38 that requires the members of such commissions selected by the Party Committees, to be "citizens" or that prohibits soldiers, police, or state employees from serving on the commissions. *Id.* As under current law, individuals may not serve as members of the General Assembly for four years after the commission they serve on submits its final map. D12:P8 (§ 3, line 194-196); App. at A8; D12:P12 (§ 7, line 42-44); App. at A12. However, individuals who currently hold office are not barred from serving. *See id.*

As with redistricting before Amendment 1, these commissions will draw legislative maps, which must be "approved by at least seven-tenths of the members." D12:P10 (§ 3, line 244-248); App. at A10; D12:P13 (§ 7, line 86-90); App. at A13. And, as before 2018, if the commissions cannot agree, "a commission of six members appointed from among the judges of the appellate courts of the state of Missouri" will draw the maps. D12:P10 (§ 3, line 249-265); App. at A10; D12:P13-14 (§ 7, line 91-107); App. at A13-14.

IV. Summaries of SJR 38

The stipulated record contains three summaries of SJR 38. The General Assembly provided their own summary, which is the

subject of this appeal. But the Secretary of State and the Senate research staff also summarized the measure.

A. The General Assembly's summary

The General Assembly chose to provide its own ballot summary rather than allowing the Secretary of State to provide one. §§ 116.155 and 116.160, RSMo. The General Assembly's summary 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:P14-15; App. at A14-15.

B. The Senate research staff summary

Senate research staff also summarized the measure. D11:P1-3; App. at A16-18. On campaign contribution limits, research staff explained SJR 38 would lower the contribution limit for Senate campaigns by $100 but mentioned no changes to House contribution limits. D11:P1; App. at A16. On redistricting, research explained the measure "repeals the post of nonpartisan state demographer and gives all redistricting responsibility to the currently-existing

commissions, renamed as the House Independent Bipartisan Citizens Commission and the Senate Independent Bipartisan Citizens Commission, respectively." D11:P2; App. at A17. It went on to explain these commissions would continue to consist of political appointees. *Id.* Finally, research staff explained SJR 38 would revise the "order of priority" for redistricting criteria such that partisan fairness and competitiveness would now be the least important factors. *Id.*

C. The Secretary of State's Fair Ballot Language

The Secretary of State must prepare "fair ballot language" for a ballot measure. § 116.025, RSMo. He must "fairly and accurately explain what a vote for and what a vote against the measure represent." *Id.* That summary is also part of the stipulated record. D15:P1; App. at A19. Appellant Secretary said the measure will:

- "[R]educe the limits on campaign contributions that candidates for state senator can accept from individuals or entities by $100 per election. There is no change for candidates for state representative."
- [P]rohibit[] state legislators and their employees from accepting a gift of any value (which is currently $5) from paid lobbyists or the lobbyists' clients."
- [M]odif[y] the criteria for redrawing legislative districts and change[] the process for redrawing state legislative district boundaries during redistricting by giving redistricting responsibility to a bipartisan commission, renames them, and increases membership to 20 by

adding four commissioners appointed by the Governor from nominations by the two major political party's state committees."

D15:P1; App. at A19.

V. Procedural History

The case was tried on stipulated facts and exhibits. D9; App. at A63-65. The trial court entered judgment in Petitioners' favor and certified a revised ballot summary to the Secretary for inclusion on the November 3 ballot. D22. The trial court's revised summary reads:

> 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 limit for senate candidates by $100; and
> - Lower legislative gift limit from $5 to $0, with exemptions for some lobbyists?

D22:P10. The State appealed.

ARGUMENT

The safeguards surrounding ballot measures are designed "(1) to promote an informed understanding by the people of the probable effects of the proposed amendment [and] (2) to prevent a self-serving faction from imposing its will upon the people without their full realization of the effects of the amendment." *Buchanan v.*

Kirkpatrick, 615 S.W.2d 6, 11-12 (Mo. banc 1981). This summary violates both principles. It fails to promote an informed understanding and is an attempt by the legislature to impose its will (a return to the old redistricting scheme) on Missourians without them realizing what they're voting on.

The summary misleads by placing two minor revisions on two popular issues—lobbyist gift and campaign finance reform—right up front and unfairly overstating those proposed changes, while burying the main issue—which is not as popular—further down. But that isn't the only problem. The summary attempted to further deceive voters by misstating the nature of the redistricting changes and omitting any mention that SJR 38 is an outright repeal of the 2018 voter-adopted limits on partisan gerrymandering.

The trial court appropriately prevented the Secretary from certifying this summary to the voters.

I. This Court should closely scrutinize the legislature's ballot summary.

Most ballot title cases involve initiative petitions – a citizen proposes a measure and the Secretary of State summarizes it with input from the Attorney General. That process results in disinterested government officials, rather than the measure's proponent, summarizing the measure for voters.

But here the legislature wrote the measure and then summarized its own work. The State says this Court must give deference to the legislature's summary. *E.g.*, State's Br. at 31. But this is a statutory action, and no statute requires the courts to defer

to the legislature's ballot title. To the contrary, the law gives the courts broad authority to review ballot summaries and, if they are defective, certify new ones. § 116.190.4, RSMo.

Petitioners know that in *State ex rel. Kander v. Green*, 462 S.W.3d 844 (Mo. App. 2015)—an initiative case rather than a legislative summary—this Court's *dicta* said the legislature's inherent interest in seeing its proposed measures adopted is not relevant to the analysis. *Id.* at 851-52. But just two weeks after *Green,* in *Dotson v. Kander*, 464 S.W.3d 190 (Mo. banc 2015)—which reviewed a legislature-drafted summary—the Supreme Court suggested to the contrary:

> Judicial review of a ballot title is especially important in a legislature-proposed ballot initiative. This is true because the proponent of the initiative—the General Assembly—writes the ballot title as well as the proposed amendment without any review of the ballot title by the executive department.

Id. at 193-94. In an accompanying footnote, the Court distinguished initiative cases because they involve independent review by the Secretary and Attorney General. *Id.* at 194 n.4. These cases are different from the Secretary of State cases with which this Court more frequently deals.

Without independent review by the executive department, the temptation to summarize the measure in a way that unfairly creates

prejudice in its favor is strong.[6] This Court has previously encountered—and remedied—a legislature-drafted ballot title that would mislead voters. *Seay v. Jones*, 439 S.W.3d 881 (Mo. App. 2014). As explained in more detail in the *amicus* brief of Former Missouri Lawmakers, there are strong policy reasons to be skeptical of legislature-drafted summaries and many instances in which the law imposes more searching review on transactions involving self-interested parties. So it should be here.

And it is not just this measure. The legislature is—perhaps understandably—hostile to having its traditional law-making powers exercised by the people. SJR 38 is an example, as it would repeal a measure Missourians adopted just two years ago through the initiative process. The legislature apparently thinks the people were unwise in passing that measure. But history shows the General Assembly is anything but impartial when it comes to citizen initiatives. *See Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 34-37 (Mo. banc 2015) (discussing legislative efforts to preempt an initiative petition); *State ex rel. Drain v. Becker*, 240 S.W. 229 (Mo. banc 1922) (similar); S.B. 113&95 & S.B. 161, 96th Gen. Ass., 1st Reg.

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[6] *See also* Nicholas R. Theodore, *We the People: A Needed Reform of State Initiative and Referendum Procedures*, 78 Mo. L. Rev. 1401, 1419 (2013) (explaining "Missouri appears to be a national leader in overturning voter initiatives" and that "state actors are not necessarily disinterested in the outcome of the initiative which raises some potential red flags regarding any potential bias or misinformation communicated in the ballot summary").

Sess. (Mo. 2011) (repealing recently enacted "puppy mill" legislation); App. at A36-59.[7]

In the face of this hostility, Missouri's judicial branch vigilantly protects the people's right to use the initiative. The General Assembly may not do an "end run around the constitutionally protected right of the people of Missouri to enact legislation by ballot initiative." *Earth Island Inst.*, 456 S.W.3d at 34. Because Amendment 1 was a constitutional amendment rather than a statute, the legislature cannot accomplish that end run directly; it must instead ask voters to overturn their own enactment. For this reason, it is critically important that voters receive a clear, unbiased summary of what they are being asked to do.

That inherent legislative conflict of interest is at its height in this case because SJR 38 addresses how to redraw the districts of the people who proposed the measure. Put simply, it directly impacts the prospect of legislators retaining their jobs. Legislators have an obvious, strong incentive to install a map-drawing process more favorable to themselves before the next redistricting cycle (the first under the nonpartisan demographer system).

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[7] *See also* Jessica Martin, *Missouri legislators quick to overturn voter-approved initiatives because voters have allowed it, constitutional law expert says* (Mar. 22, 2011), https://source.wustl.edu/2011/03/missouri-legislators-quick-to-overturn-voterapproved-initiatives-because-voters-have-allowed-it-constitutional-law-expert-says/.

II. A summary statement must tell the voters what they are being asked to do and this one did not.

To protect and inform the voters, a summary statement must be "true." § 116.155, RSMo. It must also be fair and sufficient. § 116.190.3, RSMo. These standards are well established:

> Insufficient means "inadequate; especially lacking adequate power, capacity, or competence." The word "unfair" means to be "marked by injustice, partiality, or deception." Thus, the words insufficient and unfair . . . mean to inadequately and with bias, prejudice, deception and/or favoritism state the consequences of the initiative.

Cures Without Cloning v. Pund, 259 S.W.3d 76, 81 (Mo. App. 2008) (citations and alterations omitted). The summary "should accurately reflect both the legal and probable effects of the propos[al]." *Shoemyer v. Sec'y of State*, 464 S.W.3d 171, 174 (Mo. banc 2015) (citing *Brown v. Carnahan*, 370 S.W.3d 637, 654 (Mo. banc 2012)). "Sometimes it is necessary for the . . . summary statement to provide a context reference that will enable voters to understand the effect of the proposed change." *Brown*, 370 S.W.3d at 654; *Boeving v. Kander*, 493 S.W.3d 865, 879 (Mo. App. 2016).

And the legislature is not exempt from these requirements. Its "summary statement must accurately describe the primary objectives of the proposed amendments." *Seay*, 439 S.W.3d at 889. Indeed, "[i]t is incumbent upon the legislature to prepare a summary statement that endeavors to promote an informed understanding of

the probable effect of a proposed amendment." *Id.* (quoting *Coburn v. Mayer*, 368 S.W.3d 320, 324 (Mo. App. 2012)).

This Court's ballot summary decisions generally address two types of drafting errors. Some cases involve a summary that tells voters a proposal will do something it will not. *E.g.*, *Sedey v. Ashcroft*, 594 S.W.3d 256, 267 (Mo. App. 2020) (summary mis-described what measure would require election authorities to do with provisional ballots); *Cures Without Cloning*, 259 S.W.3d 76 (summary stated it would "repeal" cloning ban when it would not). Others address a summary that omits critical details necessary for voters to understand what is being proposed. *Boeving*, 493 S.W.3d at 875-76 (omission of information regarding annual increases to fee to be imposed); *Seay*, 439 S.W.3d at 890-91 (omission of appropriation contingency on early voting proposal).

This case involves both issues. Bullet points 1 and 2 of the legislature's summary must be revised because they are simply untrue. Bullet point 3 is both untrue and misleading. Further, it omits a critical piece of information: that its central feature is to repeal Amendment 1's redistricting system.

A. <u>The summary's first bullet point falsely told voters a yes vote would "ban all lobbyist gifts." (Responds to Appellants' Point II)</u>

The legislature's first bullet point told voters the measure would ban "all" lobbyist gifts to legislators and their employees. D9:P2-3. As the trial court correctly concluded, that assertion was "objectively untrue." D19:P6-7. SJR 38 would not ban all lobbyist

gifts. High-value lobbyist gifts are generally *already* prohibited. But there are three existing exceptions and SJR 38 would preserve two of them, eliminating only the one for economically *de minimis* gifts.

In *Sedey*, this Court considered the summary of a proposal that would have made lists of absentee voters publicly available. 594 S.W.3d at 271. The summary, however, asked if the Constitution should be amended to "make voters' method of voting a public record (mail, in person or military)?" *Id.* The Court invalidated that portion of the summary because it inaccurately presented "the legal and probable effects of the proposed provision." *Id* at 272. It further noted "[i]nclusion of this inaccurate assertion in the summary statements may prejudice some voters against the proposed amendments." *Id.*

Boeving was similar. The summary included a bullet point about an equity assessment fee. The summary told voters the fee would be $0.67—which was literally true—but failed to mention it would increase annually. "This is not a case of a vague but accurate summary; instead, the summary statement in this case is specific, but inaccurate." *Boeving*, 493 S.W.3d at 878. Without reference to the annual adjustment, the summary failed to "adequately inform voters of the initiative's probable effects." *Id.* at 880.

The first bullet of this summary is also specific but inaccurate. Use of the word "all" in describing the ban on lobbyist gifts communicates to voters that no lobbyist would ever be permitted to give a gift to legislators or their staff under any circumstances. That is false. "There cannot be any broader classification than the word

'all.' In its ordinary and natural meaning, the word 'all' leaves no room for exceptions." *Heritage Resources, Inc. v. Caterpillar Fin. Servs. Corp.*, 774 N.W.2d 332, 346 (Mich. Ct. App. 2009) (citations and alterations omitted). And, yet, SJR 38 would preserve two exceptions to the gift ban: one for lobbyists related to a legislator or employee by the fourth degree of blood or marriage and one for unpaid lobbyists. D12:P1-2 (§ 2, line 8-17); App. at A1-2.

If voters approve SJR 38, all lobbyists (paid and unpaid) would still be allowed to give gifts (of unlimited amounts) to legislators or their employees if they are related to the legislator or employee within the "fourth degree of blood or marriage." D12:P2 (§ 2, line 14-17); App. at A2.[8] Under this exemption, the chief of staff to a sitting Senator could receive a car from a lobbyist who is her spouse's cousin and is lobbying for specific action from the Senator.

The State says never you mind because the word "lobbyist" doesn't mean what you think it means. State's Br. at 40. In doing so, it asks the Court to speculate as to what an "ordinary voter would describe as a lobbyist gift." *Id.* The State avoids any discussion of the word "all." Of course, the Court should not accept the invitation to redefine words the voters will see. The measure will ban "all"

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[8] There are apparently two methods to determine who is included in such ban—canon law and civil law—and they produce different results. *See State ex inf. Roberts v. Buckley*, 533 S.W.2d 551, 554 n.4 (Mo. banc 1976). *Compare Sommers v. Woods*, 895 S.W.2d 622, 623 (Mo. App. 1995) (applying canon law), *with State ex rel. Mo. Hwy. & Transp. Comm'n v. Johnson*, 658 S.W.2d 900, 905 (Mo. App. 1983) (applying civil law).

lobbyist gifts—except the ones it will allow from cousins and other relatives. That's not a total ban.

And that's not the only exemption. The restriction applies only to "paid lobbyists." One can be a "lobbyist" without being paid to lobby. Mo. Const. art. III, § 2(b) (limiting gifts from "paid lobbyists" to $5.00 or less); App. at A29; *see also* § 105.470, RSMo; *Calzone v. Summers*, 942 F.3d 415, 426 (8th Cir. 2019) (discussing the statute and volunteers who are lobbyists by virtue of being designated to lobby).

So, a billionaire seeking a tax break for his company might not be paid to lobby. But if his company asks him to seek action by the legislature, he is nevertheless a "lobbyist." SJR 38 would not ban "all" lobbyist gifts to legislators because it would retain the language limiting the scope of the ban to paid lobbyists.[9]

The State again says it doesn't matter. It claims the word "lobbyist" must refer only to "paid lobbyists." State's Br. at 40. It asks the Court to consider "modern parlance" and claims "there is no widespread public concern about the corrupting influence of gifts from such 'unpaid lobbyists.'" *Id.* Basically, it argues the word "paid" is meaningless. The Court must assume the opposite. *Barrett v. Greitens*, 542 S.W.3d 370, 382 (Mo. App. 2017) ("A court must assume that every word contained in a constitutional provision has effect and meaning and is not mere surplusage.").

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[9] The Secretary's fair ballot language likewise states the ban applies only to "paid lobbyists." D15:P1; App. at A19.

The State also argues the relatives and unpaid lobbyist exceptions are *de minimis*. State's Br. at 40. But there is no way to know—and certainly nothing in this record on which to base a conclusion—whether the exceptions will allow gifts from many lobbyists or only a few.[10]

So, while the legislature's summary says SJR 38 will ban "all" gifts from lobbyists, gifts from many lobbyists will remain permissible. Because "all" means "all," the summary would falsely advise voters SJR 38 will do something it will not. *See Fed'n of Homemakers v. Hardin*, 328 F. Supp. 181, 184-85 (D.D.C. 1971) (concluding label stating product was "all meat" was false and misleading because ordinary meaning of word "all" would indicate to consumers the product was "totally and entirely meat," not up to 15% non-meat ingredients). A ban on "all lobbyist gifts" tells voters there will be no lobbyist gifts, when the law would actually allow them in some instances. The trial court correctly found this bullet to be "literally false." D19:P7.

B. The summary's second bullet point misleadingly told voters a yes vote would "reduce legislative contribution limits." (Responds to Appellants' Point III)

The second bullet point told voters a yes vote would reduce "legislative campaign contribution limits." The trial court found it

[10] There is certainly some reason to think relatives of elected officials occasionally engage in the business of lobbying. *See* Glen Justice, *When Lawmaking and Lobbying Are All in the Family*, *New York Times* (Oct. 9, 2005).

untrue and misleading because SJR 38 "will not reduce 'legislative contribution limits' for approximately 83% of Missouri legislators." D19:P7. By telling voters the measure would do something it won't really do, the summary fails to give voters "a sufficient idea of what the proposed amendment would accomplish, without language that is intentionally unfair or misleading." *Seay*, 439 S.W.3d at 889 (quotations omitted).

It is true that the measure will reduce "some" campaign contribution limits. But that is not what the summary says. This Court has cured similar problems before.

In *Seay*, as here, the General Assembly included information in a summary that was technically correct, but overstated the effects of the measure in a deceptive way. There, the General Assembly proposed a measure that would have allowed voting for 6 days in advance of election day *if* the General Assembly subsequently appropriated funds to cover it. 439 S.W.3d at 889-92. The summary, however, failed to mention the appropriation contingency.

The Court determined this statement would "mislead voters as to the effects of the passage of HJR 90" and was "insufficient and unfair for failing to make reference to the funding contingency." *Id.* at 892. *Boeving* involved a similar problem—the summary truthfully stated a $0.67 fee would be imposed but deceptively omitted the fact that it would increase annually. 493 S.W.3d at 875-76. And, as in *Seay*, this Court deemed that summary unfair and insufficient. *Id.* at 878.

Here, it is simply incorrect to say SJR 38 would reduce "legislative" contribution limits. The word "legislative" refers, of course, to the legislative branch of government. The legislature is made up of a Senate and House of Representatives. Mo. Const. art. III, § 1; App. at A29. Telling voters the measure applies to the entire legislature when it applies only to the substantially smaller of the two bodies that compose that branch is unfair and insufficient.

That would be like telling voters a measure will reduce executive office campaign contribution limits when it will reduce the limits only for the State Treasurer. Or telling voters a measure will reduce judicial contribution limits when it will reduce limits only for candidates for retention to the Supreme Court. The trial court correctly concluded the second bullet point was misleading, insufficient, and unfair. D19:P7.

And it does not matter that the second bullet point does not use the word "all" to preface "legislative contribution limits." An unqualified promise that the measure will reduce contribution limits is the same as saying "all." *See Sedey*, 594 S.W.3d at 271 (explaining unqualified reference to "voters" would "suggest[] [provision's] applicability to *all* voters").

The reality is that SJR 38 would reduce contribution limits only on candidates for the 34-member Senate and not on candidates for the 163-member House. Senate races are fewer than 20% of all legislative races and even then SJR 38's proposed revision would amount to only a 4% decrease in allowable contributions. Voters deserve to know both those facts, particularly since the contribution

limits are the "spoonful of sugar" that aids them in swallowing repeal of the redistricting changes they just adopted.[11]

In response to the trial court's concerns that the measure does not reduce limits for House races, the State argues the court was simply wrong. But the State improperly relies on "facts" outside the record in violation of Rule 84.04(c). The Court should strike Point III of the State's brief because it advances arguments the State failed to preserve and relies on facts not in the record.

At the trial court, the State expressly conceded SJR does not reduce contribution limits for all legislators. It affirmatively represented to the trial court: "To be sure, SJR will reduce the contribution limit for candidates for the Senate ***but not for the House of Representatives***." D18:P18 (emphasis added).[12] Its argument there was that "the summary statement neither states nor implies that SJR 38 applies to both chambers of the General Assembly." *Id.*

Now, without alerting this Court that it quotes material outside of the record, the State abandons its trial court argument altogether by not even advancing it in its brief. The State here

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[11] The Secretary and Senate research staff both described the campaign contribution changes consistently with Petitioners' approach in their respective summaries. D11:P1-2; App. at A16-17; D15:P1; App. at A19.

[12] That's also what the Secretary said before Petitioners filed suit. D15:P1; App. at A19 ("There is no change for candidates for state representative.").

contends SJR 38 *would* reduce all campaign contribution limits because it proposes to eliminate the biannual inflation adjustment.

It argues the elimination of that adjustment will result in: (1) an immediate reduction of the current inflation-adjusted contribution limits and (2) future reductions every two years of the amounts to which the contribution limits would otherwise have been adjusted. There are many problems with these arguments.

First, they were never raised below, either in briefing or at trial.[13] There was simply no mention of the elimination of the inflation-adjustment provision. "To allow an argument to be made for the first time on appeal deprives the trial court of its opportunity to thoughtfully consider and make a ruling on the argument." *Stoner v. Dir. of Revenue*, 358 S.W.3d 514, 521 n.12 (Mo. App. 2011). Thus, even in court-tried cases, this Court's "review is limited to those issues put before the trial court." *In re Marriage of Coulter*, 759 S.W.2d 642, 644 (Mo. App. 1988). The trial court cannot be accused of error based on an issue never presented to it. The State's arguments are waived.

Second, the State's argument concerning the alleged inflation-adjusted figures impermissibly relies on facts not in evidence. Rule 84.04(c) requires a party's statement of facts to provide a citation to a specific page in the record on appeal for each assertion made. But

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[13] The parties agreed the trial transcript was unnecessary to decide this appeal. Had Petitioners known the State would attempt to raise new arguments and facts on appeal, it would not have made such agreement. Regardless, there is nothing in the record demonstrating the State preserved this argument.

there is no evidence in this record concerning any inflation-based adjustments to the contribution limits.

Thus, the State's brief impermissibly cites to a "PDF" hosted on a website. State's Br. at 14. It then relies on that information to advance its contention that there will be an immediate reduction to campaign contribution limits for both chambers of the General Assembly. But there is no way to know whether the PDF contains accurate information and Petitioners were not given an opportunity to challenge any evidence on the issue. The State's conduct is completely improper and these references and arguments should be stricken. *Cope v. Parson*, 570 S.W.3d 579, 582 n.2 (Mo. banc 2019) (sustaining motion to strike portions of Governor's brief for failure to comply with Rule 84.04(c)).

Finally, even if this Court were to ignore the State's failure to preserve these arguments and its reliance on facts outside the record,[14] the State's arguments are simply wrong. It contends the elimination of the inflation adjustment will result in a "reduction" of campaign contribution limits and cites the dictionary definition of "reduce." But elimination of the inflation adjustment simply would not reduce (*i.e.*, "make smaller") the House contribution limit set in Constitution.

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[14] There are other problems with the PDF the State cites. Inflationary adjustments are made based on the Consumer Price Index. Mo. Const. art. III, § 2(b). The PDF the State cites says nothing about the Consumer Price Index. Instead, it appears to be rank hearsay as to what some unknown individual at the Ethics Commission claims the current contribution limits are.

Regardless of the inflation adjustment, the Constitution limits contributions to candidates for the House of Representatives to $2,000. D12:P2 (§ 2, line 32-33); App. at A2. The inflation adjustment provision might very well result in the limit being increased in the future. Or it might not, depending on what the Consumer Price Index does. But elimination of the potential for future increases in the contribution limit is not the same as "reducing" the $2,000 limit currently set forth in Article III, § 2(c)(1) if SJR 38 passes. That limit will remain exactly where it currently is. The legislature's summary told voters there will be an absolute reduction in contribution limits for both offices. That's just not true.

C. The third bullet point was also partial and unfair.

The third bullet presents a more elaborate form of deception. The trial court correctly identified several problems with the legislature's summary and concluded it needed to be rewritten.

The first words in that bullet tell voters the measure would "[c]reate citizen-led independent bipartisan commissions." D9:P3; App. at A65. It is an argumentative phrase that peppers the voter with a list of attractive words in hopes of selling the changes—reminiscent of selling a simple knife by saying "it slices, it dices, it makes julienne fries."

But the deeper problem is that SJR 38 wouldn't do the things the list says. And ballot titles are not true, sufficient, or fair if they tell voters a measure will change existing law when it will not. *Mo. Mun. League v. Carnahan*, 303 S.W.3d 573, 588 (Mo. App. 2010) (rejecting portion of summary that suggested measure would change

Constitution to require just compensation for takings when Constitution already required that). Instead, the summary must explain what will actually change if voters adopt the measure. *Id.*

1. *The third bullet point incorrectly informed voters the measure would "create" commissions that already exist. (Responds to Appellants' Point IV)*

The first problem with the list is that SJR 38 would not "create" the referenced commissions; it would simply rename existing commissions. Create means "to bring into existence or to invest with a new form." *State v. Foster*, 838 S.W.2d 60, 64 (Mo. App. 1992) (quoting *Webster's Third New Int'l Dictionary* (1966)). SJR 38 does not bring the commissions into existence. Nor does it invest them with a new form—they currently consist of individuals nominated by the political parties and appointed by the Governor. That would still be true if the measure passes.

A review of the substance of SJR 38 shows it does not create any commissions even within the broadest meaning of that term. The words create, establish, or similar words to not appear anywhere in its text. *See* D12; App. at A1-15. It would simply insert buzzwords in the titles of the existing commissions. *See* D12:P7-8 (§ 3, line 177-183); App. at A7-8 and D12:P11-12; App. at A11-12 (§ 7, line 25-31) (inserting the words "independent bipartisan citizens" in front of references to existing commissions.)

Senate research staff summarized this aspect of SJR 38 by stating it would "give[] all redistricting responsibility to the ***currently-existing*** commissions, renamed as the House

Independent Bipartisan Citizens Commission and the Senate Independent Bipartisan Citizens Commission, respectively." D11:P2; App. at A17 (emphasis added). The Secretary made similar comments. D15:P1; App. at A19.

The State says Senate research's summary does not matter because 10 different people might summarize a measure 10 different ways. State's Br. at 51-52. (The State is silent regarding the fair ballot language drafted by the Secretary, a named defendant.) While that may be true, it is a fact of record that three different government entities summarized SJR 38 and only one of them—the one with a direct interest in the measure's passage—chose to characterize the measure as "creating" these commissions, while the Secretary made an admission that Petitioners are right.

The State also argues SJR 38 would "invest" the commissions "with a new form" because it would modify how members are appointed and modify their duties. State's Br. at 50-51. These arguments are overstated and incorrect.

Currently, slightly different methods are used to select the 16-member House commission and the 10-member Senate commission. Mo. Const. art. III, §§ 3, 7; App. at A30-35. SJR 38 would essentially combine these methods and apply them to both commissions, resulting in two 20-member commissions. D12:P7-8 (§ 3, line 161-186); App. at A7-8; D12:P11-12 (§ 7, line 9-34); App. at A11-12. Both commissions would still be filled with partisan nominees appointed by the Governor. This is not a revolutionary change.

More fundamentally, changing how commissioners are selected does not "create" the commissions. For example, if Article V of the Constitution were changed to expand the number of Judges on the Missouri Supreme Court and have them popularly elected rather than selected using the Missouri Nonpartisan Court Plan, no one could fairly claim that amendment "created" the Supreme Court.

The State's argument about modification of the commissions' duties fails for the same reasons. The function of the commissions is, has always been, and under SJR 38 would continue to be to draw maps. Before 2018, the commissions had initial map-drawing responsibility, with the courts as back-up. Mo. Const. art. III, §§ 2, 7 (as amended Nov. 2, 1982); App. at A24-26. Now, the commissions have secondary authority to re-draw the demographer's maps upon a supermajority vote. Mo. Const. art. III, § 3(c)(3); App. at A33. And, under SJR 38, the commissions would again have initial map-drawing responsibility, with the courts as back-up. D12:P7-10 (§ 3, line161-265); App. at A7-10; D12:P11-14 (§ 7, line 9-107); App. at A11-14. Shifting initial responsibility back to the commissions does not "create" them, just as Amendment 1 did not "create" them when it gave them secondary rather than primary map-drawing responsibility.

These misstatements matter because telling voters this measure will "create" new commissions implies voters will get something brand new when in reality, they are simply returning to a previously rejected system. By adopting Amendment 1, voters overwhelmingly voted to end the commissions' unilateral control

over redistricting and reduce partisan influence. As discussed in the following sections, the legislature's summary also makes inaccurate statements regarding whether the commissions will be "independent" and "citizen-led."

But even if those characterizations were accurate (and they are not), SJR 38 would not ***create*** commissions fitting those descriptions – the commissions will consist of the same partisan appointees as they do right now. The summary statement should not be used as a campaign commercial to imply the measure will create commissions that already exist or that their composition will be somehow different than under current law. *See Sedey*, 594 S.W.3d at 272; *Mo. Mun. League*, 303 S.W.3d at 588.

2. *The third bullet point will likely mislead voters by stating SJR 38's redistricting commissions will be "citizen-led" and "independent." (Responds to Appellant's Point IV).*

The summary also tells voters SJR 38 would create not just any commissions, but "citizen-led independent" commissions. The trial court thought the entire phrase was unfair. It was correct.

The State first defends the phrase "citizen-led," arguing it is not insufficient or unfair because the ordinary voter will assume a citizen means someone who lives in the state and does not serve in some sort of public capacity (soldier, police officer, elected official, etc.). State's Br. at 52. But, accepting the State's definition of citizen-led as true, that is not what the measure would do.

The State's argument about what a voter will think citizen-led means is not found in the text of SJR 38. *See* D12; App. at A1-15. Any party member selected by a State Party Committee can be nominated and appointed to one of the redistricting commissions. And any party member who "resides" in a Congressional District can be nominated by one of that district's Committees.[15] No provision limits commission membership to individuals who do not serve in a public capacity. In fact, sitting members of the General Assembly are eligible to be nominated under the process in SJR 38. So are soldiers, police officers, firefighters and anyone else the nominating committees might choose. Accepting the State's definition of "citizen" as true, the commissions might consist entirely of non-citizens.

Although the State's brief offers a definition, the one that usually comes to mind is a permanent inhabitant of a particular place (a citizen of Missouri or a citizen of Jackson County), not the State's not-a-state-functionary definition (*i.e.*, civilians). But under either definition, SJR 38 imposes no citizenship requirement on commission members. *See* D12:P7-8 (§ 3, line 164-175); App. at A7-8; D12:P11 (§ 7, line 9-23); App. at A11. It merely requires they be chosen "by a majority vote of the elected members of the committee present" and be "members of their party." *Id.* Nothing requires the

[15] Although SJR 38 requires individuals selected to be party members, Petitioners are not aware of any formal process or requirements to become a member in either major party. Nor does SJR 38 define what it means to be a member of a party.

commissions to be made up of "citizens," much less that a "citizen" lead them.

Use of the term "citizen-led" implies to voters that politicians and other state-affiliated individuals will not be leaders of the redistricting commissions. It is pure speculation not based in the text of the measure and it enticingly suggests these commissions will be led by people just like the voters themselves. That is intentionally argumentative, likely to create prejudice in favor of the measure, and, thus, insufficient and unfair. *See Sedey*, 594 S.W.3d at 267.

The word "independent" fares no better. The State says "independent" fairly describes the commissions because they control their own processes. State's Br. at 54. It also claims it will be clear to voters these commissions are not under any political control. *Id.* Like the term "citizen-led," the legislature's use of the word "independent" suggests a certain outcome to voters that is not supported by the plain text of the measure. That is argumentative, insufficient, and unfair. *See Sedey*, 594 S.W.3d at 267.

As discussed, SJR 38 does not prohibit sitting members of the House or Senate, their employees, or prospective candidates from serving on these commissions. At a minimum, such individuals can influence the commissions to draw maps to protect the districts of their fellow party members in the General Assembly. And prospective members of the General Assembly can influence the commissions to draw maps that make their run for the legislature easier (subject to the below qualification).

SJR 38 would merely prohibit commission members "from holding office as members of the General Assembly for four years following the date of the filing by the commission of its final plan." D12:P8 (§ 3, line 194-196); App. at A8; D12:P12 (§ 7, line 42-44); App. at A12. That limited time period would allow a member of the General Assembly to come back and run under a map they helped draw. Maybe that would happen; maybe it wouldn't.

And maybe the commission members will be independent or maybe they will consist entirely of those employed by or beholden to state officials and members of the General Assembly. But it is misleading to guarantee voters that those individuals with the most to gain or lose will have nothing to do with the process. *See Leib v. Walsh,* 45 Misc. 3d 874, 880 (N.Y. Sup. Ct. 2014) (striking ballot abstract language claiming a commission would be "independent" when its members were "handpicked appointees of the legislative leaders" or "essentially political appointees by proxy").

The qualifications for individuals serving on the commissions are generally holdovers from the pre-2018 Constitution. Calling them "citizen-led" and "independent" puts a gloss on these features, but is not a substantive change.[16] Current law requires the commissions to be just as citizen-led and independent as the proposed changes. Telling voters SJR 38 would transform the

[16] The Secretary's fair ballot language uses neither the phrase "citizen-led" nor the word "independent" when describing the redistricting commissions, despite being unconstrained by word limits. D15:P1; App. at A19.

commissions into something better is unfair and misleading. *Mo. Mun. League*, 303 S.W.3d at 588.

3. *The third bullet point incorrectly told voters SJR 38 will offer "minority voter protection." (Responds to Appellants' Point V).*

After telling voters about the "citizen-led independent bi-partisan" commissions they would "create" with a yes vote, the third bullet discussed criteria for drawing legislative maps. Those maps, voters were told, will be drawn based on "minority voter protection." D9:P3. But if SJR 38 is adopted, those words would appear nowhere in the Constitution. In fact, if SJR 38 is enacted Missouri's existing minority voter protections will be watered down. And that's putting it charitably.

First, SJR 38 would eliminate any express protection for "minorities." Right now, the Constitution says "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, whether by themselves or by voting in concert with other persons." Mo. Const. art. III., § 3(c)(1)(b); App. at A31 (emphasis added).

If SJR 38 passes, that language will be deleted. D12:P5 (§ 3, line 58-62); App. at A5. Instead, SJR 38 would prohibit districts from being "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" or in a way that gives such individuals

less opportunity to elect representatives of their choice. D12:P5 (§ 3, line 62-70); App. at A5 (emphasis added). It is not accurate to describe this protection as "minority voter protection" when the measure will expressly delete the word "minority" and replace it with an amorphous protection for people of *any* race or color, minority or not.

SJR 38 would also eliminate any protections for "language minorities." D12:P5 (§ 3, line 58-62); App. at A5. This, too, will result in less protection for "minority voters." The State's sole response on this point is to claim Petitioners have not identified any language minorities whose rights would not also be protected by SJR 38's "race or color" language. State's Br. at 60. Of course, it is not difficult to imagine hypotheticals in which those protections would diverge. The point is, there is currently express protection for language minorities and under SJR 38 that will not be true.

And SJR 38 would eliminate constitutional language prohibiting districts being drawn with the "intent or result" of denying equal opportunities for minority voters. D12:P5 (§ 3, line 58-62); App. at A5. Instead, SJR 38 will protect only against a district "which results" in abridgment of the right to vote based on race or color. D12:P5 (§ 3, line 62-70); App. at A5. This shift in language will very likely make it more difficult for minority voters to prove a violation has occurred.

In addition to the foregoing issues, the brief of *amici* National Civil Rights and Missouri-Based Organizations discusses other

significant changes SJR 38 would make that weaken existing minority voter protections.

For all of these reasons, it is incorrect to tell voters SJR 38 will have commissions drawing districts based on "minority voter protection." The trial court correctly found this part of the bullet point to be misleading.

4. *The third bullet point's recitation of redistricting criteria is unfair and misleading. (Responds to Appellants' Point V).*

The summary's "minority voter protection" language is an egregious example of the legislature misstating the effects of SJR 38. But the entire list of redistricting criteria is also deceptive. The third bullet says districts will now be drawn based on "one person, one vote, minority voter protection, compactness, competitiveness, fairness and other criteria." D9:P3; App. at A65. The trial court correctly concluded compactness, competitiveness, and fairness are *currently* required by the Constitution. D19:P8-9.

As noted, this Court has previously found improper—and rewritten—summaries that tell voters a measure will change the law when the measure simply restates existing law. *Mo. Mun. League*, 303 S.W.3d at 588. While a *reference* to existing law may be necessary for context, it is improper for a summary to imply a measure will change the law when it will not. *Id.* That ruling is consistent with the legislature's statutory obligation to prepare "a true and impartial statement of the purpose of the *proposed* measure." § 116.155, RSMo (emphasis added). And it is unfair to say

that a constitutional amendment will do something when it will continue to happen without adoption of the amendment.

The summary begins by asking: "Shall the Missouri Constitution be amended to . . .." It then uses future tense verbs at the beginning of each bullet point – ban, reduce, create. The third bullet point thus asks, "shall the Missouri Constitution be amended to create . . . commissions to draw state legislative districts . . . based on . . . compactness, competitiveness, [and] fairness." It thus suggests that new commissions will be created to draw districts using new criteria.

But the listed criteria are not new. SJR 38 would retain the current requirements of compactness, competitiveness, and fairness. D12:P6 (§ 3, line 99-104); App. at A6. (Though, as discussed below, SJR 38 would make significant, undisclosed changes to the priority of these criteria.) Because consideration of all these criteria is already mandated, it is improper for the summary to suggest adoption of the measure would require their consideration. It would not. *Mo. Mun. League*, 303 S.W.3d at 588.

D. <u>The third bullet point fails to disclose the primary objective of SJR 38 – the repeal of redistricting rules voters adopted just two years ago. (Responds to Appellants' Point I)</u>

Once the Court works its way through all the summary's misleading statements about what it claims SJR 38 will do (even though it will not), the Court must confront the fact that the summary fails to tell voters what the measure will *really* do. That

renders the summary insufficient and unfair. *Boeving*, 493 S.W.3d at 875-76; *Seay*, 439 S.W.3d at 890-91. The trial court was correct to revise the summary to disclose SJR 38's central feature.

1. *A measure's central features are its "primary objectives" or "purposes."*

It is well-established that a summary must include mention of a measure's central features. *Boeving*, 493 S.W.3d at 875-76; *Seay*, 439 S.W.3d at 890-91. Recently, in *Sedey*, this Court undertook to provide further guidance about how to ascertain a measure's central features and determine when a summary must be revised to include them.

When something is omitted from a summary, the test is whether it is a "central feature" of the measure and, "if so, does its absence render the summary statements insufficient." *Sedey*, 594 S.W.3d at 270. A measure's central features are closely related to the "purpose" of a proposal. *Id.* at 269-70.

Sometimes, a measure's purpose might be ascertained by looking at the "ballot or petition title." *Id.* at 270. If not, the Court can consider "what issue the proposed amendment is designed to address, what the proposed amendment would accomplish, or its primary objectives." *Id.* (citations, quotations, and alterations omitted).

In *Sedey*, there was no title, so this Court looked at what the measure would accomplish to determine whether the creation of a no-fault absentee voting system was a central feature. *Id.* at 270. Because the measure would "vastly expand eligibility for absentee

voting to cover all eligible voters in Missouri," the Court concluded no-fault absentee voting was a central feature. *Id.* No revisions to the Secretary's summary were necessary, however, because "it was written broadly enough to encompass" the central feature. *Id.* at 271. Thus, a more-specific reference to "no-fault absentee voting" was not required. *Id.*

2. *SJR 38's primary objective is to undo Amendment 1 by eliminating the nonpartisan state demographer and making partisan fairness and competitiveness the lowest priority redistricting criteria.*

As in *Sedey*, SJR 38's title is not particularly helpful. It says SJR 38 will submit to voters a proposal "relating to regulating the legislature to limit the influence of partisan or other special interests."[17] D12:P1; App. at A1. Nothing in that title specifically mentions redistricting. But given that nearly all of SJR 38 concerns how to alter Missouri's current redistricting method, it is beyond dispute that the redistricting changes are a central feature. Similarly, in *Boeving*, this Court deemed an annual inflation adjustment—a matter almost certainly not reflected in the measure's title—to be a central feature. 493 S.W.3d at 875-76.

[17] The title itself is misleading since it is unclear how a proposal to eliminate the "nonpartisan" state demographer and reinsert the two major political parties in the redistricting process can be said to "limit the influence of partisan . . . interests."

There can be little doubt what SJR 38's "primary objective" is – the repeal of virtually everything Amendment 1 changed about redistricting and a return to the map-drawing system in place before 2018. This is evident by looking at the language SJR 38 would repeal: everything to do with the state demographer and everything that prioritizes partisan fairness and competitiveness over other redistricting criteria. App. at A60-62.[18] By contrast, SJR 38 proposes only minimal changes to Article III, § 2 (the changes summarized in the legislature's first and second bullets). D12:P1-3; App. at A1-3.

This Court previously explained Amendment 1's "main innovations" to the redistricting process were "to alter the substantive standards which guide the drawing of new districts, and to provide for a nonpartisan official to create a reapportionment plan which the House and Senate reapportionment commissions can only modify by super-majority votes." *Ritter*, 561 S.W.3d at 94. Those "substantive standards" referred to the prioritizing of partisan fairness and competitiveness over other criteria. And since those were the "main innovations" of Amendment 1's redistricting changes (wherein those changes were accompanied by a number of other amendments to Article III), then the reversal of those changes are likewise the "main innovation" or "primary objective" of SJR 38 (which is almost entirely about redistricting).

[18] This is a demonstrative Petitioners presented at trial showing (through highlighting) all the matter SJR 38 proposes to delete from Article III, § 3.

3. *The trial court correctly concluded voters must be told about SJR 38's central feature in some manner.*

But a voter who read the legislature's summary would have no idea SJR 38 proposes to: (1) do away with the nonpartisan state demographer, (2) redefine "partisan fairness" in way that renders it effectively meaningless, or (3) make partisan fairness and competitiveness the lowest priority redistricting criteria.

Instead, the third bullet misleadingly told voters SJR 38 will "create" new commissions, rather than make changes to the size of the current commissions. It implied these "new" commissions will be "citizen-led" and "independent," even though SJR 38 would not modify the qualifications for serving on the commissions in any meaningful way. And it told voters the commissions will use many of the existing criteria to draw legislative maps without disclosing that important changes would be made to the relative priority of those criteria.

And, unlike in *Sedey*, the summary's language does not communicate any of these changes to voters. To the contrary, the third bullet was drafted in such a way as to conceal these changes from voters. Put simply, the legislature's summary said nothing (broadly or specifically) to alert voters they are being asked to reverse the redistricting changes they adopted in 2018. Voters deserve to and must be told of this change.

The trial court agreed and revised the summary accordingly. There are a number of ways the summary could be revised to

disclose this central feature. For example, the summary could be revised to explicitly reference the elimination of the nonpartisan state demographer. Or, it could be revised to reference the deprioritizing of partisan fairness and competitiveness in the drawing of legislative maps. Or, it could have been revised to reference both (as Petitioners originally requested). D16:P9.

The trial court took a fourth approach: simply use a context reference to the November 2018 election to alert voters they are being asked to consider changes to the redistricting rules they just adopted, thus leaving it to voters to further educate themselves on the matter. D19:P10. That's the approach used in the one other reported case in which voters were asked to reconsider changes in an initiative they had just adopted. *Cures Without Cloning,* 259 S.W.3d at 80. It ensures voters have the necessary "context reference that will enable [them] to understand the effect of the proposed change." *Boeving*, 493 S.W.3d at 879 (quoting *Brown*, 370 S.W.3d at 654).

While the best way to revise the legislature's summary can be debated (and is discussed further in Section III), there can be little doubt the elimination of the nonpartisan state demographer and deprioritizing of partisan fairness and competitiveness are the central feature of SJR 38. Thus, they must *somehow* be referenced in the summary.

4. *The State's arguments against telling voters what they're being asked to do are based on strained interpretations of this Court's precedent.*

The State offers three reasons the repeal of Amendment 1's redistricting changes are not SJR 38's central feature or need not be mentioned. The Court should reject each of these arguments, as they are based on speculation and misinterpretation of case law.

First, the State contends *Hill v. Ashcroft*, 526 S.W.3d 299 (Mo. App. 2017), held a summary need never reference changes to "existing law." That is incorrect.

Hill involved a citizen initiative to amend the Constitution to enshrine protections for collective bargaining. *Id.* at 306. *After* the Secretary summarized the initiative, the General Assembly passed a bill governing collective bargaining matters. *Id.* at 307. The issue in *Hill* was whether the Secretary's summary became unfair and insufficient after the bill was enacted because it did not mention that the proposed measure would repeal the bill.

Unsurprisingly, this Court held the summary did not need to reference the proposal's impact on the bill—regardless of when it was enacted—because "[i]t is commonly understood that constitutional amendments will supersede statutes that are in contravention with the amended constitutional provision" and it would be improper to require such specific reference "where the consequences [of the amendment] are potentially ever changing." *Id.*

Thus, it was unnecessary for the summary to reference the bill to enable voters to understand what the initiative would do. *Id.* at

315. This Court warned against courts "insert[ing] themselves unnecessarily into the summary drafting process where it is not necessary for the protection of voters." *Id.*

This case is not *Hill* and court intervention is necessary to protect voters. *Hill* involved an attempt to interfere with the citizens' right to use the initiative based on alleged conflict with a *statute* enacted *after* the citizen-submitted proposal was summarized. This case, by contrast, involves a legislative effort to override the result of a prior, successful initiative, something Missouri courts have had to police in the past. *See Earth Island Inst.*, 456 S.W.3d at 34.

Moreover, this case concerns whether the legislature fairly and sufficiently summarized how SJR 38 will change the existing Constitution. Whereas a summary need not explain how a constitutional amendment will affect every statute that might exist, the entire purpose of the summary is to tell voters what the measure proposes to do to the Constitution. The legislature has a duty "to prepare a summary statement that endeavors to promote an informed understanding of the probable effect of a proposed amendment." *Seay*, 439 S.W.3d at 889. It did not do that. While it is common knowledge that constitutional amendments will override inconsistent statutes, the same cannot be said about how SJR 38 will alter the current Constitution. *Cures Without Cloning* demonstrates it is appropriate to provide the context that voters previously legislated on the same issue.

Second, the State argues referencing SJR 38's impact on Amendment 1 is improper because voters "may not recall what

happened" two years ago and that the trial court's revision implies SJR 38 will do more than it actually would because—it claims—SJR 38 "preserves most of" Amendment 1's redistricting rules. State's Br. at 36. That is actually an argument in favor of a reference.

We don't know whether voters will remember what they did two years ago. Certainly, Petitioners remember well what happened. But we need some reference to alert voters that further inquiry may be necessary—and that is lacking here. And, for all the reasons discussed elsewhere and in the *amicus* briefs, it is simply incredible for the State to suggest SJR 38 will "preserve most of" Amendment 1's redistricting changes.

Third, and relatedly, the State argues this Court's decision in *Cures Without Cloning* renders it improper to tell voters a proposed measure will "repeal" something else in the Constitution. Again, the State misreads this Court's precedent.

In *Cures Without Cloning*, the initiative proposed to expand the then-existing constitutional ban on human cloning such that *more* activity would fall within the ban. 259 S.W.3d at 82. This Court correctly concluded the Secretary's summary statement was unfair and misleading because it told voters the measure would "repeal" the current ban. *Id.* Of course, the reason this description was misleading was because expanding prohibited conduct is obviously not a repeal of the original prohibition.

Here, by contrast, it is appropriate to describe what SJR 38 would accomplish as a "repeal" of Amendment 1's redistricting changes. For one thing, SJR 38 itself states it will submit to voters

"an amendment repealing sections 2, 3, and 7 of article III of the Constitution of Missouri, and adopting three new sections in lieu thereof." D12:P1; App. at A1. For another, SJR 38 will—unlike the measure in *Cures Without Cloning*—as a practical matter repeal all the "major innovations" Amendment 1 introduced concerning redistricting for the reasons discussed elsewhere.

III. This Court has authority to, and should, substantially revise the legislature's unfair and insufficient summary (Responds to Appellants' Point VI).

The final issue in this case, as in all ballot title cases, is the proper remedy. Petitioners believe the trial court's revised summary was proper and this Court should affirm. But the review here is *de novo*, and the Court may have different views about how to revise the summary. So Petitioners have not specifically addressed every aspect of the trial court's revised statement and will instead respond to the State's legal arguments as they pertain to this Court's authority to revise the legislature's summary statement.

A. There is no presumption in favor of the legislative summary.

The overarching thrust of the State's argument is that courts should defer to the legislature's summary-writing "discretion." State's Br. at 64. And some cases do indeed say the body of case law "gives discretion to the Secretary." But nothing in Chapter 116 requires deferring to the Secretary much less the legislature. The State takes one snippet of analysis about the Secretary and simply

extends it to "in this case, the Legislature." *Id.* Yet it cites no case for that precise proposition.

As discussed above, review of legislative summaries is different because there is no check on legislative zeal for their own ideas. *Dotson*, 464 S.W.3d at 193-94. The rules on summary statement review were written by the legislature itself. In Section 116.190, it allowed the courts to rewrite a summary statement without requiring any deference to the drafter—even if that's the legislature. *Compare with* §§ 536.140 and 536.150, RSMo (when reviewing agency decisions the court "shall render judgment . . . but shall not substitute its discretion for discretion legally vested in the" agency). The legislature could have preserved its own discretion, but instead surrendered it to the judiciary.

Nor did the legislature require courts to remand an insufficient or unfair summary back to it for revisions. The legislature instructs the courts to review the summary statement and the fiscal note summary prepared by the Auditor, but has expressly preserved the Auditor's discretion and authority to write a fiscal note summary by requiring remand if the court finds a deficiency. § 116.190, RSMo. Had the legislature wanted this Court to defer, it had every ability to provide for that.

Relatedly, the State repeatedly suggests the legislature's summary is beyond reproach because it is working within the confines of a 50-word limit. To be sure, plenty of cases say the Secretary's summary need not be perfect given the 100-word limit placed on initiative summaries. But Petitioners aren't arguing the

legislature's summary needs to be perfect, they're arguing it needs to be fair and sufficient.

B. *Cures Without Cloning* does not prevent rewriting an insufficient and unfair summary statement.

The State also contends *Cures Without Cloning*, 259 S.W.3d 76, limits the courts' authority to making only small tweaks to the original summary statement. State's Br. at 64-65. It goes on to offer a variety of examples of cases in which courts have cured unfairness or insufficiency in a ballot summary by making minor changes. *Id.* at 65-67.

The problem with this exercise is that, as the State concedes, there can be circumstances under which more substantial revisions are necessary. *Id.* at 66-67 ("To be sure, there may be extraordinary cases where the summary is so misleading in its entirety as to require a complete re-write."). In short, the extent of revisions depends—of course—on what is wrong with the summary.

In *Cures Without Cloning*, the solution was narrow because the defect was narrow. The problem was that the Secretary's summary referred to a "repeal" of the human cloning ban rather than a "change" to it. 259 S.W.3d at 82-83. Because the summary could be corrected by changing a single word, this Court held the trial court "was not authorized to re-write the entire summary." *Id.* at 83.

Cures Without Cloning does not stand for the proposition that, when faced with an unfair summary drafted by the legislature, "the courts lack authority to rewrite it." State's Br. at 64. At most, it held that a court should not rewrite a summary to correct anything

more than the defect it identified. And even that conclusion is not necessarily obvious from the language of the statute granting the courts authority to certify a new summary. A reasonable interpretation of the statute is that any unfairness or insufficiency authorizes the court to either work with the original draft or, "if it determines it to be necessary, draft its own summary." *See id.* at 84 (Smart, J., concurring in part and dissenting in part).

The Court need not revisit the issue here because all prior decisions agree that a rewrite is appropriate at least to the extent needed to make a summary statement fair and sufficient. Regardless of whether this Court finds the trial court's revised summary a useful starting point or chooses to go in a different direction, substantial revisions to the legislature's summary statement are necessary to cure its unfairness and insufficiency.

1. *Rewriting the legislature's lobbying and contribution bullet points is easy.*

The legislative summary's first bullet point was objectively false. At a bare minimum, the word "all" should be changed to the word "some." Of course, changing the summary in that manner would likely leave voters confused. The approach the trial court took avoids that issue.

The second bullet point was also highly misleading, as illustrated by the State's abandonment of its original argument and improper attempt to go in a different direction on appeal. SJR 38 would not reduce "legislative" contribution limits. At a minimum, the word "legislative" should be changed to "senate." Petitioners

believe the trial court's approach was appropriate and provides more context to voters, but this Court may have a different view.

2. *Rewriting the bullet point on redistricting is more complicated.*

The third bullet point presents the biggest issue. As discussed above, the problems on the face of the bullet are multi-faceted. Equally, if not more, troubling is the failure to alert voters to the central feature of the measure—undoing Amendment 1's prior reforms. This Court must revise that bullet to at least reference SJR 38's central feature within 50 words. Even making only the most minimal changes to the first two bullets (changing "all" to "some" and "legislative" to "senate") leaves the Court about 35 words.

Petitioners were required below to propose a different summary statement. They proposed a direct reference to the elimination of the state demographer and re-prioritizing of the redistricting criteria. D2:P9-10. The trial court went a different direction, choosing to alert voters to the change by reminding them they had just changed this process two years ago and moving that bullet point to the top of the list.

Given all of the difficulties with trying to explain the myriad ways SJR 38 would change the redistricting process in so few words, Petitioners do not believe the trial court's choice was error. It selected the approach used the last time voters were asked to undo changes they had just made to the Constitution. *Cures Without Cloning*, 259 S.W.3d at 80.

In *Cures Without Cloning*, this Court agreed revisions made in 2006 were important to the analysis of revisions proposed in 2008. *Id.* at 78-79 (discussing the factual history of the case). The Secretary of State thought it important to reference the prior vote in her summary. *Id.* at 80. The trial court substantially revised the summary, but still thought it important to mention the 2006 changes. *Id.* This Court approved yet a third summary statement but still alerted the voters to the 2006 vote, telling the voters the amendment would "change [what had been] approved by voters in November 2006." *Id.* at 83.

The State also complains that the trial court reordered the legislature's bullet points. But this just another way to make sure the central feature of a measure is brought to the attention of the voters. As discussed above, removing the *de minimis* exception for lobbyist gifts and reducing senate campaign contribution limits by $100 are arguably not central features of the measure because they are not "significant change[s] in the law." *Sedey*, 594 S.W.3d at 273. But the legislature wanted to include them and the trial court deferred.

The redistricting provisions—both in scope and in sheer volume of provisions changed—are the central feature of the measure. When Amendment 1 was on the ballot in 2018, redistricting was listed as the first bullet point. *See Ritter*, 561 S.W.3d at 81. Putting that central feature ahead of items that were not central features and mirroring the order from the 2018 vote is an appropriate remedy. The State cannot point to any case that

prohibits this, and there isn't one. There is no error in re-ordering the bullet points.

CONCLUSION

This is a historic matter. It is only the second time in reported case law—*Cures Without Cloning* being the first—that voters will be asked to repeal changes they made just two years ago. It is also rare for this Court to consider the General Assembly's summary of its own work rather than a summary drafted by the Secretary of State. As the Supreme Court instructed in *Dotson*, this review is "especially important."

Petitioners urge the Court to ensure that voters are not deceived by the legislature's attempt to mislead voters into returning to a system they did not want in 2018 and might not want again, if they are given a fair and impartial summary of the measure rather than a campaign commercial for the legislature's proposal. The trial court should be affirmed and a different summary statement certified to the Secretary.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document and the appendix were served on counsel of record through the Court's electronic notice system on August 25, 2020.

This brief complies with the limitations contained in Supreme Court Rule 84.06 and Local Rule 41. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 13,644, excluding the cover, table of contents, table of authorities, signature block, appendix, and this certificate. The font is Georgia 13-point type. The electronic copies of this brief were scanned for viruses and found to be virus free. Pursuant to Rule 55.03, the undersigned further certifies the original of this brief has been signed by the undersigned.

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