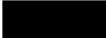



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

ANNA FITZ-JAMES,)	
Respondent,)	
)	
vs.)	WD86595
)	
JOHN ASHCROFT,)	
MISSOURI SECRETARY OF STATE,)	
Appellant.)	
)	

**AMICUS CURIAE BRIEF OF
THE AMERICAN CENTER FOR LAW AND JUSTICE AND
SUSAN B. ANTHONY PRO-LIFE AMERICA IN SUPPORT OF
APPELLANT JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE**

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Amici file this brief in support of Appellant Ashcroft and in opposition to Respondent Fitz-James's challenge to the summary statement portion of Appellant Secretary of State's official ballot title for the initiative petitions at issue in this consolidated matter. This amicus brief is being filed with the consent of the parties.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. ACLJ attorneys have appeared frequently before various state and federal courts as counsel for parties, *e.g.*, *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009), or for amici, *e.g.*, *McConnell v. FEC*, 540 U.S. 93 (2003), addressing a variety of issues including political speech and the right to life.

Susan B. Anthony Pro-Life America (SBA) is a network of more than one million pro-life Americans nationwide, dedicated to ending abortion by electing national leaders and advocating for laws that save lives, with a special calling to promote pro-life women leaders. SBA believes the legal precedents and principles governing abortion should be informed by the most current medical and scientific knowledge on human development.

The present case presents the odd and ironic situation of the proponent of grossly biased and euphemistic initiative petitions complaining about the alleged argumentativeness of ballot summaries. The ACLJ and SBA file this brief in the hopes of contributing some context, perspective, and balance to the dispute.

ARGUMENT

The circuit court accepted the challenges to the summary statements and rewrote the ballot summaries. The circuit court erred, however, by agreeing with those legal challenges. As explained below, challenger Fitz-James herself has proposed ballot initiatives which profoundly mislead and conceal the meaning of those initiatives. This Court should reverse.

A. The Law Governing the Initiative Process

The circuit court should have rejected the challenges to the summary statements. As the Supreme Court of Missouri has repeatedly stated, initiatives are primarily political matters for the people. And abortion — one of the most hotly contested issues in this country — is currently consummately political. Consequently, *the Courts of Missouri ought not to be in the position of endorsing proponent Fitz-James's tendentious version of the matters at hand.*

As the Supreme Court of Missouri has said,

When courts are called upon to intervene in the initiative process, they must act with restraint, trepidation, and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course.

Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 827 (Mo. 1990).

As this Court put it, “Judicial intervention is not an appropriate substitute for the give and take of the political process.” *State ex rel. Humane Soc’y of Mo. v. Beetem*, 317 S.W.3d 669, 674 (Mo. App. 2010). As the Supreme Court of Missouri explained, the primary

norm is the judgment of the *people*, not the judiciary.

[T]here are “procedural safeguards [in the initiative process that] are designed either, (1) to promote an *informed understanding by the people* of the probable effects of the proposed amendment, or (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). Initiative process “safeguards . . . *assure that the desirability of the proposed amendment may be best judged by the people in the voting booth.*” *Id.* at 12.

Brown v. Carnahan, 370 S.W.3d 637, 654 (Mo. 2012) (emphasis added).

In the present case, as explained further below, the initiatives which Fitz-James has proposed are exactly the sort of hide-the-ball, euphemistic proposals that aim to deceive or mislead the public and to impose an agenda “without the[] full realization” of voters regarding what is at stake. If the goal is to ensure “that voters will not be deceived or misled,” *id.* at 654, the initiatives badly fail that standard.

Fitz-James complains that the Appellant Secretary’s summary statement is argumentative and prejudicial. Even if that were the case (but see below), Fitz-James’s position would be to resolve the argument by insisting that only Fitz-James’s grossly one-sided language can be used. That, however, would be wholly inconsistent with the goals and purposes identified by the Supreme Court of Missouri for the initiative process.

As described more fully below, the language of the initiatives is profoundly deceptive. The summary statements decline to embrace that deception and rightly so. This circuit court should have denied Respondent Fitz-James’s requests.

B. The Deceptiveness of the Initiative Petitions

The various initiatives at issue are rife with euphemistic, incomplete, and misleading language. Amici wishes to highlight some prominent examples.

1. “Right to Reproductive Freedom”

Who can be opposed to “reproductive freedom”? *E.g.*, Initiative 078, Sec. 36.1. Of course, that sunny label masks a more problematic agenda. Here are some of the reasons the “reproductive freedom” banner is deceptive.

Hidden scope: As the initiatives specify, the term is undefined, “including *but not limited to*” a given list. *See Sermchief v. Gonzales*, 660 S.W.2d 683, 689 (Mo. 1983) (phrase “‘including, but not limited to’ . . . evidences an intent to avoid . . . constraints” on the “evolution” of a term). “Reproductive freedom” may well include a host of other matters not listed in the initiatives that would give voters considerable pause. WebMD, for example, says “reproductive rights” include, among a longer list of controversial matters, “abortion for minors without a parent’s or guardian’s consent.” Susan Bernstein, “What Are Reproductive Rights?” *WebMd* (Aug. 24, 2023). Abortions for minors, however, have been contentious for decades, *e.g.*, *Planned Parenthood Ass’n v. Ashcroft*, 462 U.S. 476 (1983). The National Women’s Law Center, meanwhile, says reproductive freedom includes the transgender agenda for youth. “Reproductive Rights Include Bodily Autonomy for Trans and Intersex Youth,” <https://nwlc.org/resource/reproductive-rights-include-bodily-autonomy-for-trans-and-intersex-youth/> (Aug. 9, 2022). But sex change drugs and surgery for young people likewise are, in their own

right, a point of public controversy. *E.g.*, Kate Anderson, “Missouri Gov Signs Bill Banning Child Sex Changes,” *Daily Caller News Foundation* (June 7, 2023).

“Reproductive freedom” may also be read to require the curtailing of conscience rights, *see, e.g.*, F. Signore, *et al.*, “Emergency Contraception: are the rights to conscience and to reproductive freedom irreconcilable?” 171 *Clin. Ter.* 3237 (2020), likewise a contentious matter.

Voters may break in very different directions on this potpourri of issues; yet this initiative would slip into law the imposition of one view on all these matters — proponent Fitz-James’s view — under a silent blanket of omission.

Misdirection: As to those items that *are* expressly listed, most are well-established medical practices with broad public and government support. Matters such as “prenatal care, childbirth, postpartum care, birth control, . . . miscarriage care, and respectful birthing conditions” are not matters of hot controversy or draconian government restrictions. Including items that enjoy overwhelming public approval, but which are not really at stake, misleads the voter into thinking he or she is casting a feel-good vote for what are, in reality, window dressing matters distracting the voter from the true focus: abortion.

2. “Abortion Care”

Even the initiative’s mention of abortion shows bias, employing the phrase “abortion care.” Use of this term as a substitute for “abortion” is apparently a fairly recent marketing strategy. Until Judge Pregerson used the term in a 2012 opinion for the Ninth

Circuit, *McCormack v. Hiedeman*, 694 F.3d 1004, 1012, 1018 (9th Cir. 2012), the phrase did not (according to a LEXIS search) appear in any federal circuit court opinion, other than as a quotation of other sources or document titles. The U.S. Supreme Court did not use the phrase at all prior to 2022 except once when quoting a witness for the abortion providers in *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 620 (2016). The phrase, however, appears to be becoming *de rigueur* in abortion advocacy circles and among their sympathizers.

The point of the phrase “abortion care” is presumably to soften the impact of the stark word “abortion” by adding the appealing word “care.” Nevertheless, the phrase “abortion care” is awkward and, from the perspective of abortion proponents, redundant. A surgeon does a heart bypass, not “heart bypass care.” A technician does a mammogram, not “mammogram care.” And an abortionist does abortions, not “abortion care.” *See also ProMedica Health Sys. v. FTC*, 749 F.3d 559, 567 (6th Cir. 2014) (invoking “Orwell’s admonition to use concrete terms instead of vague ones, *see* Orwell, *Politics and the English Language* (1946)”).

In reality, the controversy over abortion does not center on providing safe medical *care* for the woman before, during, or after an abortion. The controversy is over the killing of the human being residing in her womb. The initiatives, however, omit the developing human who sits at the center of the dispute.

3. The Missing Child

As the U.S. Supreme Court has recognized, many view abortion as “nothing short of an act of violence against innocent human life.” *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992). Indeed, if abortion did not entail the destruction of the tiny human dwelling in the womb, it is fair to conclude there would be no abortion controversy in this nation. Instead, the matter would be regarded as birth control is primarily a matter of moral and religious difference.

Yet the initiatives presumably strategically leave the prenatal child out of the discussion. Even when referring to later-term abortions, the initiatives refer to “gestation,” *e.g.*, Initiative 080, Sec. 36.4, without any hint of who or what is being gestated.

While it is common to see exceptions to abortion laws “to save the life of the mother,” there is no exception in the initiatives “to save the life of the child.” Indeed, that is presumably the point to prevent the child from surviving yet the language of the initiatives makes no mention of this major (for many voters) consideration. There is a huge difference between being willing to say, “I don’t want to stop the woman from having the choice,” on one hand, and adding “unless it would result in the brutal and possibly painful death of an innocent child,” on the other. To omit the latter without saying so is to distort the discussion.

4. “Compelling Government Interest”

To be sure, the initiatives do at least mouth the phrase “compelling governmental interest” (*e.g.*, Initiative 078, Sec. 36.3), by which a regulation or restriction might possibly survive judicial review in the event the initiative passes. But this too is a ruse, for at least two reasons.

Artificially limiting the interests: While the initiatives say “compelling government interests,” they do not mean it. The initiatives explicitly disallow every compelling interest but one: “a government interest is compelling only if it is for the limited purpose and has the limited effect of improving or maintaining the health of a person seeking care” *E.g.*, Initiative 078, Sec. 36.3. There is no compelling interest available after all, other than making the abortion safer for the woman.¹ And even that narrow concession is a smokescreen, as demonstrated below.

Adding an exception that swallows what little rule there is: Even the sole permitted purpose of furthering maternal health is illusory because it is subject to a catch: that it “does not infringe on that person’s autonomous decision-making.” *Id.* At a minimum, this means the state can do nothing to *stop* the abortion, even if it is being done for the most vile of eugenic or racist reasons, is being done in a horrific manner that is

¹ And, of course, these initiatives completely disallow the invocation of merely “legitimate” interests such as those the U.S. Supreme Court enumerated in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2284 (2022).

particularly painful to the prenatal human, or is being done at any time up to birth.²

Arguably, this provision would also bar genuine health-related measures such as facility licensing, sanitary disposal of biologic remains, requiring adequate malpractice insurance coverage, and so forth, if the abortion provider claims that such measures would force the facility to close and thus impair “autonomous decision-making.”

5. “Assisting a Person”

The initiatives do not use the phrase “blanket immunity.” But the voters might have a better understanding of the initiatives if they did say that. Instead, they say:

Nor shall any person assisting a person in exercising their right to reproductive freedom with that person’s consent be penalized, prosecuted, or otherwise subjected to adverse action for doing so.

E.g., Initiative 078, Sec. 36.4. The initiatives do not spell out who falls under this quite broad umbrella, but presumably it at least exempts from any responsibility the entire staff of the abortion facility. The initiatives also do not impose any conditions, and hence the exemption would seem to apply no matter how well, or how incompetently or maliciously the providers and staff discharge their duties, so long as they have the

² To the extent the initiatives purport to allow for “regulation” of late-term abortions, *e.g.*, Initiative 080, Sec. 36.4, this is also very deceptive. The text creates a massive loophole: abortions done “in the good faith judgment of a treating health care professional” *i.e.*, the abortionist “to protect the . . . physical or mental health” of the woman. *Id.* For the abortion lobby, health is a universal justification for abortion. *E.g.*, Jennifer Wright, “Every Abortion Is A Medically Essential Abortion,” *Refinery29* (Mar. 25, 2020); Ana Cristina González Vélez, “‘The health exception’: a means of expanding access to legal abortion,” *20 Repro. Health Matters* 22 (2012). Thus, a restriction with a “health” exception is really no restriction at all.

express or implicit consent of the woman getting the abortion. Such considerations would presumably matter to many voters, yet all is left unsaid.

C. The Insufficiency of Plaintiff’s Objections

In light of the foregoing, Respondent Fitz-James’s challenges should fail. The Second Amended Complaint challenging the summary statement for Initiative 085 is illustrative. Paragraphs 19a-k of that complaint enumerate the objections.

1. Subparas. a-c, j object to *omissions*: subparas. a-c object that the summary “fails to advise voters” of certain things, and subpara. j objects that the summary “does not adequately describe how the Initiative would change current Missouri law by omitting” certain matters. But complaints about what might have been added are generally not well taken. “[T]here was no requirement to articulate specifically” the aspects of an initiative; “[t]hat the court might believe that the additional information . . . would render a better summary is not the test.” *Brown v. Carnahan*, 370 S.W.3d at 664.

The court went on to quote approvingly from the court of appeals:

See *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. 1999) (rejecting claims by an initiative’s opponents who alleged that the secretary of state’s summary statement for the initiative was vague, ambiguous, and insufficient; finding that “even if the language proposed by [the opponents] is more specific, and even if that level of specificity might be preferable, whether the summary statement prepared by the Secretary of State is the best language for describing the referendum is not the test”).

Brown, 370 S.W.3d at 664.

Moreover, the specific omissions of which Fitz-James complains are not well taken. *Subpara. a* complains of the summary’s failure to say “right of reproductive

freedom” and to mouth the language from the Initiative, *see also* para. 21 (Fitz-James’s proposed rephrasing of the summary), but as explained above, that euphemistic phrase is highly deceptive and misleading. *Subpara. b* complains of the failure to say that the initiative would allow health restrictions, but as explained above, such an assertion is illusory. *Subpara. c* complains about the omission of mention of a nondiscrimination provision, but that is a matter far from the heart of the initiative (“ancillary,” as the circuit court phrased it, Judgment at 3-4)..

2. Subpara. d complains that it is not a “probable effect” of the initiative to “allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice.” But as explained above, the initiative would indeed bulldoze down any legislative effort to stop *any* abortion in the phrasing of the initiatives, “autonomous decision-making.” The initiatives do not limit the abortion “right” to licensed physicians and, notably, the abortion lobby opposes such restrictions, *e.g.*, Elizabeth Nash, “Eight Ways State Policymakers Can Protect and Expand Abortion Rights and Access in 2023,” *Guttmacher Institute* (Jan. 12, 2023) (urging, *inter alia*, repeal of “physician-only provision requirements”).

Regarding gestational limits, as noted *supra* note 2, any such pretense is misleading and ineffectual.

As for the dangerousness of abortion the interruption of a natural process, pregnancy, by the introduction of toxic chemicals or surgical instruments it would be

remarkable if there were *not* heightened risks. And in fact, peer-reviewed medical research strongly indicates that abortion, rather than being safer than childbirth, is in fact more dangerous.³ As to medical malpractice, as covered above, the initiative would grant broad, unqualified immunities to abortion providers.

3. Subpara. e objects to the statement that the initiative would “nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion,” yet as explained above, that is exactly what the initiatives would do.

4. Subpara. f objects that the initiative allows for regulation of abortion after viability but allows for abortion “at any time.” As described *supra* note 2, the pertinent initiatives do indeed *purport* to allow regulation of late-term abortions but then gut that proffer with a huge loophole for “good faith” abortionist judgments about the malleable scope of “health.”

5. Subpara. g finds misleading the statement that the initiative would allow a minor to abort at any time. But Initiatives 078, 082, 086, and 087 do not even *pretend* to authorize parental involvement. And while Initiatives 080 and 085 do purport to allow one-parent parental consent, they effectively negate that authorization by allowing the

³ The Amicus Brief of the Elliot Institute filed by the ACLJ in the U.S. Supreme Court case of *Dobbs v. Jackson Women’s Health Organization* addresses the abortion safety issue at length, including (at p. 12 & n.10) refuting the principal authorities cited by amicus League of Women Voters at pp. 13-14 of its circuit court amicus brief in this case. The Elliot Institute amicus brief is available at the U.S. Supreme Court’s website. https://www.supremecourt.gov/DocketPDF/19/19-1392/185231/20210729113330663_19-1392%20Dobbs%20v.%20Jackson%20WHO%20Amicus%20Brief%20of%20Elliot%20Institute.pdf

abortionist to disregard the lack of consent where the abortionist “in good faith” believes either that the minor is mature and capable of consenting, or that consent is not in her best interests, or that consent “may” lead to “physical or emotional harm to the minor.” Such language gives more than enough wiggle room for any willing abortion provider to do an abortion upon a minor. There is no authorization of even judicial bypasses to provide some independent review of the matter; the abortionist makes the call in-house.

6. Subpara. h objects to the assertion that the initiative “potentially” would require “tax-payer funding” of abortion. Some background is helpful here. Of the eleven initiatives originally filed, six of them, viz., 077, 079, 081, 084, 085, and 087, expressly disavowed any requirement of abortion funding by the government. *E.g.*, Initiative 085, Sec. 36.8. Tellingly, proponent Fitz-James has apparently abandoned four of these (077, 079, 081, and 084) by not including them in the current litigation. Whether the proponent is serious about pursuing the remaining two (085 and 087) remains to be seen. The other initiatives at issue here (078, 080, 082, and 086) contain no language disavowing abortion funding. Hence, this objection at most applies only to 085 and 087. But even as to those, the disavowal is only of the *initiative* “requiring” “*government*” funding. There is no disavowal of *state legislation or executive action* authorizing taxpayer funding of abortion. And there is no disavowal of using the “nondiscrimination” provisions, *e.g.*, Initiative 085, Sec. 36.7, to coerce *third parties* such as insurance companies or employers to fund abortions. Such coerced funding would come from other insureds or

from company owners or patrons, all most likely taxpayers who will find themselves paying for abortions, like it or not.

7. Subpara. i objects to “awkward wording,” which is not just petty but highly ironic given the overwhelming use of euphemisms and neologisms like “abortion care” and “miscarriage care” in the initiatives themselves.

8. Subpara. k complains that the summary statement focuses on abortion, but as explained above, that is a quite accurate depiction of the initiatives.

None of these objections has merit. Moreover, the “remedy” Fitz-James proposes essentially mimicking the deceptive language of the initiatives would be to impose on the potential signers and voters tendentious and distorted language that is antithetical to the goal “that voters will not be deceived or misled,” *Brown v. Carnahan*, 370 S.W.3d at 654.

CONCLUSION

As the Supreme Court of Missouri has said, “whether the summary statement prepared by the Secretary of State is the best language for describing the referendum is not the test.” *Brown v. Carnahan*, 370 S.W.3d at 664. While Fitz-James finds fault with the Secretary’s summary statements, the irony is that her own initiatives are replete with deceptive and misleading language and glaring omissions. She is in no position to criticize the Secretary’s summaries, which at least provide some means for the voters to recognize that there are in fact major controversies underlying the too-smooth wording of

the initiatives. The Circuit Court erred in upholding Fitz-James’s challenges. This Court should reverse and remand with direction to deny relief to Respondent Fitz-James.

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CERTIFICATION

On October 10, 2023, a copy of the foregoing was sent by electronic mail via the Missouri eFiling System to all counsel of record. This brief complies with the limitations of Rule 84.06(b) and contains 3582 words.

/s/ Brad L. Blake

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