WD83962

IN THE MISSOURI COURT OF APPEALS

Western District

BARBARA PIPPENS, et al.,

Plaintiffs/Respondents,

v.

JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE, et al.,

Defendants/Appellants.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Daniel R. Green, Circuit Judge

BRIEF OF *AMICI CURIAE* MISSOURI CHAMBER OF COMMERCE AND INDUSTRY, MISSOURI FARM BUREAU, MISSOURI SOYBEAN ASSOCIATION, MISSOURI CORN GROWERS ASSOCIATION, MISSOURI CATTLEMEN'S ASSOCIATION, AND CORNERSTONE 1791

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INTEREST OF AMICI

All amici are Missouri nonprofit organizations. The Missouri Chamber of Commerce and Industry is a membership organization of businesses which supports litigation and advocacy to make Missouri a better place to live and work. The Missouri Farm Bureau is a grassroots membership organization which advocates for farmers, the rural way of life, and all Missourians; it has an office in every Missouri county. The Missouri Soybean Association is a grassroots, grower-led organization working on legislative, policy, and regulatory efforts on behalf of soybean growers and the entire soy chain of supply. The Missouri Corn Growers Association has represented Missouri corn farmers for over 30 years through education, advocacy, and litigation. The Missouri Cattlemen's Association is a grassroots organization that represents thousands of Missouri member-producers, as well as non-producer associate members, through advocacy and education to support the beef industry. Collectively, the amici represent thousands upon thousands of Missourians from every part of the state and from all walks of life.

All of these amici have an interest in: (1) restoring the importance of communities of interest as a determinative factor in state legislative redistricting, and promoting true representative government in which citizens of an identifiable community can come together to elect their own legislators; and (2) protecting individual liberty and preserving the separation of powers by confining courts to a properly judicial role—and not a political role—when legislators and citizens submit ballot measures to the people of Missouri.

Cornerstone 1791, also known as Liberty Alliance, is a Missouri social welfare organization that advocates to implement conservative principles in

Missouri by promoting the rule of law and good government. This includes, among other things, using advocacy and litigation to reform redistricting and expose what Cornerstone 1791 sees as the legal and conceptual flaws that were embedded in the so-called "Clean Missouri" proposal and never disclosed to voters; to support Missouri law enforcement; and to hold Missouri elected officials accountable to their legal and ethical obligations.

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STATEMENT OF FACTS

This case was tried on stipulated facts. The relevant facts on appeal are the full text of SJR 38, the General Assembly's ballot title, and the text of the Circuit Court's ballot title, all of which were stipulated to below. There was no evidence of the General Assembly's political intent or motivation (if any), nor would such evidence have been proper:

> Finally, the secretary's intent in choosing language for summary statements is wholly irrelevant, so the secretary's intent regarding any revision of language seems equally irrelevant. *See State ex rel. Kander v. Green*, 462 S.W.3d 844, 852 (Mo. App. W.D. 2015) ("[I]t is clear that the Secretary's ... views as they relate to [i]nitiative [p]etition[s] ...—whether he is its staunchest advocate or most vociferous opponent—have no relevance to the question at issue: whether the Secretary's ballot summary is insufficient or unfair.").

Sedey v. Ashcroft, 594 S.W.3d 256, 265 (Mo. App. W.D. 2020), *reh'g denied* (Feb. 4, 2020).

The Circuit Court ruled as a matter of law, not of fact, that the General Assembly intended a "wholesale repeal" of Amendment One, "replacing" it "with prior redistricting rules designed to benefit incumbent legislators." Judgment at 6. A comparison of Article III of the Missouri Constitution before Amendment One, after Amendment One, and under SJR 38 shows that the factually or legally verifiable elements of this statement were false. The following summary traces the recent development of the two major elements of Missouri's redistricting provisions: *who* primarily drafts the maps, and *what* criteria are used.

A. Who Has Primary Responsibility for Drafting the Maps

1. Pre-2018

Before 2018, state legislative maps were prepared by one committee for the Missouri House (Mo. Const. Art. III, § 2, as amended Nov. 2, 1982) and one for the Senate (*id*., § 7). The committees were strictly bipartisan, nominated by party members and subject to a limited choice by the Governor. *Id*. Each committee needed to muster a 7/10 majority in favor of a map; in theory, this meant all panel members of one party plus a few of the other party, the number of necessary cross-overs differing between the 16-member House-drawing committee and 10-member Senate-drawing committee. *Id*. If this failed, a not-infrequent occurrence, a panel of six appellate judges chosen by the Missouri Supreme Court drew the maps. *Id*.

2. Amendment One

Amendment One, passed in 2018, made no changes to the composition to the committees. *See* Mo. Const. Art. III, § 3 (House-drawing committee) and § 7 (Senate-drawing committee). However, it stripped them of most of their powers by vesting the power of drawing the maps in a "state demographer," which would become final unless 7/10 of the committees could agree on a specific revision. See Mo. Const. Art. III, § 3(b) (state demographer); § 3(c)(3) (House-drawing committee's power to revise); § 7(3) (Senate-drawing committee's power to revise).

Additionally, Amendment One's proponents chose the office of State Auditor—the only statewide office then held by the Democratic Party, but an office with no other responsibility for election administration—to run the selection of the "demographer." Mo. Const. Art. III, § 3(b). The Auditor was empowered to determine the "qualifications and expertise relevant to the position" by developing an "application" inquiring into those characteristics. *Id*. Then, the Auditor was given the power to winnow the applicants to a list

of those applicants "with sufficient expertise and qualifications, as determined by the state auditor," which could number as few as three. *Id.* After both parties removed 1/3 of the applicants, the Auditor was to choose the demographer using a lottery. *Id.* The Missouri Auditor is a partisan elected official and is widely perceived to use her office to serve as the standard-bearer for her party.[1] Under Amendment One's system, so long as at least two of the Auditor-chosen final three applicants were acceptable to the Auditor and her party, it would be possible for one party to choose the "non-partisan" demographer.

Missouri voters had no opportunity to consider or approve this particular change, as it was embedded not only among other redistricting provisions, but among unrelated changes to the sunshine law, campaign finance, lobbying, the speech and debate clause/legislative privileges, and ethics rules. *See* Mo. Const. Art. III, §§ 2, 19, 20(c) and (d). SJR 38, therefore, attempted to return to a bipartisan committee system, but in contrast to the pre-2018 system, it created committees that: (1) had significantly broader and more geographically diverse membership; and (2) were comparatively more likely to reach compromises.

3. SJR 38 broadened and diversified committee membership, and made committees more likely to compromise.

With respect to **membership**, SJR 38 found inspiration in Missouri's previous bipartisan committee system, which (as seen above) preserved exact

[1] https://www.stltoday.com/opinion/editorial/editorial-galloway-turns-up-the-heat-on-hawley-but-can-she-take-it-herself/article_3e35b6fd-dd47-57a6-a2a3-b1100c2c99ee.html

equality between membership of the two major parties. SJR 38 also found inspiration in separating the power of appointment between party organizations, which would produce lists of nominees, and the Office of the Governor, which would choose from those lists. Both of these were features that Amendment One retained (although as noted above, Amendment One stripped the committees of most of their authority). However, SJR 38 created new committees with broadened and reformed membership.

- First, both the House and Senate committees were to be significantly larger: the new House-drawing committee would have 20 instead of 16 members; the new Senate-drawing committee would have 20 instead of 10 members. SJR 38, Proposed Art. III, § 3(c) (House) and 7(a) (Senate).[2]
- Second, the role of the state party committees was expanded in the new House-drawing committee. Under SJR 38, each party's state committee could now name 2 of that party's 10 total members; the party's remaining 8 House-drawing committee members would be drawn from the congressional district committees. SJR 38, Proposed Art. III, § 3(c). This wrested exclusive control of the House-drawing committee from the parties' congressional district committees, which under Amendment One (and before 2018) appointed all 8 of each party's membership on the committee, one member per district. Conversely, in the Senate-drawing committee, the congressional district committees were given

[2] The analysis herein assumes Missouri retains the 8 congressional districts it received as a result of the 2010 Census. Some recent estimates, however, predict Missouri could gain one seat in the reapportionment that will follow the 2020 Census. *See* https://thearp.org/blog/apportionment/2020-citizenship/

power to choose 8 of the parties' 10 members—in contrast to the situation under Amendment One and before, where the state committee chose all members. SJR 38, Proposed Art. III, § 7(a).

- Third, the new, larger committees would be more geographically diverse than the former committees. Previously, there was *no* geographic dispersion requirement for members of the Senate-drawing committees. *See* Mo. Const. Art. III, Section 7. Under SJR 38, the new Senate-drawing committees would have to include at least one party member for each congressional district. SJR 38, Proposed Art. III, § 7(a). Further, the new Senate-drawing committee would for the first time be unable to have more than one member from any single state legislative district. *Id*.
- Fourth, for the first time, SJR 38 required that no person could serve on both a House and Senate-drawing committee. *Id*., §§ 3(c), 7(a). That meant that instead of spreading just a few citizens among the 26 combined slots in the Amendment One (and prior) committees, SJR 38 would require 40 different citizens, spread throughout all of the congressional districts, to participate in the process. *Id*.
- Fifth, the Governor was given greater discretion to choose state committee nominees on each of the House and Senate-drawing committees, which make up 20% of each committee. Those committees give the Governor 5 names per party, of which the Governor may choose 2. *Id*., §§ 3(c), 7(a). Previously, the Governor had to choose fully half of the state committees' nominees.
- Sixth, in both new map-drawing committees, the substantially larger membership, scattered across a more diverse swath of Missouri,

increases the chances for compromise by increasing the difficulty of control by any one person, such as a strong party leader. And in the House-drawing committee, 7/10 approval of a map can be accomplished by 14 of 20 members, rather than 12 of 16 members, as before. *Id*., § 3(c).

In sum, the new citizen committees created by SJR 38 are larger, more geographically dispersed, and appointed by a more diverse set of committees.

B. What Criteria Are Used to Draw Districts

1. Pre-2018

Before 2018, House districts needed to be of "as nearly as possible" equal in population, and of "contiguous territory as compact as may be." Mo. Const. Art. III, § 2, as amended Nov. 2, 1982. Senate districts followed the same equality of population rule, but in place of compactness, were required to follow county lines except when necessary to add population to counties or cities that needed to hold more than one district. *Id*., § 7.

2. Amendment One

Amendment One jettisoned these longstanding requirements by adopting two mathematical formulas, which it labeled "partisan fairness" and "competitiveness," and placing them as the top priorities behind equality of population and compliance with federal law. Mo. Const. Art. III, § 3(c)(1). The "partisan fairness" calculation attempted to predict how voters would behave in each newly-drawn legislative district using an "index" calculated from non-legislative elections, to predict electoral outcomes in each district. *Id*. It then ran simulated elections, and attempted to ensure that each party's "wasted" votes—that is, extra votes a winner did not need to win, or all votes cast for the loser—were equally as prevalent for each party, summed across the

entire state. *Id*. The effect would be to engineer the partisan makeup of the General Assembly from the top down, attempting to recreate both the House and Senate so that their partisan split approached the partisan split in presidential and gubernatorial elections.

The "competitiveness" formula, rather than measuring how competitive each race would be, measured how stable the results of the above "partisan fairness" would be if voter preferences shifted exactly the same way in every legislative district, all across the state. *Id*. It essentially stress-tested the fairness calculation at several different shift magnitudes. *Id*.

Rather than simply setting a tolerance level that would need to be passed under each of these tests, allowing the next-priority redistricting factors to be considered (such as contiguity, communities of interest, and compactness), Amendment One mandated that each test come out "as close to zero as practicable." That is, the "tolerance" level for the tests was set even more strictly than the requirement for equality of population, which at the state legislative level does not require zero tolerance. *Id*.

Only after these stringent tests were met could the contiguity requirement be considered, *id*., making it possible, if not likely, that districts would no longer be contiguous. Only after contiguity would the requirement of following subdivision lines be followed, and in contrast to the pre-2018 law, Amendment One, elevated city lines to the status of county lines. *Id*. Finally, the last-place criterion was compactness, with a more specific definition than before 2018. *Id*.

3. SJR 38 creates factors that restore the traditional election of legislators who are members of the communities they represent, rather than the creation of districts to guarantee that elections yield pre-set partisan results.

SJR 38 attempted to restore but reform the traditional redistricting criteria in which members of communities elect someone representative of that community, keeping elements of Amendment One which checked partisan excess but moderating the Amendment One approach of dividing citizens into districts based almost entirely on predictions about which of the two major parties they would elect.

- First, SJR 38 created a new, two-tiered numerical standard for district population equality—the principle of "one person, one vote"—of one percent or three percent, and made clear that the standard could be relaxed to three percent only when necessary to follow subdivision lines using the measure's new, precise formula. SJR 38, Proposed Art. III, § 3(b)(1).
- Second, it retained the supremacy of the United States Constitution and federal law, including the Voting Rights Act. SJR 38, Proposed Art. III, § 3(b)(2). In place of less precise language in Amendment One, SJR 38 adopted language directly from the Voting Rights Act and made clear that it "shall take precedence over any other part of this constitution," rather than just giving this precedence over "this Article," as did Amendment One. *Id*.
- Third, SJR 38 restored the primacy of the long-tested principles of compactness (although never before a factor for Senate

districts) and contiguity. SJR 38, Proposed Art. III, § 3(b)(3). SJR 38 kept Amendment One's new definitions of both of these principles, which were more detailed than the pre-2018 constitution. *Id*.

- Fourth, SJR 38 restored the importance of following political subdivision lines for Senate districts and created it as a new factor for House districts—something unseen before Amendment One. SJR 38, Proposed Art. III, § 3(b)(4). It also created a detailed formula for crossing county lines, required minimization of county splits, and clearly prioritized county lines over city lines—all innovations over both Amendment One and the prior constitution. *Id*.
- Finally, SJR 38 retained a role for Amendment One's two mathematical formulas, ensuring that they will be used. SJR 38, Proposed Art. III, § 3(b)(5). However, it included a tolerance level so that the formulas' "close to zero as practicable" do not squeeze out other permissible considerations, giving the committees discretion to either apply a zero-tolerance policy or build in some tolerance that allows for other traditional and permissible redistricting considerations, such as (for example) preserving former district lines that are familiar to voters, or considering lines of other key political subdivisions that are not counties or cities.

Overall, SJR 38 diminished the role of top-down, partisan engineering in favor of keeping communities together under a representative elected from among the community's residents. To accomplish the latter goal, it created

far more detailed criteria than had ever existed under the Missouri Constitution—even under Amendment One. Further, it spread the work of drawing districts across two large, strictly bipartisan citizen committees drawn from across the state, rather than from a single person appointed (and potentially reappointed for successive terms) by a partisan state official. The Circuit Court, however, held as a matter of law that SJR 38 simply returned Missouri to its pre-2018 redistricting provisions and would protect incumbents.

POINTS RELIED ON

I. The Circuit Court erred because it departed from its limited judicial role under Chapter 116, in that it adopted the plaintiffs' political judgments about the motives of Missouri's voters and legislature and struck the General Assembly's entire description of the redistricting portion of the statement, draining it of all substantive content.

Mo. Const. Art. III, §§ 3 and 7
Sedey v. Ashcroft, 594 S.W.3d 256, 259 (Mo. App. W.D. 2020)

II. The Circuit Court erred because it completely rewrote the contribution limit and lobbying portions of the summary, even though it quibbled only with details that the Court of Appeals has repeatedly instructed do not justify a total rewrite.

Mo. Const. Art. III, §§ 3 and 7
Sedey v. Ashcroft, 594 S.W.3d 256, 259 (Mo. App. W.D. 2020)

SUMMARY OF THE ARGUMENT

On its face, SJR 38 was an attempt by the General Assembly to fix several perceived flaws in 2018's Amendment One. Amendment One had made constitutional revisions on a wide variety of subjects, including legislative ethics, the Sunshine Law, the use of the Capitol building, legislative and executive branch lobbying, campaign finance, and, finally, state legislative districting. This Court ruled that the entire package could be submitted to voters for a single up-or-down vote. *Ritter v. Ashcroft*, 561 S.W.3d 74 (Mo. App. W.D. 2018).

But precisely because of *Ritter*, no court has ever ruled—or will ever be competent to rule—that Missouri voters actually agreed with (or would now approve of) any particular piece of the many provisions cobbled into Amendment One. Courts are even less competent to opine that voters did (or would) approve any individual piece of that amendment "overwhelmingly." *See* Circuit Court Judgment at 5. *Ritter* ensured that voters were never given that chance. In view of *Ritter*, the General Assembly's SJR 38 was an attempt to allow voters to focus on a few discrete portions of Amendment One so that they could finally decide whether they actually made sense. The choice would no longer be "take it or leave it."

As is clear from their briefing, Plaintiffs and other Amendment One backers opposed any effort to allow voters to narrow their focus to the merits of any of the Amendment's constituent parts, including certain controversial pieces of the Amendment's new redistricting machinery. The Circuit Court's overriding error—clear from the plain language of its judgment, which closely

tracked Plaintiffs' trial brief—was that it simply adopted as *law* the political arguments Plaintiffs advanced as part of this rearguard effort.

Having adopted Plaintiffs' political view,[3] the Circuit Court committed an escalating series of errors.

First, it decided that "Missourians overwhelmingly adopted just two years ago" redistricting rules because their intent was "to combat political gerrymandering" and "abandon" the old process. This is a political judgment about voters' beliefs. It is wrong, unsupported in the record, and beyond the competence of the Circuit Court or of any court. Next, the Circuit Court decided that by referencing bans on lobbyist gifts and reduction in legislative contribution limits—building on measures that Amendment One itself had, with *Ritter*'s endorsement, already combined with redistricting—the General Assembly misleadingly sought to "entice" voters.

Finally, the Circuit Court arrived at what it claimed was the General Assembly's "central purpose:" it "seeks to override the recent, clearly expressed will of Missouri voters" by replacing them with "prior redistricting rules designed to benefit incumbent legislators." Although cloaked in the language of the "central purpose" requirement, this is a naked political judgment. The General Assembly's political motives are not on trial in a Chapter 116 case, just as the Secretary's or proponents' politics are not on trial in an initiative case:

> 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. Courts are

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[3] *Amici* do not argue, and would have no basis to argue, that the Circuit Court did this knowingly.

> understandably reluctant to become involved in pre-election debates over initiative proposals. Courts do not sit in judgment on the wisdom or folly of proposals."

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

For the reasons shown below, the Circuit Court violated this principle when it completely rewrote the General Assembly's summary. It left not one stone upon another. This Court should enter the judgment the Circuit Court should have entered, certifying the General Assembly's summary.

STANDARD OF REVIEW AND PRESERVATION OF ERROR

When reviewing a case tried on stipulated facts, the appellate court conducts a *de novo* review on all issues. *Archey v. Carnahan,* 373 S.W.3d 528, 531 (Mo. App. W.D. 2012); *Schroeder v. Horack*, 592 S.W.2d 742, 744 (Mo. banc 1979). The only question on appeal is whether the trial court drew the proper legal conclusions. *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573, 580 (Mo. App. W.D. 2010) (citing *Overfelt v. McCaskill*, 81 S.W.3d 732, 735 (Mo. App. W.D. 2002)).

The issues were properly preserved. The issues and evidence were framed by the Petition and Answer. The trial court rendered judgment in accordance with Rule 73.01(c). Because this matter was tried to the court, Appellants were not required to file a motion for new trial or motion to amend the judgment or opinion. Mo. R. Civ. Pro. 73.01(d). Appeal from the judgment to this Court was timely.

ARGUMENT

I. The Circuit Court erred because it departed from its limited judicial role under Chapter 116, in that it adopted the plaintiffs' political judgments about the motives of Missouri's voters and legislature and struck the General Assembly's entire description of the redistricting portion of the statement, draining it of all substantive content.

a. Chapter 116 authorizes courts to review ballot titles under a very permissive fairness and sufficiency standard, and judicial inquiry into a proponent's "central purpose" must be tailored to serve the Chapter 116 "sufficiency" and "fairness" review.

The Circuit Court, experienced with ballot measure cases, recognized that it is frequently useful for courts to identify the "central purpose" or "central feature" of a measure. The judicially-created concept of a "central feature" or "purpose" is not new, even if its absence from Chapter 116 means there has never been a statutory definition to guide judicial inquiry. Still, courts recognize that it is a common-sense tool for identifying the purpose of the proposed changes, which in turn informs analysis of the sufficiency and fairness of the ballot title. *Sedey v. Ashcroft*, 594 S.W.3d 256, 259 (Mo. App. W.D. 2020) ("What constitutes a "central feature" of a proposed amendment has not been directly addressed in any cases we could find. But many cases directly state that summary statements are designed to identify for voters the *purpose* of proposed changes.").

Sedey took a textbook approach. Finding no ballot title, this Court turned to the text of the initiatives to determine "what the proposed

amendment would accomplish… if adopted." *Id*. at 270. It found that "no-fault, absentee voting" qualified as a "central purpose," but recognized that the summary did not actually mention this concept. *Id*. This Court did not, however, proceed to immediately write "no-fault, absentee voting" into the Secretary of State's summary. Instead, strictly adhering to the judicial role of standing outside of the policy debate, and out of respect for a coordinate branch of government, the court held that it was sufficient for the Secretary's summary to have used overbroad language that could still "encompass" the change. *Id*. This Court recognized that this permissiveness is required by the forgiving nature of Chapter 116's standard, which allows a rewrite of only "insufficient" language.

Here, the Circuit Court's Judgment may have initially included the words, "central feature," but its analysis bore no relationship to the analysis of *Sedey* or any other appellate authority. Instead of making a textual analysis of SJR 38, the Circuit Court tried to channel what it believed voters wanted (to "combat political gerrymandering"), and what it believed the General Assembly wanted (to "benefit incumbent legislators"). Judgment at pp. 5-6. These slogans are instantly recognizable as the political talking points of pro-Amendment One, anti-SJR partisans in politics and the media. Viewed from this pro-Amendment One political perspective, SJR 38 poses a great danger, and the simplest political argument to make to voters is to tell them that they wanted something as recently as 2018, but now, the General Assembly wants to "repeal" it and "replace" it with "rules proposed by the legislature."

This unusual emphasis on who wants what—rather than on the actual content of the proposed changes—has no precedent in decisions of this Court

or the Supreme Court. As *Sedey* showed just earlier this year, when courts use the analytical tool of identifying the "central feature" of a measure, they are asking what substantive changes it makes, not who is supporting it or who supported the provisions being revised. If those points are relevant at all, they can be made by political advertisements, not by Missouri courts.

As shown below, once the Circuit Court finally did turn to the substance of the measure (tellingly, only after it had already decided the measure's "central feature"), it was wrong in almost every way.

b. SJR 38's "central purpose" is to establish citizen-led independent bipartisan commissions to draw state legislative districts based on certain criteria.

1. There is no ground for "disagreeing" with the language of the measure itself, which "creates citizen-led independent bipartisan commissions to draw legislative districts."

The Circuit Court incorrectly argued that SJR 38 simply "renamed" existing commissions. As shown in the Statement of Facts, that is simply untrue. Amendment One stripped pre-existing commissions of the power to draw maps and transferred that power to a single state demographer, whose maps would go into effect unless the commissions could muster either 12 out of 16 votes (in the House) or 7 out of 10 (in the Senate) to agree to a specific change. Amendment One did, however, keep the membership and selection of the commissions unchanged. In response, SJR 38 innovated in two ways. First, it created commissions that would have the power to draw maps in the first place, which had been the situation with the old pre-2018 commissions. Second, it greatly expanded the membership and diversity of those commissions, expanded the number of entities that would pick them, gave the

Governor a more powerful hand in choosing certain members of each new commission, and made the Senate commission truly representative of the state.

The Circuit Court claims that these changes are so unimportant that SJR 38 is tantamount to a "renaming" of the old Amendment One committees and is the "exact system in place before 2018." That is simply wrong, and fails to include any reasoning or citation. But more importantly, it is a political judgment or talking point. Under Chapter 116, a court cannot simply import its belief about the political impact of a proposed measure into the summary statement drafted by a coordinate branch of government.

Next, the Circuit Court opines that the committees will be neither "citizen-led" nor "independent" because different statewide and localized organs of each party will nominate their membership, and the Governor will choose from among those nominees. First, as discussed above, SJR expands the number of appointees, requires them to be geographically distributed, and increases the number of individuals who get to choose the committees. The Circuit Court's implicit assumption is that each party is completely homogenous and acts with one mind and voice, so that none of this matters. But the Circuit Court is not free to disagree with the General Assembly on this policy matter, and then use raw judicial power to supplant the General Assembly's chosen language, which reflected the legislature's policy choice.

Further, the Circuit Court opines without any citation or support that Missouri voters will probably assume that a "citizen-led" commission equates to Michigan's newly-enacted proposal. *See* Mich. Const. Art. 4, Section 6. There is no reason to think that Missouri voters are following current developments in Michigan law and are closely comparing the two states, nor was there anything placed in the record regarding all of the factual

assumptions the Circuit Court apparently made. But more importantly, the Circuit Court once again made a policy assumption at odds with the General Assembly and decided that its own policy preferences should prevail.

Here, the assumption was that randomly chosen citizens (*i.e.*, the result of Michigan's untested new system) would turn out to be more "independent" than commission members chosen by their fellow citizens based on their intellect, wisdom, and ability to persuade and lead (*i.e.*, Missouri's longtime system, as improved upon by SJR 38). Indeed, one could rationally raise concerns about whether 13 randomly selected Michiganders (four who say they are Republican, four who say they are Democrat, and five who claim not to affiliate with any party) will truly "lead" their own commissions, or will quickly find themselves reliant on a politically savvy, partisan official who is assigned to help run the Michigan committee. The Michigan Secretary of State is responsible for serving as the "nonvoting secretary" of the committee, providing it technical assistance, and "training" the randomly-selected committee members who "do not need to have any prior knowledge or experience in drawing legislative districts."[4]

It is beyond the scope of amici's interest here to argue whether Michigan's policy will lead to true "independence" or is wise. No Missouri court, of course, can or should reach the issue. The Circuit Court certainly could not decide that Michigan's system yields "independence" while Missouri's does not; the Circuit Court was even less competent to make the additional political judgment that Missouri voters would actually share the Circuit Court's own beliefs. Again, the Circuit Court was obliged to leave

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[4] *See* https://www.michigan.gov/sos/0,4670,7-127-1633_91141-488602--,00.html.

undisturbed the terms the General Assembly chose for its proposal, which reflect the General Assembly's policy judgments and the judgments it hopes voters will adopt. The Circuit Court cannot drown out the General Assembly by interposing its own policy arguments in between the legislature and its constituents, the voters who elected the legislature and with whom the legislature is trying to communicate.

2. The Commissions do provide minority voter protection, and the Circuit Court misread the petition and the law in claiming otherwise.

Next, the Circuit Court incorrectly claimed SJR 38 "would significantly weaken" minority voter protections within Amendment One. That is false. The Circuit Court's only example was "the elimination of any protection for language minorities." Judgment at 9. But, perhaps failing to carefully test Plaintiff's trial brief on this point, the Circuit Court failed to recognize that SJR 38 provides that districts must "comply with all requirements of the United States Constitution and applicable federal laws, including, but not limited to, the Voting Rights Act of 1965 (as amended)." See Section 3b2. The Act, now codified (as relevant here) at 52 U.S.C. §10301(a), provides that:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision 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, or in contravention of the guarantees set forth in section 10303(f)(2) of this title…"

Section 10303(f)(2), in turn, provides that these protections extend to language minority groups:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of

the United States to vote because he is a member of a language minority group.

Yet even if SJR 38 *had* somehow "eliminated" protection for language minorities, it is not insufficient or unfair to state that the new commissions will draw districts based on "minority voter protection," as "minority voter protection" is clearly what Section (3)(b)(2) provides. *Sedey* teaches that even overbroad statements that are incorrect pass the sufficiency bar when they cover the purpose of the measure. *Id.*, 594 S.W.3d at 270. The Circuit Court was wrong to latch onto its own mistake of law and then completely strike the concept of minority voter protection from the ballot title.

3. The other criteria listed in the ballot title are all correct.

The Circuit Court strained to drain the ballot title of all its remaining positive and informative content—eliminating references to one person, one vote; fairness; competitiveness; and compactness. With respect to one person, one vote, which SJR 38 undeniably adds to the constitution, the Circuit Court made no finding at all; it simply struck it from the ballot title.

The Circuit Court next assumed that SJR 38 needed to have "strengthened" or "perpetuated" Amendment One's mathematical "fairness" or "competitiveness" tests to have mentioned them. Apparently "compactness" is also "improper" based on the same reasoning. To build its case for a misrepresentation of some kind, the Circuit Court even moved the goalposts, claiming that the ballot title informs voters "the measure will *now* require consideration of fairness and competitiveness in redistricting." Judgment at 9 (emphasis added). But the summary does no such thing. No natural reading of the statement suggests that all of the criteria are brand-new. Instead, the summary simply reports in 50 words or less five of the

main factors the newly created commissions will be applying. It clearly directs voters who are interested in knowing the exact priority, definitions, and list of "other criteria" to consult the language itself. On Amendment One, the summary was sufficient even though voters were only told that they would "change [the] process and criteria for redrawing state legislative districts during reapportionment," without even a hint of what those changes were. Here, the General Assembly's summary was sufficient and fair.

II. The Circuit Court erred because it completely rewrote the contribution limit and lobbying portions of the summary, even though it quibbled only with details that the Court of Appeals has repeatedly instructed do not justify a total rewrite.

The Circuit Court completely rewrote the bullet point regarding SJR 38's lobbyist gift ban because, as under Amendment One, there are safe harbors for legislator gifts from their own relatives and from individuals who are not paid to serve as lobbyists, but are nonetheless deemed to be "lobbyists" because they speak to legislators on behalf of others. The Circuit Court apparently labored under the misimpression that it needed to include the reduction from $5 to $0, perhaps because it viewed SJR 38's reform as "economically irrelevant" and wanted to highlight that opinion for the voters. Again, such policy judgments were not for the Circuit Court. Less intrusive revisions would simply state, "Ban legislative gifts from most lobbyists," or "…from paid lobbyists."

Second, the Circuit Court once again disregards *Sedey*, which counsels caution when the only alleged flaw is in the possible overbreadth of a statement. *Id.*, 594 S.W.3d at 270. Here, though, the original language was correct, because SJR 38 will indeed "reduce legislative contribution limits."

First, it makes an immediate reduction in Senatorial contribution limits, from $2500 to $2400. But just as importantly, it cuts into both House and Senate contribution limits as compared to Amendment One, as it eliminates Amendment One's annual Consumer Price Index adjustment, which would have allowed contribution limits to rise with inflation. This Court has previously observed that CPI adjustments can be more than *de minimis* considerations when it comes to ballot titles: "…the desirability of mandatory, annual, inflation-based increases has been the subject of substantial public debate, in connection with (for example) the minimum wage, public-employee compensation, governmental benefits such as Social Security, and income tax rates and brackets." *Boeving v. Kander*, 493 S.W.3d 865, 875 (Mo. App. W.D. 2016). There was no justification for the Circuit Court to override the General Assembly's plain and accurate statement with its own apparent policy judgment that the loss of the CPI inflator here was so insubstantial that it did not deserve being factored in to the ballot title. The bullet point should stand as written. Even if this Court agrees with the Circuit Court's policy judgment, though, the least intrusive fix is to keep the current bullet point, "Reduce legislative campaign contribution limits," and insert the word, "senatorial."

CONCLUSION

For the foregoing reasons, the Circuit Court should be reversed and the General Assembly's ballot title should appear on the general election ballots.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on August 21, 2020.

Further, 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 6121, excluding the cover, table of contents, table of authorities, signature block, appendix, and this certificate. The font is Century Schoolbook 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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