No. SC100742

IN THE MISSOURI SUPREME COURT

MARY ELIZABETH ANNE COLEMAN, *et al.*,
PLAINTIFFS/RESPONDENTS,

v.

SECRETARY OF STATE, JOHN R. ASHCROFT,
DEFENDANT,

and

MISSOURIANS FOR CONSTITUTIONAL FREEDOM
AND DR. ANNA FITZ-JAMES,

INTERVENORS/APPELLANTS.

On Appeal from the Circuit Court of Cole County, Missouri

The Honorable Christopher Limbaugh

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JURISDICTIONAL STATEMENT

By order of the Presiding Judge on September 7, 2024, the Court of Appeals transferred this matter to this Court because Plaintiffs' Petition raised a constitutional challenge to Section 116.200, RSMo (though the circuit court did not resolve that claim). *See* Order, Case No. WD87468 at 2-3 (Sept. 7, 2024). The Missouri Supreme Court has "exclusive appellate jurisdiction in all cases involving the validity of a . . . statute or provision of the constitution of this state." Mo. Const. art. V, § 3.

INTRODUCTION

This case is about whether the people's right to engage in direct democracy will be protected, or if Section 116.050 must be read so broadly that the Court is duty-bound to adopt an interpretation of that procedural statute that would throw a certified amendment off the ballot. The circuit court's decision threatens to grind our system of constitutional initiative petition to a halt at the last minute.

Hundreds of thousands have exercised their power as citizens, and want their fellow Missourians to vote on whether to change the Constitution with regard to abortion rights.[1] As this Court has noted:

> Nothing in our constitution so closely models participatory democracy in its pure form. Through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the people. The people, from whom all constitutional authority is derived, have reserved the power to propose and enact or reject laws and amendments to the Constitution.

Brown v. Carnahan, 370 S.W.3d 637, 645 (Mo. banc 2012). The people have reserved to themselves the power to do that "independent of the general assembly." Mo. Const. art. III, § 49.

The right of the people supersedes the views of public officials. The Secretary had strong views, for example, on the merits of the initiative petition now known as Amendment 3. *See Fitz-James v. Ashcroft*, 678 S.W.3d 194 (Mo. App. 2023), but he has acknowledged the expression of the people's will and certified Amendment 3 for a vote on the November ballot. D17.

After he did so, four plaintiffs sued to try to keep Amendment 3 off the ballot. *See generally* D2. They argued that hundreds of thousands of legal voters may not have the

[1] When it overruled *Roe* and *Casey*, the United States Supreme Court discussed the government's authority to authorize or restrict abortions and "return[ed] that authority to the people and their elected representatives." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022). This initiative is an exercise of that authority.

vote to which they are entitled, not because of some infirmity in the substance of the measure, or because the process used did not comply with the Constitution, but because the introductory material in the measure did not comply with a *statutory* requirement that (they claim) requires the proposed constitutional amendment to list all of the *statutes* it would "repeal." *Id.*

This claim is novel. To Intervenors' knowledge, no recorded decision has ever accepted such a theory and used it to decertify a proposed constitutional amendment that was supported by the requisite number of voters' signatures. And on the Friday before a Tuesday "drop dead" day for changes to the ballot, they convinced the circuit court to remove the proposed constitutional amendment from the ballot. *See* Judgment; A1. The circuit court was wrong to do so, and this Court should reverse its decision.

The circuit court's fundamental error is that it misapprehended the standard courts have routinely applied to challenges under Section 116.050.2. First, the circuit court was wrong because the statute does not require proposed constitutional amendments to speculate about or address whether statutes might be rendered invalid if the Constitution is amended. The express language of Section 116.050.2 does not require a proposed constitutional amendment to list statutes it "repeals" or might "repeal." Statutory initiatives need to do that, but amendments proposing constitutional amendments need only list amendments to the Constitution. This plain-language reading makes good sense because a constitutional amendment cannot "repeal" an existing statute—it can only render it invalid. The circuit court did not find that Amendment 3 made undisclosed amendments to the Constitution. *See* D28; A1. Nor did the circuit court address the other issues raised in the Petition (an alleged single-subject violation and alleged unconstitutionality of Section 116.020). D28:P10; A10.

Second, even assuming a constitutional amendment *could* repeal a statute, it is undisputed that the amendment here does *not* purport to expressly do so. The circuit court failed to apply the repeal-by-implication standard some cases have endorsed in this context. Even then, it is not the responsibility of a proponent to "ferret out" what statutes might be deemed invalid in the future. *See Knight v. Carnahan*, 282 S.W.3d 9, 19 (Mo.

App. 2009). Certainly, a change in the Constitution might result in some statutes being found unconstitutional at a later date. But nothing in Amendment 3 would invalidate statutes without further action by the courts or result in repeal without further action from the General Assembly.

Further, even if Section 116.050 could be read to require listing statutes that might later be invalidated, and even if Amendment 3 would clearly and undoubtedly invalidate some statutes that it did not identify, nothing in Section 116.050.2 specifies that a measure must be kept from the ballot as a result of such infirmity. This Court has consistently held that technical requirements will not keep a measure from the ballot unless there is a clear expression by the legislature mandating such a result. *See Boeving*, 496 S.W.3d at 507; *United Labor Committee of Missouri v. Kirkpatrick*, 572 S.W.2d 449, 456-57 (Mo. banc 1978); *see also Bradshaw v. Ashcroft*, 559 S.W. 3d 79, 90 (Mo. App. 2018); *Sweeney v. Ashcroft*, 652 S.W.3d 711, 732-33 (Mo. App. 2022).

Finally, if this Court believes Section 116.150.2 can only be interpreted in a way that would keep this measure off the ballot—denying the will of hundreds of thousands of legal voters—the statute is simply unconstitutional. The Court will no doubt find an interpretation of the statute that avoids that result. But if it cannot, the statute must fall.

This Court should reject the invitation to order Amendment 3 removed from the ballot. Courts have done this only once in modern times, and they did so based on a *constitutional* challenge. Nothing about the present petition warrants reversing the Secretary's certification, which would effectively invalidate the signatures of the more than 254,000 Missourians who signed it. The circuit court's judgment should be reversed and the initiative placed before the voters.

STATEMENT OF FACTS

Article III, Section 49 of the Missouri Constitution guarantees to citizens the right to propose constitutional amendments through the initiative process. Mo. Const. art. III, § 49. Chapter 116 of the Revised Statutes of Missouri provides the statutory process for statewide initiatives that is generally divided into four phases: phase one – review of the form of submitted petitions (within fifteen days of submission); phase two – preparation of an official ballot title for use in circulation of initiative petitions and placement of the measure on the ballot (ordinarily within 51 days of submission); phase three – circulation of petitions for signature (from certification of official ballot title until six months before the general election); and phase four – submission and certification of signed petitions for sufficiency for placement on the ballot.

A. Phase One: Approval of Petition as to Form

When a proposed initiative is filed, the Secretary of State and Attorney General must "review the petition for sufficiency as to form and approve or reject the form of the petition, stating the reasons for rejection, if any." § 116.332.1, RSMo. This pre-circulation review of the form of the proposed petition is required to be public, and takes place on an expedited, statutory timetable. *Id.*

Within two days of receipt of a proposed amendment, the Secretary must "conspicuously post on its website the text of the proposed measure, a disclaimer stating that such text may not constitute the full and correct text as required under section 116.050, and the name of the person or organization submitting the sample sheet." § 116.332.2, RSMo. The Attorney General must make a recommendation as to the form of the proposed initiative within ten days. § 116.332.3, RSMo. And the Secretary must "make a final decision as to the approval or rejection of the form of the petition" and communicate that decision "within fifteen days after submission of the petition." § 116.332.4, RSMo.

This review includes consideration of whether the proposed petition complies with the requirements of Sections 116.040 and 116.050. If the proposed form of the petition is rejected, the Secretary is required to remove the text of the proposed measure from the

website within three days of its rejection. § 116.332.2, RSMo. If the proposed form of the petition is approved by the Secretary, the proposed amendment moves to phase two.

Here, phase one began when Intervenor Dr. Anna Fitz-James submitted to the Secretary an initiative petition to amend the Missouri Constitution on March 8, 2023. D16;P4, ¶ 7. This advanced the amendment to phase two.

B. Phase Two: Preparation of Official Ballot Title

In phase two, the Secretary, Attorney General, and State Auditor review the proposed measure to determine the sufficiency of the text of the measure and prepare and review the official ballot title. *See* § 116.334, RSMo. Within twenty-three days of approval of the petition as to form in phase one, the Secretary of State must transmit to the Attorney General "a summary statement of the measure . . . not exceeding one hundred words . . . in the form of a question using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure." *Id.* The Auditor must likewise prepare a fiscal note and summary "using language neither argumentative nor likely to create prejudice either for or against the proposed measure" within 20 days of receiving it from the Secretary. § 116.175.2-3, RSMo.

Both the Auditor and the Secretary must transmit their summaries to the Attorney General, who is given ten days to "approve the legal content and form." § 116.175.4, RSMo (fiscal note); § 116.334.1, RSMo (summary statement). This phase also includes mandatory consideration of comments from the public regarding the proposed measure. *See* § 116.334.1, RSMo (requiring Secretary to accept public comments regarding proposed measure "for a period of fifteen days after the petition is approved as to form"); § 116.175.1, RSMo (authorizing proponents and opponents to provide Auditor "proposed statements of fiscal impact").

The result of phase two is an official ballot title containing a summary statement and fiscal note summary that must be included on signature pages for circulation. *See* § 116.040, RSMo (requiring use of "Official Ballot Title"); § 116.080, RSMo (requiring Secretary to certify Official Ballot Title "within Three days" after receiving approved summary statement and fiscal note summary). "[I]t may take up to 51 days from the time

the proponent first submits the proposed petition until the official ballot title is certified." *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 487 (Mo. banc 2022).

In this case, Secretary Ashcroft did not certify an official ballot title for much longer than the 51 days envisioned by *No Bans on Choice*. The protracted delay arose from the Attorney General's refusal to approve the form of the Auditor's fiscal note and summary. As this Court is aware, the Auditor sent his fiscal note and summary to the Attorney General on March 29. *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 5 (Mo. banc 2023). The Attorney General rejected the form and content of the fiscal note and summary twice, requiring Dr. Fitz-James to pursue relief through a writ of mandamus, obtaining an order that the Attorney General approve the fiscal note and summary. *Id.* (affirming order requiring Attorney General to approve fiscal note summary because "technical formalities cannot stand in the way" of "the ability of voters to get before their fellow voters issues they deem significant"). These processes prolonged the time it took to obtain an official ballot title from April 28, 2023 (51 days after submission) until July 26, 2023 – 140 days after submission. D16; P3, ¶ 8.

Any Missouri citizen can challenge the fairness and sufficiency of the ballot title by filing suit within ten days of its certification. § 116.190, RSMo. Dr. Fitz-James filed suit on June 29, 2023, attempting to challenge the ballot title. D16:P3, ¶¶ 9-10. On July 26, 2023, the Circuit Court granted the Secretary's motion to dismiss the challenge as not yet ripe because he had not yet certified the official ballot title. *See Fitz-James v. Ashcroft*, Case No. 23AC-CC03953 (Cole County Cir. Ct. July 26, 2023). [2] Later the

[2] This Court can take judicial notice of other courts' dockets. *Moore v. Mo. Dental Bd.*, 311 S.W.3d 298, 305 (Mo. App. 2010) ("It has long been the law that courts may (and should) take judicial notice of their own records in prior proceedings which are (as here) between the same parties on the same basic facts involving the same general claims for relief. Judicial notice of records from other related proceedings involving the same parties can be on the court's own motion or at the request of a party." (quotations omitted)). To the extent a request to take judicial notice is required, Intervenors make such request here.

same day, Secretary Ashcroft certified the official ballot title and Dr. Fitz-James filed an amended petition.

Pursuant to statute, these challenges are to be expedited and "placed at the top of the civil docket." § 116.190.4, RSMo. The Circuit Court of Cole County entered judgment on September 25, 2023 finding certain portions of the summary statement to be insufficient or unfair and certified new language. D16:P3, ¶ 10. Following an appeal by the Secretary, the Court of Appeals certified a new summary statement for inclusion in the official ballot title on October 31, 2023. *See Fitz-James*, 678 S.W.3d 194 (redrafting summary statement because it was insufficient and unfair). D16:P3, ¶ 11.

Separately, some of the Plaintiffs here challenged the Secretary's Official Ballot Title, claiming the Auditor's fiscal note summary for this measure was insufficient and unfair. The circuit court rejected their challenge, and the decision was affirmed by the Court of Appeals. *See Kelly v. Fitzpatrick*, 677 S.W.3d 622 (Mo. App. 2023). Plaintiff Coleman raised no argument in the prior suit that the measure was insufficient and unfair to be circulated to voters because it failed to identify statutes that conflict with the proposed constitutional amendment.

The revised official ballot title, consistent with the decisions of the Court of Appeals in *Fitz-James* and *Kelly* was certified by the Secretary on November 28, 2023. *See* https://www.sos.mo.gov/petitions/2024IPcirculation#2024086.

C. Phase Three: Circulation of the Proposed Amendment

Intervenor Missourians for Constitutional Freedom thereafter began circulating the initiative for signatures from registered voters. Chapter 116 establishes requirements associated with signature gathering. *See* § 116.060, RSMo (initiative pages must contain signatures of voters from only one county); § 116.070, RSMo (permitting signatures by mark and attestation); § 116.080, RSMo (requirements for circulators and notarization); § 116.090, RSMo (penalties for fraudulent signatures). The signatures are required by statute to be delivered to the Secretary no later than six months before the next general election. § 116.334.3, RSMo; *see also* Mo. Const. art. III, § 50.

On May 3, 2024, Intervenor Missourians for Constitutional Freedom submitted to the Secretary signed petition pages for the initiative petition to be validated and assessed for compliance with the Constitution and Chapter 116. D16: P3, ¶ 12. These petition pages contained hundreds of thousands of signatures.

D. Phase Four: Certification of the Proposed Amendment for the Ballot

The Secretary must "examine the petition to determine whether it complies with the Constitution of Missouri and with . . . chapter [116]." § 116.120.1, RSMo. This examination involves verification of the signatures submitted by local election authorities throughout Missouri. *See* § 116.130, RSMo. On August 13, 2024, the Secretary certified the initiative petition for inclusion on the ballot for the November 5, 2024 general election. D17. The Secretary found that more than 254,000 registered Missouri voters had signed the initiative, seeking to place the measure on the ballot. D16: P4, ¶ 13. Pursuant to Section 116.210, the Initiative Petition was denominated as Amendment 3. *Id.*

E. The Challenges Below

Section 116.200 permits any citizen to file suit seeking to challenge the Secretary's certification decision under Section 116.150 within ten days. Plaintiffs filed their challenge on August 22, 2024, nine days after certification. *See* D1. Plaintiffs alleged the Secretary's certification decision should be reversed for three reasons. Count I alleged Amendment 3 failed to comply with the petition form requirements in Sections 116.040 and 116.050 because it did not identify statutes or constitutional provisions it allegedly would repeal. D1:P17-26. Count II alleged Amendment 3 violates the single-subject requirement in the Missouri Constitution because it allegedly addressed subjects beyond reproductive freedom. D1:P26-32. Count III alleged Section 116.200.1 is unconstitutional because it does not permit adequate time for citizens to challenge the Secretary's decision to certify a measure for the November ballot. D1:P32-34.

Intervenors answered on August 30, 2024, denying the allegations in pertinent respects. *See* D9. Intervenors denied all allegations relating to the alleged requirement of Section 116.050 to identify all statutes that may be impliedly "repealed" by a proposed constitutional amendment. D9:P10, ¶¶ 85-101. Intervenors also affirmatively alleged the

asserted requirement to identify all statutes impliedly "repealed" by a new constitutional provision is "not justiciable and not ripe for review." D9:P16. Intervenors denied that Amendment 3 contains more than one subject, D9:P12, ¶¶ 108-127, and affirmatively alleged that it contained only one subject, D9:P16. Intervenors denied that Section 116.200 is unconstitutional as applied to the facts here. D9:P15, ¶¶ 133-138. Intervenors also pled the affirmative defense of laches, alleging Plaintiffs unreasonably delayed pursuit of relief on their claims and that Intervenors and thousands of Missourians relied on the sufficiency of the form of the petition as certified by the Secretary. D9:P17.

The Secretary, represented by the Attorney General, filed an answer and stated the contentions about the requirements of Section 116.050 are "legal contentions that do not require an answer." D15:P9-11, ¶ 82-83, 85-101.

The case proceeded to trial on stipulated facts and an expedited basis. On Friday, September 6, Intervenors filed their trial brief and the parties filed a joint stipulation of facts. *See* D16, D27. After a bench trial where no witnesses testified or additional evidence was adduced, the circuit court entered judgment for Plaintiffs on Count I. *See* D28:P10; A10. The circuit court ordered that Amendment 3 be removed from the November ballot because Amendment 3 did not include "any statute or provision that will be repealed . . . in . . . violation of the sufficiency requirements under 116.050.2(2), RSMo.," thus rendering Amendment 3 insufficient. D28:P9-10 A9-10. The circuit court did not, however, find that Amendment 3 failed to list any *constitutional provision* it repeals or modifies. *See generally* D28; A1. Recognizing the September 10, 2024 deadline for court-ordered modifications to the general election ballot, the circuit court stayed its order until September 10 to permit expedited review. D28:P10; A10.

Thereafter, Intervenors filed their notice of appeal. *See* D29. The Court of Appeals transferred the appeal to this Court on its own motion, finding the appeal contained constitutional questions within this Court's exclusive jurisdiction. *See* Order, WD87468 (Sept. 7, 2024).

POINTS RELIED ON

I. The circuit court erred in concluding Amendment 3 was insufficient for not identifying statutes it might invalidate because Section 116.050.2 is phrased in the disjunctive and its plain and unambiguous language does not require the proponent of a proposed constitutional amendment to identify such statutes in that constitutional amendments do not "repeal" statutes and Amendment 3 does not expressly repeal any constitutional or statutory provisions.

- § 116.050, RSMo
- Mo. Const. art. III, § 50

II. The circuit court erred in concluding Amendment 3 was insufficient for not identifying statutes it might invalidate because the circuit court misapplied longstanding case law in that courts have interpreted the word "repeal" in Section 116.050 to cover only situations where two provisions are so irreconcilable that both cannot stand and the circuit court did not identify any statute that Amendment 3 would clearly, unambiguously, and entirely displace.

- § 116.050, RSMo
- *Ritter v. Ashcroft*, 561 S.W.3d 74 (Mo. App. 2018)
- *Knight v. Carnahan*, 282 S.W.3d 9 (Mo. App. 2009)

III. The circuit court erred in concluding Amendment 3 was insufficient for not identifying statutes it might invalidate because interpreting Section 116.050 to require that would make it an unconstitutional attempt by the legislature to add burdensome requirements to the initiative process in that Article III, Section 50 requires only that an initiative contain "the full text of the measure," which Amendment 3 did.

- *Boeving v. Kander*, 496 S.W.3d 498 (Mo. banc 2016)
- *Buchanan v. Kirkpatrick*, 615 S.W.2d 6 (Mo. banc 1981)

- *United Lab. Comm. of Mo. v. Kirkpatrick*, 572 S.W.2d 449 (Mo. banc 1978)

IV. The circuit court erred in reaching the issue of Amendment 3's sufficiency and entering a judgment in Plaintiffs' favor on Count I because Plaintiffs' claims were barred by laches in that Plaintiffs could and should have challenged Amendment 3's alleged noncompliance with Section 116.050 in their prior lawsuit and Plaintiffs' unreasonable and unexplained delay has prejudiced Intervenors and the many Missourians who signed Amendment 3.

- *Metro. St. Louis Sewer Dist. v. Zykan*, 495 S.W.2d 643 (Mo. 1973)
- *Bauer v. Transitional Sch. Dist.*, 11 S.W.3d 405 (Mo. banc 2003)
- *Boeving v. Kander*, 496 S.W.3d 498 (Mo. banc 2016)

STANDARD OF REVIEW AND PRESERVATION

In a court-tried case, "the judgment is affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Fitz-James*, 678 S.W.3d at 202. Here, the matter was submitted based on the parties' Joint Stipulation of Facts and Exhibits. Because there is no underlying factual dispute, this Court reviews the circuit court's decision *de novo*. *See Pippens v. Ashcroft*, 606 S.W.3d 689, 701 (Mo. App. 2020). Appellants believe the decision below erroneously applies the law.

The issues in this appeal are fully preserved for review as discussed in specific detail before each point below. On an extremely abbreviated schedule, Intervenors actively contested Plaintiffs' claims, filing a trial brief arguing against Plaintiffs' various legal theories and a proposed judgment upholding the Secretary's decision to put Amendment 3 to vote. *See* D27.

Even assuming that any of Intervenors' arguments were not preserved, the Court should exercise its discretion to review the circuit court's actions for plain error. The Court has discretion to exercise plain-error review of unpreserved arguments to prevent injustice. *See* Rule 84.13(c); *see also Great S. Sav. & Loan Ass'n v. Wilburn*, 887 S.W.2d 581, 584 (Mo. banc 1994). The injustice must be "so egregious as to weaken the very foundation of the process and seriously undermine confidence in the outcome of the case." *Williams v. Mercy Clinic Springfield Communities*, 568 S.W.3d 396, 412 (Mo. banc 2019) (quotation omitted).

The present circumstances easily satisfy that standard. The right of the people to engage in the most direct form of democracy is at stake. "Nothing in our constitution so closely models participatory democracy in its pure form. Through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the people." *Missourians to Protect Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990). Such right "should not be thwarted in preference for technical formalities." *United Labor Comm.*, 572 S.W.2d at 454.

This case is the product of a group of plaintiffs sandbagging and attempting to manipulate the certification process and the judiciary to disenfranchise the more than 250,000 Missourians who provided signatures in support of Amendment 3. *See* D17. Following copious litigation in which they were involved, and following the Secretary certifying Amendment 3 for the ballot, Plaintiffs brought an eleventh-hour suit on August 22, 2024. D16:P4, ¶ 14. Plaintiffs never explained why their last-minute challenge was not brought sooner. Plaintiffs' first communication with the Court to schedule the matter for a hearing was a full week later, on August 29, 2024. D10. Trial proceedings lasted approximately a week and a half. It was in this compressed time frame that Intervenors defended Amendment 3.

Failure by this Court to fully review the matters presented here would result in manifest injustice because an adverse decision would disenfranchise the many Missouri voters who should be permitted to exercise their constitutional right to vote on one of the most hotly contested political issues of our time.

ARGUMENT

I. The circuit court erred in concluding Amendment 3 was insufficient for not identifying statutes it might invalidate because Section 116.050.2 is phrased in the disjunctive and its plain and unambiguous language does not require the proponent of a proposed constitutional amendment to identify such statutes in that constitutional amendments do not "repeal" statutes and Amendment 3 does not expressly repeal any constitutional or statutory provisions.

As noted, this Court reviews the circuit court's decision *de novo*. *See Pippens*, 606 S.W.3d at 701. Intervenors' arguments are preserved because Intervenors actively contested Plaintiffs' position that Amendment 3 was insufficient for not listing statutes it may "repeal." Intervenors specifically alleged in their answer that "Amendment 3 would add an entirely new Section to Article I of the Missouri Constitution and, as such, does not repeal any other provision of the Missouri Constitution." D9:P16. Intervenors also raised this argument in their trial brief. *See* D27:P7-11 (arguing "the measure does not on its face repeal any law, nor is it "irreconcilably repugnant" to any law" and that the effects of Amendment 3 on statutory and Constitutional provisions must be determined over time by courts on a case-by-case basis).

The circuit court held that voters will not be allowed to vote on Amendment 3 because the initiative petition "did not comply with the necessary requirements of § 116.050.2(2)." D28:P10; A10. The circuit court said the failure was not including "any statute or provision that will be repealed, especially when many of these statutes are apparent, is in blatant violation of the sufficiency requirements." *Id.* Importantly, the circuit court's judgment does not find that the proposed amendment repeals any provisions of the Missouri Constitution. That's almost certainly because the proposal would add language to the Constitution, not amend any.[3] Instead, the circuit court listed

[3] The circuit court did not accept Plaintiffs' argument that Amendment 3 repealed other sections of the Constitution by implication. In that respect the circuit court was right. *See*

"several examples" of statutes it believed Amendment 3 would "repeal." D28:P8-9; A8-9.

A. The plain language of Section 116.050.2 does not require a proposed constitutional amendment to identify statutes that might be deemed invalid because constitutional provisions do not "repeal" statutes.

The plain language of Section 116.050 does not require a proposed constitutional amendment to list statutes that might be considered incompatible with such amendment.

There are two type types of initiatives. Mo. Const. art. III, § 50. The first type proposes amendments to the Constitution and such petitions must be signed by eight percent of legal voters. *See id.* There is a separate process for a statutory initiative. That type of initiative must be signed by five percent of legal voters. *See id.* The latter type does not propose an amendment to the Constitution, but rather to statutes.

When interpreting Section 116.050, one must keep those two types of petitions in mind, as well as the rule that statutes should be interpreted with "the words used in their plain and ordinary meaning." *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). Where the statute is clear and unambiguous, courts apply the statute as written. *Id.* "In determining whether the language is clear and unambiguous, the standard is whether the statute's terms are plain and clear to one of ordinary intelligence." *Id.*

Section 116.050 addresses petitions to amend both the Constitution and statues. It provides that the full text of the measure shall "[i]nclude all sections of existing law *or* of the constitution which would be repealed by the measure." § 116.050.2(2), RSMo (emphasis added). Critically, "[t]he 'ordinary use' of the word 'or' is almost always disjunctive." *Boles v. City of St. Louis*, 690 S.W.3d 592, 601 (Mo. App. 2024) (quotations omitted). In other words, the plain and ordinary command of Section 116.050 is that an initiative must list *either* the "existing law" (statutory provisions) *or* the constitutional provisions being amended, but not both.

Kuehner v. Kander, 442 S.W.3d 224 (Mo. App. 2014) (concluding mere reference to another constitutional provision did not mean it was being repealed).

That language mirrors the Constitution's delineation between the two types of initiatives. It means a statutory initiative petition (one "proposing laws" and signed by five percent of voters) shall list the statutes being amended, while a constitutional initiative petition (one proposing "constitutional amendments" and signed by eight percent of voters) shall list the "constitutional provisions" being amended. Section 116.050 simply does not require what the circuit court said the proposed constitutional amendment here must do.

Context and common sense support this reading. When one is amending the Constitution, it is natural to identify other provisions of the Constitution being repealed. Similarly, when one is amending or enacting a statute, it is natural to identify other statutes being repealed by the enactment (which, as described below, is what the legislature does when enacting a law).[4]

But it does not make sense that Section 116.050 would require a petition to identify statutes to be "repealed" when amending the Constitution, nor to identify constitutional provisions being "repealed" when amending statutes. A statute *cannot* amend or repeal the Constitution. And in plain and ordinary parlance, a constitutional provision may render a contrary statute *unconstitutional—i.e.*, may invalidate, abrogate, or limit a statute—but it does not *repeal* a statute.

The United States Supreme Court recently explained this: "[W]hen it 'invalidates' a law as unconstitutional, the Court of course does not formally repeal the law from the U.S. Code or the Statutes at Large." *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2351 n.8 (2020). "Instead . . . the Court recognizes that the Constitution is a 'superior, paramount law,' and that 'a legislative act contrary to the constitution is not law' at all." *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). That is also how this Court has referred to conflicts between state statutes and the Missouri Constitution.

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[4] This is the same process the General Assembly engages in when it drafts legislation—whether it be a bill amending the revised statutes or a joint resolution proposing to amend the Constitution.

E.g., *State v. Kinder*, 89 S.W.3d 454, 460-61 (Mo. banc 2002) (declaring statute that conflicted with Constitution "void as an unconstitutional delegation").

Moreover, a statute is not stricken from the books (*i.e.*, "repealed") just because a constitutional amendment is adopted or even because a court declares all or part of a statute unconstitutional. Rather the statute remains on the books until the legislature elects to repeal or amend it. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 935-36 (2018) (explaining a "statute continues to exist, even after a court opines that it violates the Constitution, and it remains a law until it is repealed by the legislature that enacted it").

As an example, Missouri's flag-burning statute remains on the books, despite being declared facially unconstitutional a decade ago. *See* § 578.095, RSMo; *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014). Many other laws, such as those regulating marijuana use, remain on the books even though subsequent constitutional amendments and interpretations may have nullified them.

Only a legislative enactment can "repeal" a statute, even after declared invalid. *See State ex rel. Aull v. Field*, 119 Mo. 593, 24 S.W. 752, 754 (1894) ("So, when an act of the legislature is void for failure to observe some constitutional prerequisite, nothing could be more appropriate than for the legislature to remove the act at once from a place among the valid laws of the state, and by an apt reference call attention to its repeal, and at the same time enact a valid law on the same subject in its stead."). In fact, every few years, the General Assembly considers revision bills which direct the Revisor of Statutes to remove inoperative statutes from the Revised Statutes of Missouri. *See, e.g.*, House Revision Bill 1 (2018); House Revision Bill 2 (2018). It is thus certainly not the case that any statute is automatically "repealed" upon a vote of the people to adopt a constitutional amendment. Instead, courts must apply the Constitution to a specific case and set of facts and decide whether the Constitution invalidates any given statute, or whether the two can be harmonized. And, thereafter, the affected statute remains on the books unless and until the General Assembly repeals it.

Thus, the plain language and context of Section 116.050 make clear that initiatives proposing to amend the Constitution are not required to identify *statutes* they will "repeal," because that is not what constitutional amendments do. Rather, initiatives proposing to amend the Constitution need only identify constitutional provisions that will be repealed. The circuit court erred in concluding that Amendment 3 was required to say *anything* about its potential impact on statutes. Its judgment should be reversed.

B. Interpreting Section 116.050 to require initiatives for constitutional amendments to identify provisions of existing statutes that would be repealed is also inconsistent with Article III, Section 28.

There is another plain-language reason to adopt the interpretation that constitutional petitions need only identify constitutional text they would repeal, and that statutory petitions need only do the same for statutory text they would repeal. Such a reading conforms the initiative process with the standard legislative process, as required by Article III, Section 28.

Section 116.050 provides requirements for petitions "filed under the provisions of [chapter 116]." § 116.050.1, RSMo. Consistent with Article III, § 50, it says petitions must "contain a full and correct text of the proposed measure." *Id.* Unlike Article III, § 50, it then goes on to say the "full and correct text" of a petition must bracket and underline deletions and additions, § 116.050.2(1), RSMo, and "[i]nclude all sections of existing law or of the constitution which would be repealed by the measure," § 116.050.2(2), RSMo.[5] Finally, the statute requires petitions to "[o]therwise conform" to

[5] To the extent the circuit court believed Article III, Section 50 *itself* requires a proposed constitutional amendment set forth all statutory provisions it might invalidate, not even the *Halliburton* and *Moore* cases it cited go that far. Rather, they both held the initiative provision of earlier versions of the Missouri Constitution inherently required proposed constitutional amendments to set forth *constitutional* provisions that would be repealed. *Halliburton v. Roach*, 139 S.W. 689 (Mo. 1910); *Moore v. Brown*, 165 S.W.2d 657 (Mo.

Article III, § 28 of the Constitution, which governs legislative bills. § 116.050.2(3), RSMo.

This reference to Article III, Section 28 demonstrates an intent to impose on initiative petitions procedural requirements akin to those followed by the legislature when enacting bills under Article III, § 28. And, as discussed below, not even the legislature undertakes to "ferret out" and identify every statute that might later be declared by the courts to have been repealed by implication (an impossible task even for the legislature, with all its support staff).

For example, when the General Assembly proposes a constitutional amendment, it includes language stating a section is to be repealed and then includes new language for the section. It does not list in the resolution statutes that would be "repealed" by the amendment. *See, e.g.*, Senate Joint Resolution No. 36, 97th General Assembly, 2014 (resolution submitting to Missouri voters "an amendment repealing section 23 of article I of the Constitution, and adopting one new section in lieu thereof relating to the right of Missouri citizens to keep and bear arms"). It certainly does not list every statute that *might* be "repealed" by implication.

Missouri is a repeal and replace state. *See, e.g.*, *Mo. State Conf. of the Nat'l Assoc. for the Advancement of Colored People v. State*, 601 S.W.3d 241, 245 (Mo. banc 2020) ("SB 631 repeals and replaces section 115.277, providing for expanded absentee and mail-in voting for the remaining 2020 elections."). When the legislature passes a bill, any provision the legislature amends is repealed and reenacted with the new language, and any provision the legislature repeals is removed in its entirety. To make clear to the public what it intends to do, the General Assembly brackets language a bill proposes to repeal and underlines language it proposes to add or change.[6]

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banc 1942). And this Court has more recently suggested even that is not required. *See Boeving*, 496 S.W.3d at 509.

[6] These instructions are included at the bottom of every piece of legislation considered by the General Assembly.

These are the *only* provisions listed in the full-text of bills. Bill titles and enacting clauses are all standard and—as becomes obvious when looking at one—serve as the basis for the title and enacting clause of an initiative petition. All of the provisions listed in the bill title and enacting clause are those that are expressly in the language of the bill. Legislative bills (the format of which Section 116.050 explicitly imports into the initiative process) do not include an *additional* list of provisions that might be deemed in the future to have been repealed as an implication of the bill's passage.

This is all Section 116.050 requires for initiative petitions. Any other reading would be inconsistent with Section 116.050's plain language; with Article III, Section 28; and with how legislation is normally enacted. Amendment 3 complied with the requirements of Section 116.050, as described therein. It set forth the full text of the measure, which—by definition—identified any provisions it was repealing, the same way a bill would. D18;A12. In this case, Amendment 3 does not propose to repeal anything. *Id.*

The circuit court erroneously read Section 116.050 to impose an additional requirement on initiatives: to list out all statutory provisions that might theoretically be deemed incompatible with the measure if enacted. D28:P8-9; A8-9. But, as explained above, this is not a requirement imposed on legislative bills and it is not something the legislature ever does. Given that Section 116.050 expressly directs initiatives to follow the same process as the legislature (by imposing a bracketing/underlining requirement and requiring compliance with Article III, § 28), there is no basis for reading such a requirement into the statute.

The circuit court pointed out that one prior initiative used a "disclaimer" in the introductory language. Of course there is no law requiring such a disclaimer and other initiatives do not use one. And these "disclaimers" of laws that might be implicated are a fool's errand that might cause further problems for a proponent of the initiative such as if the proponent misses some statute or, as the circuit court did, cites a statute they did not mean to repeal. Such a disclaimer is of no help to the voters (it is just a meaningless set of numbers to them) and serves no purpose while listing the statutes (or constitutional

provisions) expressly repealed does have a purpose and is consistent with full-text requirements.

Further, as discussed below in Point III, courts have consistently refused to allow the legislature to burden the initiative process with procedural detail. This Court should adopt interpretations of the statute that do not do so. *See Boeving*, 496 S.W.3d at 507. Reading Section 116.050 to require initiatives to do *more* than the legislature must do would certainly be unconstitutional as an undue burden the right to initiative petition. *See infra* Point III. The Court should not interpret Section 116.050 to create constitutional problems. *Doe v. St. Louis Cmty. Coll.*, 526 S.W.3d 329, 350 (Mo. App. 2017) ("The canon of constitutional avoidance 'allows courts to avoid the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations,' resting on the presumption that lawmakers 'did not intend the alternative which raises serious constitutional doubts.'"). Rather, it should interpret and apply Section 116.050 per its plain language and context to require a proposed constitutional amendment to only include other sections of the constitution it would repeal.

C. This interpretation is also consistent with the Secretary and Attorney General's approval of the form of Amendment 3.

In the days immediately after a proposed petition is filed, the Secretary and Attorney General must both review the form of the proposed initiative and determine whether it is sufficient. As part of this review, the Secretary determines whether the proposed amendment identifies the statutory or constitutional provisions it will repeal. Both the Secretary and Attorney General concluded this initiative was sufficient as to form and proceeded to draft official ballot language. Although these kinds of rejections as to form are a routine part of the initiative cycle,[7] the Secretary did *not* reject Amendment

[7] This general election cycle, 174 proposed initiatives were filed with the Secretary. He rejected nine as to form. *See* https://www.sos.mo.gov/elections/petitions/2024. In many cases, the proponent filed a revised petition at or near the time of the rejection to fix the form problems. For example, Proposals 2024-111 (rejected) and 2024-112 (approved to

3 as to form. If Amendment 3 had to identify all statutes it would "repeal" by implication, the Attorney General and the Secretary (both of whom are politically opposed to the substance of Amendment 3) would certainly have rejected it as to form.

This is entirely consistent with Intervenors' interpretation of Section 116.050. It requires constitutional amendments to identify constitutional provisions that would be repealed by the new amendment. Having seen that the full text of the amendment does not repeal any section of the Missouri Constitution, the Secretary and Attorney General determined the proposed initiative was sufficient as to form. The circuit court's contrary conclusion cannot be reconciled with the longstanding interpretation of Section 116.050.

II. The circuit court erred in concluding Amendment 3 was insufficient for not identifying statutes it might invalidate because the circuit court misapplied longstanding case law in that courts have interpreted the word "repeal" in Section 116.050 to cover only situations where two provisions are so irreconcilable that both cannot stand and the circuit court did not identify any statute that Amendment 3 would clearly, unambiguously, and entirely displace.

This Court reviews the circuit court's decision *de novo*. *See Pippens*, 606 S.W.3d at 701. Intervenors' arguments are preserved because Intervenors actively contested Plaintiffs' position that Amendment 3 was insufficient for not listing statutes it may repeal but lost after a trial. *See* D27:P8-15 (arguing "[a]n initiative needs to set forth and strike out only such provisions of existing law with which it is in "irreconcilable repugnance or direct conflict" and citing *Buchanan*, *Knight*, and *Ritter*).

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circulate) were filed by the same proponent, Mark Pederson, seventeen days apart. Proposals 2024-118 (rejected) and 2024-119 (approved to circulate) were filed by the same proponent, Paul Berry III, fifteen days apart. Proposals 2024-166 (rejected), 2024-167 (rejected), and 2024-168 (approved to circulate) were filed by the same proponent, JoAnn Franklin, over a 27-day period. *Id.*

As explained above, Section 116.050's plain language does not require that a proposed constitutional amendment identify (a) any statute that would be "repealed" by the measure (because constitutional amendments do not repeal statutes) or (b) anything that is not *expressly* repealed. Even if this Court were to interpret Section 116.050 to require an initiative proposing a *constitutional* amendment to list *statutes* that would be "repealed" by implication of its enactment, the circuit court's judgment should still be reversed. In a number of cases, this Court and the Court of Appeals have addressed claims that an initiative failed to identify all provisions of existing law that would be repealed by the proposed amendment. Such claims have been uniformly rejected. And the case law makes clear that the circuit court applied the wrong legal standard.

The circuit court's judgment faulted Amendment 3 because it "advises voters of *no changes* it makes to existing Missouri law." D28:P7; A7 (emphasis added). Elsewhere, the circuit court reasoned Amendment 3 did not identify "even the most basic of statutes that would *be repealed, at least in part*, by Amendment 3." D28:P8; A8 (emphasis added). Although the circuit court seemed to believe numerous statutes in "Chapter 180" conflict with Amendment 3, the judgment purports to identify only one that would be "repealed, at least in part": "Missouri statute 180.017.2. [sic]."[8] D28:P9; A9.

Under well-established precedent an initiative is not required to identify provisions it will "change." Nor is an initiative required to identify provisions that might be "repealed in part." Rather, provisions of the ballot measure "must be in direct conflict with or . . . irreconcilably repugnant to existing law." *Ritter v. Ashcroft,* 561 S.W.3d 74, 95 (Mo. App. 2018). "[I]t is not enough that [] provisions of existing law will be changed

[8] Presumably, the circuit court meant to reference Chapter 188 (Regulation of Abortions) and Section 188.017. But Intervenors are left to speculate about the circuit court's intent, because it did not. Chapter 180 is denominated "Supreme Court Library" and there is no provision 180.017. The circuit court's judgment should be reversed on this basis alone, as it does not even identify a single statute that Amendment 3 supposedly "repeals."

or affected by the amendment." *Id.* "[S]ection 116.050 does not require initiative proponents to include all those provisions 'affected,' 'impacted,' or 'modified' by a proposed measure." *Id.*

This standard is based on the meaning of the word "repeal":

> [T]he abrogation or annulling of a previously existing law by the enactment of a subsequent statute which declares that the former law shall be revoked and abrogated (which is called express repeal), *or which contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force* (called implied repeal).

Id. at 95-96 (emphasis added).

Although footnote 3 of the judgment recites this standard, the judgment does not actually conclude that Amendment 3 is so irreconcilable with *any* statute that only one of the two can stand in force. *See generally* D28;A1. And, assuming the judgment meant to reference Section 188.017, Amendment 3 does not "repeal" that statute within the meaning of Section 116.050.

A. Amendment 3 does not explicitly repeal any law.

One way for an initiative to amend existing law is to do so expressly. That occurs where the statute explicitly "declares that the former law shall be revoked." *Ritter*, 561 S.W.3d at 95. The text of Amendment 3 is in the record. D18;A12. It does not expressly declare that any constitutional provision or statute is revoked. *Id.*

B. Amendment 3 does not "repeal" Section 188.017 by implication.

The only statute the circuit court specifically referenced in its judgment was section "180.017." D28:P8-9; A8-9. Construing this as a reference to Section 188.017, Amendment 3 does not repeal that statute by implication.

In considering this issue, the Court should start with first principles. Laws "relating to the same subject matter are *in pari materia* and should be construed harmoniously." *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248 S.W. 3d 101, 107 (Mo. App. 2008). Likewise, "[w]here possible, courts are to interpret statutes so that they are in harmony with the constitution." *Bennett v. Owens-*

Corning Fiberglas Corp., 896 S.W.2d 464, 467 (Mo. banc 1995). "Repeals by implication are not favored, and if by any fair interpretation" both laws can be given effect, "there is no repeal by implication." *State v. Carter*, 614 S.W.3d 74, 79 (Mo. App. 2020).

It is exceedingly difficult to determine on an expedited, hypothetical basis whether existing statutes will be deemed to be in irreconcilable conflict with Amendment 3. Such analysis is further complicated by the fact that Amendment 3 explicitly allows the continued existence of laws regulating abortions:

> Notwithstanding subsection 3 of this Section, the general assembly may enact laws that regulate the provision of abortion after Fetal Viability provided that under no circumstance shall the Government deny, interfere with, delay, or otherwise restrict an action that in the good faith judgment of a treating health care professional is needed to protect the life or physical or mental health of the pregnant person.

D18;A12.

If Amendment 3 is approved by voters, there will probably be litigation about its scope and effect. That is the appropriate time to sort out whether Amendment 3 might invalidate existing statutes in whole or part, facially or as applied. *See Boeving*, 496 S.W.3d at 511 n.8. As set out in the next section, this is a quagmire the Court should not enter on a profoundly expedited basis with no factual record and no parties with a present dispute. If the Court feels compelled to wade into the matter now, however, Amendment 3 does not clearly and unambiguously repeal Section 188.017 in its entirety.

To begin, the circuit court's judgment did not conclude Amendment 3 would repeal Section 188.017 in its entirety. The circuit court only referenced subdivision 2 of that statute. D28:P8-9; A8-9. But the judgment does not actually say Amendment 3 would repeal even that subdivision. It simply quotes language from Amendment 3 and from Section 188.017.2. *Id.* No analysis is provided, and the reader is left to draw their own conclusions about compatibility between the two.

Notably, Chapter 188 contains a severability provision. *See* § 188.018, RSMo. It states, in relevant part, that if "any one or more provisions, sections, subsections, sentences, clauses, phrases, or words of this chapter . . . is found to be unenforceable, unconstitutional, or invalid," then such provision, section, subsection, sentence, clause, phrase, or word is severable "and the balance of [Chapter 188] shall remain effective." *Id.* This, too, makes it hard to determine—in the context of speedy, hypothetical-laced litigation—whether Amendment 3 will later be deemed "irreconcilably repugnant" to Section 188.017, such that only one of the two may "stand in force." *Ritter*, 561 S.W.3d at 95-96. The legislature has expressly directed courts to preserve as many of Chapter 188's provisions as possible in the event of a constitutional challenge.

Section 188.017.2 provides that no abortions may be performed except in cases of medical emergency. Abortions performed in violation of that provision (*i.e.*, not in a medical emergency) constitute a felony. Section 188.017.3—which the circuit court did not address—creates an affirmative defense to such charges if the abortion is performed during a medical emergency. Section 188.017.2 also provides that no charges may be filed against a woman upon whom an abortion is performed based on conspiracy to violate the law. Amendment 3, in relevant part, would prohibit the State from infringing a person's right to obtain an abortion and would prohibit the State from prosecuting a person based on "actual, potential, perceived, or alleged pregnancy outcomes, including but not limited to miscarriage, stillbirth, or abortion." D18:P2; A12.

The judgment does not explain why it is that these two provisions are wholly irreconcilable. *See* D28:P8-9; A8-9. They are not, under the standard courts have applied to such challenges. Section 188.017.2 allows *some abortions* and protects *some people* from prosecution for providing those abortions. The statute also protects those on whom abortions are performed from prosecution. To be sure, enactment of Amendment III would protect *more people* from prosecution and provide *more protection* for reproductive rights. But Amendment 3 and Section 188.017.2 both allow abortions under certain circumstances and both protect those on whom abortions are performed from prosecution. Accordingly, the two provisions are not wholly repugnant to one another.

If enacted, Amendment 3 may be interpreted to prevent *parts* of Section 188.017 from being enforced. But, given Section 188.018's severability mandate, it is far from clear that courts will apply Amendment 3 to invalidate Section 188.017 *in toto*. It is conceivable courts might apply Section 188.018 and conclude some aspect of Section 188.017 remains viable even if Amendment 3 is enacted. For example, courts might theoretically limit Section 188.017's abortion ban to post-viability abortions. Or they may not. Only time, and real, fact-based litigation will tell.[9]

At this juncture, it is it is simply not enough that the provisions of existing law may be "changed," "affected," "impacted," or "modified." *Ritter*, 561 S.W.3d at 95. In *Knight v. Carnahan*, 282 S.W.3d 9, the Court of Appeals rejected a claim that an initiative proposing statutory amendments violated Section 116.050 on the theory that it irreconcilably conflicted with existing statutes. It rejected that claim because the initiative did not "necessarily negate[]" the prior provisions. *Id.* at 19. This was so, even though the initiative would "sharply curtail the [Gaming] Commission's pre-existing regulatory and licensing authority, by capping the number of excursion gambling boat licenses." *Ritter*, 561 S.W.3d at 97.

So it is here. Amendment 3 may sharply curtail the State's authority to prosecute abortion providers. But some abortions are permitted now, and there is not the sort of irreconcilable conflict that would justify preventing Missourians from voting on Amendment 3.

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[9] If Amendment 3 passes and challenges are brought, courts will also need to analyze and factor in Amendment 3's directive to apply strict scrutiny to the rights it would enshrine. *See* D18:P2; A12. That standard does not tell us whether any particular law will be invalidated. "That strict scrutiny applies 'says nothing about the ultimate validity of any particular law; that is the job of the court applying' the standard." *Dotson v. Kander*, 464 S.W.3d 190, 197 (Mo. banc 2015) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 230 (1995)).

C. Amendment 3's summary statement is not relevant to this analysis.

The circuit court adopted Plaintiffs' assertion that the summary statement of Amendment 3 supports the proposition that Amendment 3 in fact repeals some other provision of law. D28:P8-9. That is wrong.

The summary statement says Amendment 3 "removes Missouri's ban on abortion." But one of the purposes of summary statements is to describe the probable effect of a measure. *See Sedey v. Ashcroft,* 594 S.W.3d 256, 263 (Mo. App. 2020) (explaining summary statement "should accurately reflect the legal and probable effects of the proposed amendment"). The probable effect of a measure is what may happen if the measure is passed. As discussed extensively above, this may include litigation surrounding whether certain laws are no longer operative in light of the language of Amendment 3.

The language of the summary statement is not any indication of compliance (or not) with Section 116.050. That statute requires the proponent of a measure to include any provisions that are repealed by the measure, not provisions which could, might, or probably will later be held invalid. All the summary statement does in this instance is put voters on notice that there may be future litigation regarding the operation of certain other laws of Missouri.

Further, the aforementioned summary statement does not identify which statutes constitute "Missouri's ban on abortions." It certainly does not purport to undertake the analysis applied in *Ritter*, *Knight*, and other cases to determine whether Amendment 3 is, *in fact*, wholly irreconcilable with any particular statute. And, as discussed above, when that analysis is applied, Amendment 3 is not wholly irreconcilable with the one statute the circuit court incorrectly identified.

III. The circuit court erred in concluding Amendment 3 was insufficient for not identifying statutes it might invalidate because interpreting Section 116.050 to require that would make it an unconstitutional attempt by the legislature to add burdensome requirements to the initiative process in that Article III, Section 50 requires only that an initiative contain "the full text of the measure," which Amendment 3 did.

If Section 116.050 must be interpreted to require an initiative proposing to amend the Constitution to list out (i) any statutes at all or (ii) every existing statute that might one day be deemed by the courts to be incompatible with, and thus repealed by, the provision proposed, such requirement would be an impermissible and unconstitutional burden on the people's right to the initiative. Extensive case law concerning the initiative process makes this clear.

Intervenors preserved this issue by pleading the unconstitutionality of Section 116.050 as an affirmative defense in their Substitute Answer. D9:P17. Intervenors also addressed the issue in their trial brief. D27:P14-15. The interpretation and constitutionality of a statute are reviewed *de novo*. *Planned Parenthood of St. Louis Region v. Knodell*, 685 S.W.3d 377, 383 (Mo. banc 2024).

A. The legislature cannot burden the people's right to the initiative with extra statutory procedures.

"Statutes implementing the constitutionally created initiative process should not restrict or limit the electorate's power." *Comm. For A Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503, 512 (Mo. banc 2006). Indeed, "[l]egislation cannot limit or restrict the rights conferred by [a] constitutional provision." *United Lab. Comm. of Mo.*, 572 S.W.2d at 454 (quotations omitted). All "legislation must be subordinate to the constitutional provision, and in furtherance of its purposes, and must not in any particular attempt to narrow or embarrass it." *Id.* at 455 (quotations omitted). The Constitution prevails over any legislation purporting to restrict constitutional rights. *Id.*

The "requirements for initiative petitions proposing constitutional amendments are set forth in article III, section 50." *Boeving*, 496 S.W.3d at 507. The initiative power in

Article III, Section 50 "is broad and is not laden with procedural detail." *United Lab. Comm. of Mo.*, 572 S.W.2d at 454. It "is too akin to our basic democratic ideals to have this process made unduly burdensome." *Id.* at 455.

Time after time, Missouri courts have declined to allow the legislature to unnecessarily complicate and burden the initiative process with extra-constitutional procedures. That is the correct approach. The right at issue here is not bequeathed by the General Assembly or to be exercised only as the General Assembly sees fit. The people are the font of legislative power in Missouri and they reserved to themselves the right of initiative petition "independent of the General Assembly." Mo. Const. art. III, § 49.

In *United Labor Committee of Missouri v. Kirkpatrick*, 572 S.W.2d 449, this Court declined to invalidate an initiative based on technical noncompliance with statutory affidavit and notary requirements. In *Boeving v. Kander*, 496 S.W.3d 498 (Mo. banc 2016), this Court similarly declined to prohibit the Secretary of State from considering signatures gathered prior to changes to the official ballot title, even though the statutes require the ballot title be attached, and the title had changed after the signatures were gathered. These are but a few examples of courts' unwillingness to override the power the people reserved to themselves based on alleged noncompliance with statutory procedures.

B. Article III, Section 50 creates a simple procedure for amending the Constitution and does not require identification of statutes that might conflict with a proposed constitutional amendment.

Article III, Section 50 establishes few requirements for exercising the initiative power to amend the Constitution. Such petitions must (i) be signed by 8% of legal voters, (ii) be filed at least six months before the election, (iii) contain an enacting clause, (iv) contain "the full text of the measure," and (v) not amend or add more than one article of the Constitution, or otherwise exceed a single subject. Mo. Const. art. III, § 50. ***That is it.*** This Court has observed that "[a]ny concerns the framers may have had concerning providing potential signers with accurate information would have been satisfied fully by these requirements." *Boeving*, 496 S.W.3d at 507.

Section 116.050 requires initiatives to contain "the full and correct text of the proposed measure." That is consistent with the constitutional requirement. But the statute goes further, according to the circuit court, to require the measure to include statutes "repealed" (or impliedly "repealed") by a constitutional amendment. D28:P8-9; A8-9. That interpretation is repugnant to the Constitution.

This Court has made clear the Constitution "is concerned *only with* what a proposed constitutional amendment *'contains,'* not with what [it] will or might do if the voters approve it." *Boeving*, 496 S.W.3d at 509 (emphasis added). What an initiative contains is its text. Article III, Section 50 requires that text to be fully set out in the initiative. It is undisputed Amendment 3 contained all text of the proposed measure. D18:P2; A12. If a constitutional initiative proposes to explicitly repeal or modify another provision of the Constitution (or, in theory, a statute), that will, of course, be set out in its text.

A proposed constitutional amendment's hypothetical impact on the multitude of Missouri statutes, by contrast, is what the initiative "will or might do if the voters approve it" – exactly what this Court has said Article III, Section 50 is not concerned with. Thus, the General Assembly may not impose additional restrictions on the initiative process by requiring initiatives to address this. This Court has also explained that initiative drafters need not "ferret out" and list all *constitutional provisions* "which could possibly or by implication be modified by the proposed amendment." *E.g.*, *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 15 (Mo. banc 1981). It would make even less sense for a constitutional initiative to be required to "ferret out" all *statutes* that might be invalidated if a constitutional amendment is enacted.

As explained above, the Constitution and statutes are separate corpuses of law, with the former being superior to the latter. And amending the Constitution does not "repeal" "existing law" within the meaning of § 116.050.2(2), RSMo. If a newly enacted constitutional provision irreconcilably conflicts with a statute, the former controls. But it is virtually impossible for the lay sponsors of an initiative to predict in advance (when drafting and submitting the measure) whether this will turn out to be the case.

Whether the proposed measure and existing statutes irreconcilably conflict can be determined only on a case-by-case basis, after courts have made every effort to "harmonize the statute with the constitution." *In re Link*, 713 S.W.2d 487, 493 (Mo. banc 1986). These are the sorts of determinations that should be made based on developed records, with actual aggrieved parties to a live dispute, and after careful consideration – not based on hypothetical assertions that must be resolved at the breakneck speeds associated with Chapter 116 litigation. *See Boeving*, 496 S.W.3d at 511 n.8 ("Constitutional challenges to the operation and effect of statutory or constitutional provisions proposed through the initiative process are matters of such gravity and import that they are ill-suited to expedited, hypothetical-laced litigation under section 116.200.1.").

C. If Section 116.050 requires what the circuit court said it does, it imposes an unconstitutional burden on the initiative.

This reality demonstrates why any arguable requirement in Section 116.050 to list out every statute that might later be deemed to irreconcilably conflict with a proposed constitutional amendment would impermissibly "plac[e] an excessive burden on those seeking change by way of the initiative." *Buchanan*, 615 S.W.2d at 15.

Consider the implications of the circuit court's strained construction of Section 116.050. Constitutional provisions, by their nature, usually set out broad, general principles of law. Under the circuit court's interpretation, a constitutional petition must set out in full any statute that a new constitutional amendment might "repeal." Citizens wishing to present a petition would need to canvass the entirety of the Revised Statutes of Missouri in exhaustive detail, hunting for any provision that conflicts with the proposed amendment. What's more, they would have to divine whether any statute might be implicitly repealed by the proposed amendment.

That goes well beyond "ferreting out." Instead, proponents must predict—with 100% accuracy—how this Court would come out on difficult questions of constitutional and statutory interpretation. If they get it wrong just once, the circuit court's reasoning necessarily continues, the whole petition is invalidated (here, after being certified and

hundreds of thousands of Missourians have signed it). The only way to know if proponents got it wrong is for the courts to conduct complex statutory analyses at breakneck speeds in expedited litigation with no factual record.

It is simply not possible for those seeking to use the initiative process to divine how courts might eventually harmonize (or not) the proposed amendment and Missouri's innumerable statutes under the countless hypothetical circumstances under which the provision and statutes might come into conflict. But, if the circuit court's interpretation is correct, initiative sponsors must attempt to list out every conceivable conflict, or risk having the measure excluded from the ballot at the last minute when someone who opposes it identifies a hypothetical conflict the sponsors did not think of.

When these kinds of concerns were raised below, the circuit court agreed Intervenors were right, at least "with regard to some attenuated and not directly related statutes and provisions, but certainly not all of them." D28:P8; A8. But that just begs the question. The circuit court articulated no standard or rule of decision. How is a group of citizen petitioners supposed to determine what possible statutory effects are "attenuated" or "not directly related"? How is that citizen group supposed to know whether a reviewing court would reach the same conclusion? What if they identify too many statutes as "repealed" for fear of having their petition found wanting, and then a court holds the petition is misleading because it would not result in the repeal of a given statute?

Assuming citizens navigate this legal thicket, they then must include the full text of every one of the implicitly affected statutory provisions on each petition. Each petition may well contain dozens, if not hundreds, of pages of the Revised Code.

This, in turn, will "burden[] potential signers with redundant (or, worse, misleading) information." *Boeving*, 496 S.W.3d at 507. If initiative sponsors try to play it safe by including a laundry list of statutes that might be deemed to irreconcilably conflict with the proposed amendment, they risk providing misleading information to potential signers and voters if the courts later find no conflict.

This would grind the process to a halt. And it is simply not necessary. Voters are not fools. They can and should be presumed to know the Constitution sits above statutes. They can read the "full text of the measure" and decide whether they wish to enshrine the proposal in the Constitution, thereby allowing courts to void conflicting statutes.

D. The Court can avoid striking Section 116.050 by interpreting it consistent with its plain text.

"[I]f one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-39 (Mo. banc 1991). Here, the Court can and should easily interpret Section 116.050 so that it is constitutional, while simultaneously preserving the people's right to the initiative and allowing them to vote on Amendment 3. As explained above in Point I, the Court can and should interpret Section 116.050 as merely requiring proposed constitutional amendments to identify those provisions of the *Constitution* that they explicitly propose to repeal, but not statutory provisions.

The statute is certainly susceptible of such reading. Indeed, that is what its plain text says. And that reading would render Section 116.050 consistent with Article III, Section 50. An initiative would, by definition, comply with Section 116.050.2(2) by setting forth the "full text of the measure," which would necessarily identify any provisions being expressly repealed. Importantly, if the constitutional initiative would not repeal any constitutional provision, none would be listed, as is the case here.

But, if the Court concludes Section 116.050 can only be read to require a constitutional initiative to list out every statute that might conceivably be deemed to irreconcilably conflict with the measure if enacted, then the Court should declare Section 116.050 unconstitutional. For all the reasons described above, that interpretation—adopted by the circuit court—imposes an unconstitutional burden on the initiative process. Whichever path the Court chooses, Amendment 3 should be on the November ballot.

IV. The circuit court erred in reaching the issue of Amendment 3's sufficiency and entering a judgment in Plaintiffs' favor on Count I because Plaintiffs' claims were barred by laches in that Plaintiffs could and should have challenged Amendment 3's alleged noncompliance with Section 116.050 in their prior lawsuit and Plaintiffs' unreasonable and unexplained delay has prejudiced Intervenors and the many Missourians who signed Amendment 3.

Finally, the circuit court should never have entertained Plaintiffs' eleventh-hour challenge under Section 116.050 in the first place. As explained above, there is a lengthy, four-step process for an initiative petition to get on the ballot. In this case, that process was prolonged and plagued by litigation. That included a challenge by many of the Plaintiffs here to the sufficiency of the ballot title. *See Kelly*, 677 S.W.3d 622.

When Plaintiffs filed their prior suit, the full text of the initiative petition had been submitted to the Secretary. It contained the exact same statement about how it amended the constitution (and nothing about statutes) that it does now. It was available for Plaintiffs to review. And such review (which Plaintiffs undoubtedly undertook, as they challenged that very same document on other grounds) would quickly have disclosed that the initiative did not identify statutes it might invalidate. At that time, Plaintiffs could, and should, have included in their challenge to the Secretary's ballot title a challenge to the Secretary's decision to approve the initiative for circulation based on alleged noncompliance with Section 116.050.

Instead, Plaintiffs sandbagged. They did not raise this issue when the measure was before the Circuit Court of Cole County and the Court of Appeals. Nor is there any evidence Plaintiffs—or anyone else—raised the issue during the public comment period. Only after Amendment 3's sponsors expended considerable time and money gathering signatures, hundreds of thousands of Missourians signed the initiative petition, local election authorities expended resources verifying signatures, and the Secretary certified Amendment 3 for the ballot—all in reliance on the Secretary and Attorney General's original approvals of the measure as to form—did Plaintiffs raise this issue. They did so when there was little time for the courts to carefully and thoughtfully weigh the issue,

given the statutory deadline for making changes to the ballot. Under these circumstances, Plaintiffs should be deemed to have forfeited any right to challenge Amendment 3's compliance with Section 116.050.

"Laches is the neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done." *Metro. St. Louis Sewer Dist. v. Zykan*, 495 S.W.2d 643, 656 (Mo. 1973). "There is no fixed period within which a person must assert his claim or be barred by laches." *Id.* Instead, "the length of time depends upon the circumstances of the particular case." *Id.* Laches applies to bar suit where the delay "work[s] to the disadvantage and prejudice of the defendant." *Id.* at 657.

Intervenors preserved the laches defense by raising it in their Substitute Answer. D9:P17. Intervenors also actively litigated this issue at trial. D27:P1-5. A circuit court's decision regarding laches is reviewed for abuse of discretion. *Baldwin v. Baldwin*, 667 S.W.3d 199, 208 (Mo. App. 2023). A circuit court abuses its discretion if its ruling "is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Robinson v. Langenbach*, 599 S.W.3d 167, 180 (Mo. banc 2020). Here, the circuit court did not address Intervenors' laches defense. But, as explained below, the relevant facts are undisputed and demonstrate that the circuit court abused its discretion by not rejecting Count I outright.

A. Plaintiffs engaged in unreasonable and unexplained delay

Plaintiffs' delay was unreasonable and unexplained. The unreasonableness of the delay is obvious. *Plaintiffs previously brought challenges to this initiative*. The issue they now raise concerning Section 116.050 was apparent when they filed that suit. And the prior suit challenged the sufficiency of the ballot title of this proposed initiative. There is no good reason not to have asserted that claim and to instead have waited until hundreds of thousands of Missourians would be deprived of their right to vote on a matter they expressly asked to place on the ballot.

The delay is also unexplained. In the circuit court, Plaintiffs argued they did not assert this claim earlier because Section 116.200.1 provides that such a challenge "may not be filed until "[a]fter the secretary of state certifies the petition as sufficient.'" D14:P51. That is not what Section 116.200 says. It reads, in relevant part: "After the secretary of state certifies a petition as sufficient or insufficient, any citizen *may* apply to the circuit court of Cole County to compel him to reverse his decision. The action must be brought within ten days after the certification is made." § 116.200.1, RSMo (emphasis added).

In other words, Section 116.200 is permissive. It *allows* challenges as to the sufficiency of an initiative to be brought within 10 days of ballot certification, but it does not preclude such suits from being brought earlier in the four-phase process. And Section 116.200 is not the only mechanism Chapter 116 creates for review of the form of the petition, or for citizen challenges. The appropriate time to challenge the form of the petition is much earlier in the process.

This reading makes sense, when one considers that there are different types of "sufficiency" under Chapter 116 and they are evaluated at different times. First, there is the sufficiency of a petition's *form*. The form includes the ballot title, the signature page, and the text of the measure itself. *See* §§ 116.040, 116.050, 116.332, 116.334, RSMo. The Secretary and Attorney General review and approve the sufficiency of a petition's form at the very outset of the initiative process, in phase one. It occurs before signature gathering or even certification of the ballot title. Here, the Secretary and courts approved the sufficiency of the form of Amendment 3 long ago. That was the appropriate time for Plaintiffs to contest Amendment 3's compliance with Section 116.050.[10]

[10] *Missourians to Protect the Initiative v. Blunt* and other cases discussing when a single subject challenge may be brought do not preclude a challenge to the statutorily prescribed *form* of the document. The form is approved in the early phases of the process and does not change throughout.

The second type of sufficiency is whether the official ballot title is sufficient and fair. At this time, any Missouri citizen can challenge the sufficiency of the ballot title—and the underlying sufficiency of the form of the petition – pursuant to Section 116.190 or perhaps even under a noncontested, section 536.150 challenge to the decision of the Secretary of State and Attorney General approving the petition as to that form. Plaintiffs in the present certification challenge *also sued* to challenge the ballot title, yet there is no evidence they raised the present challenge to the form under Section 116.050.

The third type of sufficiency is whether an initiative collected a sufficient number of signatures to appear on the ballot. The Secretary "makes a determination on the sufficiency of the petition and if the secretary of state finds it sufficient . . . shall issue a certificate setting forth that the petition contains a sufficient number of valid signatures to comply with the Constitution of Missouri and with this chapter." § 116.150, RSMo. It is clear, from Section 116.150, and the structure of Chapter 116 as a whole, that this phase of the initiative petition process is concerned only with whether there are sufficient number of valid signatures to qualify an initiative for the ballot.

Thus, Section 116.200 authorizes suits challenging the Secretary's certification as to the number of signatures within 10 days of the certification occurring. All other issues as to the form can and should be resolved before the Secretary issues his Section 116.180 certification of the ballot title, and certainly long before the Section 116.150 certification of the sufficiency of the signatures needed to present the measure to voters. Section 116.200 did not require Plaintiffs to wait until the Secretary issued his Section 116.150 certification to attack the form of Amendment 3. Plaintiffs' delay was both unreasonable and unexplained.

B. Plaintiffs' delay has also prejudiced Intervenors.

The prejudice to Intervenors, voters, and the courts is also obvious. Had Plaintiffs raised this issue during their prior suit, the issue could have been considered outside the shadow of the deadline for making changes to the ballot. That would have given the courts time to carefully and thoughtfully weigh the issue. And it would not have created a crisis on the Friday before the Tuesday ballot-change deadline.

Perhaps most fundamentally, if Plaintiffs had raised the issue when the Secretary issued his initial certification of sufficiency, the issue *could have been corrected* and the right of the people to use the initiative process could be protected. If the full text of Amendment 3 was inconsistent with Section 116.050 (which it is not), then the courts could simply have ordered that the petition be revised to identify statutes that might be invalidated by Amendment 3's enactment. (According to the circuit court's judgment, there is only one.) Amendment 3's sponsors could then have continued collecting signatures. This Court's precedent teaches that any previously gathered signatures would remain valid. *See Boeving*, 496 S.W.3d at 505. Instead, because of Plaintiffs' piecemeal litigation tactics, Intervenors risk having Amendment 3 tossed off the ballot at the eleventh hour based on alleged non-compliance with an extra-constitutional procedural requirement.

C. The existence of prejudice is further underscored by the lack of any statutory requirement to invalidate an initiative based on noncompliance with Section 116.050.

"[I]n the absence of any clear and unambiguous statutory requirement" making noncompliance with the provisions of Chapter 116 fatal, the will of the voters will not be abrogated. *Sweeney*, 652 S.W.3d at 733 (quotations omitted). Neither Section 116.050 nor any other provision of Chapter 116 says failure to identify provisions of "existing law" that will be repealed invalidates an initiative *at all*, let alone clearly and unambiguously.

So even if there were a violation of Section 116.050, the remedy would not be to enjoin Secretary Ashcroft from taking steps to place Amendment 3 on the ballot. *See* D28:P10; A10. That is inconsistent with this Court's past directives about statutes affecting the right to the initiative. And it is inconsistent with the general rule about the consequences of noncompliance with a statute. When a statute does not expressly state "what results will follow in the event of a failure to comply with its terms, the rule is directory and not mandatory." *Bauer v. Transitional Sch. Dist.,* 11 S.W.3d 405, 408 (Mo. banc 2003).

Missouri courts have largely avoided this issue by taking an extremely narrow view of the word "repeal" in Section 116.050. They have repeatedly refused to prohibit Missourians from considering initiatives proposing to amend the Constitution based on alleged failure to identify all provisions of existing law that might be affected or altered by a proposed measure. *See Boeving*, 496 S.W.3d at 509; *Buchanan*, 615 S.W.2d at 15; *Cady v. Ashcroft*, 606 S.W.3d 659, 670 (Mo. App. 2020); *Ritter*, 561 S.W.3d at 97; *Kuehner*, 442 S.W.3d at 231; *Knight*, 282 S.W.3d at 19. The clear through line in all these cases is that courts will make every effort to preserve the people's right to use the initiative process against procedural attacks.

The circuit court did not do that. It instead interpreted the word "repeal" broadly and then reasoned Section "116.200 provides . . . the exclusive remedy under these circumstances," which is to "enjoin the secretary of state from certifying the measure and all other officers from printing the measure on the ballot." D28:P9; A9. But Section 116.200 does not reference Section 116.050, it merely references sufficiency. Section 116.100 addresses when a petition shall be "rejected as insufficient," but does not discuss statements about repealed material. Section 116.120 discusses the "number of qualified voters needed to find the petition sufficient," but contains no discussion of repealed material. The only other statute that discusses sufficiency and Section 116.050 is Section 116.040. That provision has to do with the form of the petition, and declares that if the form follows that section and section 116.050 "it shall be sufficient, disregarding clerical and merely technical errors."

Put simply, no statute clearly and unambiguously requires invalidating an initiative for noncompliance with Section 116.050. Thus, the remedy would not be to prevent Amendment 3 from appearing on the ballot. The remedy would simply be to correct the alleged noncompliance at the earliest possible opportunity. No such opportunity exists, because Plaintiffs engaged in unreasonable and unexplained delay. That is an independent reason for this Court to reverse the judgment below.

CONCLUSION

For all the reasons set forth above, the Court should reverse the judgment below and order Secretary Ashcroft to take all necessary steps to place Amendment 3 on the ballot of the November general election.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 9th day of September, 2024, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule 84.06(b) and that the brief contains 14,379 words.

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