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No. SC99931

In the Supreme Court of Missouri

QUINTON LUCAS,

Contestant,

v.

JOHN R. ASHCROFT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, AND SCOTT M. FITZPATRICK, IN HIS OFFICIAL CAPACITY AS STATE AUDITOR,

Contestees.

Original Jurisdiction

CONTESTEES' BRIEF

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Introduction

On November 8, 2022, more than 1.2 million Missourians approved a new amendment to the Constitution. Amendment No. 4 received the most support out of all the proposed amendments. That amendment asked whether voters would adopt a provision that would "authorize laws, passed before December 31, 2026, that increase minimum funding for a police force established by a state board of police commissioners to ensure such police force has additional resources to serve its communities?" Ex. 2, at 2. Pursuant to § 116.175, RSMo, the Fiscal Note Summary stated "State and local governmental entities estimate no additional costs or savings related to this proposal." *Id.* Missourians take their responsibility to vote seriously, and courts are rightly hesitant to second-guess the will of the People.

Mayor Lucas asks the Court to throw out these votes from the November 8 election because the Fiscal Note Summary is allegedly unfair. In his view, it says that "there is no cost for delivery of [more] police services." Tr. 112:22–23. That view is inconsistent with a straightforward reading of the Fiscal Note Summary that the measure has "no additional costs or savings." The Fiscal Note Summary, on the other hand, is entirely consistent with what state and local governments told the Auditor and with what is common knowledge in Missouri—the Kansas City Board of Police Commissioners (the Board) received roughly 25 percent of Kansas City's general revenues in FYs 21, 22, 23, Tr. 219:23–220:15 (Queen), and that it would continue to receive 25 percent of Kansas City's general revenues. No change in costs has occurred.

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Amendment No. 4, and the legislation it authorized (SB 678), did make one change: it placed the discretion to continue to fund the KCPD at 25% in the Board's hands. Tr. 187:17–20 ("while [the City] might be funding the Board of Police Commissioners at 25 percent and even more in some years, that was as a matter of discretion."). This change in legal authority prevents City officials, including Mayor Lucas, from passing ordinances that unlawfully interfere with the Board's "exclusive management and control" of the KCPD. Ex. 504, at 9; *see* § 84.460, RSMo.[1] In 2021, Mayor Lucas did just that by helping pass ordinances to "reduce the Annual Police Budget" and defunded Patrol Divisions to the tune of nearly $23 million. Ex. 504, at 3–4 (noting millions reduced from the Metro, Central, and East Patrol Divisions). Mayor Lucas claims that, due to this dispute, he believes that the State or some unknown others "would attempt to punish the City for" the ordinances. Br. 11. Despite the alleged conspiracy, Amendment No. 4 and SB 678 continue the same level of funding for the KCPD, ensuring that they have sufficient resources to serve their community.

Now Mayor Lucas is doing all the City can to invalidate those laws—including by challenging the Fiscal Note Summary for SJR 38 (what became Amendment No. 4). The Auditor carefully prepared the Fiscal Note Summary and complied with the statutory obligations in Chapter 116. Though Mayor Lucas claims that the Auditor "ignored the information the City provided," Br. 8, the evidence shows that the Auditor sought to

[1] All statutory citations are to the most recent edition of the Revised Statutes of Missouri unless otherwise noted. All citations to rules are to the Missouri Supreme Court Rules unless otherwise noted.

understand the City's position and that position can be found in the Fiscal Note, nearly verbatim. In response to the Auditor's fact-finding mission, the City sought to provide "a political answer" because "it was important that any answer that we provide probably ought to be run by the Mayor's Office to ensure that they are on board." Tr. 218:23–219:7. The evidence also shows that the Auditor determined the City's responses were unreasonable because the City "did not indicate additional costs or savings would be added to the City overall." Ex. 49. The Auditor also recognized that the City had indicated "increased funding for the police department [] would result in decreased funding for other services." *Id.* There is no error and the Court should approve the Fiscal Note Summary.

Though the Fiscal Note Summary complies with the law, Mayor Lucas's suit violates the Election Code. In the shadow of this Court's decisions permitting a post-election challenge to a ballot title, the General Assembly amended § 116.190, RSMo, *to extinguish* that statutory right no later than 56 days before the election. This contest was filed well after the November election, and it is untimely. Elected officials may not bring an election contest, but the evidence shows that Mayor Lucas has done exactly that. He maintains this election contest by virtue of his office and at the taxpayers' expense. He also appears to view Chapter 115 and Chapter 116 as "choose your own adventure" statutes, where the litigant selects what provisions and clauses to follow. Not only is that wrong, the Court requires strict compliance with the Election Code to confer jurisdiction. As he failed to file a verified petition within the prescribed time, it should be dismissed.

This Court should not permit Mayor Lucas to set aside the will of the voters just because he does not like the result. The Court should find for the Secretary and the Auditor.

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Jurisdictional Statement

This Court ordinarily has original jurisdiction over election contests to state constitutional amendments. § 155.555, RSMo; *see also* MO. CONST. ART. VII, § 5 ("The general assembly shall designate by general law the court or judge by whom the several classes of election contests shall be tried and regulate the manner of trial and all matters incident thereto."). Mayor Lucas challenges the sufficiency of the fiscal note summary for Amendment No. 4, a constitutional amendment approved by voters at the November 8, 2022 election.

The Court lacks jurisdiction over this case because Mayor Lucas failed to comply with the mandatory procedures in the Election Code, challenges to the fiscal note summary are not cognizable under Chapter 115, and the facts show that Mayor Lucas lacks standing because he brings this action in his official capacity. These issues will be addressed in Sections I, II, and V of the Argument. The Court should dismiss the case.

Statement of Facts

A. The Auditor's experienced team follows the statutory requirements in preparing fiscal note summaries.

The Auditor's experienced staff know that the requirements for fiscal note summaries are found in Chapter 116. Tr. 347:10–16. The staff involved in preparing fiscal notes have been doing so since 2008, 2017, and 2022. Tr. 339:6–11. They all have CPA's, and two have more advanced certifications from accredited groups that require exams. Tr. 340:16–341:13. They keep up to date with continuing professional education. *Id.* In addition to their years of experience, they have other duties such as assisting the

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Auditor's office in completing audits and writing roughly 130 reports each year for state and local governmental entities. Tr. 336:17–14. The office has extensive experience preparing fiscal notes and summaries—including 100 fiscal notes in the last six months. Tr. 338:1–19.

The Auditor begins preparing fiscal note summaries by reviewing the resolution or Initiative Petition (IP) and requesting information from state and local governments "asking them what the costs or savings that the measure would have on their state or local government entity." Tr. 341:16–342:5. This process can take up to ten days. Tr. 344:19–345:12. The Auditor may follow-up with government units that have not responded. *Id.* And nearly all responses are contained (nearly verbatim) in the fiscal note. Tr. 345:19–346:1.

To prepare the fiscal note summary, the Auditor reviews the fiscal note responses for reasonableness. Tr. 346:2–347:16. Using their knowledge about government operations, the Auditor's staff verifies the source of the information and reviews the responses holistically to see if the information is consistent and makes sense. *Id.* The Auditor may also ask additional questions for clarification. *Id.* The review also encompasses asking entities to support their responses, Tr. 346:17–347:2, and determining whether the responses contain speculation, Tr. 342:11–17.

After determining the reasonableness of the responses, the Auditor prepares the fiscal note summary. The summary is limited to 50 words excluding articles. § 116.175.2, RSMo. The summary "shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure." *Id.* They attempt

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to write the summary "as neutrally as we can" without contextualizing the facts. Tr. 348:18–349:10. The office estimates costs and savings by combining the amounts for each governmental group into a "total for cost[s] or savings." *Id.* The Auditor's office then prepares a summary sheet that is reviewed by the legal and executive staff. Tr. 343:1–9. The summary sheet "explains the reasoning for what we're including or excluding in the fiscal note summary." *Id.*

Once the fiscal note summary has been approved, the fiscal note and the fiscal note summary are sent to the Attorney General. *See* § 116.175.2, RSMo. Chapter 116 only permits the Attorney General or the circuit court of Cole County to return the fiscal note summary to the auditor for revision. § 116.175.5, RSMo. No other statute authorizes the Auditor to stray from the deadlines in § 116.175, RSMo.

B. Statutory scheme funding the Board.

The Board is an agency of the state and the "proper maintenance of an adequate police system in Kansas City is a matter of state concern." *State ex rel. Spink v. Kemp*, 283 S.W.2d 502, 522 (Mo. banc 1955). The statutory scheme provides that the Board must submit an estimated budget to the City each January, and the City Council is "required to appropriate the total amount so certified … except that in no instance shall the governing body of the cities be required to appropriate for the use of the police board in any fiscal year an amount in excess of one-fifth of the general revenue fund of such year." § 84.730, RSMo (1958). The City explained that though it was only required to fund the Board at 20 percent of general revenue, it could and did consistently fund the Board at 25 percent. Tr. 207:9–13 (agreeing that as a matter of discretion "Kansas City had been funding the

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Police Department at 25 percent for many years."); Tr. 187:17–20 ("while [the City] might be funding the Board of Police Commissioners at 25 percent and even more in some years, that was as a matter of discretion."). It is no easy task to determine the City's general revenue under § 84.730, RSMo, because "[t]he actual determination of what general revenue is requires an analysis of line-by-line every revenue source of the City." Tr. 209:1–6 (Queen).

In Fiscal Years 21, 22, and 23, the City had funded the Board at 25.8%, 25.9%, and 24.3%, respectively. Tr. 219:23–220:15; Ex. 507. The City only fell short of 25 percent because the City's general revenue increased and the general revenue calculation included federal ARP funds for that year. *Id.* In other words, without the extra money in FY 23 ending April 20, 2023, the Board would have received 25% or more of the general revenue.

In 2022, the General Assembly passed SB 678, changing the funding requirement to 25 percent of the City's general revenues. § 84.730, RSMo (2022) ("in no event shall the governing body of the cities be required to appropriate for the use of the police board in any fiscal year an amount in excess of one-fourth of the general revenue fund of such year."). The City confirmed that "the movement from 20 to 25 percent turns what was discretion into requirement, statutory requirement." Tr. 187:20–22.

Alongside SB 678, the General Assembly passed SJR 38 that, if adopted, exempts from the Hancock Amendment laws passed by the General Assembly before December 31, 2026 that "increase minimum funding for a police force established by a state board of police commissioners to ensure such police force has additional resources to serve its

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communities." Ex. 2. SJR 38 was received by the Secretary on May 18, 2022, *id.*, and it was received by the Auditor on May 23, 2022. Ex. 6.

The twenty-day deadline to prepare and deliver the fiscal note and fiscal note summary to the Attorney General expired on Sunday, June 12, 2022. § 116.175.2, RSMo. That means it had an effective delivery date of Friday, June 10. The Auditor met the thirty-day deadline to deliver the approved package to the Secretary on Wednesday, June 22, 2022. § 116.175.3, RSMo. The Secretary certified the official ballot title on June 23, 2022. Ex. 30.

C. Drafting the Fiscal Note Summary for Amendment No. 4.

On May 23, 2022, the Auditor requested information from its usual list of contacts and included the Board. Tr. 352:17–354:21. An extensive follow up process with Kansas City ensued.

The City asserted that Amendment No. 4 will have a "negative fiscal impact" by authorizing SB 678 that "increases the amount that Kansas City must fund its police department from 20% to 25% of the City's general revenue." Ex. 24, at KCMOEC210. The Auditor's staff responded wanting to know whether the City expected to "meet that maximum 25 percent each year." Tr. 355:18– 25. Kansas City confirmed on the same day that it expected "the maximum 25 percent to be reached each year." Tr. 356:7–11. The City attorney did not need to check with others because it was "common knowledge" that the "City had been funding the Police Department 25 percent for many years." Tr. 207:5–11 (Queen). But the Auditor wanted to know if the City could translate that percentage into dollars because "If we were gonna put it in a fiscal note summary, we wouldn't put a

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percentage in." 357:16–348:5 (Beeler). The City attorney explained he would ask the Finance Department on Friday, May 27. Ex. 24, KCMOEC207. The next week the Auditor's office followed up, and the City replied that the estimated dollar amount (based on FY 23) for the difference between 20 and 25% was $38.7 million.[2] *Id.* The Auditor included that information in the fiscal note itself. Tr. 357:33–348:1 (Beeler).

On Friday, June 3, the Auditor's staff reached out to the Board for their response. Tr. 361:3–7. Specifically, they told the Board that the City "responded with costs."[3] Ex. 20, SAO352. On Monday, June 6, the Board responded and explained that the City determined the KCPD received 25.8% of general revenue in FY 22. Ex. 29, SAOAR16. The Board explained that this was $1.8 million less than FY 2020. *Id.* The Auditor's staff found it relevant because the City's responses left the impression that the change from 20 to 25% "was gonna increase their costs overall." Tr. 363:13–21. With this information, the Auditor's office asked the City, on the same night, whether "the required funding from 20 to 25% of general revenue actually increase city costs?" Ex. 24, at KCMOEC206. The office continued to try to get in touch with the City the next morning, June 7—three days before the fiscal note summary was due. Tr. 365:5–23 (Beeler).

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[2] The City testified that in FY 23 the City funded the Board at 24.3% of general revenue and that this $38.7 million does not reflect the .7% difference in potential funding. Tr. 217: 1–6 (Queen).

[3] Mayor Lucas erroneously claims that the Auditor agrees Amendment No. 4 imposes costs. Br. 47. Not so. This email reflects the Auditor's staff's understanding at the time based only on the City's unreliable responses.

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On June 8, a different City attorney responded. Ex. 24, KCMOEC206. The City's statement explained that adopting Amendment No. 4 and SB 678 "could obligate the City [] to appropriate an additional 5% of its general revenue" to the Board. *Id.* It noted that any "change to the percentage would limit the City's budgetary flexibility and necessitate a reduction in other services the City provides." *Id.* The City asserted that this legislative combination could "decrease its funding for other services, including but not limited to, fire protection services, roadway and infrastructure maintenance, and other municipal services by more than $38.7 million." *Id.*

The City's carefully worded response did not say how much KCPD had been funded in 2022, in a percentage or in dollars. Tr. 213:7–214:15 (Queen). The City did not deny it funded KCPD at 25.8% in 2022. *Id.* The response does not mention costs. *Id.* The City did not tell the Auditor that the proposed measure would increase taxes or fees. Tr. 221:3–222:13. The City also had not "contemplated" cuts in any of the areas it identified in its response. *Id.* City officials, while workshopping their response, indicated that this was "a political answer" and "it was important that any answer that we provide probably ought to be run by the Mayor's Office to ensure that they are on board." Tr. 218:23–219:7. And the City did not answer the question posed by the Auditor—two days before the fiscal note summary had to be sent to the Attorney General. *See* Tr. 222:22–224:19.

With the City's June 8 response, the Auditor's office drafted the summary sheet and the fiscal note summary. The summary sheet noted that the City's response was not included because SB 678 had not been signed into law and the City was already funding the KCPD at over 25%. Tr. 370:23–371:17. Although the City said that "increased funding

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for the police department would decrease funding for other services," the statement did "not indicate that additional costs or savings would be added to the City overall." Ex. 49. And the summary sheet explained that a response from Jefferson City was not included because it did not indicate "direct costs or savings" was vague and speculative. *Id.*

As no other entity had provided additional costs or savings, the Auditor's Office approved the summary with no estimated costs or savings.

D. Mayor Lucas challenges the Fiscal Note Summary.

Mayor Lucas and the City began preparing to challenge any changes to the police funding enacted by the General Assembly in January 2022—ten months before voters approved Amendment No. 4. Mayor Lucas sponsored the Ordinance that appropriates taxpayer monies for this litigation. Tr. 147:12–14; *see* Ex. 96. And the City already had the requisite attorney-client relationship by virtue of Mayor Lucas's office. Tr. 168:4–7. In April of 2022, the City hired private counsel to advise on SJR 38 and SB 678, and "upon request the City, and any officers or employees, in any related litigation." Ex. 115, at 1. The City is paying for this private counsel. Tr. 170:18–22. And the City says the City Charter allows it to represent Mayor Lucas without an engagement letter. No written agreement memorializes that counsel represents Mayor Lucas in his personal capacity. Tr. 129:2–4.

On August 11, 2022, the City's shared counsel with Mayor Lucas sent letters to the Secretary and then the Auditor requesting that they revise the fiscal note summary based on Kansas City's responses to the Auditor. Ex. 33, 37. Mayor Lucas hoped that this request "could be resolved short of litigation." Tr. 124:2–8. He thought "we could have a

favorable fiscal note summary short of legal action." Tr. 124:19–23. Notably, the August 11 letter to the Secretary ended on a hopeful note: asking that "your office act swiftly to rectify the ballot language, and reserve all rights to pursue post-election claims under Chapter 115" noting "[i]t would be unfortunate—and needlessly wasteful—if your office had to administer a second election." Ex. 33, at KCMOEC30. The next day Mayor Lucas took to twitter to bemoan Missouri bureaucrats and predict that "[t]his will end up in court." Tr. 152:5–153:1, Ex. 76. Though Contestees responded to the first round of correspondence, the efforts were fruitless.

On November 8, 2022, Amendment No.4 received more than 1.2 million votes in favor, as officially announced on December 9, 2022. Ex. 52. The Secretary's office received no complaints regarding Amendment 4. Tr. 307:12–20 (Clark).

On January 6, 2023, Mayor Lucas filed an unverified petition styled as an election contest to "[s]et aside the results of the November 8, 2022 vote on" Amendment No. 4. After Contestees filed a motion to dismiss for, among several reasons, failing to comply with § 155.557, RSMo, Mayor Lucas filed a verified petition on January 26, 2023. Mayor Lucas alleged that the "fiscal note summary falsely represented the City's position as to the Amendment's fiscal impact" and "inaccurately represents the Amendment's actual fiscal impact." Am. Pet. ¶38(a) & (b).

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Argument

I. The Election Code and the Constitution do not permit a post-election challenge to a Constitutional Amendment's fiscal note summary, and dismissal is proper.

The General Assembly, empowered by the Constitution, has expressly provided a pre-election cause of action to the sufficiency and fairness of a fiscal note summary. The "election contest statutes are a code unto themselves," and their procedures "are exclusive and must be strictly followed as substantive law." *Foster v. Evert*, 751 S.W.2d 42, 44 (Mo. banc 1988) (quotation omitted). This suit seeks to use the Chapter 115 election contest procedures as a vehicle to bring a Chapter 116 fiscal note summary challenge. It is true that this Court approved this maneuver for summary ballot statements, which are part of the official ballot title. *Shoemyer v. Missouri Sec'y of State*, 464 S.W.3d 171, 172 (Mo. banc 2015); *Dotson v. Kander*, 464 S.W.3d 190 (Mo. banc 2015) (*Dotson II*); *Dotson v. Kander*, 435 S.W.3d 643 (Mo. banc 2014) (*Dotson I*). But that was before the General Assembly amended § 116.190, RSMo (2014), providing that "[a]ny action brought under this section that is not fully and finally adjudicated within one hundred eighty days of filing" is extinguished. *Dotson* and *Shoemyer* cannot be reconciled with the Election Code (as amended), the Missouri Constitution, or this Court's precedents.

The *Dotson* precedents should be confined to the then-governing statutes. *Dotson I* was decided July 18, 2014, and at the time, the statutory scheme only prohibited "court-ordered modifications to a ballot title within six weeks of an election." 435 S.W.3d at 645.

In Dotson II, the Court held that Chapter 116 was not the exclusive vehicle to challenge the language of a ballot title because (1) "the election procedures contained in

chapter 115 shall apply to the elections on statewide ballot measures," (2) the term irregularity was construed as "a challenge to the ballot title of a proposed constitutional amendment … so long as the issue has not been previously litigated and determined," (3) there "is no statutory indication that [Chapter 116] is the only vehicle for such a challenge." 464 S.W.3d at 194. The Court further construed Chapter 116's procedures for writing a ballot summary statement to be the same as *the result* of any election on any question. *Id.* But when there are conflicts between Chapters 115 and 116—and there are plenty—Chapter 116 controls. § 116.020, RSMo. This Court's long held precedent explains that an election contest "alleges that through an irregularity in the conduct of an election, the officially announced winner did not receive the votes of a majority of the electorate." *Foster*, 751 S.W.2d at 43. That is expressly different than a ballot title challenge—which does not challenge the validity of the result of an election.

Dotson and *Shoemyer* also created an equitable remedy not found in the Election Code and contravenes the Constitution's prohibition against amending it outside the procedures provided in the Constitution. MO. CONST. ART. XII, § 1. Under the Constitution, an amendment takes effect (and becomes part of the Constitution) thirty days after an election only if a majority of the votes are cast in favor of it. MO. CONST. ART. XII, § 2(b). Chapter 115 provides for a recount or a new election when the Court sufficiently doubts that the measure passed. § 115.593, RSMo. Thus, the General Assembly's remedy applies when the results are challenged and the amendment has not taken effect. The Court's remedy applies regardless of the result of the election and, as such, effectively repeals a part of the Constitution.

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Contestees expressly request that the Court revisit and overturn its prior rulings or limit those cases to their facts and do not extend their reasoning to fiscal note summaries.

A. The *Dotson* and *Shoemyer* decisions create a new judicial remedy unauthorized by the General Assembly.

In *Dotson I*, petitioners sought to challenge the ballot title for a measure that was certified on June 13, 2014, and placed on the August 5, 2014, primary election date—seven weeks and four days later. 435 S.W.3d at 644. The circuit court dismissed the appeal on July 1 because "section 115.125.2 prohibited it from altering a ballot title." *Id.* This Court decided *Dotson I* on July 18, 2014, noting that the statutory scheme only prohibited "court-ordered modifications to a ballot title within six weeks of an election." 435 S.W.3d at 645. The Court dismissed the case as moot, stating that "judicial review of a claim that a given ballot title was unfair or insufficient (when not previously litigated and finally determined)" citing § 115.555, RSMo. No reason was given, and the Court did not explain how it arrived at the "when not previously litigated and finally determined" text.

Less than a month later, in August 2014, *Dotson I*'s ballot measure and the one challenged in *Shoemyer* passed. Pursuant to the Court's suggestion in *Dotson I*, the challengers filed post-election challenges to the ballot titles—within 30 days of the election or, in the case of *Shoemyer*, the certification of the recount. 464 S.W.3d at 173. Both petitions were filed before November 4, 2014.

The Court explained that its previous dismissal was based on its assessment that "the trial court and appellate judicial review could have been completed within 11 days." *Dotson II*, 464 S.W.3d at 194. And "due to no delay on their part" the challenge was

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foreclosed. *Id.* Under a Chapter 115 challenge, registered voters could "contest '[t]he result of *any* election on *any* question' *after* an election has been held." *Id.* (citing § 115.553.2, RSMo) (emphasis in original). The Court cited § 116.020, RSMo, as providing that the "election procedures" in Chapter 115 apply to statewide ballots and relied on *Gerrard v. Bd. of Election Com'rs*, 913 S.W.2d 88 (Mo. Ct. App. 1995), and *Marre v. Reed*, 775 S.W.2d 951 (Mo. banc 1989). *Id.* *Shoemyer* simply reaffirms *Dotson II*'s holding and finds that "the thirty day filing period does not begin until the results are certified *after* a recount." 464 S.W.3d at 173–174.

Judge Stith's separate writings shed some light on the Court's consideration of the Chapter 115 and 116 maneuver. First, she noted that there is no text that incorporates Chapter 116 into Chapter 115. *Dotson II*, 464 S.W.3d at 211 (Stith, J. concurring). She explains that due to the mootness holding in *Dotson I*, the Court was "in a quandary because of the unfairness of precluding review of the ballot title despite the bringing of a timely challenge to its language." *Id.* at 212. She states that the Court "speculat[ed] in dicta that the mooting of the chapter 116 challenge did not preclude any review of the ballot title." *Id.* And being "[h]eld hostage by its previous dicta," the Court broke from its precedents about election irregularities. *Id.* ("No prior case, however, states that ballot title insufficiency is an election irregularity."). She further notes that the cited cases "simply highlight[] the lack of authority for addressing a ballot title challenge under chapter 115." *Id.* at 214. *Dotson II* "basically incorporates chapter 116 into chapter 115 by reference. But, if the legislature so intended, it would have so provided." *Id.*

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In criticizing the *Shoemyer* opinion, Judge Stith explained that the dicta in *Dotson I* "stands as an abject demonstration of the dangers of obiter dictum, particularly when, as in *Dotson I*, that issue was not briefed or argued." *Shoemyer*, 464 S.W.3d at 176 (Stith, J., dissenting). She further would have not permitted *Shoemyer* to file a post-election ballot title challenge because the petitioners had not previously tried to file a Chapter 116 challenge. *Id.* In her view, "permitting such challenges first to be brought after an election invites sandbagging—waiting to see if a measure passes and only challenging the ballot title if the measure does pass, when it is too late to correct the ballot title." *Id.*

B. The statutory scheme, especially as amended, does not support permitting a Chapter 115 ballot title challenge.

Chapter 116's text has always required a pre-election challenge, and the General Assembly's amendment to § 116.190 shows that it further limited the time frame for "[a]ny citizen who wishes to challenge the official ballot title or the fiscal note prepared for a proposed constitutional amendment." § 116.190.1, RSMo. Fourteen days after the *Dotsons* and *Shoemyer* decisions, the Governor signed into law SB 104 (2015) that amended, and indeed repealed and replaced, § 116.190 so that "[a]ny action brought under this section that is not fully and finally adjudicated within one hundred eighty days of filing, and more than fifty-six days prior to election in which the measure is to appear, including all appeals, shall be extinguished, unless a court extends such period upon a finding of good cause." § 116.190.5, RSMo (2015). This subsequent amendment refutes any doubt that challenges to the fiscal note summary must be brought before the election and fully adjudicated 56 days before the election. No post-election challenges are permitted.

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Courts give "statutory language its plain and ordinary meaning." *Brock v. Dunne*, N637 S.W.3d 22, 28 (Mo. banc 2021). "In order to discern the intent of the General Assembly, the Court looks to statutory definitions or, if none are provided, the text's 'plain and ordinary meaning,' which may be derived from a dictionary." *Gash v. Lafayette Cnty.*, 245 S.W.3d 229, 232 (Mo. banc 2008). "When the legislature provides a statutory definition, it 'supersedes the commonly accepted dictionary or judicial definition and is binding on the courts." *Cosby v. Treasurer of State*, 579 S.W.3d 202, 207 (Mo. banc 2019). "The legislature is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018). Courts presume that the legislature does "not insert idle verbiage or superfluous language in a statute." *Civ. Serv. Comm'n of City of St. Louis v. Members of Bd. of Aldermen of City of St. Louis*, 92 S.W.3d 785, 788 (Mo. banc 2003). Legislative changes should not be construed as useless acts unless no other conclusion is possible." *State ex rel. Missouri State Bd. of Registration for Healing Arts v. Southworth*, 704 S.W.2d 219, 225 (Mo. banc 1986). Moreover, "it is a well established rule of statutory construction that specific designations will control over general terms." *Terminal R. R. Ass'n of St. Louis v. City of Brentwood*, 230 S.W.2d 768, 769 (Mo. 1950).

First, even before the statutory amendments, the *Dotson II* decision erroneously turned an order of precedence rule upside down. Though the "election procedures contained in Chapter 115 shall apply to elections on statewide ballot measures," the Court failed to heed the statute's exception—when "the provisions of chapter 116 directly conflict, … chapter 116 shall prevail." § 116.020, RSMo. Instead of giving the

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requirements in § 116.190, RSMo, precedence, the Court permitted the procedures in Chapter 115 to control.

The provisions governing challenges to fiscal note summaries and election contests directly conflict in many ways. Venue for a fiscal note summary challenge is in the circuit court of Cole County, § 116.190.1, RSMo (2003), but "all contests to the results of elections on constitutional amendments … shall be heard and determined by the supreme court," § 115.555, RSMo. One "must be brought within ten days after the official ballot title is certified by the secretary of state," § 116.190.1, RSMo (2003), and election contests must be filed "[n]ot later than thirty days after the official announcement of the election result by the secretary of state," § 115.557, RSMo. Petitions for election contests must be verified and challenges to a fiscal note summary have no such requirement. Compare § 115.557, RSMo, with § 116.190.3, RSMo (2003). The party defendants also differ. *Compare* § 115.553.2, RSMo, *with* § 116.190.2, RSMo (2003).

Importantly, if the petition is successful, the provisions have different and exclusive remedies. Section 116.190.4, RSMo (2003), requires that the court "remand the fiscal note or the fiscal note summary to the auditor for preparation of a new fiscal note or fiscal note summary." Election contests permit a court to order a recount under § 115.583, RSMo, or in drastic circumstances, a new election, § 115.593, RSMo. "The right to contest an election exists by virtue of statute; it is not a common law or equitable right." *Bd. of Election Com'rs of St. Louis Cnty. v. Knipp*, 784 S.W.2d 797, 798 (Mo. banc 1990). So "the legislature has the authority to choose what remedies will be permitted under a statutorily created cause of action." *Estate of Overbey v. Chad Franklin Nat'l Auto Sales*

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N., LLC, 361 S.W.3d 364, 375 (Mo. banc 2012). And "[t]he court may only grant relief that is specifically authorized by the election contest statutes." *Wright-Jones v. Johnson*, 256 S.W.3d 177, 181 (Mo. Ct. App. 2008); *Hockemeier v. Berra*, 641 S.W.2d 67, 68 (Mo. banc 1982) ("[T]he courts are without jurisdiction to entertain a petition for relief where none is specifically granted by statute."). This exclusivity of remedies also means the provisions of Chapter 115 and 116 conflict, such that the latter control in a ballot title challenge.

Other statutory clues indicate that § 116.190, RSMo, is the sole procedure to challenge the official ballot title. It applies to "[a]ny citizen who wishes to challenge the official ballot title or the fiscal note prepared for a proposed constitutional amendment." The plain text of § 115.553.2, RSMo, shows that "*[t]he result* of any election on any question may be contested." It does not say that the method of putting questions on the ballot may be challenged—as indicated by section's short title: "Candidate may challenge returns — registered voter of area may contest result." § 115.553, RSMo. The first subsection confirms that election contests are concerned with the results, as a candidate "may challenge the correctness of the returns for the office, charging that irregularities occurred in the election." § 115.553.1, RSMo. And the venue provision (cited by Mayor Lucas) states that "all contests to *the results* of elections on constitutional amendments … shall be heard and determined by the supreme court." § 115.555, RSMo (emphasis added); Am. Pet. ¶ 7.

Even if the Court could somehow look past the statutory scheme in place before *Dotson I*, the General Assembly's two subsequent changes make clear that official ballot

challenges must be brought before the public votes on a ballot challenge. The General Assembly initially amended § 116.190.5, RSMo (2014), so that "[a]ny action brought under this section" that is not finally adjudicated within 180 days "is extinguished," unless specific good cause exists. Because the amendment was not effective until November 4, 2014, the Court adjudicated the version in effect as of 2013. *Dotson II*, 464 S.W.3d at 193 (referencing "Section 116.190, RSMo Supp. 2013"). The text stating that the action is "extinguished" indicates that the limitation "operate[s] on the right rather than the remedy." *Marston v. Juv. Just. Ctr. of The 13th Jud. Cir.*, 88 S.W.3d 534, 537 (Mo. Ct. App. 2002) (quoting *Wentz v. Price Candy Co.*, 175 S.W.2d 852, 854 (Mo. 1943)). The General Assembly may "create a right of action conditioned upon its enforcement within a prescribed period, the theory being that the lawmaking body which has the power to create the right may affix the conditions under which it is to be enforced." *Id.* And when, as here, "the General Assembly amends a statute, we presume that it was aware of the courts' interpretation of the statute" leading to the conclusion that the amendment changed the court's interpretation. *Id.* This conclusion is confirmed by the General Assembly's second amendment, S.B. 104 (2015), stating that the action must be fully adjudicated "more than fifty-six days prior to election in which the measure is to appear." § 116.190.5, RSMo (2015). Not only does this section provide a limited time frame for challenges to the ballot title, it also extinguishes the statutory right to the cause of action before the election.

The plain text of the statutory scheme, whether before *Dotson II* or after, makes clear that challenges to a ballot measure's fiscal note summary is governed by § 116.190, RSMo, and not cognizable as an election contest. The General Assembly further amended

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the statutory scheme to expressly end, not just the remedy, but the statutory right to the cause of action itself. The amendments have not been interpreted by this Court, so the prior judicial decisions do not reach this version of § 116.190, RSMo. *See Charter Commc'ns Ent. I, LLC v. Dir. of Revenue*, 667 S.W.3d 84, 89 (Mo. banc 2023) ("Judicial decisions must be construed with reference to the facts and issues of the particular case, and ... the authority of the decision as a precedent is limited to those points of law which are raised by the record, considered by the court, and necessary to a decision.").

C. Missouri case law confirms that election contests remedy the conduct of the election itself, not the sufficiency of the official ballot title.

Missouri decisions, including those relied on by the Court in *Dotson II*, show that an election contest is not a review procedure for any violation of an election statute—but those violations that affect the conduct of the election. There is no dispute here that the certified fiscal note summary was accurately printed on the ballot. Tr. 108:12–110:3 (Lucas). Mayor Lucas simply does not like the content of the fiscal note summary, but an election contest is not the proper vehicle.

Dotson II primarily relied on *Gerrard* and *Marre* to find that "the violation of election statutes [is] an irregularity that may be addressed in an election contest." 464 S.W.3d at 194. As an initial matter, neither decision is a challenge to an official ballot title. In *Marre*, a candidate for Marshal was defeated by 11 votes. 775 S.W.2d at 951–52. The contestant alleged 14 unqualified voters voted in the election. *Id.* Citing *Foster*, the Court explained that "[a]n election contest ... is an action by which the contestant challenges the conduct of the election itself." *Id.* at 952. The action "alleges that through an irregularity

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in the conduct of an election, the officially announced winner did not receive the votes of a majority of the electorate." *Id.* It explained that "ballots cast by those who are not qualified to vote contaminate the reported results" create risk that the democratic process will not determine that the voters' will is done. *Id.* at 953. It further construed the term "irregularities" from § 116.183, RSMo, the same way as in § 116.193, RSMo. "Because voting by unqualified voters is an irregularity examined by the court in conducting a recount, it follows that such an irregularity may be considered in determining whether a new election should be ordered." *Id.* at 953–54. This statutory construction counsels against holding that an insufficient fiscal note summary is an "election irregularity" because a recount (one of two remedies) would be insufficient to remedy the approved content on the ballot. After reviewing the evidence, the Court found that 11 voters (the margin of defeat) were not properly qualified to cast a ballot and held that this constituted election irregularities that required a new election. *Id.* at 955–56.

In *Gerrard*, the Court of Appeals addressed an election contest involving a city (not the election authority) potentially violating § 115.646, RSMo, by sending out an informative mailer using public funds and whether the ballot itself conformed with the instruction requirements to voters. 913 S.W.2d at 89, 91. The mailer "was endorsed by the aldermen and made statements favoring passage of" the initiative. *Id.* at 89. The court applied dictionary definitions to find that disregarding a statute came within the terms of "irregularity." It confirmed its reading by relying on three cases (excluding *Marre*). *Id.* Those decisions *all* found irregularities that went to the conduct of the election, not the sufficiency or fairness of the official ballot title. *See Gasconade R-III Sch. Dist. v.*

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Williams, 641 S.W.2d 444, 445 (Mo. Ct. App. 1982) (unqualified voters, defective ballot instructions, and improper absentee voting); *Clark v. City of Trenton*, 591 S.W.2d 257, 258 (Mo. Ct. App. 1979) (improper notice before an election); *Eversole v. Wood*, 754 S.W.2d 27, 28 (Mo. Ct. App. 1988) (failure to put an election on a ballot in one precinct). In the end, the court found that neither the city mailer (due to the provisions of § 115.646, RSMo, permitting public statements) or the actual ballot presented an election irregularity that would affect the outcome of the election. *Id.*

Furthermore, the evidence at trial supports the proposition that election irregularities are commonly understood as the conduct of the election. The Secretary's office testified that Missourians submit complaints about the conduct of the election on all manner of issues such as a voter not being listed on the registration at their polling place and third parties engaging in advocacy outside of polling places. Tr. 299:13–300:7. In the complaints that were filed with the Secretary, the office noted that Missourians were also concerned about the wrong official/contest being listed on the ballot and improper signs at the polling places. Tr. 304:6–9, 304:25–305:2. The office further gave examples of election irregularities such as voters getting the wrong ballot or in an extreme case, if the wrong ballots were handed out the entire day. Tr. 306:8–21. The evidence further showed that no voter filed a complaint about Amendment No. 4. Tr. 307:12–20.

D. Other state courts agree that an election irregularity must arise from Election Day conduct.

Many other states have statutes allowing a voter to contest an election for irregularities, including Georgia. There, a voter can contest an election for "[m]isconduct,

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fraud, or irregularity by any primary or election official or officials sufficient to change or place in doubt the result." Ga. Code Ann. § 21-2-522(1); *accord* Minn. Stat. § 209.02, subd. 1; Miss. Code. Ann. § 23-15-927; Mont. Code Ann. § 7-7-105(1); N.Y. Elec. Law § 16-102(3); N.C. Gen. Stat. § 163-182.9(b)(2); 26 Okla. Stat. §§ 8-109, 8-118; Wash. Rev. Code § 29A.68.070; Wis. Stat. § 5.90(2), (3); Wyo. Stat. § 22-16-109(a). And in these states, their Courts have interpreted "irregularity" to focus on Election Day conduct, like fraud or invalid signature verification.

In Georgia, "the party contesting an election generally must show a specific number of illegal or irregular ballots, or a specific number of voters who voted illegally or were irregularly recorded or rejected." *Martin v. Fulton Cnty. Bd. of Registration & Elections*, 307 Ga. 193, 223, 835 S.E.2d 245, 267 (2019) (cleaned up). In one successful election contest, a contestant "succeeded in th[e] task" of "show[ing] that there were enough irregular ballots to place in doubt the result." *Howell v. Fears*, 275 Ga. 627, 628, 571 S.E.2d 392, 393 (2002). Another successful election contest included a case where the irregularities included assistants for disabled voters not taking the required oath, felons voting illegally, double voting, paid voting, dead voting, and illegal disenfranchisement. *McCranie v. Mullis*, 267 Ga. 416, 416 & n. 6, 478 S.E.2d 377, 378–79 & n. 6 (1996). "Additionally, the poll managers failed to verify in writing the claimed disabilities." *Id.* at 416, 478 S.E.2d at 379. All of these show quintessential election day conduct. Other cases in Georgia indicate fundamentally the same thing. *See Mead v. Sheffield*, 278 Ga. 268, 270–71, 601 S.E.2d 99, 101–02 (2004); *see also Stiles v. Earnest*, 252 Ga. 260, 261, 312 S.E.2d 337, 338–39 (1984); *id.* at 262–63, 312 S.E.2d at 339 (Smith, J., dissenting); *Harris*

v. City of S. Fulton, 358 Ga. App. 788, 795, 856 S.E.2d 361, 366 (2021); *cf. DeLeGal v. Burch*, 273 Ga. App. 825, 828–29, 616 S.E.2d 485, 488–89 (2005) (holding a clerical error is not an irregularity when it substantially complies with election statutes).

A Minnesotan contestant fails to state a claim when they do not "alleg[e] irregularities in the conduct of the election or a violation of election laws." *Bergstrom v. McEwen*, 960 N.W.2d 556, 563 (Minn. 2021); *see also Franken v. Pawlenty*, 762 N.W.2d 558, 569 (Minn. 2009). Minnesota challenges often involve the process of voting or tabulating the vote, like miscounting the vote totals, *see, e.g.*, *Holmen v. Miller*, 296 Minn. 99, 108–09, 206 N.W.2d 916, 921–22 (1973), allowing unauthorized people to stay in the polling location, *Munnell v. Rowlette*, 275 Minn. 92, 95, 145 N.W.2d 531, 534 (1966), or clerical errors involving the name of candidates on the ballot, *Moulton v. Newton*, 274 Minn. 545, 550, 144 N.W.2d 706, 710 (1966). None of the cases surveyed involve a sufficiency challenge to the content of the ballot—if the content shows what is approved there is no irregularity.

Wyoming's description of election irregularities rings true here. *Hamilton v. Marshall*, 282 P. 1058 (Wyo. 1929). In that case, the polls were required to close at 7 PM, but they stayed open after 9 PM. *Id.* at 1059. The plaintiff alleged that all votes cast after 7 PM were illegal and irregular. *Id.* The Court dismissed the case because there was no evidence the votes would have impacted the outcome of the election, but that does not change that this challenge was to the conduct of the election, not to a ballot title. *Id.* at 1060.

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The Supreme Court of Montana addressed allegations of election irregularities in *Weber v. City of Helena*, 297 P. 455 (Mont. 1931). There, the Court noted the plaintiff alleged various procedural problems, including the registration of voters, the failure to provide a list of registered voters, the refusal by election officials to allow some qualified voters to vote, and that some people illegally voted. *Id.* at 458. The complaint was ultimately dismissed because "the city conducted the election in question in substantial conformity" with the election procedures. *Id.* at 459. However, the Court found the election procedures used to conduct the election were superseded and, as such, were irregularities requiring overturning the election. *Id.* at 463.

A New York Appellate Court dealt with similar issues in *Allgrove v. Canary*, 493 N.Y.S.2d 42 (N.Y. App. Div. 2d Dep't 1985). There, the Court dismissed a claim of election irregularities because the allegations were of improper use of party funds. *Id.* at 43. The Court held a challenge for irregularities focuses on "frauds or irregularities in the actual voting process." *Id.*

Courts in Mississippi, North Carolina, Oklahoma, and Washington agree. *See, e.g.*, *Boyd v. Tishomingo Cnty. Democratic Executive Comm.*, 912 So. 2d 124, 129 (Miss. 2005); *James v. Bartlett*, 607 S.E.2d 638, 640–41 (NC 2005); *Simpson v. Dixon*, 853 P.2d 176, 185 (Okla. 1993); *In re February 14, 2017, Special Election on Moses Lake Sch. Dist. #161 Proposition 1*, 413 P.3d 577, 579–82, 587 (Wash. App. 2018); *DeBroux v. Bd. of Canvassers for the City of Appleton (Three Cases)*, 206 Wis.2d 321, 331 n. 10, 334, 557 N.W.2d 423, 427 n. 10 (Ct. App. 1996).

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The examples from other States noted above demonstrate that an "irregularity" means the actual conduct affecting Election Day procedures. This should give the Court more comfort that its' interpretation in *Dotson II* is an outlier.

E. The remedy sought here, and generally, in a post-election challenge to the official ballot title conflicts with the Missouri Constitution.

Mayor Lucas specifically requests that the Court "[s]et aside the results of the November 8, 2022 vote on the Amendment." Am Pet. at 12–13. But that relief is inconsistent with two provisions of the Missouri Constitution. *First*, the Constitution provides that "[i]f a majority of the votes cast thereon is in favor of any amendment, the same shall take effect at the end of thirty days after the election." MO. CONST. ART. XII, § 2(b). Second, "[t]his constitution may be revised and amended only as therein provided." MO. CONST. ART. XII, § 1. By operation of the Constitution, Amendment No. 4 took effect and became part of the Missouri Constitution 30 days after voters passed it—December 8, 2022. The Secretary of State certified that result the next day. Thus, setting aside the election and holding that article X, § 21 (2) is no longer part of the Constitution is effectively amending the Constitution outside the procedures provided for in article XII.

This Court's case law confirms this reading. Where the Constitution provides a method for amendment, any amendment attempt "must conform to that procedure." *Moore v. Brown*, 165 S.W.2d 657, 659 (Mo. banc 1942). But an action claiming that a procedure was not followed *must* be brought and resolved before adoption. When defects "are not substantive," this Court expressly held, "an amendment cannot be held void after adoption." *Id.* at 663. Procedural defects are thus distinct from substantive defects, where

"the measure will be void even if adopted." *Id.* at 662. For this reason, this Court previously held that alleged noncompliance with statutes governing the initiative process were "not substantive" defects, and thus the Court could not render the amendment "void after adoption." *Id.* at 663.

There is some doubt whether the "dichotomy between procedural defects in the initiative process and substantive defects" is the precise formulation for this distinction. *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 828 (Mo. banc 1990). Instead, the Court appeared to explain that the form of the amendment must comply with article III, § 50, or be stricken from the ballot. *Id.* Still, *Missourians to Protect the Initiative* only addressed what an initiative petition must do to be placed on the ballot (not what is required for passage), and it explained that pre-election challenges were viable. *Id.* at 829; *see* MO. CONST. ART. III, § 51. In contrast, article XII, § 2(b) requires that the submission of such measures for the electorate's "approval or rejection by official ballot title as may be provided by law." As the General Assembly has expressly provided a mechanism, by law, to address the ballot title insufficiencies before the electorate adopts an amendment, this Court should not create additional, extra-constitutional remedies that Missourians have not approved.

The Court should find that § 116.190, RSMo, prohibits post-election challenges to the ballot title and end its invitation to sandbagging that it began in *Dotson II*.

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II. The Court lacks jurisdiction to hear the case because Mayor Lucas brings suit in his official capacity and not as a registered voter.

This Court recently affirmed that elected officials may not bring a § 116.190 challenge to a fiscal note summary in their official capacity. *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 9 n.6 (Mo. banc 2023) ("The Attorney General cannot bring such a challenge in his official capacity… ."). Chapter 115 also expressly provides that only "registered voters" may bring an election contest. § 115.553, RSMo. There is no dispute that Mayor Lucas is a registered voter, but this Court must decide whether he brings this suit in his individual or official capacity. Mayor Lucas is represented by the City Attorney's Office and "[t]he City Charter is effectively that engagement letter based on the items I read out of it. That is where the attorney-client relationship [with Mr. Lucas] is established." Tr. 168:17–24. Kansas City appropriated taxpayer monies for this lawsuit and pays for private legal representation through a contract with Kansas City to "provide legal representation of the City, its duly authorized officers, employees, and volunteers," Ex. 115, at 1. The overwhelming evidence shows that Mayor Lucas brings this suit in his official capacity.

The party seeking relief from the Court must show that it has standing, *Manzara v. State*, 343 S.W.3d 656, 659 (Mo. banc 2011), and one "seeking relief under the election-contest provisions must 'bring h[im]self strictly within their terms.'" *Miller v. Frank*, 519 S.W.3d 472, 475 (Mo. Ct. App. 2017) (quoting *Wright-Jones*, 256 S.W.3d at 180). If a party fails to strictly comply "with the election contest statutes," the Court loses subject matter jurisdiction over the petition. *Wright-Jones*, 256 S.W.3d at 180. Statutes limiting

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the class of potential plaintiffs for statutory causes of action must be strictly construed. *See Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918 (Mo. banc 1995). "When the burden of proof is placed on a party for a claim that is denied, the trier of fact has the right to believe or disbelieve that party's uncontradicted or uncontroverted evidence." *White v. Dir. of Revenue*, 321 S.W.3d 298, 305 (Mo. banc 2010).

Courts give "statutory language its plain and ordinary meaning." *Brock v. Dunne*, 637 S.W.3d 22, 28 (Mo. banc 2021). "When the words are clear, there is nothing to construe beyond applying the plain meaning of the law." *Id.* The "construction of statutes is not to be hyper-technical, but instead is to be reasonable and logical and to give meaning to the statutes." *Gash*, 245 S.W.3d at 232.

This Court requires that the proper party bring special statutory actions. *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995) (when clear statutory text "limits the class of persons who can bring suit," text must be strictly construed). The closest analogue to this statutory action is in Hancock Amendment cases where courts limit the litigant to the person the statute endows with a legal right to pursue the action. *Fort Zumwalt Sch. Dist.,* 896 S.W.2d 918, 921 (Mo. banc 1995) (School districts are not "taxpayers" and thus cannot bring claims limited to "taxpayers"); *Sch. Dist. of Kansas City v. State*, 317 S.W.3d 599, 610 (Mo. banc 2010) (same). Here, the unambiguous language limits the ability to bring an election contest to "one or more registered voters from the area in which the election was held." § 115.553, RSMo.

The Amended Petition makes clear that this suit is a challenge under § 116.175, RSMo. Am. Pet. ¶¶ 34–36. In *State ex rel. Fitz-James*, the Court rejected the Attorney

General's assertion that § 116.175 permits him as well as the circuit court of Cole County to reject a fiscal note summary on fairness and sufficiency grounds. 670 S.W.3d at 9, n.6 (stating Attorney General's objections were not based on "legal form and content."). It expressly noted that "the Attorney General cannot bring such a challenge in his official capacity," but that he could bring a claim in his individual capacity as "any citizen" might. *Id.* The Court recognized this important distinction only weeks ago.

Mayor Lucas has the burden to show and persuade this Court that he brings this action in his personal capacity. He has not done so. Mayor Lucas claimed that "[i]f I were not Mayor, I would intend to continue this legal action as an individual." Tr. 146:6–9. He also claims he had a discussion about representation in a private capacity with the City Attorney." Tr. 129:20–130:3. That is the entirety of his testimony on whether he brings this suit in his individual capacity, and notably the Commissioner cut the witness off because his testimony was non-responsive to the question. Tr. 146:17–18. The Court should not credit that statement, and even if it does, the overwhelming evidence shows that this suit is brought by Mayor Lucas in his official capacity.

Mayor Lucas cannot show when the attorney-client relationship began for this matter. No written agreement memorializes that counsel represents Mayor Lucas in his personal capacity. Tr. 129:2–4. He does not have an email where he asks the City Attorney to represent him. Tr. 129:17–19. There is no engagement letter with the City Attorney's office. Tr. 168:17–20. He does not know when the relationship began. Tr. 130:12–15. Specifically for private counsel Wilmer Hale, he agreed in his deposition that he did "not recall the precise phone call or formation of [the] attorney-client relationship here." Tr.

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148: 9–23. Mayor Lucas does not receive any bills from private counsel. Tr. 145:20–24. He has not signed a written consent for anyone else to fund the litigation. Tr. 147:18–20.

The evidence shows that Mayor Lucas is represented by virtue of his office. The City testified that the City Attorney's relationship with Mayor Lucas "was established at the time he got elected even as City Council member in 2015." Tr. 168:4–7. His election and office obviates the need for an engagement letter. Tr. 168:17–24. Mayor Lucas sponsored the Ordinance that appropriates taxpayer monies for this litigation. Tr. 147:12–14; *see* Ex. 96. And the City agrees that it pays for private counsel. Tr. 170:18–22. But that Ordinance does not provide that the City Attorney may represent a private party. Tr. 225:8–10. When asked what allows private counsel to represent Mayor Lucas in this litigation, the City pointed out the provision in *the City's* legal services agreement where private counsel would "provide legal representation of the City, its duly authorized officers, employees, and volunteers." Tr. 172: 13–20. It also noted that "the contract and the Law Department really relates back to the City Charter and the City Charter giving the City Attorney's Office the authority to deal with litigation in which the City has an interest." Tr. 172:23–173:2. The City Charter authorizes the Law Department to "[r]epresent *the City* in all legal matters and proceedings in which *the City* is a party or interested." Kansas City Charter art. IV, § 407(a)(2) (emphasis added). It does provide that the Law Department can "[d]irect the management of all litigation in which the City is a party or interested." *Id.* § 407(a)(1). But the Charter only expressly provides that the Law Department can represent the City and does so twice. Tr. 232:10–14. The Court should

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not read surplusage into the Kansas City Charter. *See Middleton v. Missouri Dept. of Corr.*, 278 S.W.3d 193, 196 (Mo. banc 2009).

Mayor Lucas also said that the City Attorney has served as his counsel (versus the City's counsel) for U.S. Supreme Court amicus briefs. Tr. 133:10–13; *see* Tr. 130:24–25 (noting City Attorney has represented him in private capacity for amicus briefs). But two different amicus briefs list the City Attorney representing him as "Mayor Quinton D. Lucas." Tr. 134:13–17, 139:13–17. Mayor Lucas touted that "sometimes people call me Mayor Quinton Lucas when they're just talking about their neighbor." Tr. 135:25–136:2. He also suggested that "I am a local government leader, depending on how you see that, either officially as a Kansas City Mayor or as just someone they want on their briefs." Tr. 138:10–18. The Court should not credit Mayor Lucas's attempt to paper over the fact the City Attorney's Office has only represented him in his official capacity or when official claims were involved. *See* Tr. 130:16–25 (noting McGuire matter had "official and individual claims.").

Mayor Lucas bemoans that the case law on determining the capacity question is sparse. But this case presents little difficulty. Not only is Kansas City interested in the suit, it pays for private counsel the City hired out of appropriated taxpayer monies (by a bill sponsored by the Mayor), and the attorney-client relationship exists by virtue of Mayor Lucas's office. Mayor Lucas's interest also surpasses any registered voter's interest—he testified that it was significant that Amendment No. 4 "extends until my last full year as Mayor of Kansas City." Tr. 107:18–20. And he asserted that Amendment No. 4 (and SB 678) were repercussions to retaliate against the City for attempting to defund the KCPD.

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Tr. 104:19–105:17. This exceptional level of official action (appropriations, hiring private counsel for the City, representation by virtue of his office, and claimed retaliation for an official act) leaves no doubt that this suit is brought in Mayor Lucas's official capacity.

Mayor Lucas sees no issue with using the authority and power of his office to maintain this suit because he is a registered voter. Lucas Br. 36–37. And he cites cases showing that two parties can be real parties in interest. *Id.* Those decisions, however, are not distinguishing between parties that may bring suit and parties that may not. *Twin Chimneys Homeowners Ass'n v. J.E. Jones Const. Co.*, 168 S.W.3d 488, 496 (Mo. Ct. App. 2005) (Homeowners Association had rights to enforce under incorporation documents); *Brookshire ex rel. Brookshire v. Retz*, 111 S.W.3d 920, 923 (Mo. Ct. App. 2003) (explaining employer's claim derivative of employee's claim). In contrast, neither Kansas City nor the Mayor of Kansas City may bring this suit. § 115.553, RSMo.

Another reason counsels finding that Mayor Lucas brings this suit in his official capacity: City resources cannot be used for the private litigation of a registered voter. "Taxes may be levied and collected for public purposes only[.]" MO. CONST. ART. X, § 3. No political subdivision shall "grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution." MO. CONST. ART. VI, § 23. And a city cannot "lend its credit or grant public money or property to any private individual, association or corporation[.]" MO. CONST. ART. VI, § 25. "If the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal, notwithstanding it also involves as an incident an expense, which, standing alone, would not be lawful. But if the primary object is not to subserve a public

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municipal purpose, but to promote some private end, the expense is illegal, even though it may incidentally serve some public purpose." *St. Louis Cnty. v. River Bend Ests. Homeowners' Ass'n*, 408 S.W.3d 116, 138 (Mo. 2013); *see also State v. Bott*, 518 S.W.2d 726, 728 (Mo. App. 1974) ("It is unlawful for a city to lend its credit or grant public money to any private individual."). The City has asserted that it "has an interest in this case and in this litigation because it's the City's budget that will be harmed." *E.g.*, Tr. 227:16–18 (Queen). But election contests do not vindicate a municipal purpose, especially contests involving State constitutional measures or statewide offices. Construing this action as Mayor Lucas acting in his official capacity (funded by an ordinance he sponsored) alleviates these constitutional concerns.

The Court should reach this issue due to the novelty and widespread threat of litigation that Mayor Lucas's actions portend. If he is correct, there is no practical limit to the use of official resources to litigate election contests—every constitutional amendment would be subject to challenge by Missouri's many political subdivisions (or state officers), all state officers could use their general counsel if they lose at the ballot box, and any "registered voter" could contest losses for any state-authorized office—even if they are an elected official. *See* § 115.553.2, RSMo ("The result of any election on any question may be contested by one or more registered voters from the area in which the election was held."). The General Assembly's decision to only permit a "registered voter" to bring election contests serve a higher purpose by discouraging needless litigation by those that lose at the ballot box.

The Court should dismiss the case for lack of jurisdiction.

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III. The Court should grant judgment for Contestees because Amendment No. 4's ballot title was fair and sufficient. (Responds to Point 1).

Mayor Lucas wishes to set aside the election results because the fiscal note summary indicated that Amendment No. 4's fiscal impact on Kansas City resulted in no additional costs or savings. He primarily claims that the Fiscal Note Summary is misleading in that it tells voters there are no costs for more police services and that Kansas City will incur costs in his opinion. *See* Tr. 112:17–23. But the Fiscal Note Summary reflects what Kansas City told the Auditor: if all proposed legislation passed, the City would continue to pay 25 percent of its general revenues to the KCPD. The cost of Amendment No. 4 in providing KCPD resources is not estimated to change because it preserves the current funding. Mayor Lucas concedes that Amendment No. 4's "cost" is to the City's discretion. Br. 57 ("Amendment No. 4 'threaten[ed] to turn that discretionary choice into a statutory requirement' … .") Removing the City's discretion to change that funding amount is neither a monetary cost nor a potential expenditure and does not belong in a fiscal note summary.

A. Standards for evaluating the sufficiency and fairness of a fiscal note summary.

The Fiscal Note Summary must be upheld unless the Contestant shows that it is unfair or insufficient. "In the context of requiring a fair and sufficient fiscal note by the state auditor, 'the words insufficient and unfair ... mean to inadequately and with bias, prejudice, deception and/or favoritism state the fiscal consequences of the proposed proposition." *Brown v. Carnahan*, 370 S.W.3d 637, 654 (Mo. banc 2012). In "examining the fairness and sufficiency of the fiscal note summary, the summary's words are

considered sufficient and fair where they adequately and without bias, prejudice, or favoritism synopsize the fiscal note." *Id.; Boeving*, 493 S.W.3d at 874. This is a demanding standard because a "fiscal note summary is not judged on whether it is the 'best' language, only [on] whether it is fair." *Brown*, 370 S.W.3d at 654.

Contestants "bear the burden of demonstrating in the first instance that the Auditor's fiscal note and fiscal note summary are insufficient or unfair." *Mo. Mun. League v. Carnahan*, 303 S.W.3d 573, 582 (Mo. Ct. App. 2010), *as modified* (Feb. 2, 2010) (*Mo. Mun. League I*).

B. Chapter 116.175 requires the fiscal note summary to state the estimated cost or savings caused by a measure—the additional expenditure of funds.

Well-worn principles of statutory construction require that the fiscal note summary reflect an increase in an amount expended caused by the proposed measure. That did not occur here and the Fiscal Note Summary was accurate.

Undefined terms in statutes are given "the text's 'plain and ordinary meaning,' which may be derived from a dictionary." *Gash*, 245 S.W.3d at 232. The term "cost" is "[t]he amount paid or charged for something; price or expenditure." *Cost*, Black's Law Dictionary (11th ed. 2019). Section 116.175 requires disclosure of an estimate of a monetary expenditure caused by the proposed measure—an additional amount incurred by the governmental unit. If a statute raises the price of a fishing license from $1 to $2, an estimated cost of that statute is $1/unit—the additional amount expected to be paid.

That is exactly what Kansas City told the Auditor in its first response—the alleged negative fiscal impact was that SB 678 "increases the amount that Kansas City must fund

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its police department from 20% to 25% of the City's general revenue." Ex., 24, at KCMOEC210. When the City translated that cost to dollars, it told the Auditor that the measure (and SB 678) would increase the City's required funding by the difference (the "net" or additional cost) of $38.7 million. *Id.* at KCMOECC207. Mayor Lucas also endorses this allegedly "invented 'net' additional cost requirement." Br. 54. He (belatedly) tells the Court that an alternative Fiscal Note Summary would say that the City "estimates that [Amendment No. 4] could increase the City's costs by up to $38.7 million." Br. 52, n.11. He does not claim the measure could increase the costs by $193.5 million—the entire 25 percent of general revenues. Everyone agrees the difference in the amount expended between years caused by the measure is a valid estimated cost. Tr. 410:18–23 ("[I]t's the amount related to the measure itself which would have to be higher than the costs that you already have.") (Beeler).

Here, the facts show that the City is not expending more funds due to Amendment No. 4 (or SB 678) because KCPD routinely receives 25 percent of general revenues. It is "common knowledge" that the City had been funding the Police Department [at] 25 percent for many years." Tr. 207:5–11 (Queen). When given the chance to explain that was not the case, the City did not dispute this fact because "the City does not deny that [25.8%] was the percentage that was funded in fiscal year 22."[4] Tr. 214:4–10. And once apprised

[4] Nor did the City use this opportunity to tell the Auditor the information was outdated. *See* Br. 56. This is likely because absent an increase in the general revenue, the City would have funded the Board at more than 25 percent. Ex. 507.

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of that fact,[5] the Auditor excluded the City's responses from the Fiscal Note Summary because "[C]ity funded above the level that the City of Kansas City officials indicated SB 678 would set as the maximum that could be required." Ex. 49.

The plain meaning of cost as an amount expended forecloses Mayor Lucas's claim that the estimated cost includes non-direct and non-financial costs, such as budgetary flexibility or an increase or decrease in services. Br. 46. And Mayor Lucas fails to cite any statute or authority for this proposition. The City considers this loss of flexibility as a cost because it may require compensation from other services, that potential loss in services leading to diminished quality of life, leading to a potential reduction in the tax base, leading to other deleterious effects. *Id.* But this chain of speculation does not inform voters of the actual amount the proposed measure may expend, and to verify the claims, it would require a significant independent investigation that is both unrealistic in the twenty days allotted by statute. *See Brown*, 370 S.W.3d at 650; *Boeving v. Kander*, 493 S.W.3d 865, 885 (Mo. Ct. App. 2016) (Auditor needs "plausible grounds" to omit speculative submissions). Mayor Lucas hooks on to the ordinary statement that a law imposes a cost "if a law makes a City pay more for something, even if the City can offset that by cutting back in some manner in some other area." Tr. 405:7–11. The reason the City's responses were excluded is not due to offsetting, but the fact Amendment No. 4 does not impose an increased amount[6] on the City above what it has already chosen to fund the KCPD.

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[5] Though the City's responses "gave some indication of potential costs," Tr. 410:12–14 (Beeler), new facts showed that these alleged costs were not reasonable, Ex. 49.

[6] It is true that the actual dollars required by SB 678 may change from year to year. In

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C. The Fiscal Note Summary is sufficient and fair because it did not "summarize" the City's unreasonable and unreliable responses.

Mayor Lucas belatedly claims that the Fiscal Note Summary is "insufficient and unfair on its face for the simple reason that it does not summarize the fiscal note." Br. 42. Similarly, he claims that by omitting the City's views, the Fiscal Note Summary does not state Amendment No. 4's estimated cost. Br. 44. Notably, "the petition shall state the reasons why the fiscal note or the fiscal note summary portion of the official ballot title is insufficient or unfair." § 116.190, RSMo. The only grounds raised by Mayor Lucas are that the "fiscal note summary falsely represented the City's position as to the Amendment's fiscal impact" and "inaccurately represents the Amendment's actual fiscal impact." Am. Pet. ¶ 38(a) & (b). As Mayor Lucas argues, "'shall' connotes a mandatory duty," Br. at 42–43, and neither petition identifies these reasons, *see* Am Pet. ¶¶ 38–44. The Court need not consider these unpleaded meritless grounds. Even if considered, the Fiscal Note Summary need not contain a summary of every response submitted to the Auditor, especially unreasonable submissions, and the record evidence shows that Kansas City's responses were unreliable.

Amendment No. 4's Fiscal Note spans six pages and contains responses from twenty-nine government units. Ex. 29, at SOSAR11–16. "All of the details of a fiscal note need not be set out in a summary consisting of a mere fifty words." *Mo. Mun. League I*, 303 S.W.3d at 583. Whittling this information down to those fifty words (or less) requires

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these circumstances, it is not an increased cost attributable to Amendment No. 4 because that change results from the change in general revenue. *See* Tr. 186:16–20.

the Auditor's discretion, and the Court has explained that § 116.175, RSMo, "vests great discretion in the Auditor, both as to what information to solicit as well as whether and to what extent to rely on whatever information is received." *State ex rel. Fitz-James*, 670 S.W.3d 1, 9 n.6. The Court should also reject Mayor Lucas's attempt to convert his disagreement with the reasonableness inquiry into a claim that the summary must include all the responses by a favored entity verbatim. *Id.*

This attempt to use "summarize" to require the Auditor to include a notice about each view expressed on a measure, no matter how unreliable, is untenable. Nor does Mayor Lucas faithfully apply the principle he seeks to impose. Responses from the Attorney General, the Secretary of State, the City of Jefferson, and the KCPD allegedly indicated an impact to some degree. *E.g.,* Ex. 29, at SOSAR11–12 (Attorney General noting that his office "could absorb costs associated with increased litigation" and potentially "request additional appropriations."). Yet, he does not argue that those responses must be included for the Fiscal Note to be properly summarized. That would be "unnecessarily cumbersome to require the Auditor's office to more specifically categorize each response received in a summary." *Protect Consumers' Access To Quality Home Care Coal., LLC v. Kander*, 488 S.W.3d 665, 674 (Mo. Ct. App. 2015).

Using the process to assess fiscal impact that Missouri courts have approved time and again, the Auditor "examine[d] the submissions to determine whether they appear complete, are relevant, have an identifiable source, and are reasonable."[7] *Brown*, 370

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[7] Mayor Lucas inconsistently asks the Court to consider that this section of *Brown* is a mere

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S.W.3d at 649; *see* Tr. 346:2–347:16; *see also Missouri Mun. League*, 303 S.W.3d at 582 (approving Auditor's current process). The Auditor may also examine submissions and may omit them for being too speculative. *Boeving*, 493 S.W.3d at 885.

"The auditor's determination of reasonableness is based on the auditor's experience in state government and overall knowledge and understanding of business and economic issues." *Brown*, 370 S.W.3d at 649. If the Auditor finds a suggested fiscal impact unreasonable, he or she may give it less weight in preparing the fiscal note summary and may exclude it. *Brown*, 370 S.W.3d at 649; *Sinquefield v. Jones*, 435 S.W.3d 674, 685 (Mo. App. 2014); *Mo. Mun. League v. Carnahan,* 364 S.W.3d 548, 557 (Mo. Ct. App. 2011) (*Mo. Mun. League II*), *Mo. Mun. League I,* 303 S.W.3d at 582.

Here, the Auditor routinely sought the City's input to complete its response and clarify the "negative fiscal impact" the City mentioned. Ex. 24. Indeed, without the Auditor's persistence, three of Mayor Lucas's bullet points, Br. 43, would not have been reported, and therefore not contained in the Fiscal Note. In the last round of communications, the Auditor asked the City to verify that it had recently funded the KCPD at 25.8% and "would increasing the required funding from 20 to 25% of general revenue actually increase city costs." Ex. 24, at KCMOEC206. The City declined to answer these

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summary of testimony by the Auditor (and therefore not a holding or requirement) and as a limit to the Auditor's reasonableness review. Br. 50 n.6; *id.* at 53 ("The Auditor's analysis is limited to …"). Importantly, every court to consider the Auditor's process has approved it and deemed the investigations appropriate. *Protect Consumers' Access To Quality Home Care Coal.*, 488 S.W.3d at 674; *Sinquefield*, 435 S.W.3d 674 (Mo. Ct. App. 2014); *see State ex rel. Fitz-James*, 670 S.W.3d at 9 n.6 (noting § 116.175 vests great discretion in the Auditor). In light of these authorities, Mayor Lucas's claim that the statute does not authorize the Auditor's reasonableness review is frivolous.

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questions, and instead responded with information it had already provided and a response that changing the required funding percentage "would limit the City's budgetary flexibility" and potentially decrease funding for other city services by more than $38.7 million. Ex. 24, at KCMOEC205. The Auditor then understood that the $38.7 million figure was not an estimate of an expenditure caused by Amendment No. 4. Ex. 49 (noting the "city funded above the level that the City of Kansas City officials indicated SB 678 would set as the maximum that could be required."). As a result, the information was properly excluded[8] from the Fiscal Note Summary.

The record completely supports the Auditor's determination that Amendment No. 4 (and SB 678) would result in no additional monetary expenditure by Kansas City. Though the City explicitly failed to mention this to the Auditor, it had been funding the Board at roughly 25% for the last three fiscal years. Ex. 507. The City's $38.7 million cost calculation from FY 23 was entirely illusory—because the City had funded the Board at 24.3% that year. *Id.* And that percentage would have been higher in FY 23, but the City's general revenues fluctuated with the receipt of federal funds. *Id.* As City officials crafted their June 8 response, they included potential decreases to city services they had not contemplated. Tr. 221:15–22 ("we would not have been contemplating any cuts at that time."). And they indicated that the difference between 20 and 25 percent was "a political

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[8] Mayor Lucas's argument that the exclusion "falsely indicated that ***the City*** had determined that it could provide additional resources for the Board at no cost to itself or its residents," Br. 48, proves too much. The Auditor did not single out or represent the City's unreliable views at all, and "[f]raming the response as one collectively from [local] governmental entities as a whole is not misleading or unfair." *Protect Consumers' Access To Quality Home Care Coal.*, 488 S.W.3d at 674.

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answer" and "it was important that any answer that we provide probably ought to be run by the Mayor's Office to ensure that they are on board." Tr. 218:23–219:7 (Queen).

Mayor Lucas's claim that the City's "analysis" should not have been excluded due to its speculative nature fails. Br. 57. He mistakenly argues Chapter 116, RSMo, forecloses the Auditor from excluding information he deems unreasonable from a fiscal note summary, but courts have repeatedly said otherwise. *Brown*, 370 S.W.3d at 649; *Sinquefield*, 435 S.W.3d at 685; *Mo. Mun. League v. Carnahan,* 364 S.W.3d 548, 557 (Mo. Ct. App. 2011) (*Mo. Mun. League II*); *Mo. Mun. League I,* 303 S.W.3d at 582.

The Auditor did not "refuse" to consider the impact of future laws authorized by Amendment, *see* Br. 58, as the summary sheet expressly acknowledges that if SB 678 became law, the City's officials "did not indicate that additional costs or savings would be added to the City overall," Ex. 49. It is true that Amendment No. 4 authorizes certain laws enacted before December 31, 2026, and like all legislation, the content and passage is subject to the General Assembly's discretion. But the Auditor's office expressed the common sense view that in drafting the Fiscal Note Summary it cannot speculate about a law passed in 2025 "because the law hasn't passed yet, so we don't know what dollar amount there would be."[9] Tr. 424:23–425:3. Mayor Lucas's concern that as Amendment No. 4 authorizes laws under the Hancock Amendment (dealing with expenditures and unfunded mandates) the Auditor should have considered future costs, Br. 60–61, is

[9] Mayor Lucas also criticizes the Auditor's actions related to "other fiscal note summaries far more speculative claims of fiscal impact." Br. 61. Other fiscal note summaries are irrelevant to this matter, and despite the Auditor's recent litigation success, no further comment will be given on matters relating to potential litigation.

misplaced under the facts here. The record shows that SB 678 merely requires the City to continue funding the KCPD at the same level as it has the past three fiscal years and is not a cognizable "cost" for purposes of the Fiscal Note Summary. The Auditor is authorized to discount speculative submissions and exclude them from the fiscal note summary, and to conclude otherwise is a misstatement of the law and "diminishes the role of the auditor in the production of the fiscal note and fiscal note summary." *Sinquefield*, 435 S.W.3d at 685.

> Requiring fairness and sufficiency of an initiative's summary statement, fiscal note, and fiscal note summary reflects that there are procedural safeguards in the initiative process that are designed either, (1) to promote an informed understanding by the people of the probable effects of the proposed amendment, or (2) to prevent a self-serving faction from imposing its will upon the people without their full realization of the effects of the amendment. Initiative process safeguards assure that the desirability of the proposed amendment may be best judged by the people in the voting booth.

Boeving, 493 S.W.3d at 874.

Mayor Lucas's wish for his office (and the City) to retain discretion on whether to fund the KCPD above 20 percent is understandable. That does not justify telling voters that Amendment No. 4 would cost the City $38.7 million annually—when three weeks earlier the City had calculated that it had funded the KCPD at roughly 25 percent for the last three fiscal years. Ex. 507. The Auditor's role in preparing the Fiscal Note Summary is a procedural safeguard to prevent such self-serving interests from placing inaccurate information on the ballot. As the City was already funding the KCPD at the same level as Amendment No. 4 and SB 678 would require, and the proposed measure did nothing to increase the expenditures required from the City's overall budget.

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IV. Mayor Lucas has failed to show that any irregularities were of sufficient magnitude to cast doubt on the election.

Mayor Lucas cannot satisfy the high bar to show that any irregularity casts the "validity of the *entire* election under suspicion," and therefore the election contest fails. *Knipp*, 784 S.W.2d at 799. He relies entirely on the testimony of Mr. Akins who conducted a public opinion poll in April of 2023. That poll presented inaccurate information to respondents and the survey did not test what pieces of information caused respondents to change their minds. Tr. 275:16–19 (agreeing "the survey doesn't tell you what part of that question the respondents voted for."). Mr. Akins also did not measure how many people cared about the fiscal note summary. Tr. 277:3–22. Without asking the question, "you can't get the information." Tr. 267:12–15.

As a threshold issue, ordering a new election is a drastic remedy. *Knipp*, 784 S.W.2d at 797. The contestant must do more than "a prima facie showing of irregularities" that cause a court to doubt whether a proposition succeeded. *Id.* To toss aside all the votes, those properly cast and improperly cast alike, contestant must show "the validity of the *entire* election is under suspicion, not simply the *result* of the election." *Id.*; *compare* § 115.583, RSMo, *with* § 115.593, RSMo. The burden of proof remains with Mayor Lucas, and "the trier of fact has the right to believe or disbelieve that party's uncontradicted or uncontroverted evidence." *White*, 321 S.W.3d at 305.

The evidence does not show "that there was a 'sea change' in voters' opinions after they were presented with the same information that the City gave to the Auditor." Br. 64. Indeed, the survey contained inaccurate information and asked respondents for their

reaction. In Question 6/7, the survey told respondents that the Amendment "could result in higher taxes for its residents." Ex. 59, at KCMOEC12891. The City agreed that when the Auditor requested information about Amendment No. 4's impact, it did not say that the Amendment "would potentially require an increase in taxes" or in fees. Tr. 221:3–14 (Queen). The City and Mayor Lucas, however, did express that opinion in the August correspondence. *Id.* But the record does not support that the Auditor ignored this opinion while drafting the fiscal note summary. And without a "submission that provided a projection of an increase or decrease of tax revenue," "it would be improper for the Auditor to include comment" on tax revenue in the Fiscal Note Summary. *Protect Consumers' Access To Quality Home Care Coal.*, 488 S.W.3d at 676. Moreover, for this "irregularity" to have any effect, the Court would have to hold that, absent any statutory authority, the Auditor may revise the *certified* fiscal note summary at any time in his discretion.

Question 6/7 telling respondents that Amendment No. 4 "could result in higher taxes for its residents" is significant. Ex. 59, at KCMOEC12891. Mayor Lucas testified that even when a ballot measure's goal is "wonderful" and "polled very favorably," if the measure is related to a tax, the measure may fail. Tr. 127:4–14. Not only did the "higher taxes" phrase present inaccurate information, that information was prejudicial and biased respondents' reactions.

The survey also tested information that is not relevant to Amendment No. 4's potential costs or savings. *First*, Question 6/7 biased respondents (who voted in November) by falsely indicating they had previously been misled. In particular, respondents were told that "instead of not costing taxpayers any money, this Amendment

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would have a negative fiscal impact on the City." Ex. 59, at KCMOEC12891. Mr. Akins explained that he used this phrase to tell respondents that "there could actually be a cost associated with this, not what you've heard earlier." Tr. 285:13–23. And he agreed that "it's possible that the respondent then is reacting not to other information, but from being told that they were fooled." Tr. 286:6–12. *Second*, question 8/9 "compares increasing funding for the Kansas City Police Department with a decrease in services for other listed entities." Tr. 281:14–22. As the Court knows, the City was not contemplating cuts to those services when it responded to the Auditor. Even had that information been accurate, it does not reflect "the measure's estimated cost or savings" as § 116.175.3, RSMo, requires.

The survey's design presents two problems for the Court: the Court cannot ignore any flaw in the survey and it cannot tell what information is responsible for any effect. The survey asked two questions and each "present[ed] several different pieces of information." Tr. 276:15–277:2. Questions 6/7 Mr. Akins confirmed that "the survey doesn't tell you what part of [a] question the respondents voted for" because "[w]e're asking them to react to the whole." Tr. 275:16–23; *see* Tr. 279:9 ("Well, again we loop it all together[.]"). He agreed that each of the questions "build off each other," and he "view[s] them in tandem." Tr. 278:15–23. So there is no way for the Court to determine what information is responsible for any perceived effect—positive or negative.

The public opinion survey's data cannot possibly show the magnitude of any one alleged irregularity in the adoption of Amendment No. 4. And it does not show whether the fiscal note summary played any role in the adoption of Amendment No. 4 because it was not Mr. Akins's job "to dissect which parts people cared about or do not care about."

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Tr. 277:15–22 (asking whether the survey "measure[d] how many people cared about the fiscal note summary."). The Court has to either believe every piece of information caused all the survey's results or none of them did. With each question containing inaccurate or irrelevant information, Mayor Lucas has completely failed to show that the magnitude of any alleged irregularity and cannot meet his burden.

V. Mayor Lucas failed to comply with the mandatory requirements of the Election Code and the case should be dismissed.

From the beginning, Mayor Lucas has failed to comply with the Election Code—including by failing to file a verified petition on time. This requires dismissal.

"The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language," *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013), relying in part on the statutory context, *LaBlance v. Dir. of Revenue*, 658 S.W.3d 505, 510 (Mo. banc 2022), and in part on dictionaries, *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010). "When the words are clear, there is nothing to construe beyond applying the plain meaning of the law." *State v. Rowe*, 63 S.W.3d 647, 649 (Mo. banc 2002); *see also Moore v. Bi-State Dev. Agency*, 609 S.W.3d 693, 696 (Mo. banc 2020); *Akins*, 303 S.W.3d at 565. When a word is used in one provision but not the other, that omission is ordinarily deemed intentional. *See Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 179 S.W.3d 266, 270 (Mo. banc 2005).

Interpreting Chapter 115 has additional nuances. Because "[t]he statutory requirements" for bringing a Chapter 115 challenge "are clear and unambiguous." *Foster*, 751 S.W.2d at, the "[e]lection contest review procedures are exclusive and must be strictly

followed as substantive law." *Hockemeier*, 641 S.W.2d at 69. When "review procedures cannot possibly be complied with, and there are no others, the courts [lose] jurisdiction of the case." *Id.*

A contestant has 30 days to "file a ***verified*** petition" to contest the election results. § 115.557 (emphasis added). Contestants must file a verified petition challenging the election within 30 days of the results being announced. § 115.557, RSMo. Petitions filed after that date are "out of time." *Macon Cnty. Emergency Services Bd. v. Macon Cnty. Comm'n*, 485 S.W.3d 353, 356 (Mo. banc 2016). Contestant did not comply with either of these requirements.

Normally, a petition relates back if the claim arises "out of the conduct, transaction, or occurrence set forth…in the original pleading." Rule 55.33(c). However, the Rules of Civil Procedure do not necessarily apply in election contests, *see Chastain v. James*, 463 S.W.3d 811, 820 n. 15 (Mo. Ct. App. 2015), because the "election contest statutes are a code unto themselves," *Foster*, 751 S.W.2d at 44.

Rule 55.33(c) does not apply to Chapter 115 contests. Chapter 115 has two provisions relating to the taking of evidence, and both incorporate the normal discovery rules. §§ 115.561.2, 115.569. However, no section in Chapter 115 incorporates the pleading rules—and both Chapter 115 and Chapter 116 have specific pleading rules. Notably, a challenge to a ballot title "shall state the reasons why the fiscal note or the fiscal note summary portion of the official ballot title is insufficient or unfair and shall request a

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different fiscal note or fiscal note summary portion of the official ballot title."[10] § 116.190.3, RSMo. This omission was intentional. If the General Assembly wanted the civil pleading rules to apply, it could have said so, as it incorporated Supreme Court Rules in §§ 115.561.2 and 115.569. Since the General Assembly did not expressly include Rule 55.33 while expressly including other rules, this Court should presume the General Assembly did not want Rule 55.33 to apply to Chapter 115 challenges.

The statutory context further demonstrates this principle. Election contests move at breakneck speed. The contestee must be personally served within two days. § 115.559.1. If the contestee is unreachable, the summons is left at their home and "in a conspicuous place" at the Clerk's office. *Id.* A copy of the petition must be sent to all interested parties "immediately." § 115.559.2. And the contestee must answer the petition within 15 days of filing (not within 30 days of service). *Compare* § 115.559.3 *with* Rule 55.25(a). Allowing unconditional relation back after amendment would slow down the process and does not comport with the statutory scheme.

Finally, allowing unconditional relation back would undermine the General Assembly's intent. The General Assembly wants these proceedings to move quickly. That is why, for example, this Court has original jurisdiction over this type of Chapter 115 challenge. *See* § 115.555. Allowing unconditional relation back means a party could repeatedly amend their petition without being untimely, dragging the proceedings out for far longer than the General Assembly intended.

[10] Neither of Mayor Lucas's petitions comply with the latter requirement.

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Conclusion

Contestees respectfully request that the Court provide judgment in their favor and against Mayor Lucas by finding that the Fiscal Note Summary was fair and sufficient, Mayor Lucas has failed to show an election irregularity of sufficient magnitude to order a new election, his statutory right to challenge the ballot title was extinguished before the November 8, 2022, election, the suit fails because it is brought by Mayor Lucas in his official capacity, and that dismissal is proper because his verified petition was untimely.

Respectfully submitted,

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Certificate of Service

I hereby certify that on August 28, 2023, the foregoing was filed through the Missouri Case.net e-filing system, which will send notice to all counsel of record. Additionally, I have served the following counsel via electronic mail:

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Certificate of Compliance

I certify that the foregoing includes the information required by Rule 55.03, and complies with the requirements (that apply) contained in Rule 84.06. Relying on the word count feature of Microsoft Word, I further certify that the total number of words contained in this brief is 16,981words, which is within the applicable limitations on length set forth in Rule 84.06(b).

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