

SC99931

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IN THE SUPREME COURT OF MISSOURI

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QUINTON LUCAS,

Contestant,

v.

JOHN R. ASHCROFT, Missouri Secretary of State, *et al.*,

Contestees.

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BRIEF OF CONTESTANT QUINTON LUCAS

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Tara M. Kelly, No. 64624  
Senior Associate City Attorney  
2300 City Hall  
414 E. 12th Street  
Kansas City, Missouri 64106  
Phone: 816.513.3117  
Tara.Kelly@kcmo.org

Debo P. Adegbile (*pro hac vice*)  
Wilmer Cutler Pickering Hale and Dorr  
LLP  
7 World Trade Center  
250 Greenwich Street  
New York, NY 10007  
Phone: 212.230.8800  
Debo.Adegbile@wilmerhale.com

Britany Riley-Swanbeck (*pro hac vice*)  
Wilmer Cutler Pickering Hale and Dorr  
LLP  
2100 Pennsylvania Avenue NW  
Washington, DC 20037  
Phone: 202.663.6137  
Britany.Riley-  
Swanbeck@wilmerhale.com

James R. Layton, No. 45631  
Tueth Keeny Cooper Mohan & Jackstadt,  
P.C.  
34 N. Meramec, Suite 600  
St. Louis, Missouri 63105  
Phone: 314.880.3600  
Email: jlayton@tuethkeeney.com

Andrew S. Dulberg (*pro hac vice*)  
Ivan Panchenko (*pro hac vice*)  
Wilmer Cutler Pickering Hale and Dorr  
LLP  
60 State Street  
Boston, MA 02109  
Phone: 617.526.6000  
Andrew.Dulberg@wilmerhale.com  
Ivan.Panchenko@wilmerhale.com

*Attorneys for Contestant Quinton Lucas*

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## JURISDICTIONAL STATEMENT

When Missourians cast their ballots on November 8, 2022, they were asked to decide whether the Missouri Constitution should be amended “to authorize laws ... 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. 51 at 9. That proposed constitutional amendment (“Amendment No. 4” or the “Amendment”) was accompanied on the ballot by a fiscal note summary (the “Fiscal Note Summary”) prepared by the Missouri State Auditor’s Office (the “Auditor”) and certified by the Missouri Secretary of State (the “Secretary”). Contestant Quinton Lucas brings this election contest pursuant to Chapter 115 of the Revised Statutes of Missouri to challenge the sufficiency and fairness of the Fiscal Note Summary.

This Court has original jurisdiction over election contests. RSMo. § 155.555 (App 7) (“[A]ll contests to the results of elections on constitutional amendments ... shall be heard and determined by the supreme court.”); *see also, e.g., Dotson v. Kander*, 464 S.W.3d 190, 193 n.2 (Mo. 2015) (“This Court has jurisdiction to hear this [Chapter 115 election contest] pursuant to Mo. Const. art. VII, sec. 5 and section 115.555.”). An election contest under Chapter 115 is a proper vehicle for challenging the sufficiency and fairness of the components of a ballot title, including the fiscal note summary. *See Shoemyer v. Kander*, 464 S.W.3d 171, 174 (Mo. 2015) (“[A] challenge to a ballot title may be brought post-election.”); *Dotson*, 464 S.W.3d at 193 (“[A] post-election challenge to ballot titles can be brought under chapter 115.”). And this Court has expressly rejected the arguments—repeated by Contestees here—“that chapter 116 is the exclusive means to challenge the

ballot title of a proposed constitutional amendment,” and that the “specific timeline for filing a pre-election challenge in section 116.190 should control over the general election contest provisions in chapter 115.” *Dotson*, 464 S.W.3d at 194-195; *see also, e.g.*, Contestee Missouri State Auditor’s Answer to Plaintiff’s Petition for Election Contest (“Auditor’s Answer”) at 10-11.

As discussed below, Contestees’ assertion that this Court lacks authority to hear the contest because the real party in interest is not a registered voter is meritless (*see infra* at 32-34)—which this Court has already recognized by denying Contestees’ motion to dismiss the contest on that basis. Mr. Lucas is registered to vote in Missouri. Transcript of June 26 Hearing (“June 26 Tr.”) 101:8-10 (Q. Lucas) (testifying that he is “a registered voter in the state of Missouri”). He is therefore a proper contestant. RSMo. § 115.553.2 (App 5) (“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.”).

Finally, the Petition was timely filed. An election contest must be commenced “[n]ot later than thirty days after the official announcement of the election result by the election authority.” RSMo. § 115.577 (App 11). The results of the November 8, 2022 election were announced on December 9, 2022. *See* Ex. 52. Mr. Lucas commenced this contest 28 days later, on January 6, 2023.<sup>1</sup>

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<sup>1</sup> That Mr. Lucas’s initial petition was not verified, as Contestees pointed out in their unsuccessful motion to dismiss, is irrelevant. This Court has held that “the timing of ... verification is unimportant as long as the petition is verified prior to the entry of the final judgment.” *Drury Displays, Inc. v. Bd. of Adjustment of City of St. Louis*, 760 S.W.2d 112, 114 (Mo. 1988). Mr. Lucas cured any conceivable defect in his initial petition by filing a



## STATEMENT OF FACTS

At its core, this contest presents the question of whether a proposed constitutional amendment authorizing the General Assembly to increase minimum funding for, and provide additional resources to, the Kansas City Board of Police Commissioners (the “Board”) imposes costs on the City. It does, and the City clearly and consistently communicated that to Contestees. Contestees ignored the information the City provided: When it was time to inform Missouri voters of the Amendment’s fiscal impact, Contestees said that “local governmental entities estimate no additional costs or savings related to this proposal.” Ex. 51 at 9 (App 94). Contestees knew that statement was inaccurate but refused to amend the Fiscal Note Summary even after the City contacted them about the error. As a result, on November 8, 2022, Missouri voters cast their ballots based on a misrepresentation. The evidence shows that the false information on the ballot had a material effect on the outcome of the vote. Had Contestees provided voters with a fair and sufficient Fiscal Note Summary, as the law requires, the Amendment may have failed. Relief is necessary to ensure that Missourians can exercise their fundamental right to vote with all the facts necessary to make an informed choice.

### I. SENATE BILL 678 AND SENATE JOINT RESOLUTION 38

This election contest is part of a series of disputes regarding the City’s funding for the Board. The City is unique among municipalities in Missouri—and indeed among all

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verified amended petition that relates back to the original. *Id.* at 114-115 (observing that, where verification is supplied by amendment, the “verification relates back to the filing of the original petition”).

major cities in the United States—in that it does not control its own police department. June 26 Tr. 102:8-12, 102:22 (Q. Lucas); 380:1-14 (S. Beeler). Instead, the Kansas City Police Department (“KCPD”) is overseen by the Board. *See* RSMo. §§ 84.350, 84.420. The Board is a State agency comprised of five members: four members appointed by the Governor, and the City’s Mayor. *See* RSMo. §§ 84.350, 84.360.

The City funds the Board and is obliged to appropriate any amount the Board requests, subject to a maximum set by statute. RSMo. § 84.730. Between 1958 and 2022, the City’s maximum obligation was 20% of the City’s general revenue fund. *See* RSMo § 84.730 (1958). In some years, the City had—in its discretion—chosen to appropriate funds above the statutory maximum. For instance, in the 2021-22 fiscal year, the City appropriated just over 25% of its general revenue fund to the Board. *See* June 26 Tr. 203:13-16 (T. Queen). In fiscal year 2022-23, the City’s appropriation fell to 24.3% of its general revenue fund. *Id.* at 182:11-17 (T. Queen).

In 2021, there was a dispute between the City and the Board regarding the use of funds the City had appropriated but that exceeded the statutory maximum—*i.e.*, amounts the City was not legally obliged to provide but had chosen to appropriate as a matter of discretion. *See* June 26 Tr. 103:11-104:3 (Q. Lucas). In May 2021, the City Council passed two ordinances that re-allocated to community-policing initiatives appropriated funds that exceeded the City’s maximum obligation to the Board. *Id.*; *see also id.* at 144:17-18, 144:22-23 (Q. Lucas). The Board sued, contending that the City lacked authority to enact the ordinances. *See* Ex. 504 at 1, 8-9. The circuit court concluded that because the City

had already approved its budget and appropriated the funds, it could no longer exercise discretion over them. *Id.* at 10-11.

That dispute set in motion a series of events that ultimately led to this election contest. After the City passed the ordinances, Nathan Garrett (then a Board Commissioner) called Mr. Lucas to express his anger. June 26 Tr. 104:4-12 (Q. Lucas). During a “profanity-laced tirade,” Mr. Garrett told Mr. Lucas that “the State swings a bigger stick” than the City. *Id.* at 104:4-18 (Q. Lucas). Mr. Lucas understood that to be a threat that the State, or at least those closely connected to Mr. Garrett, would attempt to punish the City for attempting to exercise discretion over funds it had allocated to the Board as a matter of discretion. *Id.*

A few months later, Missouri State Senator Tony Luetkemeyer introduced two proposed measures that threatened to drastically change the City’s funding obligation to the Board. The first of those measures—Senate Bill 678 (“SB 678”)—increased the statutory cap on the City’s funding obligation to the Board from 20% to 25% of the City’s general revenue fund. *See* Ex. 1. On its face, SB 678 is plainly unconstitutional—a clear violation of the Missouri Constitution’s prohibition on unfunded mandates. Mo. Const., art. X, §§16, 21; *see also Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816, 826-827 (Mo. 2013). Accordingly, Senator Luetkemeyer introduced a second measure—Senate Joint Resolution 38 (“SJR 38”)—which proposed to put before Missouri voters a constitutional amendment that would exempt certain legislation related to police funding from the existing prohibition on unfunded mandates. *See* Ex. 2 (App 21-22); *see also* Mo.

Const., art. X, § 21. Specifically, SJR 38 proposed to amend Article X, Section 21 of the Missouri Constitution to provide as follows:

[B]efore December 31, 2026, the general assembly may by law 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 KCMOEC0000162 (App 22).<sup>2</sup> Notably, December 31, 2026 is the last day of the final year of Mr. Lucas’s final term as Mayor of the City. June 26 Tr. 107:11-20 (Q. Lucas).

On May 18, 2022, the General Assembly enacted SB 678 and SJR 38. *See* Ex. 1; Ex. 2 (App 22).

## II. THE AMENDMENT IMPOSES COSTS ON THE CITY

It is undisputed that the City is the only municipality in Missouri with a police force “established by a state board of police commissioners,” and thus that the City is the only municipality affected by Amendment No. 4. Ex. 2 (App 22); *see also* June 26 Tr. 380:1-14 (S. Beeler). It is also undisputed that the City provides essentially all of the funding that supports the Board. June 26 Tr. 381:10-21 (S. Beeler). It therefore should come as little surprise that legislation designed to “increase minimum funding” and provide “additional resources” for the Board would have a negative fiscal impact on the City.

That this is the Amendment’s purpose—and likely effect—is clear from its text. The Amendment permits the General Assembly to “*increase* minimum funding” for the

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<sup>2</sup> SJR 38 was the mechanism by which Amendment No. 4 came to appear on ballots in the November 8, 2022 election. For the purposes of this contest, SJR 38 and Amendment No. 4 are effectively interchangeable and, unless necessary to provide context, Mr. Lucas will refer to them collectively as Amendment No. 4 or the Amendment.

Board to “ensure [it] has *additional* resources to serve its communities.” Ex. 2 (emphasis added). The Amendment imposes no limit on the General Assembly’s ability to set the “increase[d] minimum funding” level at whatever amount the General Assembly desires. June 26 Tr. 120:13-14, 120:18-121:5 (Q. Lucas); 203:3-12 (T. Queen); 398:5-17 (S. Beeler); Ex. 47 at KCMOEC0000344 (App 82). The General Assembly could, for instance, enact a law that turns the current *ceiling* for police funding set forth in SB 678 (25% of the City’s general revenue fund) into a *floor*, which is to say a minimum funding requirement. Just that shift—from a maximum funding requirement of 20% of the City’s general revenue fund to a minimum funding requirement of 25% of that fund—would require the City to expend additional funds totaling tens of millions of dollars. See June 26 Tr. 386:10-387:4 (S. Beeler); Ex. 24 at KCMOEC0000207 (App 32). But because Amendment No. 4 is effectively a blank check, nothing stops the General Assembly from setting the minimum funding level at well over 25% of the City’s general revenue fund, further increasing the City’s costs.

The direct monetary cost to the City has consequences. The City’s revenue is fixed. June 26 Tr. 217:7-14 (T. Queen). For that reason, increasing the City’s required appropriation to the Board will necessarily require the City to either (i) cut other critical services funded by general revenue; or (ii) do what the Hancock Amendment was intended to deter: raise taxes. *Id.* at 201:22-202:22 (T. Queen). To avoid a tax increase, the City might have to cut funding to the fire department, ambulance service, roadway and infrastructure maintenance, and other municipal services. *Id.* at 188:9-21 (T. Queen); Ex. 24 at KCMOEC0000205 (App 30). The consequences of those funding cuts are self-

evident: They would “lead[] to ... a diminished quality of life” for the City’s residents and visitors. June 26 Tr. 188:22-24 (T. Queen).

A change in the City’s funding obligation to the Board also carries non-monetary costs. The City’s Director of Finance, Tammy Queen, testified at the June 26, 2023 hearing in this contest that if the City is required to appropriate to the Board any amount greater than 20% of its general revenue fund, the City will lose flexibility to make choices regarding its budget in the future. June 26 Tr. 187:11-189:8 (T. Queen); *see also* Ex. 23 at KCMOEC0010695. Thus, if the City were faced with circumstances requiring budget cuts, it would be entirely unable to take funds away from the Board, and would need to slash other services funded by general revenue. June 26 Tr. 187:11-188:8 (T. Queen). That would mean that, in times of crisis, the City would be required to make even larger cuts to other services than might otherwise be the case but for Amendment No. 4—an outcome that the City unsurprisingly considers a cost. *Id.* at 188:9-189:17 (T. Queen).<sup>3</sup>

All relevant stakeholders recognized that the Amendment would have a negative fiscal impact on the City. The measure’s sponsor, members of the Senate Judiciary and Civil and Criminal Jurisprudence Committee, and the Board’s Commissioners all understood that the Amendment would increase the City’s costs. *See* June 26 Tr. 107:1-10, 111:2-18 (Q. Lucas). The Auditor similarly recognized that the Amendment would

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<sup>3</sup> Indeed, even if the percentage the City was obliged to appropriate to the Board remained the same, the City’s costs would increase any time its revenues increased. *See* June 26 Tr. 384:23-385:1, 385:2-4 (S. Beeler) (testifying that “if the City’s general revenue fund increased from one year to the next, 25 percent of that amount would also increase year over year,” such that the “[c]ost of funding the Board ... would increase”).

impact the City and, as discussed further below, expressly described that impact as a “cost[.]” *Id.* at 381:7-21 (S. Beeler); Ex. 20 at SAO0352 (App 26) (Auditor’s office personnel noting that “the city responded with costs”). Indeed, the record is clear that depending on how the General Assembly chooses to exercise the authority that the Amendment confers, the consequences to the City could be “catastrophic.” *See* June 26 Tr. 200:2-11, 203:3-204:2 (T. Queen).

### III. THE AUDITOR’S REQUEST FOR INFORMATION

On May 23, 2022, the Auditor contacted state and local government entities—including the City and the Board—to gather information regarding “the estimated cost or savings, if any” of Amendment No. 4. Ex. 10 at SAOAR00252. The Auditor understood at that time that the Amendment was likely to have a fiscal impact on the Board (which could receive additional resources) and the City (which would be responsible for providing those additional resources). *See* June 26 Tr. 380:1-5, 380:15-18, 381:17-21 (S. Beeler).

The City, through the City Attorney’s Office, responded the next day. It wrote that, if approved, the Amendment would “have a negative fiscal impact on the City.” Ex. 10 at SAOAR00252. It further explained that the Amendment could authorize laws like SB 678, which “increases the amount that [the] City must fund its police department from 20% to 25% of the City’s general revenue.” *Id.* This was an example—though not by any means the only one—of how the Amendment could affect the City. June 26 Tr. 180:6-12 (T. Queen).

After receiving the City’s initial response, the Auditor “reviewed SB 678.” Ex. 24 at KCMOEC0000209 (App 34). Based on that review, the Auditor concluded that SB 678

imposed a cap—*i.e.*, that “funding ... cannot exceed the 25% level.” *Id.* She asked the City whether it “anticipate[d] that the maximum 25% will be reached every year.” *Id.*<sup>4</sup> The City responded 30 minutes later: “Yes, [the] City expects the maximum 25% to be reached every year.” *Id.*

On May 27, 2022, the Auditor asked that, in addition to providing a percentage, the City “quantify the increase ... in terms of an estimated dollar amount.” Ex. 24 at KCMOEC0000208-209 (App 34-35). The City responded that, based on the submitted budget for fiscal year 2022-23, the “increase for [the City] in terms of an estimated dollar amount by increasing the amount that [the] City must fund its police department from 20% to 25% of the City’s general revenue is \$38,743,646.” *Id.* at KCMOEC0000206-207 (App 31-32). Following this exchange, the individual at the Auditor’s Office responsible for preparing the fiscal note and Fiscal Note Summary for the Amendment told a colleague that “the [C]ity responded with costs.” Ex. 20 at SAO0352 (App 26). Indeed, it had.

After receiving the City’s response on June 3, 2022, the Auditor expended great effort to solicit a statement from the Board—which to that point had been silent. *See* Ex. 20 at SAO0350-352 (App 24-26). The Auditor’s staff called the Board to share the City’s response and then exchanged phone calls with a KCPD Major tasked with preparing a response. *Id.* at SAO0351-352 (App 25-26). Finally, on June 6, 2022, the KCPD provided the Auditor with a brief statement. *See* Ex. 24 at KCMOEC0000219 (App 44). The KCPD

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<sup>4</sup> Although the current Missouri State Auditor (Scott Fitzpatrick) is male, the Auditor at all times relevant to this contest (Nicole Galloway) is female. Accordingly, Mr. Lucas will refer to the Auditor using feminine pronouns.



informed the Auditor that it was “underfunded” and “understaffed”; had “increasing costs”; and, absent an increase in funding above the 20% statutory cap, would not be able “to police the city properly,” which would be “a detriment to the community.” *Id.* The KCPD also informed the Auditor that, in fiscal year 2022, the City funded the Board at 25.8% of the City’s general revenue fund. *Id.* But the KCPD nowhere denied that the Amendment could impose costs on the City. *See id.*

The day that the Auditor received the KCPD’s letter, she asked the City whether, if it had funded the Board at 25.8% of its general revenue fund in fiscal year 2022, “increasing the required funding from 20 to 25% of general revenue actually [would] increase city costs.” Ex. 24 at KCMOEC0000206 (App 31).

On June 8, 2022, the City responded. It explained that whereas “[u]nder current law, the City is allowed to exercise its legislative prerogative to fund the [Board] at a level in excess of the statutory amount,” the Amendment could render that discretionary choice an obligation. Ex. 24 at KCMOEC0000205 (App 30). The City further explained:

A change to the percentage [of required funding] would limit the City’s budgetary flexibility and would necessitate a reduction in other services the City provides .... Based on the City’s most recent budgeted calculation of general revenue, the resolution could increase the City’s mandatory funding for the police and decrease its funding for other services funded by general revenue, 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 certainly did not write back, “No, this will not increase City costs.” June 26 Tr. 388:21-23 (S. Beeler). The Auditor did not seek any further information from the City.

#### IV. THE AUDITOR IGNORED THE CITY'S POSITION

When the Auditor receives a joint resolution like SJR 38 from the Secretary, she is required to assess its fiscal impact. RSMo. § 116.175.1 (App 15). To inform her assessment, the Auditor may request information from state departments, local government entities, and others. *Id.* The information the Auditor receives in response to those requests informs the drafting of a fiscal note and fiscal note summary for the proposed measure. RSMo. § 116.175.3 (App 15). Both the fiscal note and fiscal note summary must describe the measure's estimated costs or savings. *Id.* And the fiscal note summary must—as its name implies—summarize the longer fiscal note. *Id.*; *see also* June 26 Tr. 375:11-13, 377:16-20 (S. Beeler) (acknowledging legal requirements). The fiscal note summary appears on Missouri's ballots as part of the ballot title for a proposed measure; the fiscal note does not. *See id.* at 377:25-378:4 (S. Beeler); *see also* Ex. 51 at 9 (App 94).

The Auditor understood the City's position and captured it nearly verbatim in the fiscal *note* for the Amendment. The fiscal note thus accurately reflects that the Amendment would have a “negative fiscal impact” on the City, that the negative fiscal impact could be tens of millions of dollars, and that the Amendment could require the City to decrease funding for other services funded by general revenue. *See* Ex. 29 at SOSAR0014 (App 53).

But the Fiscal Note *Summary* reflects none of that information. Ex. 29 at SOSAR0017 (App 56); June 26 Tr. 330:6-21 (S. Clark) (admitting that the Fiscal Note Summary “doesn't say anything about the fact that Kansas City told the Auditor SJR 38 would have a negative fiscal impact” or that the impact would be “[\$]38.7 million”); 391:7-

21 (S. Beeler) (admitting that the Fiscal Note Summary does not “include ... any of the language that the City ... had provided”). Indeed, as the Auditor acknowledged, the Fiscal Note Summary “exclude[d] ... the perspective of the only [c]ity in the entire state that’s actually affected by” Amendment No. 4. *Id.* at 408:22-409:1 (S. Beeler). Thus, notwithstanding that the Auditor understood that the Amendment would impose costs on the City, the Fiscal Note Summary states: “State and local governmental entities estimate no additional costs or savings related to this proposal.” Ex. 29 at SOSAR0017 (App 56). Put another way, the Fiscal Note Summary told voters that state and local government entities agreed that an increase in minimum funding designed to provide additional resources to the Board would cost nothing—*i.e.*, that voters could get more funding for any “police force established by a state board of police commissioners” *for free*.

The Auditor ignored the information the City provided because, in the Auditor’s subjective view, the City’s analysis was not reasonable. June 26 Tr. 391:7-24 (S. Beeler). The Auditor has offered three reasons for her conclusion. First, although Section 116.175.3 requires that the Fiscal Note Summary report any “cost or savings” of a proposed measure, the Auditor disregarded the City’s responses because the City did not expressly state that the Amendment would cause the City to incur “net additional costs.” Ex. 44 at KCMOEC000341. Second, and relatedly, the Auditor concluded that because the City had appropriated to the Board more than 25% of its general revenue fund in fiscal year 2022 (two fiscal years before the first year in which Amendment No. 4 would affect the City), the Amendment would not increase the City’s costs. *See* June 26 Tr. 370:23-371:17 (S. Beeler). Finally, the Auditor refused to consider the fiscal impact of laws authorized by

Amendment No. 4, going so far as to say that she could not even consider the effect of SB 678 because, although it had been truly agreed and finally passed, Governor Parson had not signed it by the time the Auditor prepared the Fiscal Note Summary (*see id.*)—an act he took just five days after the Auditor provided the Fiscal Note Summary to the Secretary for certification.

After the Auditor drafted the fiscal note for Amendment No. 4 and the Fiscal Note Summary, she transmitted both to the Office of the Missouri Attorney General. Ex. 29 at SOSAR010 (App 49). The Attorney General “approve[d] the legal content and form of the fiscal note summary” but made clear that he did “not examine the fairness or sufficiency of the estimated fiscal impact.” *Id.* at SOSAR0009 (App 48). On June 22, 2023, the Auditor sent the fiscal note, Fiscal Note Summary, and her correspondence with the Attorney General to the Secretary, noting that this “complete[d] the fiscal note and fiscal note summary process for this proposed ballot measure.” *Id.* at SOSAR0007 (App 46). The next day, without undertaking any independent review of the Fiscal Note Summary to ensure its accuracy or compliance with legal requirements, the Secretary certified the ballot title for Amendment No. 4. *See* Ex. 30 at SOSAR0004-0005 (App 59-60); *see also* June 26 Tr. 325:18-21, 332:22-333:1 (S. Clark) (admitting that Secretary takes no “independent steps to make sure that the fiscal note summary is accurate” and “didn’t undertake any review to assess whether the fiscal note summary complied with applicable legal requirements”).

## V. THE CITY'S ATTEMPT TO ENSURE VOTERS RECEIVED ACCURATE INFORMATION

In August 2022, the City wrote to Contestees to alert them that the Fiscal Note Summary was insufficient and unfair and should be amended to accurately reflect the true fiscal impact of Amendment No. 4. *See* Ex. 33 at KCMOEC0000228-230- (App 63-65); Ex. 37 at KCMOEC0000255-257 (App 67-70); Ex. 38 at SAO0080-81 (App 75-76); Ex. 47 (App 79). Those letters—of which Mr. Lucas was aware (June 26 Tr. 113:12-18 (Q. Lucas))—reiterated the points the City had made in its earlier exchange with the Auditor and underscored the Amendment's likely effects on the City.

In letters to Contestees dated August 11, 2022, the City again explained that the Amendment would have a “negative fiscal impact of up to more than \$38.7 million” and repeated that the Amendment would affect other City services. Ex. 33 at KCMOEC0000229 (App 64); Ex. 37 at KCMOEC0000256 (App 69). In addition, the City highlighted what is otherwise evident on the face of the Amendment: It is a “blank check” that “contains no limit whatsoever on the ability of the [G]eneral [A]ssembly to enact legislation requiring the City to fund the Board.” Ex. 33 at KCMOEC0000229 (App 64); Ex. 37 at KCMOEC0000256 (App 69). That “open-ended funding obligation,” the City explained, “would impair the City’s ability to provide other services that its residents need and rely upon” and “could certainly impose substantial additional costs on the City and significant negative fiscal impact.” Ex. 33 at KCMOEC0000229-230 (App 64-65); Ex. 37 at KCMOEC0000256-257 (App 69-70). The City also made clear that there would be an increase in costs even if the Auditor focused only on the increase in the City’s funding

obligation required by SB 678—from 20% to 25% of the City’s general revenue fund. Ex. 33 at KCMOEC0000230 (App 65); Ex. 37 at KCMOEC0000257 (App 70). That is because in the then-current fiscal year—the fiscal year that immediately preceded the year in which the Amendment would affect the City’s budget—the City was funding the Board at 24.3% of general revenue. Ex. 33 at KCMOEC0000230 (App 65); Ex. 37 at KCMOEC0000257 (App 70).

The Secretary responded to the City’s letter just hours after receiving it. *See* Ex. 38 at SAO0077-078 (App 72-73). He downplayed the City’s concerns as mere “grievances” and, despite overseeing the content of ballots for all statewide elections, denied having any responsibility for the Fiscal Note Summary. *See id.* In a letter dated August 12, 2022, the City reminded the Secretary of his statutory responsibilities and reiterated its “hope that the Secretary will fulfill his obligation to Missouri voters to cure the legal concern” with the Fiscal Note Summary. Ex. 38 at SAO0080 (App 75). The Secretary never responded.

The Auditor replied to the City’s first letter on August 16, 2022. *See* Ex. 44 at KCMOEC0000340-341. After restating much of the City’s exchange with the Auditor in May and June 2022, the Auditor said that she ignored the City’s responses because the Auditor “is statutorily responsible for creating a fiscal note of **additional** costs or savings” and “[t]he [C]ity did not specify any **net additional** costs or savings for taxpayers.” *Id.* at KCMOEC0000341 (emphasis added). As the Auditor has since acknowledged, however, the words “net additional” appear nowhere in the statute governing the substance of fiscal note summaries. June 26 Tr. 404:24-405:6 (S. Beeler); *see also* RSMo. § 116.175.3 (App 15).

The City responded to the Auditor by letter dated August 22, 2022. There, the City told the Auditor that “the City *does* estimate that it will incur additional costs if [the Amendment] is approved.” Ex. 47 at KCMOEC0000344 (App 82) (emphasis in original). The City underscored that, although it had in some years appropriated to the Board amounts exceeding 25% of the City’s general revenue fund as a matter of discretion, the Amendment “threatens to turn that discretionary choice into a statutory requirement.” *Id.* And the City reminded the Auditor that it “has *not* consistently funded the Board at 25% of the City’s general revenue fund,” including in the then-current fiscal year. *Id.* at KCMOEC0000345 (App 83) (emphasis in original). In addition, the City again emphasized that the Amendment “would authorize the General Assembly to enact *any* law” increasing minimum funding, including a law compelling the City to “allocate 40%, 50%, or 100% of its general revenue fund to the Board.” *Id.* at KCMOEC0000344 (App 82) (emphasis added). The City’s letter reiterated the consequences to City residents, which should be self-evident to those with knowledge of municipal budgets:

Any increase in mandated funding—enabled by [the Amendment]—would limit the City’s budgetary flexibility and force it to choose between either (1) reducing other services or (2) increasing taxes for City taxpayers. Both represent a negative fiscal impact, and both are the inevitable result of the proposed amendment’s enactment.

*Id.* at KCMOEC0000345 (App 83); *see also, e.g.*, June 26 Tr. 347:3-9 (S. Beeler) (testifying that when developing fiscal notes and fiscal note summaries, the Auditor applies her “knowledge of government operations”).

The City’s outreach to Contestees ultimately proved fruitless. Notwithstanding that Contestees were not (and still are not) able to identify any authority precluding them from

amending the Fiscal Note Summary to ensure voters received accurate information, and that there was ample time for them to add a few words reflecting the City’s analysis before ballots for the November 2022 election were printed, Contestees did nothing. June 26 Tr. 408:11-18 (S. Beeler) (testifying that there is “no prohibition upon amending a fiscal note summary that has been sent to the Secretary of State and certified”); 333:24-333:1 (S. Clark) (testifying that ballots were not printed “until on or after August 30th, 2022”). Indeed, the Auditor never even considered amending the Fiscal Note Summary. *Id.* at 408:4-6 (S. Beeler).

**VI. THE FISCAL NOTE SUMMARY AFFECTED THE OUTCOME OF THE VOTE ON AMENDMENT NO. 4**

On November 8, 2022, voters across Missouri received ballots that addressed Amendment No. 4 in the following terms:

**CONSTITUTIONAL AMENDMENT NO. 4**

Proposed by the 101st General Assembly  
(Second Regular Session)  
SS2 SJR 38

Shall the Missouri Constitution be amended to 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?

State and local governmental entities estimate no additional costs or savings related to this proposal.

YES       NO



Ex. 51 at 9 (App 94).

Nothing in voters' ballots specifically identified the second paragraph they read as a fiscal note summary; indeed, the Fiscal Note Summary appears to be part of the ballot question itself. June 26 Tr. 111:19-112:1 (Q. Lucas). And the ballot language voters saw conveyed—despite clear expressions by the City to the contrary—that they could vote to provide the Board with additional resources without any cost to themselves or anyone else. *Id.* at 112:17-23 (Q. Lucas) (“[W]hat [the ballot language] conveys to me is a question to the voters of Missouri that says do you want more police services. And there is no cost for delivery of said police services.”); 194:16-21 (T. Queen) (testifying that the City understood the Fiscal Note Summary to convey “[t]hat there’s no cost to the City or any other state or local governmental entity to Amendment 4”). As a result of that falsehood, voters approved the Amendment. Ex. 52 at 30.

At the June 26, 2023 hearing in this contest, Mr. Lucas introduced expert testimony from veteran public opinion researcher Kevin Akins regarding whether voters' opinions about Amendment No. 4 change when they are provided with information concerning the Amendment's true fiscal impact on the City. Mr. Akins's testimony, which Contestees made no effort to rebut through expert testimony of their own, demonstrated that when Missouri voters who voted in November 2022 were presented with the actual words the City provided to the Auditor, they reported that they would—by a majority—vote against the Amendment. June 26 Tr. 258:15-259:5 (K. Akins); *see also* Ex. 60 at

KCMOEC0012961 (App 102), KCMOEC0012963 (App 103).<sup>5</sup> In other words, if the City’s “position were accurately reflected in the ballot language that voters voted on,” the Amendment “may have failed.” June 26 Tr. 266:7-10 (K. Akins).

Mr. Akins’s conclusion is based on a public opinion survey of a representative sample of Missouri voters who voted in the November 2022 election. *See* Ex. 60 at KCMOEC0012958-959 (App 99-100). To ensure that he “gather[ed] interviews that [were] reflective of the state as a whole,” Mr. Akins selected respondents through a rigorous process that considered numerous factors, including whether potential respondents were registered to vote and voted in the November 2022 election, and demographic characteristics, such as age, race/ethnicity, and partisan affiliation. June 26 Tr. 242:2-14, 243:6-244:5 (K. Akins).

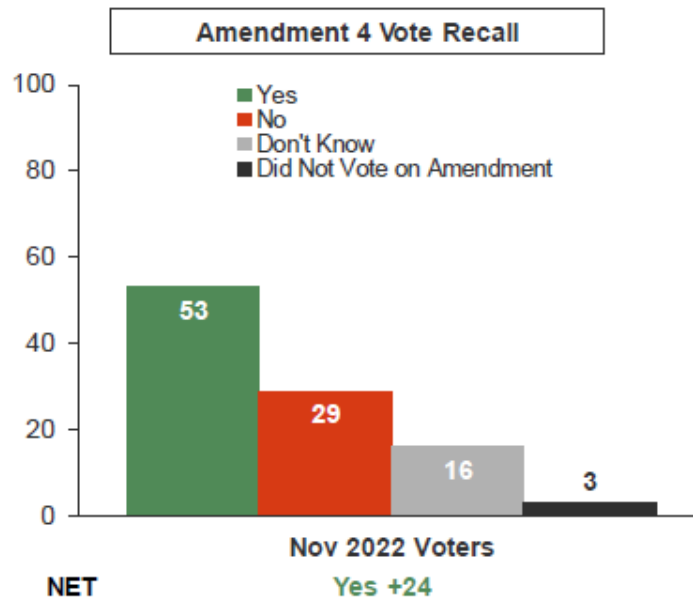
Interviews were conducted using a “multi-modal ... methodology”—*i.e.*, a combination of live phone interviews (by both cell phone and land line) and internet-based surveys made available to respondents by a text message sent to their cell phone. June 26 Tr. 244:6-16 (K. Akins). This ensured that the survey “[met] people in their preferred communications mode” and reached increasingly common “cell-phone-only households or cell-phone-mostly communicators.” *Id.* at 244:17-245:1, 256:9-17 (K. Akins). Mr. Akins gathered data from a group of 600 Missouri voters. *Id.* at 246:17-21 (K. Akins). The demographic composition of that sample closely approximated the demographic composition of the Missouri electorate in November 2022, and the sample size was

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<sup>5</sup> Although Contestees included an expert on the witness list filed with the Court, they ultimately declined to call him.

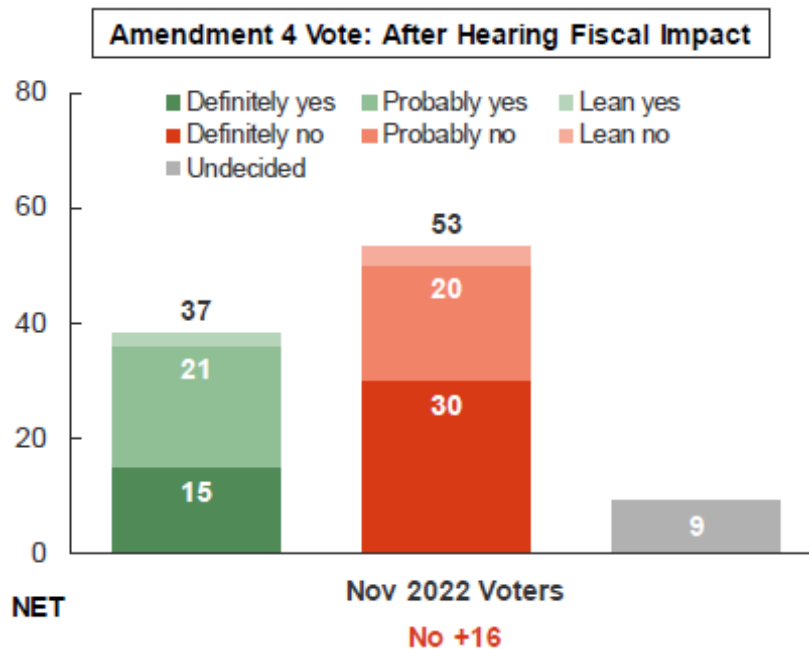
sufficient to enable Mr. Akins to draw statistically significant conclusions. *Id.* at 246:22-247:6, 256:25-257:13, 265:18-20 (K. Akins); *see also* Ex. 60 at KCMOEC0012959 (App 100).

The substantive portion of Mr. Akins’s survey began by providing respondents with the exact language concerning Amendment No. 4 that had appeared on their ballots (including the Fiscal Note Summary) and asked them whether, and if so how, they voted on the Amendment. Ex. 55 at KCMOEC0012885; Ex. 51 at 9 (App 94). Fifty-three percent of respondents reported voting for the Amendment while 29% reported voting against it:



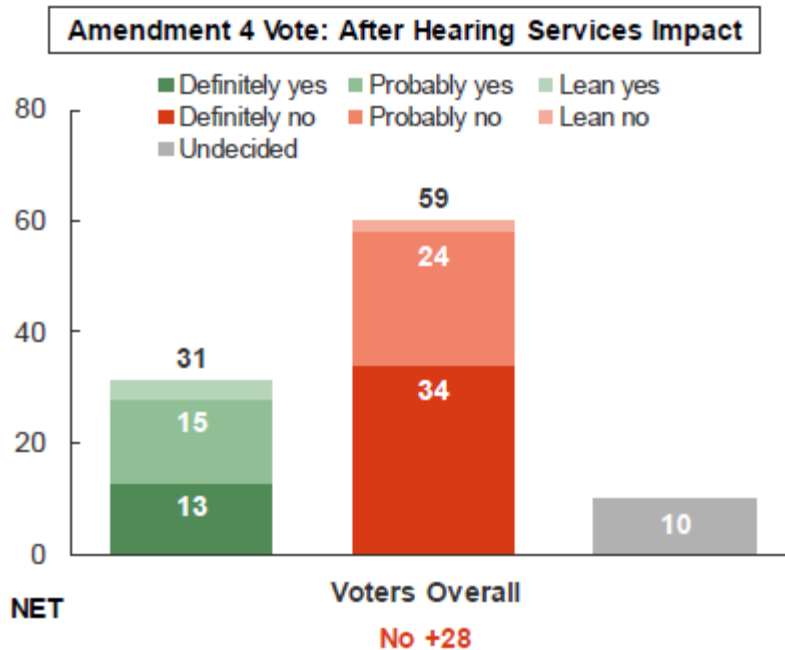
Ex. 60 at KCMOEC0012960 (App 101). The margin of support for Amendment No. 4 among respondents in Mr. Akins’s survey (24 percentage points) was nearly identical to the margin by which voters approved the Amendment in November 2022 (26 percentage points), which gave Mr. Akins additional confidence that he had “accurately captured the state.” June 26 Tr. 257:17-258:14 (K. Akins).

After establishing how respondents voted, Mr. Akins’s survey provided voters with additional information drawn from correspondence between the City and Contestees to assess how that information affected their willingness to vote for the Amendment if it appeared again on the ballot. Ex. 55 at KCMOEC0012885-886; *see also* June 26 Tr. 249:15-21, 251:23-252:1 (K. Akins). First, respondents were informed that “[t]he City of Kansas City, Missouri says that, instead of not costing taxpayers any money, this Amendment would have a negative fiscal impact on the City, and could result in higher taxes for its residents.” Ex. 55 at KCMOEC0012885; *see also* Ex. 47 at KCMOEC0000344-345 (App 82-83). Support for the Amendment immediately eroded. While 53% of survey respondents recalled voting in favor of the Amendment in November 2022, after learning that the City said it would have a negative fiscal impact, 53% said they would vote *against* it:



Ex. 60 at KCMOEC0012961 (App 102). The immediate decline in support—just 37% of respondents said they would vote in favor of the Amendment—was “notable.” June 26 Tr. 270:7-271:1 (K. Akins). Many times, when additional information is provided concerning measures that initially are popular, like Amendment No. 4, respondents “park [in] undecided” rather than indicating opposition to the measure. *Id.* at 259:6-12, 270:11-18 (K. Akins). Here, by contrast, the proportion of respondents who immediately indicated they would vote against the Amendment “increase[d] by a substantial margin.” *Id.* at 270:7-271:1 (K. Akins).

The results were even more pronounced when respondents were provided with information regarding the Amendment’s potential effect on City services: “Although this Amendment could increase funding for the Kansas City Police Department, it could decrease funding for fire protection services, roadway and infrastructure maintenance, and other services the City provides for its residents.” Ex. 55 at KCMOEC0012885. On learning that information, nearly 60% of respondents said they would vote against the Amendment:



Ex. 60 at KCMOEC0012963 (App 104). Moreover, support for the Amendment declined to just 31%, and the proportion of voters who said they “definitely” would vote against the Amendment (34%) exceeded the entire proportion of voters who said they would vote in favor of the Amendment (31%). *Id.*

When Mr. Akins examined the change in voter opinion by various demographic characteristics, he found that “many people changed their minds, not just one or two niche groups.” June 26 Tr. 260:11-261:5 (K. Akins); *see also id.* at 262:11-22 (K. Akins) (testifying that data show an “erosion” in support “across all ... voter subgroups”). For instance, after respondents learned of the Amendment’s potential impact on City services, there was a decline in support for the Amendment of 17 points among Democrats, 21 points among Independents, and 27 points among Republicans:

<b>Amendment 4 Vote: After Hearing Services Impact</b>
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	Yes	No	Net Yes	Change in Yes from Initial
<i>Overall</i>	31	59	-28	-22
Men	29	63	-34	-24
Women	33	56	-23	-20
18-34	30	62	-32	-8
35-49	32	65	-33	-25
50-64	34	52	-18	-21
65+	29	61	-32	-25
White	31	60	-29	-23
People of Color	34	53	-19	-4

	Yes	No	Net Yes	Change in Yes from Initial
Non-College Grad	32	56	-24	-24
College Grad	28	66	-38	-19
Democrats	14	78	-64	-17
Independents	34	55	-21	-21
Republicans	43	47	-4	-27
Kansas City MM	31	62	-31	-15
St. Louis MM	34	56	-22	-17
Springfield MM	33	53	-20	-27
Jefferson City MM	23	68	-45	-33

Ex. 60 at KCMOEC0012964 (App 105). Indeed, the potential impact to City services led a plurality of Republicans (47%) to indicate that they would vote against the Amendment despite initially having voted in favor of it by 59 points. *Id.* Mr. Akins testified that, based on his experience, “there are not many issues where you see this amount of movement across the partisan spectrum.” June 26 Tr. 260:11-261:5 (K. Akins).

Similarly notable was that support for the Amendment eroded across the State. Mr. Akins designed the survey questions to ensure respondents understood that the Amendment’s fiscal impact would be felt in the City. *See* June Tr. 249:22-250:9 (K. Akins). When respondents were told that the Amendment could adversely affect *Kansas City* services, support for the Amendment fell statewide, including by 17 points among respondents in the St. Louis area, 27 points among respondents in the Springfield area, and 33 points among respondents in the Jefferson City area. Ex. 60 at KCMOEC0012964 (App 105). The effect was similarly pronounced when respondents learned that the City said that the Amendment would have a negative fiscal impact on Kansas City. *See id.* at

KCMOEC0012962 (App 103) (showing declines in support of 12 points in the St. Louis area, 17 points in the Springfield area, and 27 points in the Jefferson City area).

Mr. Akins’s findings are in certain respects entirely unsurprising. Costs matter to voters. As Mr. Lucas explained based on his “substantial connections with a number of ballot questions” over the course of his career, “the hardest part of” building support for a proposed measure is explaining to voters “what the cost is.” June 26 Tr. 112:2-16, 126:15-14 (Q. Lucas). Thus, Missouri voters have previously rejected ballot initiatives that “[a] lot of people liked”—such as a proposal to allocate “\$800 million of funding to promote lifesaving cures particularly for children”—when presented with information regarding “the fiscal impact and the costs.” *Id.* at 127:4-14 (Q. Lucas). Mr. Akins’s unchallenged expert opinion demonstrates that voters may have done the same with Amendment No. 4 had Contestees provided them with a Fiscal Note Summary that accurately reflected information the City provided concerning the Amendment’s fiscal impact.



## POINT RELIED ON

The Court should set aside the results of the November 8, 2022 vote on Amendment No. 4 because the Fiscal Note Summary that appeared on voters' ballots, which excluded the City's analysis of the Amendment's costs, is insufficient and unfair—and an irregularity of sufficient magnitude to cast doubt on the outcome of the vote on the Amendment—in that (i) it told voters that there would be no costs associated with a measure designed to allow the General Assembly to enact laws that would force the City to provide additional financial resources to the Board, even though the City had told Contestees that there would be costs, including in the form of redirection of funds now used for other essential City services, and the fiscal note for the Amendment reflected as much, and (ii) voters were actually misled by the Fiscal Note Summary and many would have voted differently had the summary been accurate.

- *Shoemyer v. Kander*, 464 S.W.3d 171 (Mo. 2015)
- *Dotson v. Kander*, 464 S.W.3d 190 (Mo. 2015)
- *In Int. of J.L.H.*, 488 S.W.3d 689 (Mo. App. W.D. 2016)
- *Kansas City Power & Light Co.'s Request for Auth. to Implement a Gen. Rate Increase for Elec. Serv. v. Missouri Pub. Serv. Comm'n*, 557 S.W.3d 460 (Mo. App. W.D. 2018)
- RSMo. § 115.553
- RSMo. § 115.593
- RSMo. § 116.175

## ARGUMENT

There is no dispute that Amendment No. 4 has a single purpose: to allow the General Assembly to pass laws that require the City to provide increased minimum funding and additional resources for the Board. *See* Ex. 2; June 26 Tr. 397:21-398:4, 399:10-12 (S. Beeler). Nor is there any dispute that the City—and only the City—bears the burden of providing the contemplated funding and resources. *Id.* at 381:17-21 (S. Beeler). In other words, the Amendment imposes costs on the City and its residents. The City told Contestees just that. It informed them that the Amendment would have a “negative fiscal impact” on the City. Ex. 10 at SAOAR00252. It informed them that the cost could be \$38.7 million. Ex. 24 at KCMOEC0000205 (App 30). And it informed them that the Amendment is tantamount to a “blank check” that could have a “catastrophic” effect on other services the City provides. Ex. 33 at KCMOEC0000229 (App 64); Ex. 37 at KCMOEC00002575 (App 70); Ex. 47 at KCMOEC0000344 (App 82).

Contestees told voters none of that. As the Auditor testified, the Fiscal Note Summary that voters saw on their ballots in November 2022 “exclude[s] ... the perspective of the only [c]ity in the entire state that’s actually affected by” Amendment No. 4. June 26 Tr. 408:22-409:1 (S. Beeler). Instead, the Auditor prepared and the Secretary certified a Fiscal Note Summary that told voters that *the City* believed the Amendment would impose no costs—precisely the opposite of what the City told Contestees. *See* Ex. 29 at SOSAR0017 (App 56) (“local governmental entities estimate no additional costs or savings related to this proposal”).

That Missouri voters thought a costless increase in police funding sounded like a good bargain is no surprise. Similarly unsurprising is the evidence before this Court demonstrating that if Contestees had told voters the truth—that the Amendment has a significant negative fiscal impact on the City—the outcome of November’s vote could have been different. This Court can, and should, give Missouri voters a meaningful opportunity to exercise their preferences unencumbered by misinformation.

**I. THIS COURT HAS THE POWER AND AUTHORITY TO GRANT RELIEF.**

In an effort to avoid the inescapable conclusion compelled by the application of the law to the facts, Contestees claim that this Court is powerless to address the merits of this contest because: (A) Mr. Lucas is not a “real party in interest”; (B) registered voters cannot challenge successful constitutional amendments once they become “effective” 30 days after the election; and (C) Mr. Lucas’s claims are barred by the doctrine of laches. Each argument fails.

**A. Mr. Lucas Is A Real Party In Interest.**

Throughout this contest, Contestees have repeatedly—and wrongly—asserted that “the real party in interest is not a registered voter.” *See, e.g.*, Auditor’s Answer at 9. The Court summarily dispensed with that baseless claim when it denied Contestees’ motion to dismiss (*Lucas v. Ashcroft*, SC99931, Order Overruling Contestees’ Mot. to Dismiss (Feb. 9, 2023)), and it should do so again.

To begin, Contestees’ argument fails in the face of unequivocal statutory authority expressly permitting registered voters like Mr. Lucas to commence election contests. *See* RSMo. § 115.553.2 (App 5) (“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.”); *see also* June 26 Tr. 101:8-10 (Q. Lucas). “If [a] statute sets out a cause of action and specifies the persons who may bring the action, they are the proper parties to sue”—*i.e.*, a real party in interest. 15 Mo. Prac., Civil Rules Practice § 52.01:9 (2022 ed.). This Court’s order overruling Contestees’ motion to dismiss already recognized that this is the beginning and end of the analysis. *Lucas v. Ashcroft*, SC99931, Order Overruling Contestees’ Mot. to Dismiss (Feb 9, 2023); *see also, e.g., Mottet v. Dir. of Revenue*, 635 S.W.3d 862, 865-866 (Mo. App. W.D. 2021) (analyzing statutes and Missouri Constitution to ascertain “[t]he real party in interest in a petition for review of a driver’s license revocation”); *Cohen v. Normand Prop. Assocs., L.P.*, 498 S.W.3d 473, 478-479 (Mo. App. W.D. 2016) (analyzing RSMo. § 528.030, which “describes who may bring a partition suit,” to determine real party in interest in partition action).

Setting aside that fatal flaw, Contestees’ argument turns the real party in interest standard on its head. The requirement that “[e]very civil action ... be prosecuted in the name of the real party in interest” (Mo. R. Civ. P. 52.01), is designed “to enable those persons to maintain the action who are directly interested in the subject matter of the litigation and entitled to reap its fruits.” *Carolan v. Nelson*, 226 S.W.3d 923, 925-926 (Mo. App. W.D. 2007). The question, in other words, is whether the party bringing suit has the requisite interest—not, as Contestees would have it, whether there may exist other parties that also have an interest. One party’s interest does not diminish another’s. *See Twin Chimneys Homeowners Ass’n v. J.E. Jones Const. Co.*, 168 S.W.3d 488, 495-496 (Mo. App. E.D. 2005) (noting that both residents’ association and individual condominium

owners could be deemed real parties in interest because both are “entitled to the benefits of the litigation”); *Brookshire ex rel. Brookshire v. Retz*, 111 S.W.3d 920, 923 (Mo. App. S.D. 2003) (concluding that, “[u]nder [applicable] statute, both the employer ... and the employee ... are real parties in interest, and either could bring the suit against the third-party tortfeasor”). Thus, where multiple parties have an interest in the outcome of an action, all are real parties in interest for the purposes of Rule 52.01, and any can bring suit.<sup>6</sup>

It is undisputed that, as a registered voter, Mr. Lucas has a direct interest in exercising his fundamental right to vote based on complete and accurate information. *See* June 26 Tr. 160:11-13 (Q. Lucas) (testifying that, “as a registered voter,” he has “an interest in this litigation”), 150:5-6 (Q. Lucas) (“I just want to effectuate the best intent of fairness for voters; and so that’s why we’re here, in my opinion”). If Mr. Lucas succeeds, he (and other registered voters) will be entitled to reap the benefits by voting in a free and fair election. Demonstrating his interest, Mr. Lucas testified that he would pursue this contest by any means necessary to ensure Missouri voters are provided with accurate information regarding the fiscal impact of Amendment No. 4. *Id.* at 146:11-16 (Q. Lucas). Nothing more is required.<sup>7</sup>

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<sup>6</sup> For example, although the City (and, for that matter, every other individual registered to vote in Missouri) may have an interest in this contest, that in no way diminishes Mr. Lucas’s interest. That Mr. Lucas and other registered voters are authorized by law to contest the election while the City is not is irrelevant.

<sup>7</sup> Throughout this contest, Contestees have made much of Mr. Lucas’s relationship with his counsel. This is a red herring. Despite repeatedly being challenged to do so, Contestees have never identified *any* authority deeming such facts relevant to a real party in interest analysis. Moreover, the handful of facts regarding Mr. Lucas’s attorney-client relationships that Contestees introduced during the June 26, 2023 hearing are identical to

**B. This Court Has Already Rejected Contestees’ Fabricated 30-Day Period Of Repose.**

Contestees also argue that the Court’s authority to grant relief was extinguished when Amendment No. 4 supposedly became effective 30 days after the election. *See, e.g.*, Auditor’s Answer at 11-12. This Court has already rejected that exact argument both expressly and implicitly.

In *Shoemyer v. Kander*, 464 S.W.3d 171 (Mo. 2015), the Secretary argued—just as Contestees do here—that the suit was “untimely as it was filed nearly six weeks after the amendment [at issue] became effective.” *Id.* at 173-174. The Court dispensed with that argument in just a few sentences, holding that “the thirty day filing period” for actions under Chapter 115 “does not *begin* until the results are certified.” *Id.* at 174 (emphasis added).<sup>8</sup> Similarly, the petition in *Dotson v. Kander*, 464 S.W.3d 190 (Mo. 2015) was filed well outside Contestees’ invented 30-day period of repose. *See id.* at 193 (describing challenge to amendment adopted during August 5, 2014 special election); *Dotson v. Kander*, No. SC94482, Petition ¶ 8 & p. 11 (August 5, 2014 election results were certified August 25, 2014, and suit was filed September 24, 2014). Yet rather than conclude it had

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the facts underlying Contestees’ unsuccessful motion to dismiss. The Court has heard and rejected this exact argument once. It should do so again.

<sup>8</sup> That *Shoemyer* involved a recount (464 S.W.3d at 174) is irrelevant. The constitutional provisions on which Contestees purport to rely include no exception for recounts. *See* Mo. Const. art. XII, §§ 1, 2(b). Thus, Contestees’ position would require this Court to conclude that its authority to engage with the merits in *Shoemyer* ceased to exist six weeks before the case was even commenced.

no authority to hear the challenge, this Court addressed the dispute on the merits. *Dotson*, 464 S.W.3d at 193-200.

It is easy to see why this Court has previously rejected Contestees' argument. Contestees' reading of the law would render it impossible to challenge a constitutional amendment under Chapter 115—an outcome inconsistent with Chapter 115's goal of "ensur[ing] that the results of each election are valid." *Dotson*, 464 S.W.3d at 194. Contestees' argument would require that, between November 8 and December 8, 2022: Mr. Lucas had filed his Petition and served Contestees; the parties had conducted and completed discovery and depositions, developed a record before an appointed Commissioner, and fully briefed this matter to the Court's satisfaction; and the Court had heard oral argument and rendered a judgment. Setting aside that such a compressed schedule is unworkable, here it also would have been legally impermissible. The Secretary did not certify the results of the election until December 9, 2022 (the day *after* Contestees' proposed 30-day limit expired), and Missouri courts have made clear that Chapter 115 "*requires*, as a condition precedent to filing a petition, that the election authority have made the official announcement of the election result." *Wells v. Noldon*, 679 S.W.2d 889, 891 (Mo. App. E.D. 1984) (emphasis added). In other words, to accept Contestees' position, this Court would have to conclude that Mr. Lucas and other similarly situated voters had no avenue to assert any post-election challenge to the Amendment. That is not the law.

### **C. The Doctrine Of Laches Does Not Apply As A Matter Of Law.**

Similarly unavailing is Contestees' assertion that Mr. Lucas's claim is barred by the doctrine of laches. *See, e.g.*, Auditor's Answer at 10 (asserting laches defense). To begin,

the doctrine of laches does not apply to actions at law, such as election contests. *See Bd. of Election Comm'rs of St. Louis Cnty. v. Knipp*, 784 S.W.2d 797, 798 (Mo. 1990) (“The right to contest an election exists by virtue of statute; it is not a common law or equitable right.”); *UAW-CIO Loc. No. 31 Credit Union v. Royal Ins. Co.*, 594 S.W.2d 276, 281 (Mo. 1980) (“[S]trictly speaking the doctrine of laches is not applicable” to actions at law.). Even if the doctrine could apply, because Mr. Lucas acted within the time contemplated by Chapter 115, any argument that his claim is barred by laches fails as a matter of law. *See Lane v. Non-Tchr. Sch. Emp. Ret. Sys. of Missouri*, 174 S.W.3d 626, 639-640 (Mo. App. W.D. 2005) (concluding that the doctrine of laches did not bar claim “as a matter of law” where “the statute of limitations had not run” because “equity may not disregard a statutory provision”). Indeed, this Court in *Shoemyer* rejected a laches defense identical to the one Contestees assert here, holding that because the contestant filed within the 30-day limit specified by statute, “there was no unreasonable delay,” and the contest “[was] not barred by the doctrine of laches.” *Shoemyer*, 464 S.W.3d at 174.

Contestees’ laches defense fails for the additional reason that Mr. Lucas did not delay in asserting his rights, let alone unreasonably so. Mr. Lucas repeatedly urged Contestees to take action that would have avoided this litigation. June 26 Tr. 124:2-3, 124:7-23 (Q. Lucas); *see also* Ex. 33 at KCMOEC0000229-230 (App 64-65); Ex. 37 at KCMOEC0000255-257 (App 68-70); Ex. 38 at SAO0080-081 (App 75-76); Ex. 47 at KCMOEC0000344-346 (App 82-84). They ignored those efforts. June 26 Tr. 125:13-18 (Q. Lucas). And there is nothing unreasonable or unexplainable about Mr. Lucas’s decision to use a statutory remedy this Court has expressly approved within the time frame



specified by law. *See, e.g., Ward v. Hudgens*, 22 S.W.3d 260, 264-265 (Mo. App. S.D. 2000) (doctrine of laches does not bar claim where delay was not “unreasonable and unexplainable”).

## **II. THE FISCAL NOTE SUMMARY FOR AMENDMENT NO. 4 WAS INSUFFICIENT AND UNFAIR BECAUSE IT DID NOT COMPLY WITH THE REQUIREMENTS OF CHAPTER 116.**

This Court’s precedent makes clear that registered voters like Mr. Lucas can challenge “election results for ‘irregularities’ that occur during elections.” *Dotson*, 464 S.W.3d at 194. “[T]he violation of election statutes”—including the provisions of Chapter 116 governing ballot titles and fiscal note summaries—is “an irregularity that may be addressed in an election contest” under Chapter 115. *Id.* As relevant here, fiscal note summaries for proposed constitutional amendments must be sufficient and fair (*see* RSMo. § 116.190.3 (App 18)), and a “chapter 116 violation of the sufficiency and fairness standard” constitutes an irregularity for purposes of Chapter 115. *Dotson*, 464 S.W.3d at 195. A fiscal note summary is “insufficient” if it is “inadequate,” and it is “unfair” if it is “marked by injustice, partiality, or deception.” *Brown v. Carnahan*, 370 S.W.3d 637, 653 (Mo. banc 2012) (cleaned up). The Fiscal Note Summary for Amendment No. 4 fails on both fronts.

The Auditor’s decision to ignore the information the City provided when drafting the Fiscal Note Summary violates statutory provisions governing the process for preparing fiscal note summaries and the information they must contain. Although a fiscal note summary must “summarize the fiscal note” (RSMo. § 116.175.3 (App 15)), the Fiscal Note Summary for Amendment No. 4 does no such thing. Nor does it “state the measure’s

estimated cost or savings.” *Id.* Equally problematic, the Fiscal Note Summary fundamentally mischaracterizes the information the City provided to the Auditor, asserting that “local governmental entities estimate no additional costs ... related to this proposal” even though the City had repeatedly explained that the Amendment *would* impose costs.

Insofar as the Auditor claims she was entitled to ignore the City’s responses, her justification for doing so—that the information the City provided supposedly was unreasonable—is foreclosed by Chapter 116, which contains no provision authorizing the Auditor to ignore relevant fiscal impact analyses reflected in the fiscal note based on her subjective view of what is reasonable. Even if such an assessment were permitted, the Auditor’s criteria for assessing the reasonableness of the City’s analysis are themselves inconsistent with the law and with common sense.

For these reasons, the Fiscal Note Summary—which falsely conveyed to Missouri voters that the City believed it could provide increased minimum funding and additional resources for police at no cost—was insufficient and unfair.

**A. The Fiscal Note Summary Does Not Summarize The Fiscal Note.**

The Fiscal Note Summary for Amendment No. 4 is insufficient and unfair on its face for the simple reason that it does not summarize the fiscal note.

Chapter 116 sets forth the basic requirements for fiscal note summaries:

The fiscal note and fiscal note summary shall state the measure’s estimated cost or savings, if any, to state or local governmental entities. The fiscal note summary shall contain no more than fifty words, excluding articles, which shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure.

RSMo. § 116.175.3 (App 15). Because “the word ‘shall’ connotes a mandatory duty” (*Bauer v. Transitional Sch. Dist. of City of St. Louis*, 111 S.W.3d 405, 408 (Mo. 2003)), a fiscal note summary **must** satisfy the requirements of Section 116.175.3—including the requirement that “[t]he fiscal note summary ... summarize the fiscal note.” The Auditor agrees, acknowledging that a fiscal note summary must be a fair and accurate summary of a fiscal note. June 26 Tr. 375:11-13, 375:22-25, 377:16-20 (S. Beeler).

The problem for Contestees is that the Fiscal Note Summary does not come close to summarizing the fiscal note for Amendment No. 4—fairly, accurately, or otherwise. The fiscal note contains six paragraphs of information that the City provided to the Auditor. It states, among other things, that:

- The City indicated that Amendment No. 4 “will have a negative fiscal impact on [the] city.”
- “The increase for [the] City in terms of an estimated dollar amount ... is \$38,743,646.”
- A change in the amount the City is required to appropriate to the Board “would limit the [C]ity’s budgetary flexibility.”
- The Amendment “could increase the [C]ity’s mandatory funding for the police and decrease its funding for other services funded by general revenue, including but not limited to, fire protection services, roadway and infrastructure maintenance, and other municipal services.”

*See* Ex. 29 at SOSAR0014 (App 53).

Contestees admit—as they must—that the Fiscal Note Summary contains none of that information and does not represent the City’s position. *See, e.g.*, June 26 Tr. 329:19-24, 330:6-21, 331:12-19 (S. Clark); 391:7-21 (S. Beeler). Thus, far from summarizing the fiscal note for Amendment No. 4, the Fiscal Note Summary does not even hint at the analysis provided by the only municipality in the State on the hook for the “increase[d] minimum funding” and “additional resources” contemplated by the Amendment. *See id.* at 408:22-409:1 (S. Beeler) (admitting that the Auditor “exclude[d] from the fiscal note summary the perspective of the only City in the entire state that’s actually affected by the propose Constitutional amendment”).<sup>9</sup> The Auditor’s failure to comply with this basic aspect of Section 116.175.3 renders the Fiscal Note Summary insufficient and unfair.

**B. The Fiscal Note Summary Does Not State The Amendment’s Cost.**

The Fiscal Note Summary is also insufficient and unfair because it does not “state the [Amendment’s] estimated cost,” as Section 116.175.3 requires. RSMo. § 116.175.3 (App 15).

The City’s correspondence with Contestees made clear time and again that Amendment No. 4 would impose significant costs on the City. In response to the Auditor’s initial request for information, the City began by stating plainly that the Amendment would

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<sup>9</sup> The Auditor’s omission of the City’s analysis is particularly surprising given that she: (i) knew that the only police force established by a state board of police commissioners—and therefore subject to Amendment No. 4—was the KCPD (June 26 Tr. 380:1-5); (ii) understood that the KCPD was funded by the City (*id.* at 380:15-18); and (iii) recognized that the Amendment was likely to have a fiscal impact on the City because only the City would be responsible for providing any additional funding required by the General Assembly pursuant to the Amendment (*id.* at 381:17-21).

“have a negative fiscal impact on the City.” Ex. 10 at SAOAR00252. The City then explained that the Amendment could be read to authorize a law increasing the City’s required appropriation to the Board from 20% to 25% of the City’s general revenue fund—a threshold the City expected it would hit every year. Ex. 24 at KCMOEC0000209-210 (App 34-35). The City quantified the increase, telling the Auditor that it would cost over \$38.7 million. *See id.* at KCMOEC0000206-209 (App 31-34); *see also* June 26 Tr. 385:5-10 (S. Beeler) (testifying that the Auditor “asked the City to quantify that increase,” and that the City “told [the Auditor] it would cost \$38.7 million”). The City also told the Auditor that a change in the required level of funding for the Board would “limit the City’s budgetary flexibility and necessitate a reduction in other services the City provides of up to 5% of its general revenues.” Ex. 24 at KCMOEC0000205 (App 30). Thus, the Amendment “could increase the City’s mandatory funding for the police and decrease its funding for other services funded by general revenue, including but not limited to, fire protection services, roadway and infrastructure maintenance, and other municipal services by more than \$38.7 million.” *Id.*

Of course, a shift in required funding for the Board from 20% to 25% of the City’s general revenue fund was only illustrative of a potentially far more significant fiscal impact. Amendment No. 4 contains no limit on the General Assembly’s authority to increase the minimum level at which the City must fund the Board. *See* Ex. 2 at KCMOEC0000162 (App 22); *see also* June 26 Tr. 398:5-21 (S. Beeler) (testifying that Amendment No. 4 contains no limitation on General Assembly’s authority). As the City told Contestees months before the November 2022 election, Amendment No. 4 “essentially

forces the City to hand the State a blank check made out to the Board ... in any amount the legislature desires—including 100% of the City’s revenues.” Ex. 33 at KCMOEC0000229-230 (App 64-65); Ex. 37 at KCMOEC0000256-257 (App 69-70). That “open-ended funding obligation” could “impair the City’s ability to provide other services that its residents need and rely upon” and “could certainly impose substantial additional costs on the City and significant negative fiscal impact.” Ex. 33 at KCMOEC0000229-230 (App 64-65); Ex. 37 at KCMOEC0000256-257 (App 69-70). Offsetting those costs could require the City to increase taxes for City taxpayers. Ex. 47 at KCMOEC0000345 (App 83).

It is not difficult to see that Amendment No. 4 could potentially impose significant costs on the City. Setting aside the direct financial costs—which the City estimated could be (but would certainly not be limited to) over \$38.7 million—the City identified several consequential and non-financial costs. As Ms. Queen testified, the loss of budgetary flexibility that would necessarily flow from a change in the required level of funding for policing would cause other services to “suffer”:

[W]e may have to cut the Fire Department, we might have to reduce ambulance service, we might have to say we can’t issue fire permits or other inspection permits.... And that then leads to ... a diminished quality of life and service for citizens, for taxpayers, for voters, for residents. And it effectively diminishes the value of our City.

June 26 Tr. 188:9-189:8 (T. Queen). The reduction of services other than policing could have a negative “snowball effect ... on the tax base.” *Id.* Residents displeased by decreases in fire protection, ambulance service, street preservation, and other services might choose to leave the City, causing it to lose revenue from income, property, and sales taxes, “all of

which factor into the City’s resources.” *Id.* at 189:9-17 (T. Queen). Indeed, depending on how the General Assembly chooses to exercise the authority that Amendment No. 4 confers, the effect could be “catastrophic” to the City. *Id.* at 200:2-11, 203:21-204:2 (T. Queen).

The Auditor *agrees* that the Amendment imposes costs on the City. On June 3, 2022, the individual at the Auditor’s Office who was responsible for preparing the Fiscal Note Summary reported to a co-worker that “the [C]ity responded *with costs*.” Ex. 20 at SAO0352 (App 26) (emphasis added). During the June 26 Hearing, the Auditor testified that the City was the “only” government entity “that gave a full response” to the Auditor’s request for information, and that the City “gave some indication of *potential costs*.” June 26 Tr. 410:12-14 (S. Beeler) (emphasis added). And the Auditor agreed that a “law ... imposes *a cost*” where, as here, it “makes a City pay more for something, even if the City can offset that by cutting back in some manner in some other area.” *Id.* at 405:7-11 (S. Beeler) (emphasis added).

Despite possessing information provided by the City that she agreed described the Amendment’s costs (and had included in the fiscal note), the Auditor ignored the City’s analysis when she drafted the Fiscal Note Summary. Indeed, as the Auditor conceded, the Fiscal Note Summary “exclude[s] ... the perspective of the only [c]ity in the entire state that’s actually affected by” Amendment No. 4. June 26 Tr. 408:22-409:1 (S. Beeler). Reading just the Fiscal Note Summary—the only statement on the November 2022 ballot regarding the Amendment’s fiscal impact (*see* Ex. 51 at 9)—voters would have no way of knowing that the City clearly and repeatedly informed the Auditor that the Amendment

would have a negative fiscal impact and impose significant costs. *See also, e.g.*, June 26 Tr. 377:25-378:4 (S. Beeler) (testifying that although a fiscal note summary appears on ballots, the fiscal note does not). Thus, on November 8, 2022, voters were left with the misimpression that they could “get something [*i.e.*, more funding for police] without paying for it, something for nothing.” June 26 Tr. 250:19-24 (K. Akins).

For these reasons, the Fiscal Note Summary does not comply with the requirement under Chapter 116 that a fiscal note summary “state the measure’s estimated cost” (RSMo. § 116.175.3 (App 15)), and it is therefore insufficient and unfair.

**C. The Fiscal Note Summary Mischaracterized The City’s Analysis And The Fiscal Note In Which That Analysis Is Reflected.**

The Fiscal Note Summary suffered from a final, fundamental problem: It told Missouri voters precisely the *opposite* of what the City conveyed to the Auditor. The City repeatedly and at great length told the Auditor that it anticipated the Amendment would have a “negative fiscal impact” and could cost the City tens of millions of dollars—to say nothing of the potentially limitless costs that could arise because the Amendment is effectively a blank check. *See supra* at 9-12, 18-21. The Auditor recorded that information in the fiscal note. *See Ex. 29* at SOSAR0014 (App 53). But when it was time to draft the Fiscal Note Summary, the Auditor chose to tell voters that “local governmental entities estimate no additional costs or savings related to this proposal.” *Ex. 51* at 9 (App 94). That language falsely indicated that *the City* had determined that it could provide additional resources for the Board at no cost to itself or its residents—a proposition that directly contradicts both what the City told the Auditor and the Auditor’s own fiscal note.



Put simply, the Fiscal Note Summary was not merely misleading, but fundamentally false. The Fiscal Note Summary’s deceptive nature provides yet another basis on which to conclude that it was unfair. *See Brown*, 370 S.W.3d at 653 (defining “unfair” as “marked by injustice, partiality, or deception”).

**D. The Auditor’s Justification For Ignoring The Information The City Provided Is Meritless.**

The Auditor’s sole defense of her decision to omit any mention of the City’s responses in the Fiscal Note Summary is that the information the City provided was, in the Auditor’s view, not reasonable. *See June 26 Tr. 391:22-24 (S. Beeler)*. That argument fails because (1) Chapter 116 does not authorize the Auditor to exclude from fiscal note summaries relevant fiscal impact assessments based on her subjective assessment of reasonableness; and (2) the Auditor’s criteria for assessing the reasonableness of the City’s analysis are inconsistent with the law and logic.

**1. Chapter 116 Does Not Permit The Auditor To Exclude From Fiscal Note Summaries Relevant Fiscal Impact Assessments Based On A Subjective Reasonableness Analysis.**

In satisfying her obligation to “assess the fiscal impact of [a] proposed measure,” the Auditor “may consult with the state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal.” RSMo. § 116.175.1 (App 15). The Auditor includes all relevant responses that she receives in the fiscal note. *June 26 Tr. 374:15-20 (S. Beeler)*. The Auditor agreed that the City’s responses regarding the fiscal impact of Amendment No. 4 were relevant and included them in the Amendment’s fiscal note. *June 26 Tr. 394:13-15 (S. Beeler)*; *see also Ex. 29 at*

SOSAR0014 (App 53). But when the Auditor prepared the Fiscal Note Summary, she excluded the City’s analysis of costs based on an interpretation of her statutory authority that finds no support in the governing statute.

Neither Section 116.175 nor any other provision in Chapter 116 expressly authorizes the Auditor to assess the reasonableness of information in a fiscal note when preparing a fiscal note summary. To the contrary, the General Assembly has commanded that a fiscal note summary “*shall* summarize the fiscal note.” RSMo. § 116.175.3 (App 15) (emphasis added); *see also supra* at 38-39.<sup>10</sup> And courts “cannot incorporate unwritten conditions, exceptions, or limitations into [a statute’s] unambiguous command.” *In Int. of J.L.H.*, 488 S.W.3d 689, 696 (Mo. App. W.D. 2016) (rejecting agency’s argument that statute requiring that juveniles “shall be advised” of certain rights prior to interrogation was subject to unwritten public safety exception).

Nor should this Court defer to the Auditor’s interpretation. Missouri law is clear that, “[o]n issues of law, [courts] do not defer to [agencies] but, instead, address the matter *de novo*” and “exercise[] independent judgment to correct erroneous [legal]

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<sup>10</sup> This Court’s references in *Brown*, 370 S.W.3d at 649 to the Auditor’s reasonableness review do not help Contestees. Those references reflect the Court’s summary of testimony by a representative of the Auditor, not a holding by the Court that Chapter 116 permits the Auditor to review fiscal note submissions for reasonableness when preparing fiscal note summaries. *See id.* at 649, 662 n.18. There is no suggestion anywhere in *Brown* that the Court was presented with any argument on that issue. To the extent *Brown* says anything about the nature of the Auditor’s reasonableness review, it makes clear that it is limited to “establish[ing] whether” the information provided “addresses or diverges from the particular issue,” not “analyz[ing] or evaluat[ing] the correctness of” that information. *Id.* at 649. Contestees do not—and cannot—suggest that the information the City provided diverged from the topic of the Auditor’s request.

interpretations.” *Kansas City Power & Light Co.’s Request for Auth. to Implement a Gen. Rate Increase for Elec. Serv.*, 557 S.W.3d at 466, 469 (reversing agency determination that electric vehicle charging stations are not “electric plants” for purposes of the Missouri Energy Efficiency Investment Act); *see also, e.g., Missouri Pub. Serv. Comm’n v. Union Elec. Co.*, 552 S.W.3d 532, 539 (Mo. banc 2018) (courts “need not afford [an agency’s] interpretation” on “legal issues” “any deference”; reversing agency decision based on “implausib[le] ... interpretation” of agency rule); *Gervich v. Condaire, Inc.*, 370 S.W.3d 617, 620 (Mo. banc 2012) (courts are “not bound by [an agency’s] interpretation and application of the law, and no deference is afforded to the [agency’s] interpretation of the law”; reversing agency decision predicated on incorrect legal standard).

Although the Auditor is tasked with summarizing the fiscal note in not more than 50 words (RSMo. § 116.175.3 (App 15)), that requirement neither authorizes the Auditor’s proposed reasonableness analysis nor gives the Auditor license to ignore her own fiscal note. In any event, the Auditor has never suggested that the word limit played any role in her decision to disregard the City’s analysis. Nor could she. The Fiscal Note Summary contains 15 words. *See* Ex. 51 at 9 (App 94) (“State and local governmental entities estimate no additional costs or savings related to this proposal.”); *see also* June 26 Tr. 392:24-393:2 (S. Beeler). The Auditor readily could have conveyed the City’s position in the remaining 35 words. For instance, the following statement contains 49 words: “The City of Kansas City, Missouri estimates the proposal could increase the City’s mandatory funding for the police department and decrease funding for fire protection services, roadway and infrastructure maintenance, and other City services. Other State and local

governmental entities estimate no costs or savings related to this proposal.” That is consistent with what the City told the Auditor. *See* Ex. 24 at KCMOEC0000205 (App 30). And the Auditor could have told voters just that.<sup>11</sup> Instead, she willfully ignored the information the City provided.

Rejecting the Auditor’s proposed reasonableness assessment is appropriate in these circumstances given the likelihood that the Auditor’s subjective understanding of what is reasonable could lead to the omission of accurate information from voters’ ballots. Contestees agree that fiscal note summaries should provide Missouri voters with accurate information. June 26 Tr. 325:4-8 (S. Clark); 375:7-10 (S. Beeler). The individuals best placed accurately to assess how a proposed measure will affect a state or local government entity are its employees. *See* June 26 Tr. 383:23-384:4, 393:17-19 (S. Beeler). Yet the Auditor’s interpretation of Section 116.175 allows her unilaterally to determine—based on a subjective understanding unconstrained by any guidance from the General Assembly—that certain information is not reasonable, and thus to substitute her personal view for facts provided by the entities that respond to her requests for information. That is precisely what occurred here—an outcome fundamentally at odds with the General Assembly’s command that a fiscal note summary “shall summarize the fiscal note.”

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<sup>11</sup> An even simpler alternative, which contains just 37 words, is: “Most state and local governmental entities estimate no additional costs or savings related to this proposal, except the City of Kansas City, Missouri, which estimates that it could increase the City’s costs by up to \$38.7 million.” *See* Ex. 24 at KCMO0000206-207 (App 31-32).

**2. The Auditor’s Criteria For Assessing The Reasonableness Of The City’s Responses Do Not Withstand Scrutiny.**

Even if the Auditor were permitted to review fiscal note submissions for reasonableness, the criteria she applied when assessing the information that the City provided are inconsistent with the law and nonsensical. The Auditor’s analysis is limited to “establish[ing] whether” a fiscal note submission “addresses or diverges from” the subject matter of the proposed measure. *Brown*, 370 S.W.3d at 649. The information the City provided satisfies that standard because it addresses (and does not diverge from) the Amendment’s fiscal impact; the Auditor has never suggested otherwise. Instead, she claims that the City’s analysis was “not reasonable” because: (a) the City did not say that Amendment No. 4 would cause it to incur “net additional” costs; (b) the City had in one prior fiscal year funded the Board at more than 25% of the City’s general revenue fund; and (c) the Auditor would not speculate about what the General Assembly might do with the authority granted to it under Amendment No. 4. Each explanation fails.

**a. Fiscal Note Summaries Are Not Limited To Reporting “Net Additional” Costs.**

The Auditor’s claim that she was permitted to disregard the City’s analysis of costs because the City never reported that Amendment No. 4 would cause it to incur “net additional” costs is at odds with the Auditor’s statutory mandate.

Under Chapter 116, the Auditor is tasked with “assess[ing] the fiscal impact of [a] proposed measure.” RSMo. § 116.175.1 (App 15). That assessment is reflected in the fiscal note and fiscal note summary, which must “state the measure’s estimated costs or savings, if any, to state or local governmental entities.” *Id.* § 116.175.3 (App 15). The

word “costs” in Section 116.175.3 is not modified by an adjective such as “net” or “additional.” *Id.* (App 15). And the Auditor was unable to identify *any* law that expressly limits fiscal note summaries to describing *net* increases in costs or *net additional* costs. June 26 Tr. 404:24-405:6 (S. Beeler). That is no surprise. Section 116.175 (App 15) requires the Auditor to inform voters about *any costs*—not just “net additional” costs—and this Court owes no deference to the Auditor’s contrary view. *See supra* at 47-48.

That is particularly so in light of the Auditor’s inability to keep her story straight. Although the Auditor has asserted in this contest that the Fiscal Note Summary need only have informed voters about the “net additional” costs of Amendment No. 4, that is not the information she requested from the City and other state and local government entities. Instead, consistent with the text of Section 116.175.3 (App 15), the Auditor’s initial request for information asks the recipients to “determine the estimated cost or savings, if any” of Amendment No. 4. Ex. 10 at SAOAR00252; *see also* June 26 Tr. 382:16-21 (S. Beeler) (testifying that May 23, 2022 request for information does not ask for “net” or “additional costs the City would incur if the measure is approved”). Yet by applying an invented “net additional” cost requirement found nowhere in the applicable statutes, the Auditor somehow determined that she was entitled to ignore the City’s response. June 26 Tr. 408:22-409:1 (S. Beeler).

In any event, even if the Auditor were right about what the law requires (and she is not), the City satisfied her fictional standard by repeatedly making clear that it anticipated additional costs attributable to Amendment No. 4. *See* Ex. 37 at KCMOEC0000257 (App 70) (“Th[e] open-ended funding obligation” under Amendment No. 4 “could certainly

impose *substantial additional costs on the City* and significant negative fiscal impact.” (emphasis added); Ex. 47 at KCMOEC0000344 (App 82) (“To be clear, the City *does* estimate that it will incur additional costs if [the Amendment] is approved.” (emphasis in original)). It is common sense that Amendment No. 4 would impose additional costs on the City. As the City explained, the Amendment provides a blank check to the General Assembly, which could pass any law at any time before 2027 compelling the City to provide additional resources to the Board. Ex. 33 at KCMOEC0000229 (App 64); Ex. 37 at KCMOEC0000257 (App 70). If the General Assembly uses the authority Amendment No. 4 confers, that will undoubtedly impose additional costs on the City, potentially forcing it to divert funds from other agencies or to raise taxes. Ex. 24 at KCMOEC0000205 (App 30).

**b. The Auditor’s Myopic Focus On The Level At Which The City Funded The Board In One Prior Fiscal Year Ignores The Limitless Effect Of Amendment No. 4 And Record Evidence.**

The Auditor’s second justification for concluding that the information the City provided was not reasonable is that the City funded the Board at 25.8% of the City’s general revenue in the 2021-22 fiscal year. The Auditor’s position appears to be that, because certain of the City’s responses to the Auditor’s request for information refer to SB 678 (which increased the cap on mandatory Board funding to 25% of the City’s general revenue fund), and the City funded the Board above that level in one prior fiscal year, Amendment No. 4 would not impose costs on the City. *See* Ex. 49 at 1. To the extent that theory is based on the notion that the City was required to identify “net additional” costs, it should

be rejected for the reasons described above. *See supra* at 50-52. It also fails for several independent reasons.

*First*, the Auditor’s focus on the 25% threshold misses the broader point that the Amendment imposes a “limitless mandate” on the City’s funding for the Board. June 26 Tr. 120:13-14, 120:18-121:5 (Q. Lucas). As the Auditor has admitted, nothing in the text of Amendment No. 4 precludes the General Assembly from requiring the City to fund the Board at over 25% of the City’s general revenue fund. *See supra* at 10, 41; *see also* June 26 Tr. 378:18-20 (S. Beeler) (testifying that the Auditor reviewed the Amendment’s proposed text when she received it from the Secretary’s Office). That the City funded the Board at just over 25% of the City’s general revenue fund in the 2021-22 fiscal year says nothing about the costs that a future law authorized by the Amendment might impose on the City.

*Second*, the Auditor’s position is predicated on outdated information. The City does not invariably fund the Board at 25% or more of its general revenue fund. June 26 Tr. 182:11-14 (T. Queen). In fact, as Contestees knew months before the November 2022 election, in the 2022-23 fiscal year—the fiscal year immediately preceding the year in which a law authorized by Amendment No. 4 would affect the City’s budget—the City funded the Board at 24.3% of the City’s general revenue fund. Ex. 33 at KCMOEC0000230 (App 65) (“[F]or the current fiscal year, the City allocated 24.3% of its general revenues to the Board”); Ex. 37 at KCMOEC0000257 (App 70) (same); Ex. 47 at KCMOEC0000345 (App 83) (similar). Insofar as a year-over-year comparison to the 25% benchmark has any salience, it makes clear that “a 25% allocation would result in an



unequivocal increase in the City’s statutory fiscal responsibility.” Ex. 33 at KCMOEC0000230 (App 65); Ex. 37 at KCMOEC0000257 (App 70) (same).

*Third*, the Auditor ignores that, to the extent the City had in the past funded the Board at or near 25% of the City’s general revenue, it had done so as a matter of discretion. But as the City explained, Amendment No. 4 “threaten[ed] to turn that discretionary choice into a statutory requirement,” requiring it to “choose between ... reducing other services or ... increasing taxes for City taxpayers.” Ex. 47 at KCMOEC000344-345 (App 82-83). In light of the fixed nature of the City’s resources, the loss of discretion could have severe economic consequences. *See* June 26 Tr. 187:11-189:17 (T. Queen).

*Finally*, as the Auditor testified, the percent at which the City funds the Board does not “really mean anything to voters”—what matters is how the percentage “translate[s] into dollars.” June 26 Tr. 356:16-357:5 (S. Beeler). And the Auditor acknowledged that, “if the City’s general revenue fund increased from one year to the next, 25 percent of that amount would also increase year over year.” *Id.* at 384:23-385:1 (S. Beeler). In other words, if the general revenue fund were to increase, the “[c]ost of funding the Board ... would increase,” even if the percentage at which the City funded the Board stayed the same. *Id.* at 385:2-4 (S. Beeler). But rather than taking that into account, the Auditor became fixated on the very percentages she admitted were meaningless.

**c. The City’s Analysis Was Grounded In A Common Sense Analysis Of The Amendment’s Text, Not Speculation.**

The Auditor’s final justification for deeming unreasonable the information the City provided is that, in the Auditor’s view, it was “too speculative to make a prediction about

the impact of ... future laws” authorized by Amendment No. 4 because the Auditor could not predict what the General Assembly would do with the authority the Amendment conferred. June 23 Tr. 400:4-7 (S. Beeler). That explanation fares no better than the first two.

*First*, the Auditor’s refusal to consider the impact of laws authorized by Amendment No. 4 undermines the purpose of the fiscal note summary requirement. The “entire point” of a fiscal note summary “is to communicate the fiscal impact of a law the voters have not yet approved”—in this case, Amendment No. 4. June 26 Tr. 395:8-11 (S. Beeler); *see also* RSMo. § 116.175.1 (App 15) (requiring the Auditor to “assess the fiscal impact of the proposed measure”). And the sole purpose of Amendment No. 4, in turn, was to “authorize future laws.” *Id.* at 399:10-12 (S. Beeler). Thus, as the Auditor conceded, her view that it would be “too speculative” to consider the effects of those future laws leads to the absurd conclusion that it would be “*impossible* to summarize the impact of” the Amendment. June 26 Tr. 423:14-18 (S. Beeler) (emphasis added). That view cannot be reconciled with the Auditor’s statutory responsibility. It is also inconsistent with what the Auditor told Missouri voters. Far from suggesting that it was impossible to predict the fiscal impact of Amendment No. 4, the Auditor’s Fiscal Note Summary falsely assured voters that state and local government entities indicated it would have no impact at all.<sup>12</sup>

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<sup>12</sup> This also underscores the self-defeating nature of the Auditor’s claim that the City’s analysis was unreasonably speculative. Although the Auditor claims it was too speculative to predict what the General Assembly would do in the future, the Fiscal Note Summary in fact did just that. In indicating that Amendment No. 4 would have no cost, the Fiscal Note Summary assumed that the General Assembly would do *nothing* with the authority

Particularly unavailing is the Auditor’s contention that the potential effect of SB 678 “could be considered speculative” because, when the Auditor prepared the Fiscal Note Summary, “[i]t was unclear if the Governor was going to sign [it] or not.” *See* June 26 Tr. 370:24-371:17 (S. Beeler). By that point, SB 678 had been truly agreed to and finally passed, and the Auditor admitted that she did not “have any idea one way or the other” whether Governor Parson would decline to sign SB 678. *Id.* at 395:2-5, 396:10-12 (S. Beeler).<sup>13</sup> Instead of reflecting that purported uncertainty, the Auditor again put her thumb on the scales by preparing a Fiscal Note Summary that assumed SB 678 did not exist. Just five days after the Auditor provided the Fiscal Note Summary to the Secretary—and over four months before the November 2022 election—Governor Parson signed SB 678, eliminating whatever doubt the Auditor arguably could have had about its potential effect. *See* Press Release, Office of Governor Michael L. Parson, Governor Parson Signs SB 678, *Increasing Kanas City Police Department’s Annual Budget* (June 27, 2022), <https://governor.mo.gov/press-releases/archive/governor-parson-signs-sb-678-increasing->

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conferred by Amendment No. 4, or that any future laws requiring the City to provide “additional resources” would have no fiscal impact. The Auditor has never attempted to provide a factual basis for either of those speculative assumptions.

<sup>13</sup> By contrast, Ms. Queen clearly explained that the City did not “have any reason to think” Governor Parson would *not* sign SB 678 because he is aligned politically with the bill’s supporters and “had been very vocal in being pro-police.” June 26 Tr. 179:23-180:5 (T. Queen).

kansas-city-police-departments.<sup>14</sup> Despite having months before the election to do so, the Auditor took no steps to update the Fiscal Note Summary to reflect that reality.

*Second*, the Auditor’s position that she could not consider the effect of laws authorized by Amendment No. 4 ignores the common sense understanding of the Amendment and the context in which it came to appear on the ballot. The Amendment proposed to grant the General Assembly authority to “increase minimum funding for a police force established by a state board of police commissioner to ensure such police force has additional resources to serve its communities.” Ex. 2 at KCMOEC0000162 (App 22). That language suggests that, if voters approved the Amendment, a law increasing funding requirements to provide resources in *addition* to what the City was presently providing would be “next.” June 26 Tr. 181:2-15 (T. Queen). That understanding was shared by numerous stakeholders. *Id.* at 111:2-10 (Q. Lucas) (“[M]uch of the conversation surrounding [the Amendment] spoke to the fact that there would be a higher cost to Kansas City. Indeed having appeared in the Missouri Legislature next to the sponsor of the bill, the discussion both by the sponsor, by members of the committee, by everyone discussing it, the Board of Police Commissioners and others was that this related to higher costs for the City to fund policing in Kansas City.”).

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<sup>14</sup> The Court may take judicial notice of the Governor’s Press Release as a matter of public record. *See, e.g., Borrson v. Missouri-Kansas-Texas R. Co.*, 172 S.W.2d 835, 837 (Mo. 1943) (taking judicial notice of public records of the State Highway Department); *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 931 n.3 (8th Cir. 2012) (“matters of public record” are subject to judicial notice); *Hernandez v. Oregon Leg.*, 521 F. Supp. 3d 1025, 1031 n.4 (D. Or. 2021) (judicial notice may be taken of “[p]ublic records and government documents available from reliable sources on the Internet, such as websites run by governmental agencies”).

The broader context surrounding the Amendment’s appearance on the ballot in the November 2022 election further undermines the Auditor’s view. SJR 38, which proposed to put the Amendment to Missouri voters, followed on the heels of a dispute between the City and the Board regarding the use of appropriated funds that exceeded the City’s statutory obligation. *See* June 26 Tr. 103:11-105:1 (Q. Lucas). The General Assembly sought to send the City a message by carving out police funding from the Missouri Constitution’s prohibition on unfunded mandates. *See Breitenfeld*, 399 S.W.3d at 826-82. That prohibition applies only to laws that *increase* required expenditures beyond existing levels. *See id.* Thus, the General Assembly would have no reason to ask voters to approve an amendment to that portion of the State Constitution unless it intended to require the City to increase the level at which it funded the Board.

*Finally*, the Auditor’s assertion that the City’s analysis was “too speculative” cannot be reconciled with her willingness to include it in the fiscal note, and to include in other fiscal note summaries far more speculative claims of fiscal impact. For instance, in the fiscal note summaries for a series of initiative petitions proposing to amend the Missouri Constitution to provide an explicit right to reproductive freedom, the Auditor reported that “[l]ocal governmental entities estimate costs of at least \$51,000 annually in reduced tax revenues.” June 26 Tr. 418:17-22 (S. Beeler). That portion of the fiscal note summary was based on a submission by one local government entity—Greene County, Missouri—which estimated that the proposed amendment would lead to the annual loss of “135 future citizens,” which would “lead to a future loss of tax revenue of \$51,000 per year.” *Id.* at 419:6-10, 16-19 (S. Beeler). That information was based on highly speculative

assumptions regarding, among other things: (i) the number of lives lost as a result of the amendment; (ii) where those individuals who had not yet been born would live as adults; (iii) where those individuals would work and how much they would earn; (iv) the tax rates in place when those individuals became part of the tax base; (v) how much those individuals would pay in taxes; (vi) and how the loss of that tax revenue would affect Greene County’s overall tax revenue. The Auditor nevertheless credited the information Greene County provided and included it in the fiscal note summaries for the relevant initiative petitions. *Id.* at 402:4-8 (S. Beeler). Yet the Auditor refused to assess the fiscal impact of the very laws that Amendment No. 4 was designed to authorize—an outcome that underscores the subjective and malleable nature of the Auditor’s supposed reasonableness assessment.

\* \* \*

Ultimately, the Auditor’s misunderstanding of the law and flawed process generated an insufficient and unfair Fiscal Note Summary that contradicted the content of the fiscal note and precluded Missouri voters from evaluating “the desirability of the proposed amendment ... in the voting booth” on a fully informed basis. *Dotson*, 464 S.W.3d at 193 (internal quotation mark omitted). Contestees’ failure to comply with Chapter 116’s sufficiency and fairness standard constitutes an irregularity for the purposes of a post-election challenge under Chapter 115. *See id.* at 195.

**III. THE INSUFFICIENT AND UNFAIR FISCAL NOTE SUMMARY IS AN IRREGULARITY OF SUFFICIENT MAGNITUDE TO CAST DOUBT ON THE VALIDITY OF THE VOTE ON AMENDMENT NO. 4 BECAUSE THE RECORD DEMONSTRATES THE FISCAL NOTE SUMMARY HAD A DECISIVE EFFECT ON VOTERS' OPINIONS CONCERNING THE AMENDMENT.**

Chapter 115 is designed “to ensure that the results of each election are valid.” *Dotson*, 464 S.W.3d at 194. To that end, Section 115.593 authorizes this Court to order relief—including ordering a new election—if it “determines there were irregularities of sufficient magnitude to cast doubt on the validity of the initial election.” RSMo. § 115.593 (App 13). The record before the Court is clear and uncontested, and it establishes nothing short of “significant and serious doubts” about the outcome of the vote on Amendment No. 4. June 26 Tr. 265:24-266:10 (K. Akins). Relief under Chapter 115 is both appropriate and necessary.

The unrebutted expert opinion of Mr. Akins, a veteran public opinion researcher, demonstrates that if voters had been provided with accurate information reflecting the City’s analysis of the Amendment’s fiscal impact—information that Contestees should have included in the Fiscal Note Summary—the outcome of the vote could have been different. June 26 Tr. 265:24-266:10 (K. Akins); *see also* Ex. 60 at KCMOEC0012961 (App 102) (“A majority of voters say they would have opposed the Amendment if the fiscal note summary had indicated that [the Amendment] had a negative fiscal impact.... This suggests that the Amendment may not have passed had the fiscal note summary reflected the City’s position.”).

As detailed above, Mr. Akins’s opinion is based on the statistically significant results of a public opinion survey of Missouri voters who voted in the November 2022 election. *See supra* at 22-29. Those results 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. June 26 Tr. 258:15-259:5 (K. Akins). When the respondents in Mr. Akins’s survey were provided with the exact language that appeared on the ballot in November 2022, they reported that they had voted in favor of the Amendment by a margin of 24 points (53% in favor to 29% against)—virtually the same margin by which voters approved the Amendment in November 2022 (26 points). *See* Ex. 60 at KCMOEC0012960 (App 101); *see also*; Ex. 51 at 9 (App 94) (Jackson County Sample Ballot). On learning that the City believed the Amendment would have a negative fiscal impact, a majority of respondents (53%) said they would vote **against** the Amendment; only 37% of respondents said they would vote in favor, a 16-point decline in support. *See* Ex. 60 at KCMOEC0012961 (App 102); *see also* Ex. 10 at SAOAR00252 (email from City to Auditor informing Auditor that the Amendment “will have a negative fiscal impact on the City of Kansas City”); Ex. 47 at KCMOEC0000345 (App 83) (letter from City to Auditor explaining that “[a]ny increase in mandated funding—enabled by SJR 38—would limit the City’s budgetary flexibility and force it to choose between either (1) reducing other services or (2) increasing taxes for City taxpayers”). As Mr. Akins testified, for such a shift in opinion to occur immediately is notable. June 26. Tr. 259:6-24, 270:7-271:1 (K. Akins).

Support for the Amendment “further erode[d] when voters hear[d] that the Amendment could reduce [C]ity services, like fire protection and road maintenance.” Ex.



60 at KCMOEC0012963 (App 104); *see also* Ex. 24 at KCMOEC0000205 (App 30). With that information, 59% of respondents indicated they would vote against the Amendment, with only 31% saying they would vote in favor. Ex. 60 at KCMOEC0012963 (App 104). In fact, the proportion of respondents who said they would *definitely* vote “no” (34%) exceeded the total proportion of respondents who said they would or might vote “yes” (31%). *Id.*

Moreover, the data demonstrate that the change in voters’ opinions was not driven by “one or two niche audiences across the state or in one region of the state.” June 26. Tr. 260:11-261:5 (K. Akins); *see supra* at 27-29. Rather, support for the Amendment eroded across “every major subgroup,” including across partisan lines and across media markets. Ex. 60 at KCMOEC0012962, KCMOEC0012964 (App 103, 105).

The evidence before this Court underscores “just how important [ballot] language is.” June 26 Tr. 250:10-24 (K. Akins). Words matter. *Id.* at 291:4-11 (K. Akins). So do costs—even for proposals that might otherwise be popular. *See, e.g., id.* at 112:2-16 (Q. Lucas). When Missouri voters entered the voting booth on November 8, 2022, what they saw on the ballot—“local governmental entities estimate no additional costs or savings related to this proposal” (Ex. 51) (App 94)—was fiction. That fiction precluded voters from “assess[ing] responsibly the cost of” the increased minimum funding and additional resources that Amendment No. 4 promised. *See* June 26 Tr. 128:5-14 (Q. Lucas). And unrebutted expert analysis demonstrates that had Contestees told voters the truth, the Amendment “may have failed.” June 26 Tr. 265:24-266:10 (K. Akins). Accordingly, there

is sufficient doubt about the outcome of the vote—the “validity of the initial election” (RSMo. § 115.593 (App 13))—on the Amendment to warrant relief under Chapter 115.

### **CONCLUSION**

Contestees failed to comply with their statutory duties and knowingly misinformed Missouri voters about the costs associated with a proposed amendment to the State’s Constitution. Contestees’ actions had a decisive effect on the outcome of the vote on Amendment No. 4. Missouri voters should have the opportunity to make an informed choice about their Constitution—a choice they can make only if they are presented with accurate information regarding the Amendment’s fiscal impact on the City.

The Court should set aside the results of the November 8, 2022 vote on the Amendment and order a new election.

Respectfully submitted,

/s/ Tara M. Kelly

Tara M. Kelly, No. 64624  
Senior Associate City Attorney  
2300 City Hall  
414 E. 12th Street  
Kansas City, Missouri 64106  
Phone: 816.513.3117  
Tara.Kelly@kcmo.org

/s/ James R. Layton

James R. Layton, No. 45631  
Tueth Keeny Cooper Mohan & Jackstadt,  
P.C.  
34 N. Meramec, Suite 600  
St. Louis, Missouri 63105  
Phone: 314.880.3600  
Email: jlayton@tuethkeeney.com

/s/ Debo P. Adegbile

Debo P. Adegbile (*pro hac vice*)  
Wilmer Cutler Pickering Hale and Dorr LLP  
7 World Trade Center  
250 Greenwich Street  
New York, NY 10007  
Phone: 212.230.8800  
Debo.Adegbile@wilmerhale.com

/s/ Andrew S. Dulberg

Andrew S. Dulberg (*pro hac vice*)  
Ivan Panchenko (*pro hac vice*)  
Wilmer Cutler Pickering Hale and Dorr LLP  
60 State Street  
Boston, MA 02109  
Phone: 617.526.6000  
Andrew.Dulberg@wilmerhale.com  
Ivan.Panchenko@wilmerhale.com

/s/ Britany Riley-Swanbeck  
Britany Riley-Swanbeck (*pro hac vice*)  
Wilmer Cutler Pickering Hale and Dorr LLP  
2100 Pennsylvania Avenue NW  
Washington, DC 20037  
Phone: 202.663.6137  
Britany.Riley-Swanbeck@wilmerhale.com

*Attorneys for Contestant Quinton Lucas*

## CERTIFICATE OF SERVICE

The undersigned counsel certifies that a true and correct copy of the foregoing brief was served electronically via Missouri CaseNet e-filing system on the 7th day of August, 2023, to:

Jeff P. Johnson, Mo. Bar No. 73249  
Deputy Solicitor General  
Missouri Attorney General's Office  
Post Office Box 899  
Jefferson City, MO 65102  
Tel: (314) 340-7366  
Fax: (573) 751-0774  
jeff.johnson@ago.mo.gov

Todd Anthony Scott  
Assistant Attorney General  
207 W. High Street  
Post Office Box 899  
Jefferson City, MO 65102  
Tel: (573) 751-8366  
todd.scott@ago.mo.gov

*Attorneys for Contestees*

The undersigned counsel further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 17,076 words.

Pursuant to Rule 84.06(c), this brief:

1. contains the information required by Rule 55.03;
2. complies with the limitations in Rule 84.06(b); and
3. contains 17,076 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2023.

/s/ Tara M. Kelly