SC99931

IN THE SUPREME COURT OF MISSOURI

QUINTON LUCAS,

Contestant,

v.

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

Contestees.

REPLY BRIEF OF CONTESTANT QUINTON LUCAS

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INTRODUCTION

Contestees do not dispute that they prepared and certified a Fiscal Note Summary for Amendment No. 4 that disregarded the City's analysis of the Amendment's costs, including that the measure would have a "negative fiscal impact" on the City and impose costs of tens of millions of dollars.[1] Indeed, the Auditor conceded that she "exclude[d]" from the Fiscal Note Summary "the perspective of the only [c]ity in the entire state that's actually affected by" the Amendment. Tr. 408:22-409:1. Instead, Contestees told voters that all state and local government entities—which necessarily included the City—believed that a measure allowing the General Assembly to require the City to "increase minimum funding" and provide "additional resources" for the Board would cost the City and its taxpayers nothing. That is false, and unrebutted expert evidence establishes significant doubt that the outcome of the vote on the Amendment would have been the same had voters known the truth.

Contestees' response to this reality is remarkable. First, they seek to distract from the merits by asserting that this Court's precedents (which, along with statutory authority, authorize this contest) were wrongly decided and urging the Court to overturn them. Next, they claim for the first time that Mr. Lucas—who they concede is a registered Missouri voter—lacks standing even though the law permits any "registered voter" to challenge "[t]he result of any election on any question." RSMo. § 115.553.2. For the reasons set forth below, the Court can readily dispense with both arguments.

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[1] Defined terms have the same meaning as in Mr. Lucas's opening brief ("Br."). Unless otherwise specified, all emphasis has been added.

When, after 36 pages, Contestees finally engage with the merits, their arguments are unavailing. They ignore (in equal measure) the Amendment's text, the Auditor's statutory responsibility, and the City's analysis of the Amendment's fiscal impact. The Amendment authorizes the General Assembly to pass laws that will "increase minimum funding" and provide "additional resources" for the Board. Ex. 2 at KCMOEC0000162 (App 22). To claim (as Contestees do) that the Auditor "cannot speculate" about the Amendment's fiscal impact is to abdicate all responsibility—the purpose of a fiscal note summary is to predict the fiscal impact of proposed measures. The City did so, informing the Auditor that the Amendment would have a "negative fiscal impact" (Ex. 24 at KCMOEC0000210 (App 35)), would be a "blank check" drawn on the City's coffers (Ex. 37 at KCMOEC0000256 (App 69)), and could require the City to raise taxes or reallocate funds from other services (Ex. 47 at KCMOEC0000345 (App 83)).

To defend the Fiscal Note Summary (which says none of these things), Contestees focus myopically on the fact that the City has previously appropriated over 25% of its general revenue to the Board. Opp. 37-46. That is beside the point. The Amendment does not limit the General Assembly's authority to require the City to provide "increase[d] minimum funding" and "additional resources" for the Board. Ex. 2 at KCMOEC0000162 (App 22); Tr. 398:5-17 (S. Beeler). As the City repeatedly told Contestees, the Amendment's open-ended grant of authority imposes numerous costs beyond a potential increase in the City's funding obligation from 20% of general revenue to 25%. Regardless, even that change alone imposes a "cost" as Contestees define it, including because the City funded the Board at less than 25% of general revenue in the prior fiscal year.

Nor can Contestees effectively parry Mr. Lucas's showing, based on expert evidence Contestees concede is "uncontradicted [and] uncontroverted" (Opp. 31), that the outcome of the vote on the Amendment likely would have been different if voters had seen a Fiscal Note Summary reflecting the City's analysis. Supported only by counsel's speculation, Contestees' claims that the public opinion research Mr. Lucas introduced was inaccurate and biased ring hollow.

Finally, Contestees resurrect their argument that this contest should be dismissed because Mr. Lucas's initial petition was not verified. Mr. Lucas previously explained why that argument is meritless, and the Court rejected it in denying Contestees' motion to dismiss. The Court's earlier decision is both dispositive and correct.

ARGUMENT

I. THIS COURT'S PRECEDENT PERMITS CHALLENGES TO ELECTION RESULTS BASED ON BALLOT TITLE DEFECTS, AND CONTESTEES' ARGUMENTS TO OVERTURN THAT PRECEDENT ARE MERITLESS

Contestees spend most of the Opposition attempting to erect purported hurdles that they assert preclude the Court from adjudicating this contest. Opp. 13-36, 50-52. Contestees' principal argument is that the law does not permit Mr. Lucas to challenge election results based on ballot title defects. *Id.* at 13-29. But Contestees admit that this Court in *Dotson v. Kander*, 464 S.W.3d 190 (Mo. banc 2015) held that the law authorizes such challenges. Opp. 13. In the face of that concession, Contestees accuse the Court of legal error and expressly ask it to overturn *Dotson*. *Id.* at 15.

The Court should decline Contestees' invitation. "Under the doctrine of *stare decisis*, a decision of this Court should not be lightly overruled." *Sw. Bell Yellow Pages,*

Inc. v. Dir. of Revenue, 94 S.W.3d 388, 390 (Mo. banc 2002). The doctrine of *stare decisis* may be disregarded only where the prior decision at issue is "clearly erroneous and manifestly wrong." *Eighty Hundred Clayton Corp. v. Dir. of Revenue*, 111 S.W.3d 409, 411 n.3 (Mo. banc 2003).

Contestees cannot make the necessary showing because *Dotson* was correctly decided. In *Dotson*, the Court considered an election contest involving the summary statement portion of a ballot title. 464 S.W. at 192-193. Like Contestees, the contestee in *Dotson* argued that the law only permits pre-election review of ballot titles. *Id.* at 194. In evaluating that argument, the Court observed that Chapter 115 "provides guidelines for post-election challenges to election results for irregularities." *Id.* (cleaned up). The Court concluded, based on its precedent, that "the violation of election statutes" is "an irregularity that may be addressed in an election contest." *Id.* Applying that principle, the Court held that a violation of the requirement that a ballot title be sufficient and fair constitutes an irregularity for purposes of Chapter 115, and therefore can provide the basis for an election contest. *Id.* The Court rejected the argument that "chapter 116 is the exclusive means to challenge [a] ballot title," reasoning that "[a]lthough chapter 116 provides a pre-election challenge to a ballot title, there is no statutory indication that it is the ***only*** vehicle for such a challenge." *Id.*

The Court's conclusion in *Dotson* was (and remains today) a natural extension of its precedent. Three decades before *Dotson*, the Court held in *Beatty v. Metro. St. Louis Sewer Dist.*, 700 S.W.2d 831 (Mo. banc 1985) that election contests "properly encompass[]," among other things, matters that affect the "outcome of an election." *Id.* at

838. The language that appears on voters' ballots does just that. For that reason, the Court in *Beatty* held that "[t]he wording of [a] proposition on a ballot" is "cognizable … in an election contest." *Id.* Fifteen years after *Beatty*, this Court expressly rejected the claim that "pre-election judicial review" is the only means by which to challenge a ballot title. *United Gamefowl Breeders Ass'n of Missouri v. Nixon*, 19 S.W.3d 137, 139 (Mo. banc 2000). The Court underscored that Section 116.190 "do[es] not expressly provide that [it] is the exclusive method[]" for judicial review of ballot titles. *Id.*

Thus, far from being an "outlier," as Contestees assert (Opp. 28), *Dotson* faithfully applied this Court's precedent. Contestees do not identify a single case that undermines *Dotson*'s reasoning or conclusion.[2] Instead, boldly accusing this Court of "approv[ing]" a "maneuver" in *Dotson*, Contestees assert that *Dotson* (A) created an "unauthorized" remedy inconsistent with Chapters 115 and 116; (B) overlooked purported limitations on what constitutes an "irregularity" for purposes of Chapter 115; and (C) conflicted with the Missouri Constitution. Each contention fails.

A. *Dotson* Is Consistent With Chapters 115 And 116

This Court's consistent construction of Chapters 115 and 116 over the course of more than 30 years—and the General Assembly's failure to amend either chapter to

[2] Indeed, Contestees make clear that their arguments are based on the "separate writings"—*i.e.*, a concurrence and a dissent—of Judge Stith in *Dotson* and *Shoemyer v. Kander*, 464 S.W.3d 171 (Mo. banc 2015). *See* Opp. 16-17. In the eight-plus years since it decided those cases, the Court has shown no inclination to adopt Judge Stith's position. Nor is there reason to do so now.

overrule this Court's holdings—refutes Contestees' claim that *Dotson* created an "unauthorized" remedy at odds with the applicable "statutory scheme." Opp. 15-17.

Contestees argue, for instance, that the law does not permit voters to challenge election results based on ballot title defects because the provisions in Chapter 115 that permit such challenges conflict with aspects of Chapter 116. Opp. 18-20. That argument relies on Section 116.020, which provides that the "election procedures" in Chapter 115 "apply to elections on statewide ballot measures, except to the extent that the provisions of chapter 116 directly conflict, in which case chapter 116 shall prevail." RSMo. § 116.020. Section 116.020 cannot bear the weight Contestees place on it. To begin, that provision speaks only to the "***election*** procedures" in Chapter 115, not the "election ***contest*** procedures." Section 116.020 therefore says nothing about the application of the Chapter 115 provisions pertinent here.

Regardless, there is no conflict between the relevant provisions in Chapters 115 and 116 because, as Contestees admit, those provisions concern different legal actions. *See* Opp. 20. Chapter 115 authorizes ***post***-election challenges to the "result of any election on any question" (RSMo. § 115.553.2), while Chapter 116 concerns ***pre***-election challenges to ballot titles. It is therefore unremarkable that actions under Chapters 115 and 116 are governed by different procedures, subject to different timelines, and authorize different remedies. That does not mean, however, that there is a conflict between them within the meaning of Section 116.020. *See Edwards v. City of Kirkwood*, 142 S.W. 1109, 1110 (Mo. App. 1912) (where two laws "can stand together and be of effect, it is the duty of the court to construe them so as to harmonize and not nullify either"). As this Court has repeatedly

recognized, the existence of procedures for pre-election review does not bar post-election review. *United Gamefowl Breeders Ass'n*, 19 S.W.3d at 139 (Section 116.190 "only govern[s] pre-election review" and does not preclude post-election review of a ballot title); *Marre v. Reed*, 775 S.W.2d 951, 953 (Mo. banc 1989) (permitting post-election challenge to voter qualifications notwithstanding statutes describing pre-election procedures for such challenges). Contestees cite no authority to the contrary.[3]

Similarly unavailing is Contestees' argument (Opp. 20-21) that post-election challenges are precluded by amendments to Section 116.190 that require pre-election challenges to be "fully and finally adjudicated within one hundred eighty days of filing, and more than fifty-six days prior to [the] election." RSMo. § 116.190.5. This Court has rejected the argument that "the specific timeline for filing a pre-election challenge in section 116.190 … control[s] over the general election contest provisions in chapter 115." *Dotson*, 464 S.W.3d at 196. The amendments to Section 116.190 change nothing. The timeline in Section 116.190.5 is expressly limited to "action[s] brought under ***this section***"—*i.e.*, ***pre***-election challenges. But this is a ***post***-election challenge brought pursuant to Chapter 115. And the deadline Section 116.190.5 imposes—which is intended to ensure that pre-election challenges do not continue as ballots are printed and votes are cast—makes no sense in the post-election context. In addition, the General Assembly enacted the amendments on which Contestees rely ***before*** the Court's July 2015 decision

[3] Contestees also ignore that Section 115.553.2 authorizes challenges to the "result of ***any*** election on ***any*** question" (RSMo.§ 115.553.2)—not just in circumstances where there was no opportunity for pre-election review under Chapter 116.

in *Dotson*. The amendments therefore could not have been intended to "change[] the [C]ourt's interpretation" of the law, as Contestees suggest (Opp. 21). Indeed, although the General Assembly has had over eight years since *Dotson* to amend Chapters 115 and 116 to preclude election contests based on ballot title defects, it has not done so.[4]

Dotson was consistent with the law when it was decided, and it is consistent with the law today.[5]

B. Defective Ballot Language Constitutes An Irregularity

Contestees next argue that Chapter 115 only permits review of violations of election statutes governing "Election Day conduct." Opp. 24. That is not the law, and, even if it were, ballot language is integral to "Election Day conduct."

Ordinary "rules of statutory construction and existing precedent clearly indicate [that] violation of an election statute is an irregularity" for purposes of Chapter 115 because "the plain meaning of the word irregularity clearly would include disregarding a statute." *Gerrard v. Bd. of Election Comm'rs*, 913 S.W.2d 88, 89-90 (Mo. App. E.D. 1995). Contestees cite no authority construing "irregularity" in Chapter 115 to encompass

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[4] Moreover, if the General Assembly intended all ballot title actions to be resolved before an election, it would presumably amend Chapter 116 to require public notice of proposed ballot language in time for voters to bring pre-election challenges. Currently, the statutory scheme only provides for public notice (by local election authorities) during "the second week prior to the election" (RSMo. § 115.127.2), long after the ten-day limit for commencing an action under Section 116.190 has run.

[5] Insofar as Contestees request that the Court limit *Dotson* "to [its] facts and … not extend [its] reasoning to fiscal note summaries" (Opp. 15), there is no basis for such a distinction. *Dotson*'s holding applies to "ballot title[s]" (464 S.W.3d at 195), which include fiscal note summaries (RSMo. § 116.180).

violations of just those election laws that supposedly affect "Election Day conduct." Indeed, ***all*** election laws affect the conduct of elections. *See Dotson*, 464 S.W.3d at 194-195 (observing that "courts have considered the violation of election statutes an irregularity that may be addressed in an election contest," and rejecting the argument that "the 'irregularities' referenced in chapter 115 refer to conduct during an election").

Even if this Court were to limit Chapter 115 as Contestees suggest, presenting misleading ballot language to voters ***is*** "Election Day conduct." That is why, long before *Dotson*, Missouri courts (including this Court) deemed post-election challenges to ballot language cognizable. *See, e.g.*, *Beatty*, 700 S.W.2d at 838 ("The wording of the proposition on a ballot" is an "issue[] cognizable … in an election contest."); *Gerrard*, 913 S.W.2d at 90 (evaluating post-election challenge to ballot language). This contest proves the point: Public opinion research shows that the Fiscal Note Summary affected voters' conduct and may have changed the outcome of the election. *See* Br. 24-32.

Unable to contend with this Court's precedent, Contestees assert that "the evidence at trial supports the proposition that election irregularities are commonly understood as the conduct of the election." Opp. 24. That is unsupported, inaccurate, and beside the point. Contestees presented no evidence of "common understanding" at the June 26, 2023 hearing. Contestees' reliance on the Secretary's testimony is misplaced because he did not purport to comprehensively define "irregularity" for purposes of Chapter 115. Tr. 306:8-21. In fact, no witness testified that an insufficient and unfair ballot title is not an irregularity. In any event, testimony on this topic is irrelevant because what constitutes an "irregularity" is a question of law, and courts "need not afford [an agency's] interpretation"

on "legal issues" "any deference." *Missouri Pub. Serv. Comm'n v. Union Elec. Co.*, 552 S.W.3d 532, 539 (Mo. banc 2018).

Contestees' reliance on out-of-state cases construing other states' unique election laws (Opp. 24-28) goes nowhere. None of Contestees' cases holds that defective ballot language cannot constitute an election irregularity. And other states' courts permit challenges to election results based on ballot language defects. *See, e.g.*, *Dacus v. Parker*, 466 S.W.3d 820, 829 (Tex. 2015) (invalidating election results based on ballot language defect); *Wadhams v. Bd. of Cnty. Comm'rs of Sarasota Cnty.*, 567 So. 2d 414, 417-18 (Fla. 1990) (similar); *Beck v. City of Cincinnati*, 124 N.E.3d 120, 122 (Ohio 1955) (similar).

C. This Court Can Grant The Relief Authorized By Chapter 115

Finally, without addressing Mr. Lucas's arguments on this issue (Br. 38-39), Contestees repeat their assertion that the Court's authority to grant relief was extinguished when the Amendment became effective 30 days after the election. *See* Opp. 28-29. Contestees do not deny that the contestees in *Shoemyer* made the same argument (2015 WL 718364 at *25-27), and this Court rejected it (464 S.W.3d at 174). Nor do they explain why the Court should disregard that precedent. Contestees also do not dispute that their proposed rule is unworkable and would eliminate voters' right to challenge successful constitutional amendments. *See* Br. 39. The Court rejected Contestees' attempt to dismiss Mr. Lucas's election contest on this basis (*see* Order Overruling Contestees' Mot. to

Dismiss (Feb. 9, 2023)), and Contestees articulate no reason for reaching a different conclusion now.[6]

II. MR. LUCAS HAS STANDING

For the first time, Contestees contend that Mr. Lucas lacks standing, purportedly because (they say) he brings this election contest in his official capacity as the City's Mayor rather than in his personal capacity as a registered voter. Opp. 30-36. This argument is meritless.

Mr. Lucas plainly has standing to contest this election. Standing requires a "legally protectable interest in the litigation," which exists if the plaintiff is "directly and adversely affected by the action in question or if the plaintiff's interest is conferred by statute." *Williston v. Vasterling*, 536 S.W.3d 321, 339 (Mo. App. W.D. 2017). Chapter 115 confers standing on any "registered voter[] from the area in which the election was held." RSMo. § 115.553.2. Contestees concede that Mr. Lucas satisfies that standard. *See* Opp. 30. Nothing more is required. *See State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 233 (Mo. App. 1978) ("As registered voters these plaintiffs were authorized by [] 115.553(2) to contest 'any question' in an election.").

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[6] Particularly perplexing is Contestees' suggestion that the Fiscal Note Summary is a mere "procedural" defect unworthy of this Court's attention. Opp. 28-29. "The dichotomy between procedural defects … and substantive defects … is not found in the language of the constitution or [relevant] statutes." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 828 (Mo. banc 1990). Regardless, the challenge here concerns whether Missourians were fully informed when they voted on the Amendment, which is a redressable substantive defect.

Contestees attempt to sidestep their fatal concession by arguing that Mr. Lucas brings this contest not in his personal capacity, but solely in his official capacity as the City's Mayor, a conclusion they reach supposedly because the City Attorney's Office represents Mr. Lucas and the City has funded outside counsel. Opp. 30. Neither the law nor the facts support Contestees' claim. The law is clear that elected officials can sue in their personal capacities. *See, e.g.*, *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 9 n.6 (Mo. banc 2023) ("[N]othing prevents" the Attorney General from challenging a ballot title "in his individual capacity."); *Brooks v. State*, 128 S.W.3d 844, 849 (Mo. banc 2004) (plaintiffs, including elected officials, had standing to bring claims in their personal capacities as taxpayers); *State ex rel. City of Desloge v. St. Francois County*, 245 S.W.3d 855, 861 (Mo. App. W.D. 2007) (similar).

Courts evaluate questions of capacity by considering the content of pleadings, evidence supporting pleaded facts, and the nature of the claimed injury. *See Desloge*, 245 S.W.3d at 861 n.3 (elected officials had standing in their personal capacities because they "alleged their status as taxpayers" in their petition); *In re Est. of Dawes*, 891 S.W.2d 510, 517 (Mo. App. S.D. 1994) ("[T]he capacity in which a party sues or is sued must be determined from the allegations of the pleadings."); *Sommer v. City of St. Louis*, 631 S.W.2d 676, 679-680 (Mo. App. E.D. 1982) (evaluating pleadings and trial testimony to determine if elected official had demonstrated requisite "injury and damage to himself" in personal capacity as a taxpayer). Mr. Lucas's Petition makes clear that he brings this contest in his personal capacity. Am. Verified Pet. ¶ 3. So does his unrebutted testimony. Tr. 101:2-15 ("I am not here in my capacity today as Mayor…. I am a registered voter

here today."), 160:11-13 (testifying that he "as a registered voter" has "an interest in this litigation"). And the injury Mr. Lucas seeks to redress—a vote permeated by misinformation—affected him in his personal capacity as a registered voter.

Contestees cite no case in which a court has precluded an elected official from maintaining a claim in their personal capacity even when they could not do so in their official capacity. Indeed, the law is to the contrary. *See Sommer*, 631 S.W.2d at 679-680 (evaluating whether elected official demonstrated right to relief in personal capacity even after concluding he could not bring claims in his official capacity). Nor do Contestees identify any authority that would allow the Court to ignore Mr. Lucas's pleading and instead determine the capacity in which he has sued by considering the nature of his relationship with his counsel.

Although the absence of legal authority alone is fatal to Contestees' argument, the facts on which they rely also do not avail them. To begin, Contestees mischaracterize the record (Opp. 32), omitting any mention of Mr. Lucas's testimony that he is pursuing this contest as "a registered voter," not "as Mayor." Tr. 101:2-15. Nor do Contestees attempt to explain why it is relevant that Mr. Lucas does not have written engagement letters with counsel, cannot recall the specific date on which the representation commenced, and does not personally pay counsel's fees (Opp. 32-33). None of that is required, nor does it bear on whether Mr. Lucas is pursuing this contest in his personal capacity.[7]

[7] Indeed, Contestees' argument would preclude a putative contestant from seeking *pro bono* representation from anyone other than a sole practitioner who is registered to vote in Missouri, because entities such as law firms and non-government organizations cannot bring challenges under Chapter 115.

Contrary to Contestees' suggestion that there is something unusual about the City Attorney's Office and outside counsel representing Mr. Lucas in his personal capacity (Opp. 33-34), Ms. Queen offered unrebutted testimony that the City has represented employees and elected officials in their personal capacities in taxpayer suits (*Dujakovich v. Carnahan*, 370 S.W.3d 574 (Mo. banc 2012)), actions seeking to quash subpoenas, and more. Tr. 167:1-25, 168:10-16. Indeed, the City Attorney's Office has previously represented Mr. Lucas in defending against claims asserted against him in his personal capacity. *Id.* at 130:16-25 (Q. Lucas).[8] Outside counsel's representation of Mr. Lucas is similarly unremarkable, and consistent with the terms of outside counsel's engagement with the City, which permits outside counsel to "represent … any officials or employees" of the City in litigation (without mention of the capacity of those individuals' suits) and "[p]erform such other related items as assigned by the City Attorney." Ex. 115 at 1.

Finally, the Court can ignore Contestees' claim that entertaining this contest would create a "widespread threat of litigation." Opp. 36. The law already permits ***any*** registered Missouri voter to contest "[t]he result of ***any*** election on ***any*** question." RSMo. § 115.553.2. The category of potential contestants under Chapter 115 is so broad that this contest could not possibly expand it.

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[8] Such representations are consistent with the City Charter. *See* Tr. 165:17-166:13 (T. Queen). Contestees do not explain why their quibbles with the City's interpretation of its own Charter (Opp. 33-34) are relevant to Mr. Lucas's standing. Insofar as Contestees claim that there is something improper about the City funding outside counsel because "City resources cannot be used for the private litigation of a registered voter," Contestees themselves admit that (i) City resources can be expended to serve "public municipal purpose[s]"; and (ii) the City has an interest in this contest (*i.e.*, the funding serves a "public municipal purpose"). *See* Opp. 34-36.

III. THE FISCAL NOTE SUMMARY WAS INSUFFICIENT AND UNFAIR

Mr. Lucas's opening brief established that (i) the Fiscal Note Summary did not summarize the fiscal note; (ii) the Fiscal Note Summary did not state the Amendment's cost; (iii) the Fiscal Note Summary mischaracterized the City's analysis; and (iv) the Auditor's justification for ignoring the City is unreasonable.[9] Contestees expressly concede the first issue, admitting that, although a fiscal note summary ***must*** "synopsize the fiscal note," "[t]he Fiscal Note Summary … ***did not*** 'summarize'" the portion of the fiscal note reflecting the City's analysis. Opp. 38, 41. This failure is fatal.[10]

In arguing otherwise, Contestees advance two propositions: that Section 116.175 requires the Auditor to report only "the additional expenditure of funds" (Opp. 38), and that the Amendment "does not impose an increased amount on the City" because the City had previously funded the Board at over 25% of general revenue (Opp. 40). Both propositions are false.

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[9] Contestees' assertion that the first two of these grounds were "unpleaded" (Opp. 41) is belied by their own reference to Mr. Lucas's Amended Verified Petition. As Contestees note, Mr. Lucas alleged that the "fiscal note summary falsely represented the City's position as to the Amendment's fiscal impact" (*id.*), which necessarily encompasses Contestees' failure to summarize the fiscal note containing the City's analysis. And the argument that the Fiscal Note Summary does not state the Amendment's cost is just another way of saying that the Fiscal Note Summary "inaccurately represents the Amendment's actual fiscal impact" (*id.*).

[10] Contestees' only response is the straw man that Mr. Lucas would require the Auditor to summarize in a fiscal note summary "every response" included in the fiscal note. Opp. 41-42. Mr. Lucas has never suggested that. His only request was that Contestees summarize "the perspective of the only [c]ity in the entire state that's actually affected by" the Amendment. Tr. 408:22-409:1 (S. Beeler).

A. Section 116.175 Does Not Support Contestees' Argument

Contestees' argument that the Auditor need only include in fiscal note summaries "additional amount[s] incurred by … governmental unit[s]" (Opp. 38) is irreconcilable with the text of Section 116.175.3. Contestees do not dispute that Section 116.175.3 does not contain the words "additional," "net additional," or any synonym, and the Auditor could not identify any law that limits fiscal note summaries as Contestees suggest. Tr. 404:24-405:6. That is because Section 116.175.3 plainly requires fiscal note summaries to "state the measure's estimated cost or savings" (RSMo. § 116.175.3)—*i.e.*, ***any*** cost or savings.

Contestees' resort to the dictionary does not help. Even if "cost" meant nothing other than "monetary expenditure" (Opp. 38), that does not bridge the gap between what Section 116.175.3 says and what Contestees would like it to say, because a "monetary expenditure" is not an "***additional*** monetary expenditure" (Opp. 44). Contestees' definition also leads to the assertion that "non-direct and non-financial ***costs***" are not "costs" (Opp. 40), which is both absurd and inconsistent with another plain and ordinary meaning of "cost" unconnected to "monetary expenditures": "[t]hat which must be given or surrendered in order to acquire, produce, accomplish, or maintain something." 3 Oxford English Dictionary 988 (2d ed. 1989).[11]

[11] Mr. Lucas in no way "endorses" Contestees' interpretation of the statute. Opp. 39. The reason that the City did not suggest the Amendment increased its costs "by $193.5 million—the entire 25 percent of general revenues" (Opp. 39) is that, as Contestees acknowledge (Opp. 6-7), the City was already required by law to appropriate to the Board up to 20% of general revenues.

Regardless, even if the Auditor's only obligation were to report "monetary expenditure[s]" (additional or otherwise), she should have done so here. As the Auditor reported in the fiscal ***note***, the City explained that even if the Amendment only increased its obligation to fund the Board from 20% of general revenue to 25%, that would reflect "an increase" of "more than $38.7 million." Ex. 29 at SOSAR0014 (App 53); *see also id.* ("[T]he resolution could increase the city's mandatory funding for the police."). The Auditor agreed that the City "said there would be increased costs for the police." Tr. 371:11-17; *see also id.* at 410:12-14 (testifying that the City "gave some indication of potential costs").[12] Having recognized that the City reported "monetary expenditure" and even "additional monetary expenditure," the Auditor's duty (even as Contestees construe it) was to include that information—"the measure's estimated cost" (RSMo. § 116.175.3)—in the Fiscal Note Summary.

B. The City's Prior Funding For The Board Cannot Save Contestees

Throughout the Opposition, Contestees cling to the fact that, in certain fiscal years, the City funded the Board above 25% of general revenue, claiming that this (i) shows the Amendment would not impose costs on the City and (ii) justifies the Auditor's conclusion that the City's analysis was not reasonable. Opp. 37-44. Contestees' argument ignores the

[12] Contestees attempt to explain away this testimony by suggesting it reflected an outdated view. Opp. 40 n.5. That is false. The cited testimony refers to the Auditor's position as of June 9, 2022 (Tr. 371:11-17) and June 26, 2023 (*id.* at 410:12-14), when the supposed "new facts" to which Contestees refer—the level at which the City funded the Board in fiscal year 2022—were well known to the Auditor.

text of Amendment No. 4, the Auditor's statutory obligation, and the information the City provided.[13]

The Amendment's text demonstrates that its entire purpose is to impose fiscal consequences on the City that are unlimited in scope. It permits the General Assembly to enact laws "that ***increase*** minimum funding" and provide "***additional*** resources" for the Board. Ex. 2 at KCMOEC0000162 (App 22). And Contestees do not dispute that there was no reason for the General Assembly to propose this constitutional amendment unless it intended to increase funding above then-current levels. The Auditor herself "recognize[d] that [the Amendment] was likely to have a fiscal impact on Kansas City." Tr. 381:7-9. She also agreed that the Amendment imposes "[n]o limitation on the authority of the General Assembly to increase the funds that Kansas City provides to the Board." *Id.* at 398:14-17. Contestees' fixation on the 25% figure ignores the broader point that, as the City repeatedly told Contestees (and their own witnesses agreed), the Amendment is a blank check that places the City's entire budget at the General Assembly's control.

[13] Contestees abandon two of the Auditor's documented justifications for excluding the City's analysis from the Fiscal Note Summary. In real time, the Auditor's "explanation of … exclusion of fiscal note information from the fiscal note summary" was based on three considerations. One was that SB 678 "ha[d] not yet been signed . . . by the governor." Ex. 49 at 1. Contestees do not even try to defend the Fiscal Note Summary on this basis. Another basis was that although the City reported that the Amendment would "increase[] funding for the police department," there would be a resulting "decrease[]" in "funding for other services," such that there would be no "additional costs … overall." *Id.* Contestees now deny that this had anything to do with their decision. Opp. 40 (exclusion of the City's analysis was "not due to offsetting"); *see also* Tr. 405:7-11 (agreeing that a law that makes the City pay more for something "still imposes a cost" even if the additional amount is offset).

It is no answer to say (as Contestees do) that the Auditor "cannot speculate" about the future laws the Amendment authorizes. Opp. 45. That amounts to abdication of the Auditor's statutory responsibility. The purpose of the fiscal note summary process is to estimate the fiscal impact of measures that are not yet law—an inherently forward-looking exercise. Because the entire purpose of the Amendment is to enable future laws, one cannot assess its fiscal impact without considering the impacts of those future laws. *But see* Tr. 399:10-16 (agreeing that "the whole point" of the Amendment was to authorize future laws, and that the Auditor "did not take into account the effect of those future laws"). Contestees' position therefore means (as the Auditor conceded) that it is "***impossible*** to summarize" the Amendment's impact. Tr. 423:14-18. That is incorrect, and incompatible with the law. *See* RSMo. § 116.175.1 ("[T]he [A]uditor ***shall*** assess the fiscal impact of the proposed measure.").[14] Nor is it what Contestees told voters. Instead of conveying that the impact of the Amendment was incalculable, Contestees said that the City and all other government entities believed the Amendment would have no cost—an assertion itself predicated on Contestees' speculation that the General Assembly would do nothing with the authority the Amendment confers.

Moreover, Contestees' pretense that the Amendment's ***only*** cost is that "the City would continue to pay 25 percent of its general revenues to the KCPD" (Opp. 37) is

[14] In addition, as Mr. Lucas explained—and Contestees do not deny—it is inconsistent with the Auditor's practices. Br. 61-62. The Auditor has credited reports of potential fiscal impact based on far more tenuous reasoning than the City's assumption that a measure that enables laws "increas[ing] minimum funding" and requiring "additional resources" would impose cost. *Id.*

untethered from what the City reported to Contestees. Contrary to Contestees' blinkered perspective, the City identified numerous costs:

- "A change to the percentage [the City must provide to the Board] would limit the City's budgetary flexibility and necessitate a reduction in other services the City provides." Ex. 24 at KCMOEC0000205 (App 30).
- "[T]he resolution could increase the City's mandatory funding for the police and decrease its funding for … fire protection services, roadway and infrastructure maintenance, and other municipal services." *Id.*[15]
- "The amendment … 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. This open-ended funding obligation, which would impair the City's ability to provide other services that its residents need and rely upon, could certainly impose substantial additional costs on the City." Ex. 37 at KCMOEC0000256-257 (App 69-70).
- "[T]he General Assembly could approve legislation requiring the City to appropriate even more of its general revenue fund to the Board. Consider what would happen if the General Assembly compelled the City to allocate 40%, 50%, or 100% of its general revenue fund to the Board. That would undoubtedly have

[15] Contestees cannot undermine the City's analysis by pointing out that in Summer 2022, the City had not itemized reductions to specific services. Opp. 44. There was no need to do so because the Amendment had not yet passed. Moreover, Contestees only learned that the City had not identified specific budget cuts during this litigation, so that fact did not affect their preparation and certification of the Fiscal Note Summary.

catastrophic consequences for the City's budget." Ex. 47 at KCMOEC0000344 (App 82).

- "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." *Id.* at KCMOEC0000345 (App 83).

Contestees ignore all of this.

Finally, Contestees' argument fails even on its own terms. The City made clear to Contestees months before the election that in the then-current fiscal year, it was funding the Board at 24.3% of general revenue. Ex. 33 at KCMOEC0000230 (App 65); Ex. 37 at KCMOEC0000257 (App 70). No amount of dissembling by Contestees regarding the availability of federal funding (Opp. 7) can change that 24.3% is less than 25%. Contestees' sole defense of the Auditor's purported reasonableness analysis fails.[16]

[16] That the City funded the Board at 24.3% of general revenue in fiscal year 2023 in no way renders "entirely illusory" (Opp. 44) the City's estimate that the Amendment could impose costs of up to $38.7 million. That amount reflects the shift from 20% to 25% of the City's general revenue fund, which Contestees themselves assert is what the Amendment "would require." *Id.* at 46. Assuming that Contestees are right about the Amendment's effect, the City's estimate of cost was entirely valid. Whereas before the Amendment the City could choose to fund the Board at no more than 20% (and allocate the extra $38.7 million however it wanted), the Amendment eliminated that discretion and rendered it impossible for the City to do anything with those funds except to appropriate them to the Board. It is no surprise that the City viewed the shift from discretion to mandate to be a cost. Tr. 187:11-189:17.

IV. UNREBUTTED EXPERT EVIDENCE DEMONSTRATES SUBSTANTIAL DOUBT REGARDING THE OUTCOME OF THE VOTE

At the June 26, 2023 hearing, Mr. Akins testified regarding the results of a public opinion survey he conducted to measure how Missouri voters' opinions concerning the Amendment changed when they were provided with information concerning the Amendment's fiscal impact that mirrored the information the City provided to Contestees. *See* Br. 25-32. The statistically significant results of his survey demonstrate that there are "significant and serious doubts" about the outcome of the vote on Amendment No. 4 because, had the Fiscal Note Summary reflected the City's analysis of the Amendment's fiscal impact, the Amendment may have failed. Tr. 265:24-266:10. The Fiscal Note Summary appeared on every ballot cast in the November 2022 election, and Contestees' failure to comply with their statutory obligations therefore brings the "validity of the ***entire*** election under suspicion." Opp. 47.

Contestees acknowledge that Mr. Akins's testimony is "uncontradicted [and] uncontroverted." Opp. 47. Contestees' only response is argument-by-adjective. Opp. 47-50 (claiming survey was "inaccurate," "prejudicial," and "biased"). These attacks are baseless.

For instance, Contestees assert that Mr. Akins's survey was inaccurate because one of the questions informed respondents that the City believed the Amendment "could result in higher taxes for its residents." Opp. 48. As Contestees admit, however, the City informed the Auditor of that months before the election. *Id.*; *see also* Ex. 47 at KCMOEC0000345 (App 83) ("Any increase in mandated [Board] funding" would "force

[the City] to choose between either (1) reducing other services or (2) increasing taxes for City taxpayers.").[17] Mr. Akins thus accurately captured information that the Auditor could (and should) have included in the Fiscal Note Summary.[18]

Contestees also complain that a question informing voters that the Amendment could result in decreased funding for services other than policing was inaccurate because, in Summer 2022, the City was not contemplating specific cuts. *See* Opp. 49. That is irrelevant for the reasons described above. *See supra* at 25 n.15.

No more persuasive is Contestees' argument that the survey introduced bias by informing voters 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." Ex. 55 at KCMOEC0012885; Opp. 48-49. Mr. Akins—an expert who has conducted over 1,000 public opinion surveys—testified that this phrase was necessary to "neutrally reset the table" because, in the prior question, voters had heard the Fiscal Note Summary as it appeared on the ballot, which "create[d] a bias that the voter can get something without

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[17] Relying on *Protect Consumers' Access To Quality Home Care Coalition, LLC v. Kander*, 488 S.W.3d 665 (Mo. App. W.D. 2015), Contestees misleadingly suggest that the Auditor was entitled to ignore the City's analysis because it did not include a precise estimate of the potential tax increase. *See* Opp. 48. But in *Quality Home Care Coalition*, the Auditor "received ***no submission*** regarding an impact on state finances." *Id.* at 676. Here, the City provided ample information regarding the Amendment's impact on its finances, all of which Contestees ignored.

[18] That the City provided this information to the Auditor in August 2022 (Opp. 48) is irrelevant. The Auditor admitted that there is "no prohibition upon amending a fiscal note summary that has been sent to the Secretary of State and certified." Tr. 408:15-18. But the Auditor did not even consider doing so. *Id.* at 408:4-6.

paying for it, something for nothing." Tr. 250:10-251:3. Contestees, neither of whom are experts in public opinion research, offer no basis to question Mr. Akins's determination.

Finally, Contestees claim that the Court should disregard Mr. Akins's findings because he did not measure how respondents reacted to every single word of additional information that was provided to them. Opp. 49-50. Contestees miss the mark. The purpose of a public opinion survey of this nature is to assess voters' reactions to additional information as a "whole." Tr. 275:19-23 (K. Akins). Whether a particular respondent cared more about the possibility that the Amendment could cause a decrease in funding for fire protection service or roadway and infrastructure maintenance is beside the point. All the additional information that survey respondents were provided mirrored what the City told the Auditor. *See* Br. 64-66. And Contestees could have included all of it in the Fiscal Note Summary.

Mr. Akins demonstrated that if Contestees had done so—indeed, if they had included even part of the City's analysis—the Amendment may have failed by a significant margin. *See* Ex. 60 at KCMOEC0012965 (App 106). Whereas respondents recalled voting in favor of the Amendment by a 24-point margin in November 2022, they reported that they would vote ***against*** it by 16 points after learning that it would have a negative fiscal impact and by 28 points after learning of the potential impact to other services. *Id.* at KCMOEC0012960-65 (App 101-106). Words matter, and the omission of the City's analysis from the Fiscal Note Summary may have been decisive.

V. THE COURT SHOULD REJECT CONTESTEES' VERIFICATION ARGUMENT AGAIN

Contestees end by resurrecting an argument this Court already rejected: that the contest should be dismissed because Mr. Lucas's initial petition was not verified. Opp. 50-52. Mr. Lucas explained in his opposition to Contestees' motion to dismiss why this argument was meritless, and this Court denied Contestees' motion. *See* Order Overruling Contestees' Mot. to Dismiss (Feb. 9, 2023). The result should be the same here—not just because it is right, but because it constitutes the law of the case. *City of Normandy v. Parson*, 643 S.W.3d 311, 314 (Mo. banc 2022) ("[T]he doctrine of law of the case provides that a previous holding in a case constitutes the law of the case and precludes relitigation of the issue.").

Contestees principally argue that Mr. Lucas's Amended Verified Petition does not relate back to his original petition because Rule 55.33(c) does not apply in election contests. Opp. 51-52. But this Court has made clear that "Rule 55.33(c) governs the issue of whether" an amended election contest petition "relates back to the date of the filing of the original petition." *Beatty*, 700 S.W.2d at 836. The Court of Appeals has explained why: Where "the statutes governing election contests are silent as to the procedural rules to apply," courts apply "the relevant procedural statutes and rules that apply in all civil actions." *Moore v. Morehead*, 666 S.W.2d 460, 461 (Mo. App. W.D. 1984). Because

Chapter 115 is silent as to relation back of amendments, the "rule[] that appl[ies] in all civil actions"—Rule 55.33(c)—governs. *Id.*[19]

CONCLUSION

The record in this case demonstrates that the Fiscal Note Summary was insufficient and unfair, constituting an irregularity of sufficient magnitude to cast doubt on the validity of the initial vote on Amendment No. 4. The Court should set aside the results of the November 8, 2022 vote on the Amendment and order a new election.

[19] Contestees also claim that permitting "unconditional relation back" would thwart the General Assembly's desire that election contests move quickly. Opp. 52. But Mr. Lucas does not ask for "unconditional relation back," and Rule 55.33(a) limits the circumstances in which amendment is permitted, rendering illusory Contestees' concern about undue delay.

Respectfully submitted,

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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 7,729 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 7,729 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2023.

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