SC97781

IN THE SUPREME COURT OF MISSOURI

BOARD OF ELECTION COMMISSIONERS FOR THE CITY OF ST. LOUIS, et al.,

Defendants-Appellants,

vs.

DAVID ROLAND,

Plaintiff-Respondent/Cross-Appellant.

Appeal from the Circuit Court of the City of St. Louis
Twenty-Second Judicial Circuit
The Honorable Julian Bush, Circuit Judge, Division 4
1622-CC09861

APPELLANTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Procedural Posture

This case is an appeal of a partial judgment from the Circuit Court of the City of St. Louis on August 23, 2016, in which the trial court determined that Defendants/Appellants the Board of Election Commissioners for the City of St. Louis (the "Election Board"), Commissioners Judge Joan Burger, Paul Maloney, Benjamin Phillips and Andrew Schwartz, Directors Leo G. Stoff and Mary Wheeler-Jones, and custodian of records Marilyn Jobe (the "Individual Defendants"), violated Chapter 610, RSMo (the "Sunshine Law"), by failing to furnish copies of absentee ballot applications and absentee ballot envelopes to Plaintiff-Respondent/Cross-Appellant David Roland ("Roland") as he requested. The Individual Defendants were sued in their official capacities only.

Roland separately appealed from the judgment entered in this case on October 16, 2017, in which the court determined that the Appellants had not committed a knowing or purposeful violation of the Sunshine Law. The trial court's partial judgment entered on August 23, 2016, did not dispose of all claims, and the court did not therein make an express determination that there is no just reason for delay pursuant to Rule 74.01(b). Therefore, the trial court's partial judgment entered on August 23, 2016, did not become appealable until the judgment entered on October 16, 2017, became final. On November 15, 2017, Roland appealed the October 16, 2017 final judgment to the Missouri Court of Appeals, Eastern District pursuant to § 512.020(5), RSMo within the time provided by Rules 75.01 and 81.04(a), challenging the trial court's taxation of costs incurred in the second phase of this case against Roland. The Election Board and the Individual Defendants cross-appealed within the time provided by Rule 81.04(c). Due to the existence of cross-appeals, the Missouri Court of Appeals designated the Election Board and the Individual Defendants as the Appellants and Roland as the Respondent/Cross-Appellant.

Jurisdiction was proper before the Missouri Court of Appeals because this case raised no issue within the exclusive appellate jurisdiction of the Missouri Supreme Court as set forth in Mo. Const. art. V, § 3, and therefore fell within the general appellate jurisdiction of the Court of Appeals. Under § 477.050, RSMo, territorial jurisdiction rested

with the Eastern District of the Missouri Court of Appeals because this appeal arose from actions within the jurisdiction of the Circuit Court of the City of St. Louis.

On February 5, 2019, the Court of Appeals affirmed the trial court's decision in part and reversed in part. A corrected opinion, which did not substantively modify the earlier opinion, was issued on February 26, 2019. On March 12, 2019, Roland's motion to rehear, modify, or transfer to this Court was denied by the Court of Appeals. On March 27, 2019, Roland filed an application for transfer in this Court pursuant to Rule 83.04. On June 4, 2019, this Court sustained Roland's application for transfer. This Court has jurisdiction under Mo. Const. art. V, § 10 to hear a case after opinion by the Court of Appeals because of the general interest or importance of a question involved in such case.

Mootness

On March 8, 2018, the Court of Appeals directed the parties to address the issue of mootness in their respective jurisdictional statements. Appellants' claims are not moot. However, even if this Court determined that Appellant's claims are moot, the public interest exception is applicable and this Court should exercise its discretion to review Appellants' claims.

A claim is only "moot if a judgment rendered has no practical effect upon an existent controversy…. When an event occurs that makes a decision on appeal unnecessary or makes it impossible for the appellate court to grant effectual relief, the appeal is moot and generally should be dismissed. In determining whether a case is moot, we may consider matters outside the record." TCF, LLC v. City of St. Louis, 402 S.W.3d 176, 181 (Mo. App. E.D. 2013) (internal citations omitted). Here, the actual production of the records Roland sought is not the decision from which an appeal is sought. Rather, Appellants appeal the judicial declaration that the Appellants violated the Sunshine Law by failing to produce such records. In his petition, Roland, asked the trial court for a declaratory judgment that Appellants violated the Sunshine Law. D137 p. 14. The trial court issued such a declaration, but *did not order* Appellants to produce the records at issue. D153 p. 3. Roland's petition did not ask for – and the trial court did not grant – injunctive relief ordering Appellants to produce the requested records. D137 pgs. 14-15; D153 p. 3. Roland

sought such an order to produce the records in his "Emergency Motion to Modify Order," noting that the trial court "did not expressly order the Defendants to immediately make the documents available for Roland's review." D154 p. 3. This motion was never ruled upon. Appellants provided Roland access to the records on August 25, 2016. D173 p. 10.

Because the trial court's partial judgment did not order Appellants to produce the absentee ballot applications and envelopes – but rather granted Roland's claim for a declaratory judgment that Appellants violated the Sunshine Law by denying these two requests – Appellants' subsequent production of the applications and envelopes did not moot the case. Though the Court cannot undo the release of the applications and envelopes, a decision by this Court would still grant relief to Appellants. Appellants suffered the stigma of an adverse court judgment finding that they violated the law. The trial court's determination had tangible negative consequences for the Election Board and its officers. This Court has previously recognized that the "social and political consequences of having been found to have broken the law" is, itself, a form of sanction for violation of the Sunshine Law. *See* Spradlin v. City of Fulton, 982 S.W.2d 255, 262 (Mo. banc 1998). The trial court's decision in this case generated significant media coverage casting Appellants in a negative light.[1] Two Commissioners were removed by the Governor, in part as a result of the trial court's decision and another related court decision.[2] A finding that this case is moot would leave Appellants without a remedy to remove the stigma of the trial court's judgment that they violated the law.

Furthermore, Appellants' claims are not moot because Roland's claims for costs, penalties, and attorney's fees that he pursued after obtaining the requested records are expressly dependent on whether a violation of the Sunshine Law occurred. Costs, attorney's fees, and other penalties are not permitted against the State of Missouri and state

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1 Stephen Deere and Doug Moore, "Absentee Ballot Applications and Their Envelopes Are Public Records, St. Louis Judge Rules," St. Louis Post-Dispatch, August 23, 2016.

2 Stephen Deere and Doug Moore, "Governor Nixon Shakes Up St. Louis Elections Board," St. Louis Post-Dispatch, September 7, 2016.

entities/officials in the absence of statutory authority. The Election Board is a state entity established to "conduct all public elections within its jurisdiction." *See* § 115.023, RSMo. Commissioners are appointed by the Governor and confirmed by the Senate. *See* § 115.027, RSMo. A "trial court may order one party to pay the other's attorney's fees and costs where a statute authorizes such an award. 'Costs cannot be assessed against state agencies or state officials absent express statutory authority.' Waivers of sovereign immunity, such as statutes allowing recovery of attorney's fees and costs against the State, are strictly construed." Hinton v. Dir. of Revenue, 21 S.W.3d 109, 112 (Mo. App. W.D. 2000) (internal citations omitted). Roland's entitlement to costs is entirely dependent upon a finding that Appellants violated the Sunshine Law. *See* § 610.027, RSMo, subsections 3 and 4. Aside from § 610.027, there is no other entitlement to costs, attorney's fees or penalties. A finding by this Court that no Sunshine Law violation occurred would obviate Roland's claims and provide relief to Appellants. Therefore, Appellants' claims are not moot.

Even if this Court determines that Appellants' claims are moot, this Court can review the claims "if the case presents 'an unsettled legal issue of public interest and importance of a recurring nature that will escape review unless the court exercises its discretionary jurisdiction.'" TCF, 402, S.W.3d at 181 (internal citations omitted). The public interest exception applies "if a case presents an issue that (1) is of general public interest and importance, (2) will recur, and (3) will evade appellate review in future live controversies." Kinsky v. Steiger, 109 S.W.3d 194, 196 (Mo. App. E.D. 2003).

The public interest exception is applicable here. This case, involving the privacy of the submission of absentee ballots and the public's right to access same, is unquestionably in the public interest. This controversy is likely to recur inasmuch as election authorities across the state process absentee ballot applications and envelopes before each public election. The controversy is likely to evade appellate review in that any decision on the public's ability to access these applications and envelopes must occur on an extremely compressed timeframe. Here, on July 22, 2016, Roland requested the applications for absentee ballots relating to the then-upcoming primary election scheduled for August 2, 2016. Absentee ballots are accepted until the "Wednesday immediately prior to the

election," in this case July 27, 2016. *See* § 115.279.3, RSMo. Requests for such records must therefore be made very close to election days. A response to a Sunshine Law request must be acted upon by the end of the third business day following the request. *See* § 610.023.3, RSMo. Roland made clear that he needed access to these records immediately because his clients believed improprieties had occurred regarding absentee ballots which would affect the outcome of the election, and were considering election contests. D146 p. 1; D169 p. 5. An election contest must be filed within "five days after the official announcement of the results of a primary election…." § 115.531, RSMo.

The ruling from which Appellants seek relief was made based on oral motions, without the benefit of a full briefing by the parties, and was issued only eight days after Appellants were served with the petition. There was considerable time pressure and Appellants were forced to act under the threat of significant financial penalties; threats which Roland reiterated several times. D145 p. 1; D146 p. 1; D148 p. 1. In the future, any election authority will have to make a decision regarding access to such records on this highly compressed timeframe, under the threat of financial penalties if the records are determined to have been improperly withheld. For an election authority, appealing a trial court's decision granting access to such records would risk subjecting the election authority to additional attorney's fees and penalties under § 610.027. In fact, the trial court's decision in this case would be held up as conclusive that an election authority must provide public access to these records, though that was not the General Assembly's intent. The public interest exemption is applicable here.

In his brief to the Court of Appeals, Roland concurred with Appellants that the case is not moot. In its opinion, the Court of Appeals found that the case was likely moot, but found that "the issues presented by the Board fall within the public interest exception to the mootness doctrine." Opinion, ED106192, p. 4. This Court should find that the case is not moot, and even if the Court determines that the case is likely moot, it should review the merits under the public interest exception.

STATEMENT OF FACTS

On Friday, July 22, 2016, Roland, a licensed attorney, submitted a Sunshine Law request via email to Marilyn Jobe, the custodian of records for the Election Board. D143 p. 1. Jobe received the request on Monday, July 25, 2016, acknowledged receipt by email to Roland, and forwarded a copy to Stoff, one of the Election Board's two directors. D159 p. 1. Roland sought seven categories of documents from the Election Board, including absentee ballot applications and absentee ballot envelopes. D143 pgs. 1-2. The Election Board directed its attorney, David Sweeney, to respond to Roland's request. Transcript ("TR") p. 65. Sweeney contacted Roland by phone and informed him that he would be advising the Election Board to deny part of Roland's request, relating to the absentee ballot applications and envelopes. D145 p. 1. On July 26, 2016, at 6:33 p.m., Roland emailed Sweeney and Stoff to dispute Sweeney's interpretation of the law. D145 p. 1. Less than three hours later, Roland emailed Sweeney, Judge Joan Burger[3], Maloney, Phillips, Schwartz, Stoff, and Jobe, despite the fact that Sweeney had already communicated to Roland that he was representing[4] the Election Board and its officers in this matter. D146 p. 1. Roland's purported justification for communicating directly with represented parties was as follows: "Although I trust that your attorney would relay to you the substance of my communication with him, this matter is of such importance that I wanted to make sure that each of you would be aware of my precise words, so that nothing would be 'lost in translation,' so to speak." D161 p. 1. Roland threatened the Individual Defendants that,

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[3] Original defendants Judge Joan Burger and Andrew Schwartz no longer serve as Commissioners for the Election Board. The Governor has appointed Jerry M. Hunter and Joseph Barbaglia in their places. Since all Individual Defendants were sued in their official capacities only, the trial court ordered Hunter and Barbaglia be substituted in place of Burger and Schwartz, pursuant to Rule 52.13(d). D173 p. 2. Since the court's order, Commissioners Maloney and Phillips have been replaced by Gene Todd and Geraldine Kraemer. Steven Capizzi now holds the position of director formerly held by Mary Wheeler-Jones. Marilyn Jobe has also retired.

[4] Sweeney had previously corresponded with Roland on July 15, 2016 on behalf of the Election Board regarding Roland's concerns about the handling of absentee ballots. D142 pgs. 1-2. Thus, in addition to Sweeney's call on July 26, 2016, Roland was on notice that Sweeney represented the Election Board in this matter.

should they fail to accept his interpretation of the law, "I would anticipate seeking a civil penalty against not only the Board as an entity, but against each individual member" of the Election Board. D161 p. 1.

Judge Burger, Stoff, and Sweeney, and other Appellants called Jose Caldera, one of the attorneys at the Missouri Secretary of State's Office responsible for advising election authorities on election law issues, to seek guidance from the Secretary of State's Office as to whether the requested absentee ballot applications and absentee ballot envelopes were open or closed records. Deposition[5] of Jose Caldera ("Depo.") pgs. 7-8, 13, 35. Caldera also advised the Secretary of State on Sunshine Law issues. Depo. p. 8. Caldera advised Judge Burger, Stoff, and Sweeney that the Missouri Secretary of State's Office's interpretation is that the absentee ballot envelopes were confidential pursuant to § 115.493, RSMo, and that the applications for absentee ballots were confidential pursuant to § 115.289, RSMo. Depo. pgs. 35-37. Caldera discussed the matter with his supervisor, Barbara Wood, who had served as General Counsel for the Secretary of State since 2008, and she concurred with his analysis. Depo. pgs. 38-39. Caldera advised Judge Burger, Stoff, Sweeney, and other Appellants on the call that the Secretary of State's Office would consider the absentee ballot applications and absentee ballot envelopes as confidential records under §§ 115.289 and 115.493, and thus closed records pursuant to § 610.021(14), RSMo. Depo. pgs. 41-43.

On July 27, 2016, Sweeney wrote to Roland notifying him that many of his requests would be granted, but that his requests for absentee ballots applications and absentee ballot envelopes would be denied because those records are closed pursuant to § 610.021(14). D162 p. 2. Sweeney further advised Roland that he would be granted access to *the list* of absentee ballot applications for the August 2, 2016 primary election on July 29 (the Friday before the primary election) in accordance with § 115.289, and that, as to certain records,

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[5] At the trial, Appellants offered Caldera's deposition into evidence pursuant to Rule 57.07(a). The deposition was admitted, but was not numbered. TR pgs. 8-9. The deposition was filed with the Court of Appeals as an exhibit in accordance with Rule 81.16(a) on February 2, 2018, and was subsequently transmitted to this Court.

Roland would be granted access, but that additional time was necessary. D162 pgs. 1-3. Roland responded to Sweeney's letter with an email to Sweeney and Judge Burger, Jobe, Maloney, Phillips, Schwartz, and Stoff, explaining his dispute with Sweeney's interpretation of the law. D163 pgs. 1-2. In his email, Roland expressed his opinion that the applications and envelopes are open records, and then again threatened, "unless the Board agrees to make these records available for my inspection, you will all be held accountable for your knowing and purposeful violation of the Sunshine Law." D163 p. 1. Roland threatened to seek "the maximum permissible civil penalty against each individual member of the St. Louis City Board of Election Commissioners." D163 p. 1.

On July 29, 2016, Roland filed this lawsuit against the Election Board and the Individual Defendants in their official capacities, seeking a declaratory judgment that they violated the Sunshine Law by declining to produce the applications for absentee ballots and absentee ballot envelopes. The trial court, as permitted by Rule 66.02, authorized separate trials on Roland's claim of a violation of the Sunshine Law, and his claim that such violations were knowing or purposeful, and deferred trial on the latter claims. To expedite the disposition of this case, counsel for Appellants agreed to an immediate hearing on the parties' oral motions for judgment on the pleadings. D152 p. 1. On August 22, 2016, Appellants' prior counsel agreed to dictate their answer[6] into the record admitting all allegations, with the exception of any allegations "related to an alleged knowing and/or purposeful violation of the Sunshine Law." D152 p. 1. The following day, Judge Julian Bush ruled that Appellants had violated the Sunshine Law by declining Roland's request to access the absentee ballot applications and absentee ballot envelopes. D153 p. 3.

Since the trial court deferred ruling on whether any Appellant had committed a knowing or purposeful violation, a separate bench trial was conducted on that issue on June 13, 2017 before Judge Jason Sengheiser. D173 p. 1. The trial court considered the joint stipulation entered into between Roland and the Appellants (D157) and testimony from Stoff, Sweeney, Maloney, Judge Burger, and Roland. After the bench trial, the court issued

[6] Appellants subsequently filed an amended answer and affirmative defenses. D156.

its Findings of Fact, Conclusions of Law, and Judgment, concluding that no Appellant had committed a knowing or purposeful violation of the Sunshine Law. D173 p. 16.

In determining that there had not been a knowing or purposeful violation of the Sunshine Law, the trial court noted that the Appellants took reasonable steps to consult with its attorney and an attorney from the Secretary of State's Office as to the interpretation of §§ 115.289 and 115.493, RSMo. D173 p. 19. The trial court also determined that the Appellants "did not have to accept [Roland's] interpretation of the Sunshine Law and election law statutes" as put forth in his direct correspondence to the Appellants. D173 p. 20. "The fact that the Board had knowledge that Plaintiff had a different interpretation of the statutes does not establish that the Board had knowledge they were violating the Sunshine Law…." D173 p. 21.

The trial court's judgment did not make an express award of costs. A minute entry accompanying the court's judgment stated: "Costs to the Plaintiff." D136 p. 16. Pursuant to §§ 492.590 and 514.060, RSMo, the clerk of the court taxed costs of $1,084.50 to Roland for the preparation of the trial transcript and the deposition of Jose Caldera. D174 p. 1. All costs taxed to Roland were incurred for the second trial, relating to knowing or purposeful violations of the Sunshine Law, at which Appellants prevailed. D174 p. 1. Roland did not appeal the trial court's determination that no Appellant knowingly or purposefully violated the Sunshine Law.

POINTS RELIED ON

I. The trial court erred in declaring that Appellants violated the Sunshine Law by declining to provide copies of the applications for absentee ballots to Roland because the applications are protected from disclosure by law under § 610.021(14), RSMo, in that § 115.289, RSMo limits disclosure of information from the applications to specific information that may only be provided to a limited group of people at specific times, and allowing public access to the applications would render the limitations of § 115.289 meaningless.

Budding v. SSM Healthcare Sys., 19 S.W.3d 678 (Mo. banc 2000)

National Council for Teachers Quality, Inc. v. Curators of Univ. of Missouri, 446 S.W.3d 723 (Mo. App. W.D. 2014)

State ex rel. Goodman v. St. Louis Bd. of Police Com'rs, 181 S.W.3d 156 (Mo. App. E.D. 2005)

State ex rel. Pulitzer Missouri Newspapers, Inc. v. Seay, 330 S.W.3d 823 (Mo. App. S.D. 2011)

II. The trial court erred in declaring that Appellants violated the Sunshine Law by declining to provide copies of the absentee ballot envelopes to Roland because the envelopes are protected from disclosure by law under § 610.021(14), RSMo, in that § 115.493, RSMo provides that voted ballots shall not be open to inspection and § 115.299 mandates that absentee ballot envelopes be stored in sealed containers along with voted ballots, and allowing public access to such envelopes would contravene the clear intent of the General Assembly.

Doe v. St. Louis Cmty. Coll., 526 S.W.3d 329 (Mo. App. E.D. 2017)

Gott v. Dir. of Revenue, 5 S.W.3d 155 (Mo. banc 1999)

Lincoln Indus., Inc. v. Dir. of Revenue, 51 S.W.3d 462 (Mo. banc 2001)

State ex rel. Brokaw v. Bd. of Educ. of City of St. Louis, 171 S.W.2d 75 (Mo. App. 1943)

ARGUMENT

I. The trial court erred in declaring that Appellants violated the Sunshine Law by declining to provide copies of the applications for absentee ballots to Roland because the applications are protected from disclosure by law under § 610.021(14), RSMo, in that § 115.289, RSMo limits disclosure of information from the applications to specific information that may only be provided to a limited group of people at specific times, and allowing public access to the applications would render the limitations of § 115.289 meaningless.

Error Preserved for Appellate Review

This point was preserved by Appellants, who agreed to expedite the case by having both parties' oral motions for judgment on the pleadings heard immediately. Appellants denied that Roland was entitled to access absentee ballot applications because the applications are protected from disclosure by law under §§ 610.021(14) and 115.289, RSMo. The trial court ruled that Appellants violated the Sunshine Law by declining to provide the applications to Roland. Appellants appealed to the Missouri Court of Appeals. This Court granted Roland's application for transfer after opinion by the Court of Appeals.

Standard of Review

The trial court entered a declaratory judgment in favor of Roland based on his oral motion for judgment on the pleadings pursuant to Rule 55.27(b). "'The question presented by a motion for judgment on the pleadings is whether the moving party is entitled to judgment as a matter of law on the face of the pleadings.' … Because a judgment on the pleadings addresses an issue of law, our review is *de novo* and without deference to the circuit court's ruling." State ex rel. Kansas City Symphony v. State, 311 S.W.3d 272, 274 (Mo. App. W.D. 2010) (internal citations omitted).

Argument

The trial court erroneously declared that Appellants violated the Sunshine Law when they denied Roland's request for access to absentee ballot applications. Absentee ballot applications are confidential pursuant to § 115.289, RSMo. Therefore, they are records protected from disclosure by law which are closed records pursuant to

§ 610.021(14), RSMo. This Court should reverse the trial court's judgment declaring that Appellants violated the Sunshine Law.

On July 22, 2016, Roland made a Sunshine Law request for "copies of all applications submitted to the St. Louis Board of Election Commissioners for absentee ballots" for each election between January 1, 2012, and July 1, 2016, and the (then upcoming) August 2, 2016 primary election. D143 pgs. 1-2. Appellants, after consulting with their counsel and an attorney from the Missouri Secretary of State's Office, denied this request based on §§ 610.021(14) and 115.289, RSMo. D162 p. 1; D164 p. 1.

The Sunshine Law, Chapter 610, RSMo

Section 610.011.1, RSMo provides that it "is the public policy of this state that … records … of public governmental bodies be open to the public *unless otherwise provided by law*. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy." Emphasis added. While the General Assembly clearly recognized the importance of openness and transparency, it is well established that an individual's privacy interest will, in some circumstances, take precedence over the State's policy of openness and transparency. Accordingly, the General Assembly established a series of exceptions to the Sunshine Law's general mandate of openness, which are set forth in § 610.021, RSMo, which provides that "a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the" subjects described in the twenty-four subsections. Many of these exceptions exist because the General Assembly recognized that sometimes, "the disclosure of individuals' highly personal identifying information trumps the public's access to these specific records." Jones v. Hous. Auth. of Kansas City, 174 S.W.3d 594, 597 (Mo. App. W.D. 2005); *see also* State ex rel. Pulitzer Missouri Newspapers, Inc. v. Seay, 330 S.W.3d 823, 827 (Mo. App. S.D. 2011) ("The legislative purpose of the Sunshine Law is for governmental conduct to be open to public inspection, but not at the expense of the vital personal interests of the citizenry.").

§ 610.021(14) – "Records which are Protected from Disclosure by Law"

Section "610.021(14) […] exempts '[r]ecords which are protected from disclosure by law[.]' The term 'law' has a particular meaning in this context: It refers to statutes." State ex rel. Missouri Local Gov't. Ret. Sys. v. Bill, 935 S.W.2d 659, 665 (Mo. App. W.D. 1996). When considering whether § 610.021(14) prohibits the disclosure of public records, "the test for determining whether the 'protected from disclosure from law' exemption applies is not whether the subject law explicitly deals with disclosure. Rather, the proper inquiry is whether disclosing records pursuant to the Sunshine Law would violate the subject law." National Council for Teachers Quality, Inc. v. Curators of Univ. of Missouri, 446 S.W.3d 723, 727-728 (Mo. App. W.D. 2014) (holding that, while the Federal Copyright Act did not explicitly protect university course syllabi from disclosure, "it does protect against the means by which the requested disclosure would be obtained. Disclosing the syllabi … would constitute a violation of the Federal Copyright Act. Therefore, the syllabi as requested are 'protected from disclosure by [the Federal Copyright Act].'"). In National Council for Teachers Quality, the court stated that "Section 610.021(14) 'may be essentially redundant.' 'Usefully, the presence of this exception eliminates the need for analysis of such questions concerning the relationship between arguably conflicting statutes.'" Id. at n. 5 (internal citations omitted). In other words, if access to certain records is restricted by another statute (the subject law), such records are necessarily "records which are protected from disclosure by law" under § 610.021(14).

§ 115.289, RSMo – The "Subject Law"

Here, the subject law protecting absentee ballot applications from disclosure is § 115.289, RSMo. Appellants could not disclose the absentee ballot applications pursuant to a Sunshine Law request without violating § 115.289. Subsection 3 of § 115.289 states:

> In each city not within a county … as applications for absentee ballots are received, the election authority shall list the name, voting address and mailing address, if different, of each applicant. Prior to 8:00 a.m. on the Friday before an election all absentee ballot applications, lists of absentee ballot applications, or any information contained on the absentee ballot applications shall be kept confidential. Use of the applications, lists or information contained thereon by the election authority prior to 8:00 a.m. on

> the Friday before an election for purposes other than processing absentee ballots shall be deemed a class one election offense. After 8:00 a.m. on the Friday before an election any person authorized under subsection 4 of this section may copy the list, and the election authority may make copies of the list available to such persons for a reasonable fee determined by the election authority.

The first sentence in § 115.289.3 provides that the election authority is to prepare a list of the names and addresses of all persons applying for absentee ballots. The second sentence expressly states that the applications, the lists of persons applying for absentee ballots, and any information contained on the application shall be confidential before 8:00 a.m. on the Friday before an election. The third sentence makes it a class one election offense[7] to use the applications, the list, or information contained thereon for any purpose other than processing absentee ballots. The fourth and final sentence states that the list – but not the applications themselves – may be accessed only by "any person authorized under subsection 4 of this section … and the election authority may make copies of the list available to such persons…."

Subsection 4 of § 115.289 provides that:

> [A]fter 8:00 a.m. on the Friday before an election, all lists of applications for absentee ballots shall be kept confidential to the extent that such lists of applications shall not be posted or displayed in any area open to the general public, nor shall such lists of applications be shown to any person who is not entitled to see such lists of applications, either pursuant to the provisions of this chapter or any other provisions of law. Persons entitled to see such lists shall include a candidate … *or any person with written authorization from a candidate*, or any person that has applied for an absentee ballot.

Emphasis added. Here, the Friday before the election was July 29, 2016, as the primary election was Tuesday, August 2, 2016. Roland, as a person with written authorization from a candidate (*See* D151 p. 1), was entitled to view the list after 8:00 a.m. on July 29, 2016, and the Election Board agreed to allow Roland timely access to the list for the August 2, 2016 primary election. D162 p. 2.

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[7] A class one election offense is a felony punishable by up to five years in prison and/or a fine between $2,500 and $10,000. *See* § 115.631, RSMo.

While provision is made in § 115.289 for only certain authorized persons to access *the list of names and addresses* of absentee voters after 8:00 a.m. on the Friday before an election, no statute provides that the applications themselves can be provided to any member of the public, including candidates or authorized representatives. Under § 115.289, *no person* can access the list prior to 8:00 a.m. on the Friday before an election and *only candidates and authorized representatives* can access the list after 8:00 a.m. on the Friday before an election. This limited exception in subsection 4 of § 115.289 permitting access to *the list* is simply inapplicable to the absentee ballots themselves.

Absentee Ballot Applications

An absentee ballot application includes a voter's "name, address at which he or she is or would be registered, his or her reason for voting an absentee ballot, [and] the address to which the ballot is to be mailed…." *See* § 115.279, RSMo. For primary elections, the application "shall also state which ballot the applicant wishes to receive." Id. A person may vote absentee because: (1) he or she will be absent on the day of the election; (2) incapacity, illness or physical disability, or to care for such a person; (3) religious belief; (4) employment by the election authority; (5) incarceration; or (6) participation in an address confidentiality program. *See* § 115.277, RSMo.

In enacting § 115.289, the General Assembly intended to balance the public interest in transparency with the privacy rights of individuals who must disclose personal information to the government in order to exercise their right to vote absentee. While a person's name and address may be publicly available by other means, a voter's reason for voting absentee and a voter's preferred political party are not generally publicly available. Therefore, § 115.289 provides access *only to a list of names and addresses* of those persons requesting absentee ballots, and restricts who can access the list and when they may do so.

At the trial court, Roland contended that applications must be open records after 8:00 a.m. on the Friday before an election because § 115.289.3 states "that absentee ballot applications shall be kept confidential 'prior to 8:00 a.m. on the Friday before an election,' but does ***not*** say that they must be kept confidential ***after*** 8:00 a.m. on the Friday before an election. The Legislature clearly demonstrated that it knows how to indicate that certain

records must be kept confidential 'after 8:00 a.m. on the Friday before an election' – indeed, it imposed that very requirement on lists of applications for absentee ballots." D169 p. 23. Emphasis in original. Roland reasons that because absentee ballots, the information therein, and the list are confidential prior to 8:00 a.m. on the Friday before an election and limited access to *the list* is expressly permitted after 8:00 a.m. on the Friday before an election, the absentee ballot applications must not be confidential after 8:00 a.m. on the Friday before an election. The trial court agreed, finding that "while the four subsections of section 115.289, RSMo have quite a lot to say about the confidentiality of the *lists* of applications for absentee ballots, the only provision relating to the confidentiality of absentee ballot applications is this: 'Prior to 8:00 a.m. on the Friday before an election all absentee ballots … shall be kept confidential.' … There is nothing that makes the application confidential after that." D153 p. 2.

The trial court's rationale does not withstand serious scrutiny. Consider the following scenario: a person walks into the office of the Election Board on the Friday before an election and requests the list of names and addresses of persons applying for absentee ballots. Such request would properly be denied *unless* that person was: (1) a candidate or his or her representative; (2) a representative of a campaign committee; (3) a person with written authorization from a candidate (such as Roland in this instance); or (4) a person who has applied for an absentee ballot. *See* § 115.289.4. However, under the trial court's construction of § 115.289, such person could then, having been denied access to the list of names and addresses of persons applying for absentee ballots, file a Sunshine Law request demanding *the actual absentee ballot applications themselves*, and the Election Board would be powerless to deny the request (and would potentially face penalties for doing so). This defeats the clear purpose of restricting access to the list of names and addresses of persons submitting applications for absentee ballots to candidates and other expressly authorized persons. Subsection 4 of § 115.289 states that *even after 8:00 a.m. on the Friday before the election*, "all lists of applications for absentee ballots *shall be kept confidential* to the extent that such lists of applications shall not be posted or displayed in any area open to the general public, nor shall such lists of applications be

shown to any person who is not entitled to see such lists of applications." Emphasis added. This statutory language cannot be reconciled with the trial court's conclusion that *any person* could make a Sunshine Law request and receive copies of absentee ballot applications, thereby obtaining all the information which the Election Board is required by § 115.289 to keep confidential and inaccessible to the general public.

The trial court's erroneous interpretation of § 115.289 would render the portion of the statute making the list of names and addresses available only to authorized persons entirely superfluous. "When engaging in statutory construction, this Court recognizes that 'every word, clause, sentence, and provision of a statute must have effect.' Presumably, the legislature did not insert superfluous language in a statute." St. Charles County v. Dir. of Revenue, 407 S.W.3d 576, 578 (Mo. banc 2013) (internal citations omitted). Here, the General Assembly clearly recognized the privacy interest in a voter's reason for voting absentee and a voter's political preference, and thus made the list of names and addresses only available to certain authorized persons, and limited such authorized persons' ability to access the list to a few days prior to an election.[8]

There is no possible rationale for limiting access to the list of names and addresses to certain authorized persons if *anyone* could access the applications themselves by making a Sunshine Law request. Why would the General Assembly limit access to the list of names and addresses to certain authorized persons, and limit the time in which they can access the list, if *any person* could obtain the applications themselves, which contain all the information on the list? The trial court ignored this question altogether, and Roland has provided no answer at any stage in these proceedings.

Construction of Exceptions to § 610.021, RSMo

The Sunshine Law's mandate that the exceptions in § 610.021 be strictly construed does not compel this Court to adopt an absurd or nonsensical reading of § 115.289. On the

[8] The General Assembly's apparent purpose in authorizing candidates and campaign representatives access to the list of names and addresses of persons who applied for absentee ballots is to provide candidates/campaigns a (very brief) period of time in which they may contact such persons to remind them to return their absentee ballots.

contrary, this Court must avoid such an interpretation. "The goal of statutory analysis is to ascertain the intent of the legislature, as expressed in the words of the statute." United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy, 208 S.W.3d 907, 909 (Mo. banc 2006). "We presume that every word of a statute has purpose, and we do not presume that the General Assembly acted in a meaningless manner or intended an absurd result. Rather, we must presume that the legislature intended for its words to have substantive effect." Marston v. Juvenile Justice Ctr. of the 13th Judicial Circuit, 88 S.W.3d 534, 537 (Mo. App. W.D. 2002) (internal citations omitted). "An interpretation which would make portions of the Act an absurdity and render other parts meaningless should not be made." Missourians for Honest Elections v. Missouri Elections Comm'n., 536 S.W.2d 766, 773 (Mo. App. 1976).

This Court must discern the General Assembly's intent in enacting § 115.289. "All canons of statutory construction are subordinate to the requirement that the Court ascertain and apply the statute in a manner consistent with that legislative intent." Budding v. SSM Healthcare Sys., 19 S.W.3d 678, 682 (Mo. banc 2000). Had the General Assembly intended to make absentee ballot applications public, it would not have included the portion of the statute mandating that the list of names and addresses of persons applying for absentee ballots be confidential, and available only to certain authorized persons in the days immediately prior to an election. To hold that absentee ballot applications are available to anyone who files a Sunshine Law request would subvert the carefully constructed balance between transparency and privacy crafted by the General Assembly.

The trial court relied entirely on the statute's silence as to the status of absentee ballot applications after 8:00 a.m. on the Friday before an election to find that they are not confidential. The trial court reasons that since the applications are expressly confidential prior to 8:00 a.m. on the Friday before an election, but the statute is silent thereafter, the applications must be open. D153 p. 2. The General Assembly's silence as to absentee ballot applications after 8:00 a.m. on the Friday before an election cannot be construed as an exemption from the general rule of confidentiality of absentee ballot information established by the statute. "'To cite the silence of the statute, however, does not end the

inquiry.' Standard rules of statutory construction require that a statute be given a reasonable interpretation in light of the legislative objective." State ex. rel. Birk v. City of Jackson, 907 S.W.2d 181, 185 (Mo. App. E.D. 1995) (*internal citations omitted*). Rather, this Court must construe the General Assembly's silence as to absentee ballots applications after 8:00 a.m. on the Friday before an election with the portion of the statute expressly limiting who can access information derived from the applications.

What is perhaps most troubling about the trial court's reading of § 115.289 is that it would place no limits whatsoever on who can access information contained on absentee ballot applications, and for what purpose. While Roland was, in this instance, able to use information from the absentee ballot applications to uncover apparent improprieties that led to the overturning[9] of a state legislative primary election, this Court must be mindful of the consequences of determining that absentee ballot applications are open records. If the absentee ballot applications are available to Roland, they are available to the news media, neighbors of applicants, attorneys, former spouses of applicants, political operatives, bulk marketers, debt collectors, and anyone else who may have an interest (political, financial, or otherwise) in knowing who submitted an absentee ballot application.

It requires no imagination for this Court to consider why a person may not wish the public to know that he or she will not be in town on election day, or for the public to know his or her political affiliation. If the General Assembly deems that it is in the interest of the public to allow greater access to information about absentee ballot applications, it is fully capable of expressly providing the public with greater access. *See* State ex rel. Goodman v. St. Louis Bd. of Police Com'rs, 181 S.W.3d 156, 159 (Mo. App. E.D. 2005) ("The legislative purpose of the Sunshine Law is for governmental conduct to be open to public

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[9] Franks v. Hubbard, 498 S.W.3d 862 (Mo. App. E.D. 2016). The irregularity which led the court to order a new election related to the absence of ballot envelopes for the 142 voters who voted absentee in person at the Election Board's offices. Id. at 866. Since these voters used electronic ballots, the Election Board did not utilize envelopes (because the ballots would not be mailed). Id. Since the number of absentee voters not submitting envelopes exceeded the margin of victory (90 votes) the court ordered a new election. Id.

inspection, but not at the expense of the vital personal interests of the citizenry. It is the role of the legislature, and not the courts, to strike the delicate balance between these two competing interests. The legislature conveys this balance and their intent to us through the express words and implied meaning of the statute.").

The absentee ballot applications are plainly records that are protected from disclosure by law. Under the test established by National Council for Teachers Quality, 446 S.W.3d at 727-728, disclosing the absentee ballot applications (or any information on the absentee ballot application other than providing the list of names and addresses to persons authorized by § 115.289.4) pursuant to the Sunshine Law would violate § 115.289. Therefore, the applications are closed pursuant to § 610.021(14).

Application of § 115.289 to Other Missouri Counties

Without addressing it before the trial court or in his briefs filed in the Court of Appeals, Roland notes in his Application for Transfer to this Court that subsections 3 and 4 of § 115.289 apply only to the City of St. Louis, St. Louis County, and Jackson County, and that a different set of rules (set forth in subsections 1 and 2 of § 115.289) apply to the remainder of the State. Application for Transfer, pgs. 4-5. This is correct, but does not change this Court's analysis. When the trial court's interpretation of § 115.289 is applied to another county in Missouri, the result is equally absurd.

Subsections 1 and 2 of § 115.289 are similar to subsections 3 and 4, however, these subsections draw no distinction between access to the list of names and addresses before or after 8:00 a.m. on the Friday before an election. Subsection 2 of § 115.289 states that "all lists of applications for absentee ballots shall be kept confidential to the extent that such lists of applications shall not be posted or displayed in any area open to the general public, nor shall such lists of applications be shown to any person who is not entitled to see such lists of applications, either pursuant to the provisions of this chapter or any other provisions of law." The list of names and addresses is confidential *at all times*, and may be accessed *only* be those persons authorized by statute. Subsections 1 and 2 do not state that use of the applications, the list, or any information therefrom is a class one election offense.

While subsections 1 and 2 provide that the list is confidential at all times (except to authorized persons), these subsections are silent as to access to the absentee ballot applications themselves or any other information derived therefrom. Under the trial court's interpretation of § 115.289, a person could make a Sunshine Law request *at any time* for the absentee ballot applications, while only certain authorized persons can access the list of names and addresses of persons requesting an absentee ballot. There is no possible rationale for providing that only certain authorized persons can access the list of names and addresses if any person could make a Sunshine Law request for the applications at any time. The trial court asks us to believe that the General Assembly intended to restrict access to the list of persons submitting absentee ballot applications to certain authorized persons, but also intended for *any person* to be able to obtain even more information by obtaining the applications themselves *at any time*. This Court cannot condone this absurd and nonsensical reading of § 115.289.

National Voter Registration Act

Without addressing it before the trial court or in his briefs filed in the Court of Appeals, Roland also contends in his Application for Transfer to this Court that the National Voter Registration Act ("NVRA") "requires public disclosure of voter registration information." Application for Transfer, p. 6. The NVRA states, in pertinent part, as follows:

> Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters….

52 U.S.C.A. § 20507(i)(1). While voter *registration* applications[10] could be accessible under the NVRA, the NVRA does not apply to absentee ballot applications or absentee ballot envelopes. "Because they are records of voting, not voter registration or removal, absentee ballot applications and envelopes are not within the NVRA Public Disclosure Provision." True the Vote v. Hosemann, 43 F. Supp. 3d 693, 728 (S.D. Miss. 2014).

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[10] Voter registration applications do not ask a voter to select a political party or whether he/she would be eligible to vote absentee. *See* §§ 115.155, 115.158, RSMo.

"Granting Plaintiffs access to these sealed documents immediately after the election, or even now, would undermine Mississippi's efforts to maintain the integrity of the election documents while an election challenge persists." Id. at n. 169. The NVRA is simply inapplicable to absentee ballot applications or envelopes.

Relief Sought

Because § 115.289 can only be read as providing that only the list of names and addresses of persons applying for absentee ballots may be released, and such list may only be released to those persons specified in the statute while remaining otherwise confidential, the conclusion is inescapable that the applications are protected from disclosure by law. Accordingly, absentee ballot applications are closed records pursuant to § 610.021(14). This Court should reverse the trial court's decision granting a declaratory judgment in favor of Roland declaring that Appellants violated the Sunshine Law by denying his request for access to absentee ballot applications.

II. The trial court erred in declaring that Appellants violated the Sunshine Law by declining to provide copies of the absentee ballot envelopes to Roland because the envelopes are protected from disclosure by law under § 610.021(14), RSMo, in that § 115.493, RSMo provides that voted ballots shall not be open to inspection and § 115.299 mandates that absentee ballot envelopes be stored in sealed containers along with voted ballots, and allowing public access to such envelopes would contravene the clear intent of the General Assembly.

Error Preserved for Appellate Review

This point was preserved by Appellants, who agreed to expedite the case by having both parties' oral motions for judgment on the pleadings heard immediately. Appellants denied that Roland was entitled to access absentee ballot envelopes because the applications are protected from disclosure by law under §§ 610.021(14) and 115.493, RSMo. The trial court ruled that Appellants violated the Sunshine Law by declining to provide the envelopes to Roland. Appellants appealed to the Missouri Court of Appeals. This Court granted Roland's application for transfer after opinion by the Court of Appeals. Plain error review is appropriate to the extent Appellants' point differs from the basis relied upon by its counsel to deny the initial Sunshine Law request.

Standard of Review

The trial court entered a declaratory judgment in favor of Roland based on his oral motion for judgment on the pleadings pursuant to Rule 55.27(b). "'The question presented by a motion for judgment on the pleadings is whether the moving party is entitled to judgment as a matter of law on the face of the pleadings.' … Because a judgment on the pleadings addresses an issue of law, our review is *de novo* and without deference to the circuit court's ruling." State ex rel. Kansas City Symphony v. State, 311 S.W.3d 272, 274 (Mo. App. W.D. 2010) (internal citations omitted).

Argument

The trial court erroneously declared that Appellants violated the Sunshine Law when it denied Roland's request for access to absentee ballot envelopes. Roland made a Sunshine Law request for "copies of the envelopes that were used to mail in absentee ballots" for each election between January 1, 2012, and July 1, 2016. D143 p. 1. Appellants,

after consulting with their counsel and an attorney from the Missouri Secretary of State's Office, denied this request based on §§ 610.021(14) and 115.493, RSMo. D147 p. 2. Because the absentee ballot envelopes are records protected from disclosure by law, this Court should reverse the trial court's decision.

§ 610.021(14) – "Records which are Protected from Disclosure by Law"

As set forth under Point I, *supra*, § 610.021(14) provides that the Election Board is authorized to close records "to the extent they relate to the following: … [r]ecords which are protected from disclosure by law…." "[T]he test for determining whether the 'protected from disclosure from law' exemption applies is not whether the subject law explicitly deals with disclosure. Rather, the proper inquiry is whether disclosing records pursuant to the Sunshine Law would violate the subject law." National Council for Teachers Quality, 446 S.W.3d at 727-728. Here, the subject laws protecting absentee ballot envelopes from disclosure are §§ 115.493, 115.295, and 115.299.

Chapter 115, RSMo, "Absentee Voting" Subchapter, §§ 115.275 – 115.304, RSMo

Chapter 115, RSMo was enacted as the "Comprehensive Election Reform Act of 1977 … 'to simplify, clarify and harmonize the laws governing elections.'" Chastain v. James, 463 S.W.3d 811, 822 (Mo. App. W.D. 2015). Chapter 115 "shall be construed and applied so as to accomplish its purpose." § 115.003, RSMo. Section 115.007, RSMo provides that no "provision of this chapter shall be construed as impliedly amended or repealed by subsequent legislation if such construction can be reasonably avoided." Chapter 115 is divided into subchapters, with §§ 115.275 through 115.304, RSMo identified as a subchapter relating to "Absentee Voting."

Procedure to Vote Absentee

A person voting absentee "shall mark the ballot in secret, place the ballot in the ballot envelope, seal the envelope and fill out the statement on the ballot envelope. The sworn statement of each person voting an absentee ballot shall be subscribed and sworn to before the election official receiving the ballot, a notary public or other officer…." § 115.291.1, RSMo. Absentee ballots must be "received by an election authority at or before the time fixed by law for the closing of the polls on election day." § 115.293, RSMo.

An absentee ballot envelope includes a statement by the voter stating "the voter's name, the voter's voting address, the voter's mailing address and the voter's reason for voting an absentee ballot." § 115.283.1, RSMo. However, § 115.294, RSMo provides that "no absentee ballot shall be rejected for failure of the voter to state on the ballot envelope his reason for voting an absentee ballot." The voter must "state under penalties of perjury that the voter is qualified to vote in the election, that the voter has not previously voted and will not vote again in the election, that the voter has personally marked the voter's ballot in secret … that the ballot has been placed in the ballot envelope and sealed by the voter … and that all information contained in the statement is true." § 115.283.1, RSMo. A person providing assistance to an absentee voter "shall include a statement on the envelope identifying the person providing assistance under penalties of perjury." Id. The attestations must be notarized. Id. The form of the required statements is set forth in § 115.283.

§§ 115.295, 115.299, and 115.493, RSMo – The "Subject Laws"

Section 115.295 states that as "each absentee ballot is received by the election authority, the election authority shall indicate its receipt on the list," and that "[a]ll ballot envelopes received by the election authority *shall be kept together in a safe place and shall not be opened except as provided in this subchapter*." Emphasis added. Absentee ballot envelopes are opened on election day by a bipartisan team of election judges. *See* § 115.299.1. One member of the team "shall open each envelope and call the voter's name in a clear voice. Without unfolding the ballot, two team members, one from each major political party, shall initial the ballot, and an election judge shall place the ballot, still folded, in a ballot box." § 115.299.4. After all the ballots assigned to a team have been placed in a box, the "votes shall be tallied and returns made" in the manner provided by law for paper ballots. Id.

At the time of the trial court's judgment, § 115.299.4 stated[11] that "[a]fter the votes on all ballots assigned to a team have been counted, the ballots and *ballot envelopes shall*

[11] Section 115.299.4 was amended by Senate Bill 592 (2018), which removed the language "placed on a string and" in the quoted language. The statute presently states "[a]fter the votes on all ballots assigned to a team have been counted, the

be placed on a string and enclosed in sealed containers marked 'voted absentee ballots and ballot envelopes from the election held [month, day],20[year]'." The statute further provides that "[o]n the outside of each voted ballot and rejected ballot container, each member of the team shall write his or her name, and all such containers shall be returned to the election authority." No other statute in the Absentee Voting subchapter, §§ 115.275 – 115.304, authorizes members of the public to inspect or copy absentee ballot envelopes.

In sum, prior to an election, absentee ballot envelopes received by an election authority are to be kept in a safe place and not opened until counted. After they are counted, the absentee ballot envelopes and the voted ballots were to be placed on a string and deposited in a sealed container. The sealed containers of envelopes and voted ballots are then signed by the election judges and returned to the election authority. Section 115.493, RSMo. provides that the "election authority shall keep all voted ballots … for twenty-two months after the date of the election. *During the time that voted ballots*, ballot cards, processed ballot materials in electronic form and write-in forms *are kept by the election authority, it shall not open or inspect them or allow anyone else to do so*, except upon order of a legislative body trying an election contest, a court or a grand jury." Section 115.493 permits voted ballots to be destroyed after twenty-two months.

The voted ballots – which, pursuant to § 115.299, must be stored securely with absentee ballot envelopes in sealed containers signed by the election judges tabulating such ballots – are plainly not open to inspection. It is impossible to infer an intent by the General Assembly to allow the public to open and inspect absentee ballot envelopes if the Election Board is expressly prohibited from allowing the opening or inspecting of voted ballots, which are stored in the same containers as the envelopes.

The requirement that voted ballots remain inaccessible to the public while retained by an election authority is so strong that *even election authority personnel are not permitted to open or inspect them*. Section 115.493 provides that while an election authority retains

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ballots and ballot envelopes shall be enclosed in sealed containers marked 'voted absentee ballots and ballot envelopes from the election held [month, day],20[year]'."

voted ballots, "***it*** *shall not open or inspect them* or allow anyone else to do so, except upon order of a legislative body trying an election contest, a court or a grand jury." Emphasis added. Because § 115.299 mandates that absentee ballot envelopes be stored in secured containers along with voted ballots, and mandates that such containers be sealed and signed by the election judges, the Election Board *could not* permit the public to access absentee ballot envelopes without violating § 115.493. Under the test established by National Council for Teachers Quality, 446 S.W.3d at 727-728, these are records protected from disclosure by law because the opening and inspecting of absentee ballot envelopes pursuant to a Sunshine Law request (and without a court order) would violate § 115.493. The absentee ballot envelopes are therefore closed records pursuant to § 610.021(14).

Reading §§ 115.295, 115.299, and 115.493, it is clear that the General Assembly did not intend for absentee ballot envelopes to be accessible to the public. Rather, the General Assembly clearly intended that absentee ballot envelopes be accessible only to a "legislative body trying an election contest, a court or a grand jury." It defies logic to suggest that the General Assembly intended for members of the public to be able to access absentee ballot envelopes in the face of the rigorous statutory restrictions on access to the envelopes and ballots. No purpose would be served in requiring that the envelopes be stored securely *with the ballots* (which are clearly and expressly not open to inspection) if the General Assembly intended to provide public access to the envelopes.

The Election Board's Procedures

At the trial, Election Director Gary Stoff testified that when the Election Board receives an application for an absentee ballot, an Election Board employee confirms that the person submitting the application is registered and compares the signature on the application to the digital signature on file. TR pgs. 61-62. A notation is made that an absentee ballot has been requested. TR p. 62. An absentee ballot, along with instructions, is mailed to the voter along with a postage pre-paid envelope. TR pgs. 62-63. The voter's name is placed only on the ballot envelope. TR p. 63. When the ballot is returned, an Election Board employee records the receipt, the ballot and envelope are sorted by ward, and placed in alphabetical order. TR p. 64. On election day, a bipartisan team reviews the

list of those persons who have been marked as returning absentee ballots and reviews the ballot envelopes received to determine that they match. TR p. 64. The ballot envelopes are then opened by the team in the manner set forth in § 115.299. As Stoff testified, the team does "not look at how a voter voted, but they'll separate the envelope from the ballot so that the ballots can be run through an optical scan scanning device." TR p. 64. After the election is certified Stoff testified that "the applications, ballots, and all other "election related materials [are] kept under seal …. [W]e box up all the election materials related to that particular election. We seal it. We lock it up." TR pgs. 22-23. The process explained by Stoff is consistent with the procedures mandated by §§ 115.295, 115.299, and 115.493.

Statutes Read *In Para Materia*

As with the absentee ballot applications, Roland, and the trial court again contend that the silence of Chapter 115 as to absentee ballot envelopes dictates that they must be open records under the Sunshine Law. D136 pgs. 2-3. Simply because no statute says "absentee ballot envelopes are confidential,"[12] the inquiry is not over. While, to a certain degree, discerning the General Assembly's intent requires this Court to read between the lines of §§ 115.295, 115.299, and 115.493, the intent to make absentee ballot envelopes inaccessible to the public is plain and unmistakable. "The provisions of a legislative act are not to be read in isolation, but are to be construed together and read in harmony with the entire act." Gott v. Dir. of Revenue, 5 S.W.3d 155, 159-160 (Mo. banc 1999). "It is a cardinal principle of interpretation that statutes *in pari materia* are to be treated as embodied in one section, and considered together in order to elucidate the legislative intent therein enacted, and this is true though they are found in different chapters of the revised statutes and under different headings. This rule is of stronger application here because all of the sections involved are not only in the same chapter but in the same article of the statutes." State ex rel. Brokaw v. Bd. of Educ. of City of St. Louis, 171 S.W.2d 75, 80 (Mo. App. 1943) (internal citations omitted). Here, §§ 115.295, 115.299, and 115.493 are all

[12] However, § 115.295 states quite plainly that "[a]ll ballot envelopes received by the election authority shall be kept together in a safe place and *shall not be opened except as provided in [the Absentee Voting] subchapter*." Emphasis added.

contained in Chapter 115, with §§ 115.295 and 115.299 both appearing in the Absentee Voting subchapter. These sections must be read *in para materia*. The provisions of § 115.493 prohibiting access to voted ballots must be read in conjunction with the statutes dictated the procedures for storing and securing voted ballots and ballot envelopes.

If the trial court were correct, any one absentee ballot envelope could be subject to a Sunshine Law request at any time, which would require the election authority to break the seal of the container of voted ballots and ballot envelopes and permit inspection and copying of the ballot envelope by any member of the public upon request. If a person requested John Doe's absentee ballot envelope, the election authority would have to unseal the container, locate Doe's ballot envelope, remove the envelope from the string, and permit inspection and copying. Election authorities could be faced with an endless series of requests for access, in which they must seal and unseal containers of voted ballots and ballot envelopes in response to public record requests. If staff members of election authorities are repeatedly sealing and unsealing the containers of ballots and ballot envelopes (which the election judges sealed and signed), the chain of custody of ballots would be compromised. In an election contest, a court could be presented with a container of ballots which has been repeatedly opened and resealed to accommodate public record requests. Under those circumstances, it would be impossible for a court to have confidence that the ballots have not been tampered with. The election judges could certainly not attest that container has not been tampered with after they signed it.

Because the mandatory procedures to secure and store absentee ballot envelopes are irreconcilable with an intent to permit the public to access to the envelopes, this Court must determine that the absentee ballot envelopes are records protected from disclosure by law.

Plain Error Review is Appropriate

Appellants' counsel representing them when the Sunshine Law request for absentee ballot envelopes was made relied solely on § 115.493 to assert that the envelopes were records protected from disclosure by law. While § 115.493 is certainly a critical component of Appellants' arguments herein, § 115.493 should be read in conjunction with §§ 115.295

and 115.299,[13] the subchapter of Chapter 115 relating to absentee voting, and that the regulatory scheme established by these sections clearly indicates the General Assembly's intent that absentee ballot envelopes are closed records. Because the Court's decision will likely be the final word on the privacy of absentee ballot envelopes, plain error review is appropriate to the extent that the applicability of §§ 115.295 and 115.299 was not preserved by Appellants' prior counsel.

Rule 84.13 provides that plain errors "affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." "The propriety of granting plain error review is fact-specific." Davolt v. Highland, 119 S.W.3d 118, 135 (Mo. App. W.D. 2003). Appellate courts "use a two-step process when conducting plain error review. 'We first determine whether or not the error is plain, and second, we determine whether or not manifest injustice or miscarriage of justice would result if the error is left uncorrected.' ''We will reverse for plain error in civil cases only in those situations when the injustice of the error is so egregious as to weaken the very foundation of the process and seriously undermine confidence in the outcome of the case.'"" Riggs v. State Dep't of Soc. Services, 473 S.W.3d 177, 186 (Mo. App. W.D. 2015) (internal citations omitted).

Here, the trial court declared that Appellants violated the Sunshine Law by denying Roland's request for access to absentee ballot envelopes. As set forth herein, the General Assembly's regulatory scheme for handling and securing absentee ballot envelopes cannot be reconciled with the trial court's declaration that the envelopes are open records accessible to the general public. Accordingly, the error is plain.

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[13] Though not specifically cited in Appellants' Point Relied On in their brief to the Court of Appeals, these statutes were referenced throughout Point II of such brief. *See* Appellants' Brief to Court of Appeals, pgs. 25, 26, 28. "Rule 83.08(b) does not prohibit a party filing a substitute brief with this Court from improving the brief with more detailed legal analysis than that articulated below." Cox v. Kansas City Chiefs Football Club, Inc., 473 S.W.3d 107, 114, n. 4. (Mo. banc 2015).

Manifest injustice would result if the trial court's error is left uncorrected. The trial court's decision led to the release of absentee voters' private information and led to the Governor's removal of two Commissioners of the Election Board. Roland's request for access to absentee ballot envelopes represented an issue of first impression for the trial court (and for the Election Board). No reported case provided guidance to Appellants as to whether these records should be publicly accessible. The guidance provided to Appellants by the Secretary of State was that the envelopes should be considered closed records under § 115.493. Depo., pgs. 35-37. Due to the considerable time pressures imposed by the statutes governing election contests and Sunshine Law requests, Appellants and the trial court were forced to make quick determinations based on a convoluted statutory scheme crafted to balance privacy with transparency. The trial court's decision was issued only eight days after the petition had been served. D136 pgs. 9-10. Under these circumstances, a decision by this Court requiring Appellants to constrict their arguments to § 115.493 would be manifest injustice, and would have the effect of severing this statute from the remaining subsections in Chapter 115 which relate to the handling and securing of absentee ballot envelopes.

In accepting transfer of this case after opinion by the Court of Appeals, this Court clearly acknowledged the vital public interests at stake. The privacy interests of persons who vote absentee should not be lightly disregarded. This Court must be mindful that this case is likely to be the final word on whether absentee ballot envelopes are accessible to the general public. If this Court limited Appellants' arguments to § 115.493 – and held that § 115.493 *read in isolation* did not establish grounds to close absentee ballot envelopes – it is extraordinarily unlikely that the applicability of §§ 115.295 and 115.299 to a request for access to absentee ballot envelopes would ever be considered by a Missouri court. No election authority in this State would incur the risk of denying a Sunshine Law request to access absentee ballot envelopes in the face of such a precedent established by this Court. Any election authority that did so would face the prospect of substantial penalties and attorney's fees for denying a Sunshine Law request. Yet granting access to the envelopes would be inconsistent with state law and would sacrifice the privacy protections established

by the General Assembly (and could compromise the security of election materials). The General Assembly's intent in enacting §§ 115.295, 115.299, and 115.493 plainly establishes that the envelopes must be kept secure and sealed along with the ballots themselves, and accessible only to a legislative body, court, or grand jury for election contest purposes. A narrow decision by this Court interpreting only § 115.493 would produce a distorted analysis of the General Assembly's intent, and would thwart a full and complete examination of the General Assembly's balance between transparency and privacy.

Voters may be reluctant to vote absentee if they believe reporters, political operatives, debt collectors, or any other person could track them down to question their voting preferences and eligibility to vote absentee. It is not hyperbole to state that this Court's decision will impact every future election in the State of Missouri. Because manifest injustice would result if this Court did not consider the applicability of §§ 115.295 and 115.299, plain error review is appropriate.

Relief Sought

Because §§ 115.295, 115.299, and 115.493 establish detailed procedures for the securing and storage of absentee ballot envelopes along with voted ballots, and prohibit inspection of voted ballots while providing no explicit ability for the public to access the envelopes, the envelopes are records which are protected from disclosure by law under § 610.021(14). This Court should reverse the trial court's decision granting a declaratory judgment in favor of Roland declaring that Appellants violated the Sunshine Law by denying his request for access to absentee ballot envelopes.

CONCLUSION

For the reasons set forth herein, Appellants pray that this Court reverse the decision of the trial court as stated in its partial judgment of August 23, 2016, declaring that Appellants violated the Sunshine Law when they determined that the absentee ballot applications and absentee ballot envelopes that Roland requested were closed records under § 610.021(14) RSMo, and assess any and all costs to Roland.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND CERTIFICATE OF COMPLIANCE WITH RULE 55.03(a)

The undersigned counsel hereby certifies that on June 24, 2019, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon all counsel. In addition, the undersigned counsel certifies under Rule 55.03(a) of the Missouri Rules of Civil Procedure that he has signed the original of this Certificate and the foregoing pleading.

/s/ *James C. Hetlage*

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count function of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 12,629, excluding the cover, signature block and certificates of service and compliance.

The undersigned further certifies that this electronic brief was scanned for viruses and found to be virus-free.

/s/ *James C. Hetlage*