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, 1622-CC09861

APPELLANTS' SUBSTITUTE REPLY BRIEF / BRIEF IN RESPONSE TO CROSS-APPEAL

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In his brief in response to Appellants' Substitute Brief, Respondent/Cross-Appellant David Roland ("Roland") makes barely any effort to address the glaring inconsistency at the heart of his argument regarding absentee ballot applications. Namely, that it is fundamentally absurd to conclude that the General Assembly intended to make a list of names and addresses of persons applying for absentee ballots available *only* to a very few specified classes of persons, and for only a short period of time, while it simultaneously intended to allow *any person* to make a Sunshine Law request to access the absentee ballot applications themselves, thereby disclosing all of the information which § 115.289, RSMo[1] requires election authorities to maintain as confidential.

Roland's contention – that a "ne'er-do-well looking for a house or person to target could find what they were looking for much quicker and easier if they were working with a prefabricated list than if they were attempting to rummage through hundreds or thousands of separate documents" – is speculative and does not withstand serious scrutiny. *See* Respondent/Cross-Appellant's Brief, p. 29. If Roland's construction of § 115.289 is correct, *any and all* absentee ballot applications would be open for public

[1] All statutory references are to RSMo 2016, unless otherwise indicated.

inspection, whether a requestor seeks one particular application, a group of applications, the applications from one city ward, or all the applications received by an election authority during an election cycle. Such "ne'er-do-well" looking to target a house or a person need not request *all* the absentee ballot applications received by the election authority to target a person or group. He or she could simply request the applications of the person(s) targeted and obtain the information sought. This Court should find the prospect that every person who submits an absentee ballot could be so targeted to be chilling. If the trial court's decision stands, requesting absentee ballot applications would become a standard part of opposition research, or of targeting any person's enemies. Any public figure, or any private citizen, who wishes to keep private his or her preferred political party or his or her reason for voting absentee – including his or her absence from the jurisdiction – would be powerless to do so.

There is a big difference between making names and addresses of absentee ballot applicants available to a select group of persons, and making all information on absentee ballot applications available to any member of the public for any reason. The General Assembly clearly provided for the limited dissemination of absentee ballot applicants' contact information, but did not intend for mass publication of all of the information contained on their applications. If the applications were available to the public, any member of the public could post copies of their applications on a social media site or in a newspaper. Or worse yet, a person seeking to deter people from voting absentee could threaten to publicize absentee ballot applicants' preferred political party and notify the public of their absence from the jurisdiction on election day through social media or other

means. An applicant for an absentee ballot should not have to choose between voting absentee and publicizing that his or her home will be unattended on election day.

Roland cites no case or statute providing that a voter's preferred political party or a voter's reason for voting absentee would be accessible to the public. Instead, Roland recites a series of statutes making voter registration records – which include a voter's name and address, but do not include a voter's preferred political party or eligibility to vote absentee – accessible to the public. *See* §§ 115.157, RSMo, 115.163, RSMo Supp. 1978. Roland then sets forth the history of the General Assembly's enactment and amendment of § 115.289. Roland's recitation of the statute's history makes clear that the General Assembly amended the statute in a manner that supports Appellants' position. The statute's history makes plain that since 1982, the General Assembly did not intend for absentee ballot applications, or any information from the applications, to be accessible to the public. A ruling to the contrary would be to hold that the General Assembly's amendments to the statute were meaningless and nonsensical.

As Roland notes, when § 115.289 was originally enacted in 1977, it did not contain any provisions making absentee ballot applications, or any information from absentee ballot applications, confidential. In fact, the statute provided that the list of the names and addresses of absentee ballot applications "shall be posted in a conspicuous place, accessible to the public," and that "[a]ny member of the public may copy the posted list." The statute was then amended in 1982 to explicitly state that the list of names and addresses of persons applying for absentee ballots is confidential, and permitted only candidates, representatives of a campaign committee, a person with

written authorization from a candidate, or a person who applied for an absentee ballot, to access the list. Otherwise, the list of names and addresses of persons applying for absentee ballots was inaccessible to the general public.

Though Roland states that the "legislature's policy choices" in amending § 115.289 "do seem unusual," his interpretation of § 115.289 would render the General Assembly's 1992 amendment completely meaningless and nonsensical. *See* Respondent/Cross-Appellant's Brief, p. 29. "The legislature is presumed not to enact meaningless provisions. When the legislature amends a statute, it is presumed to have intended the amendment to have some effect." Wollard v. City of Kansas City, 831 S.W.2d 200, 203 (Mo. banc 1992) (internal citation omitted). The General Assembly's 1992 amendment to § 115.289 manifested a clear intent to restrict access to information from absentee ballot application, and to repeal its prior policy of permitting anyone to access the list of names and addresses. This would have been a meaningless amendment if anyone could make a Sunshine Law request for the applications themselves, thereby obtaining all of the information to which the General Assembly intended to restrict access by amending the statute.

This remains true of § 115.289 today. The General Assembly's clear intent to restrict who can access information from absentee ballot applications is irreconcilable with the trial court's conclusion that *anyone* can make a Sunshine Law request to obtain the applications themselves, with all the information that § 115.289 makes confidential, including a voter's preferred political party (in primary elections) and reason for voting absentee. "Ascertainment of legislative intent is the primary goal of statutory

construction." O'Flaherty v. State Tax Comm'n of Missouri, 680 S.W.2d 153, 155 (Mo. banc 1984). Because it is clear that the General Assembly intended to restrict access to the list of names and addresses of persons applying for absentee ballots, it necessarily follows that the absentee ballot applications must be records which are protected from disclosure by law, and therefore closed pursuant to § 610.021(14), RSMo.

The trial court's interpretation of § 115.289 would result in an absurd interpretation of the statute that is contrary to the General Assembly's plain intent to restrict access to information derived from absentee ballot applications. "Construction of statutes should avoid unreasonable or absurd results … and the Court has no authority to read into a statute a legislative intent contrary to the intent made evident by the plain language…." Reichert v. Bd. of Educ. of City of St. Louis, 217 S.W.3d 301, 305 (Mo. banc 2007) (internal citations omitted). "Acting on the presumption that the legislature never intends to enact an absurd law and the principle that the reason of the law should prevail over the letter of the law, courts, 'in extreme cases have stricken out words or clauses as improvidently inserted, in order to make all sections of a law harmonize with the plain intent or apparent purpose of the legislature.'" Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, LLC, 248 S.W.3d 101, 109 (Mo. App. W.D. 2008)(internal citations omitted). This Court should give effect to the General Assembly's clear intent to restrict access to information derived from absentee ballot applications. This Court should not condone the trial court's absurd reading of the statute which would render a portion of § 115.289 meaningless.

Roland for the first time on appeal cites to § 115.926, RSMo for the proposition that "the legislature knows precisely how to craft an exemption from the Sunshine Law if that is what the legislature intends to do." *See* Respondent/Cross-Appellant's Brief, p. 30. Section 115.926 provides, in pertinent part that the "election authority shall request an electronic-mail address from each covered voter who registers to vote. An electronic-mail address provided by a covered voter shall not be made available to the public or any individual or organization other than an authorized agent of the local election authority and is exempt from disclosure under the Missouri sunshine law contained in chapter 610."

Roland asserts that "[t]his is what a statute looks like when the legislature decides that certain information is to be excepted from the Sunshine Law's disclosure requirements…. If a statute does not afford something approaching this sort of clarity when it comes to public records, the courts should apply the presumption of openness…." *See* Respondent/Cross-Appellant's Brief, p. 23. Roland's proposed test would go far beyond the strict construction of exceptions of the Sunshine Law. "The rule of strict construction does not require that the court ignore either common sense or evident statutory purpose." State v. Hobokin, 768 S.W.2d 76, 77 (Mo. banc 1989). Roland's proposed construction would have this Court ignore the General Assembly's clear intent and embrace an absurd reading of § 115.289. Roland is essentially proposing that the Court abdicate its responsibility to determine the legislature's intent and blind itself to whether such an interpretation would create an absurd result.

If the test is, as Roland proposes, that the records at issue are open to the public *unless* a statute plainly and explicitly states that the records are not subject to disclosure pursuant to Chapter 610, then there would be no need for subsection (14) to § 610.021 to exist at all. Subsection (14) exempts from disclosure "[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). There would never be a need to invoke subsection (14) if the subject law stated unequivocally that the records at issue are not subject to disclosure under the Sunshine Law. Such a statement would end the inquiry. Section 610.011, RSMo provides that public records shall "be open to the public *unless otherwise provided by law*." (Emphasis added.) If another statute outside of Chapter 610 explicitly states that records are not subject to disclosure under Chapter 610, the records are beyond the reach of § 610.011, and it would never be necessary or appropriate to invoke § 610.021(14) under the literal test proposed by Roland. Where – as with § 115.926 – the statute explicitly states that the records described therein are "exempt from disclosure under the Missouri sunshine law contained in chapter 610," there is no need to resort to the exceptions listed in § 610.021 because § 115.926 puts the records beyond the reach of Chapter 610 altogether. Subsection (14) of § 610.021 applies where there is no such explicit statement, yet the statutory scheme at issue regulates how certain information and records are accessed, and who may access same. *See* Nat'l Council for Teachers Quality, Inc. v. Curators of Univ. of Missouri, 446 S.W.3d 723, 727 (Mo. App. W.D. 2014) (Plaintiff "suggests that, because the Federal Copyright Act does not expressly address the

disclosure of copyrighted material under an open records law, it does not have any applicability to Section 610.021(14)…. Review of the relevant case law, however, reveals that 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."); *see also* American Family Mutual Insurance Co. v. Missouri Department of Insurance, 169 S.W.3d 905, 909 (Mo. App. W.D. 2005) (Holding that records containing trade secrets are protected from disclosure in response to a Sunshine Law request pursuant to Section 610.021(14) RSMo.). Section 610.021(14) represents the General Assembly's recognition that some state and federal statutes, even if they do not directly address disclosure or reference Chapter 610, tightly regulate the manner in which information can be disseminated. Subsection (14) affords a public governmental body a basis to deny a Sunshine Law request so that it does not have to choose between violating such statutes and violating the Sunshine Law.

Here, the Court is presented with a statute which unambiguously limits who can receive information regarding the names and addresses of persons applying for absentee ballots and when they can receive such information. Implicitly then, the applications themselves *must* be protected from disclosure because limiting access to a list of the names and addresses of these voters, but not limiting access to the applications themselves would be nonsensical. The trial court's decision would upend the balance of privacy and transparency crafted by the General Assembly by holding that *any person* could get the names and addresses (and the voters' reason for voting absentee and their

preferred political party) of persons applying for absentee ballots *at any time* simply by filing a Sunshine Law request for the absentee ballot applications. Because this runs counter to the clear intent of the General Assembly in adopting and amending § 115.289, this Court should find that absentee ballot applications are records which are protected from disclosure by law.

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.

In response to Point II of Appellants' Substitute Brief, Roland contends that Appellants have impermissibly altered the basis of their claim[2] from that asserted at the appellate court. As in Appellants' initial response to Roland's Sunshine Law request, Appellants still rely primarily on § 115.493, RSMo as providing the basis for closure of absentee ballot envelopes. The official response of Appellants to Roland's Sunshine Law request in July of 2016 relied upon §§ 610.021(14) and 115.493 as authority to close the absentee ballot envelopes, stating: "Section 610.021(14) permits a public governmental body to close records which are protected from disclosure by law. Section 115.493 protects the information being requested." D147 p. 2. No mention is made of the

[2] In Appellants' Brief to the Court of Appeals, Point II stated: "The trial court erred in determining 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 these envelopes are confidential processed ballot materials, and allowing public access to such records would contravene the clear intent of the General Assembly."

envelopes being processed ballot materials.[3] This is not a case in which Appellants have concocted a *post hoc* explanation for declining to disclose the absentee ballot envelopes or have moved the goalposts, as Roland suggests.

Since Roland's Sunshine Law requests, Appellants have relied upon § 115.493 for the proposition that the absentee ballot envelopes are records protected from disclosure by law, and therefore closed pursuant to § 610.021(14). In the Court of Appeals, Appellants argued that the absentee ballot envelopes should be considered processed ballot materials and thus protected from disclosure pursuant to § 115.493, while also arguing in their brief[4] that §§ 115.295 and 115.299, RSMo supported such a conclusion. Therefore, Appellants arguments herein were presented to the Court of Appeals. Appellants maintain that the same statutes support closure of the absentee ballot envelopes in this Court. Appellants' greater emphasis on §§ 115.295 and 115.299 to provide proper context to § 115.493 is not a new basis for Appellants' claims on appeal. While "Rule 83.03 prohibits the appellant from asserting claims of reversible error in this Court that were not asserted in the court of appeals," Garland v. Ruhl, 455 S.W.3d 442, 450, n. 7 (Mo. banc 2015), the applicability of §§ 115.295 and 115.299, RSMo, and the

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[3] The trial court's partial judgment indicates that Appellants' prior counsel opined during oral argument that the absentee ballot envelopes could be "processed ballot materials in write-in form" in response to Roland's motion for judgment on the pleadings. D153 p. 2. Roland's petition does not make specific reference to Appellants as having relied upon the "processed ballot materials" phrase (D137), and Appellants' initial answer was dictated into the record, admitting all of Roland's allegations except as they related to a knowing or purposeful violation of the Sunshine Law. D152, p. 1. Appellants' amended answer did not make reference to "processed ballot materials." D156.

[4] *See* Appellants' Brief to Court of Appeals, pgs. 25, 26, 28.

context they provide to § 115.493, were raised by Appellants in the Court of Appeals. To the extent that Appellants' claims are deemed to differ from their claims at the trial court and at the Court of Appeals, plain error review is appropriate, as this Court's decision will have far-reaching implications.

Section 115.493 provides that certain election records must be retained by an election authority for twenty-two months after an election and that "[d]uring 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*." (Emphasis added.) Section 115.295 provides that, as absentee ballots envelopes are received prior to an election, "[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*."[5] (Emphasis added.) Section 115.299 provides that, after absentee ballots have been counted, "the 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]'…. On 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." (Emphasis added.)

Reading these statutes *in para materia*, the clear implication is that the absentee ballot envelopes – which cannot be opened prior to the election and which must, after counting, be stored in sealed containers bearing the name of the bipartisan counting team

[5] "This subchapter" refers to §§ 115.275 – 115.304, entitled "Absentee Voting."

and returned to the election authority – are protected from disclosure. As § 115.299 mandates that the envelopes be stored in sealed containers with the voted ballots (which are indisputably closed and not open to inspection pursuant to § 115.493), which even election authority personnel are not permitted to open or inspect, it is impossible to infer that the General Assembly intended for absentee ballot envelopes to be open to inspection by a Sunshine Law request. The plain intent of the General Assembly is that absentee ballot envelopes, along with the voted ballots with which they are stored, should only be available in the case of an election contest, or in response to a subpoena by a court or grand jury.

Roland asserts that § 115.493 must be construed as providing access to absentee ballot envelopes by Sunshine Law request because he was able to utilize the records that were ultimately provided to him after the trial court's decision to successful overturn a state legislative primary race in an election contest suit filed on behalf of Bruce Franks. *See* Franks v. Hubbard, 498 S.W.3d 862, 865 (Mo. App. E.D. 2016). "Due to the extraordinarily short timeline available to conduct an election contest while still having hope of getting on the November general election ballot, if Roland had not had the few extra days Judge Bush's judgment provided with the absentee ballot envelopes, he would not have been able to identify the Board's violations of the law that allowed for a relatively quick, definitive proof that the August 2, 2016 primary election result was of doubtful validity, requiring a special election." *See* Respondent/Cross-Appellant's Brief, p. 37.

The timeline of events as recounted by Roland undercuts this assertion. Roland filed his petition in Franks election contest suit on August 17, 2016. *See* Respondent/Cross-Appellant's Brief, p. 13. Yet it was not until August 25, 2016, that Roland examined the absentee ballot envelopes at issue in Franks' primary election. D154, D173, p. 10. *See* Respondent/Cross-Appellant's Brief, pgs. 13-14. Clearly, Roland and Franks felt confident enough in their allegations that they filed a verified petition[6] asserting improprieties in the primary election and challenging the results of the election. Yet Roland would not have access to the absentee ballot envelopes he contends were essential to litigating the Franks case for another eight days.

As soon as Roland filed this election contest lawsuit, § 115.493 afforded Roland the ability to subpoena[7] the absentee ballot envelopes, as well as "voted ballots, ballot cards, processed ballot materials in electronic form and write-in forms." Section 115.493 states, in part, "during the [22 month] 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." The General

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6 *See* Case No. 1622-CC09996, 22nd Judicial Circuit, Petition, August 17, 2016.

7 That records are closed pursuant to the Sunshine Law does not make them exempt from disclosure pursuant to discovery or by subpoena. *See* State ex rel. Jackson County Grand Jury v. Shinn, 835 S.W.2d 347, 348 (Mo. App. W.D. 1992) ("[T]he records in this case are closed only to the public but are not closed to the power of a subpoena issued by the grand jury."); *see also* State v. Jackson, 353 S.W.3d 657, 661, n. 3 (Mo. App. S.D. 2011) ("[A] statutory limitation on the right of the general public to access governmental information pursuant to the Sunshine Law does not create a privilege that can be utilized to limit or defeat discovery in litigation.").

Assembly recognized that election records should be preserved and available pursuant to a subpoena to investigate and expose election improprieties. Making records available by subpoena pursuant to a lawsuit or investigation by the General Assembly or a grand jury is a far cry from making records available to *anyone* by a Sunshine Law request, which would permit release of records in bulk to be used for any purpose. Roland could have subpoenaed the absentee ballot envelopes as soon as his petition had been filed in the election contest lawsuit. Here, Roland obviously did not need the envelopes to *file* his election contest lawsuit. He filed his lawsuit with a verified petition eight days before he reviewed the envelopes. The proper method for Roland to confirm the allegations in his petition is to obtain the records by a subpoena, not by a Sunshine Law request.

The expedited timeframe for an election contest lawsuit is described in § 115.533, RSMo, which requires issuance of a summons "[i]mmediately after a petition is filed" and requires that an answer be filed by the contestee "[n]ot later than four days after the petition is filed." "The contested election shall have preference in the order of hearing to all other cases and shall be commenced at the date set and heard day to day, including evenings and weekends if necessary, until determined. There shall be no continuances except by consent, so that the case may be concluded not later than the tenth Tuesday prior to the general election." *See* § 115.535, RSMo. "*All materials and records relating to the contested election may be subpoenaed* and all information contained therein shall be subject to the rules of discovery in civil cases." *See* § 115.539, RSMo. (Emphasis added.)

While Roland was able to utilize the absentee ballot envelopes obtained after the trial court's decision herein in his election contest lawsuit, the fact remains that he could have subpoenaed those envelopes as soon as August 17, 2016. It would be indisputable that Roland was entitled to subpoena the absentee ballot envelopes pursuant to §§ 115.493 and 115.539. There is no reason to believe that – had the absentee ballot envelopes not been available through a Sunshine Law request – Roland could not have uncovered the same apparent improprieties cited in his brief by requesting a subpoena for the envelopes in his election contest lawsuit. Therefore, Roland's use of the absentee ballots envelopes in the Franks election contest lawsuit has no bearing on whether the absentee ballot envelopes are available by Sunshine Law request.

As under Point I, Roland relies on the silence of Chapter 115 to assert that absentee ballot envelopes are open to the public by a Sunshine Law request. *See* Respondent/Cross-Appellant's Brief, p. 39. Roland states that "whether absentee ballot envelopes are exempt from the Sunshine Law's disclosure requirements ***prior to*** the removal of the voted ballots inside them, that question is not before this Court." *See* Respondent/Cross-Appellant's Brief, p. 38. But alas, this question *is* before the Court because a ruling that absentee ballot envelopes are open to the public based on the statutes' silence regarding the envelopes would necessarily place no time limitation on their availability to the public. Nothing would stop a person from requesting to inspect unopened absentee ballot envelopes, and an election authority would have no statute to cite to support closing the envelopes to the public prior to an election. This is why Roland's entire premise must be rejected. Once one accepts Roland's interpretation of

§ 115.493 that the records be open to the public, it is impossible to read in an arbitrary restriction on *when* the records could be accessed.

To the extent that Roland contends that "the facts of this case demonstrate that it is entirely possible to open a container that happens to hold some of those restricted materials without opening or inspecting (or allowing a member of the public to open or inspect) the restricted materials themselves," such "facts of this case" are not in the record and no citation is provided to the legal file. *See* Respondent/Cross-Appellant's Brief, pgs. 39-40. This Court should disregard such "facts of this case" that are not in the record pursuant to Rule 84.04(e) ("All factual assertions in the argument shall have specific page references to the relevant portion of the record on appeal, i.e., legal file, transcript, or exhibits."). The Court should base its ruling on the facts within the record and the text of the pertinent statutes.

Roland cites to §§ 115.465 and 115.469, RSMo as supporting his argument that the sealing of the container of absentee ballot envelopes with voted ballots is of no particular significance because the sealed containers are not necessarily required to remain sealed. If anything, these statutes support Appellants' position. Section 115.299 requires that once a container of voted ballots and absentee ballot envelopes has been sealed and signed by members of the counting team, "all such containers shall be returned to the election authority." Section 115.465 relates to the transmission of voted ballots from a polling place after counting by election judges to the election authority. If a box is used:

> the box shall be locked and the key removed. *Each election judge shall write his name on a strip of paper* which shall be pasted over the keyhole of the ballot box and extended over the upper lid of the box and over the top for some distance. *The strip shall be pasted in such a manner that the signatures extend across the keyhole and place of opening so that if the box is opened or the key inserted in the keyhole, the paper will be torn and the signatures destroyed*. The paper shall be fastened with an adhesive material which will not permit removal of the strip without defacing it.

(Emphasis added.) A similar procedure is provided in the statute if an envelope is used rather than a ballot box. Section 115.469 provides that after election judges count write-in votes, the "election judges shall enclose the ballot cards, the envelope marked 'DEFECTIVE BALLOTS', and all write-in forms containing proper votes, in a container designated by the election authority. The container shall be securely sealed in such a manner that if the container is opened, the seal will be broken beyond repair." The clear intent of §§ 115.465 and 115.469 is that the containers, after being sealed and signed by the election judges are to remain closed so that it can be clearly detected if the container has been opened or the seal broken. It would be incongruous to determine that voted ballots and absentee ballot envelopes should be placed in a sealed, signed container, but could be opened at any time to accommodate a Sunshine Law request for an envelope. The purpose of sealing and signing the containers is so that, in the event the containers are subpoenaed pursuant to § 115.493, there can be confidence that the ballots have not been tampered with. Since § 115.299 mandates that the envelopes be stored in sealed containers with voted ballots, the conclusion is inescapable that the envelopes are not available by Sunshine Law request.

Roland asserts that plain error review is inappropriate under Appellants' Point II. He notes that any "other election authority in the state that is in doubt about its obligations to allow public inspection of absentee ballot envelopes can file a lawsuit pursuant to § 610.027.6 in order to 'ascertain the propriety' of denying access to" absentee ballot envelopes. *See* Respondent/Cross-Appellant's Brief, p. 52. While filing suit pursuant to § 610.027.6 is a remedy where a public entity is unclear as to whether records are closed under the Sunshine Law, both Roland and Appellants have acknowledged that the tight timeframe mandated for election contest lawsuits makes such a resolution entirely impractical here. Because this timeframe makes it likely that this issue will evade appellate review, this Court should fully consider whether § 115.493, read in conjunction with §§ 115.295 and 115.299, protects absentee ballot envelopes from public disclosure. While Appellants appreciate Roland's offer of assistance regarding Sunshine Law compliance, Appellants submit that this Court is better suited to provide guidance, not only to Appellants, but to every other election authority in the state. It is a near certainty that another election authority will be faced with a Sunshine Law request for absentee ballot envelopes. Clear guidance from this Court will benefit all Missouri election authorities, and will provide clarity to voters as to the implications of a decision to exercise the right to vote absentee.

Because the General Assembly intended for absentee ballot envelopes to remain undisturbed with voted ballots within a sealed, signed container, and § 115.493 provides access to voted ballots only upon an election contest or subpoena from a court or grand

jury, this Court should determine that the absentee ballot envelopes are protected from disclosure by law, and thus closed pursuant to § 610.021(14).

RESPONSE TO RESPONDENT/CROSS-APPELLANT'S POINT RELIED ON

III. The trial court did not err in requiring Roland to pay court costs because § 514.060, RSMo provides that the prevailing party is entitled to its costs, and Roland did not prevail in the second phase of the trial, at which the costs at issue were incurred.

A. Roland failed to preserve Respondent's Point I of his cross-appeal for review because he failed to file a motion to retax costs and, thus, there is no final appealable order for this Court to review.

Roland's Cross-Appeal raises one point relied on. This Court should dismiss Respondent/Cross-Appellant Roland's Point I because he did not preserve it for appellate review. Specifically, Roland failed to file a motion to retax costs. Accordingly, his point must be dismissed. "Absent some constitutional imperative not present here, however, it simply is not the role of the court of appeals or this Court to grant relief on arguments that were not presented to or decided by the trial court." Barkley v. McKeever Enterprises, Inc., 456 S.W.3d 829, 839 (Mo. banc 2015). Because the trial court never ruled upon the issue of costs, this Court lacks jurisdiction to consider the issue.

Roland asserts that the trial court erred in taxing $1,084.50 in costs to him after he did not prevail in the second phase of the trial, regarding whether Appellants committed a knowing or purposeful violation of the Sunshine Law. Circuit clerks have "a ministerial duty to tax these court costs upon request." Solberg v. Graven, 174 S.W.3d 695, 701 (Mo. App. S.D. 2005). "Once court costs are taxed by the clerk, any party may file a motion to retax costs so the trial court can review the clerk's bill of costs. *See* § 514.270; Rule

77.05. In the process of retaxation of court costs, 'all errors shall be corrected by the court ….' § 514.270. A trial court's denial of a Rule 77.05 motion to retax costs is an appealable order." Id. (internal citations omitted).

Section 514.270, RSMo. provides that any "person aggrieved by the taxation of a bill of costs may, upon application, have the same retaxed by the court in which the action or proceeding was had, and in such retaxation all errors shall be corrected by the court; …." Here, since Roland has not filed a motion to retax costs pursuant to § 514.270, there is no appealable order for this Court to review. "In applying § 514.270, Missouri courts have long recognized that '[w]here a party complains that the judgment taxing the costs is wrong, for any reason, he must, to obtain relief, lodge his complaint with the court rendering such judgment.' 'If a party contests a category or specific item of costs, the remedy is by motion to retax in the court of the alleged error.'" Wiley v. Daly, 472 S.W.3d 257, 265-266 (Mo. App. E.D. 2015). '"[W]here a statute creates a right or liability that did not exist at common law or under prior statutes, and also provides a specific remedy for the enforcement thereof, as a general rule such statutory remedy is exclusive.' 'Because § 514.270 creates a statutory right and provides a specific remedy, that remedy is exclusive.'" Id. (internal citations omitted). Roland did not avail himself of § 514.270, the exclusive remedy for claims of improper taxation of costs.

Roland claims, without citing to any statute or case law, that he was not obligated to seek relief pursuant to § 514.270 because he challenges the trial court's *ability* to assess costs against him, without regard to whether the *amount* of costs awarded is appropriate. This is a distinction without meaning and he is still obligated to file a motion

to retax costs if he contends that he should not have been taxed costs at all. Here, the trial court's judgment was silent on the issue of taxation of costs. A minute entry accompanying the court's judgment stated: "Costs to the Plaintiff." D136 p. 16. Appellants filed a bill of costs and 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. Wiley instructs that "'[w]here a party complains that the *judgment taxing the costs is wrong, for any reason,* he must, to obtain relief, lodge his complaint with the court rendering such judgment.'" 472 S.W.3d at 265-266 (internal citations omitted). (Emphasis added.) Thus, a motion asserting that costs cannot be taxed against Roland is well within the scope of § 514.270. "Before the circuit clerk taxes statutory court costs, a party's bill of costs 'is merely an unsolicited gratuitous proposal.' After the circuit clerk taxes costs, 'any party may file, in the court in which the action or proceeding was heard, a motion to retax costs so that the court can review the clerk's bill of costs.' 'If the court denies the party's motion to retax costs, the party can appeal such denial … because the denial of a Rule 77.05 motion to retax costs is an appealable order.' Because the circuit clerk had not yet taxed costs against the defendant *and the trial court had not had a chance to retax costs pursuant to Rule 77.05,* there was nothing before us to review, and we dismissed the defendant's appeal." Riggs v. State Dep't of Soc. Services, 473 S.W.3d 177, 185 (Mo. App. W.D. 2015) (internal citations omitted). (Emphasis added.)

Plain error review is not appropriate under Roland's Point I. Roland cites no reason why he could not file a motion to retax costs in the trial court. That he neglected to do so creates no manifest injustice. If the issue of the propriety of taxing costs to a

plaintiff in a Sunshine Law lawsuit arises again, the issue is fully capable of being addressed by the trial court in the manner provided by § 514.270, which can then be reviewed by appellate courts. Since Roland failed to seek relief from the taxation of costs under § 514.270, this point must be dismissed.

B. Costs were properly taxed to Roland.

Even if the Court reaches Roland's argument under his Point I, it is without merit. The trial court had clear authority under § 514.060 to assess costs against Roland. "The award of costs is a matter within the trial court's sound discretion, and we will not disturb the award absent a showing of an abuse of discretion." Sasnett v. Jons, 400 S.W.3d 429, 441 (Mo. App. W.D. 2013). "To demonstrate an abuse of discretion, the appellant must show that the circuit court's decision 'was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice.'" Id. (quoting Russell v. Russell, 210 S.W.3d 191, 199 (Mo. banc 2007)).

At issue is the Circuit Clerk's taxation of costs to Roland for the costs of Jose Caldera's deposition, taken May 31, 2017 ($694.50), and the transcript of the June 13, 2017 bench trial on the second phase of the case ($390.00), relating solely to Roland's claim that there was a knowing or purposeful violation of the Sunshine Law. D174 p. 1. Section 492.590 provides that the costs and expenses of depositions are taxable. Section 514.060 provides that "in all civil actions, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law." Here, despite Roland's assertions otherwise, there is no such different provision made by law.

"A party prevails not only by obtaining a favorable judgment, but also by obtaining a settlement, a voluntary dismissal of a groundless complaint, *or a favorable decision on a single significant issue in the underlying case*." Collector of Revenue v. Wiley, 529 S.W.3d 42, 46 (Mo. App. E.D. 2017). (Emphasis added.) Here, the trial was clearly bifurcated, and, while Roland prevailed at the first phase of the trial in August of 2016, Appellants prevailed at the second phase, the phase in which the costs at issue were incurred. As the prevailing party at the second phase of the trial, Appellants were entitled to request that such costs be taxed pursuant to § 514.060, RSMo.

After Judge Bush issued his partial judgment finding that the absentee ballot applications and absentee ballot envelopes were open records and after the Election Board promptly produced the records to Roland in August 2016, Roland could have accepted this victory and moved on. Instead, he pushed for an award of attorney's fees and costs and for an assessment of civil penalties against Appellants, thereby forcing the Election Board to depose Jose Caldera in preparation for trial and to obtain the trial transcript of the one-day bench trial before Judge Sengheiser, which account for the costs assessed against Roland. In this bifurcated case, the Election Board prevailed in the trial before Judge Sengheiser and is entitled to an award of its court costs. Thus, an award of costs to Appellants for costs incurred for the second phase of trial, at which they prevailed, was a sound exercise of discretion by the trial court. The determination that Roland should bear the costs associated with the second phase of trial certainly do not rise to level of being "so arbitrary and unreasonable that it shocks one's sense of justice"

as to constitute an abuse of discretion. *See* G.K.S. v. Staggs, 452 S.W.3d 244, 247 (Mo. App. W.D. 2014).

Roland contends that the trial court's award of costs in this case serves as a disincentive to average citizens to enforce the Sunshine Law. This Court does not have before it an average citizen seeking to obtain access to public records. Instead, before the Court is Roland, a seasoned and experienced attorney representing himself, who emphasizes Sunshine Law litigation, and who pursued the second phase of trial solely to obtain financial penalties from Appellants to compensate himself.

Roland stated clearly in discovery responses that he pursued the second phase of trial because he intended for the penalties assessed to Appellants to serve as his compensation for the first phase of trial. "I have not billed myself for the time devoted to this case; I will be paid for my time when the Court finds a knowing or purposeful violation of the Sunshine Law in this case." D171 p. 3. An award of attorney's fees is not intended to serve as a windfall for a pro se attorney/plaintiff. *See* Treasurer, Trustees of Drury Indus., Inc. Health Care Plan & Trust v. Goding, 692 F.3d 888, 898 (8th Cir. 2012) ("Thus, where an attorney represents himself personally, an award of attorneys' fees is not appropriate."); *see also* Steelman v. City of Salem, 4:12-CV-00191, 2013 WL 1363792, at 6 (E.D. Mo. Apr. 4, 2013) (Court denied attorneys' fees to attorney under the ADA, stating "the purpose of the fee-shifting provisions in the federal civil rights laws is to assist civil rights plaintiffs seeking the representation of counsel, rather than to reward those representing themselves.").

Here, Roland pressed forward to the second phase of trial with his claims of knowing/purposeful violations – founded predominantly on his own communications to the represented Election Board members (D146 and D148) – to pay himself for his own time spent pursuing his claims. As an experienced Sunshine Law litigator, Roland would have been fully aware of the long odds that a court would find a knowing or purposeful violation under the facts presented herein. Shortly before the trial in this case, this Court had spoken quite clearly to the type of facts which would indicate a knowing or purposeful violation of the Sunshine Law. *See* Strake v. Robinwood W. Cmty. Improvement Dist., 473 S.W.3d 642, 646 (Mo. banc 2015); *see also* Laut v. City of Arnold, 491 S.W.3d 191, 193 (Mo. banc 2016). The facts at issue in Strake and Laut were quite different than those before the trial court here, yet Roland pursued such claims anyway. Roland would likewise have clearly understood that case law provides that an award of attorney's fees is generally not available to pro se attorneys. And yet he proceeded, forcing Appellants, and ultimately the taxpayers, to incur the costs at issue herein. This is far removed from a situation in which the assessment of costs would serve as some form of deterrent to a citizen seeking public records. At most, the award of costs to Appellants demonstrates that where an attorney insists upon pursuing non-meritorious claims for financial penalties for the purpose of enriching himself, such litigant proceeds at his or her own risk. Since Roland's stated motivation in pursuing the second phase of trial was to compensate himself rather than to aid a client who could not otherwise afford to bring a cause of action, the award of costs in favor of Appellants was appropriate.

It is immaterial that Appellants did not specifically request an award of costs in its Amended Answer. Appellants' Amended Answer prayed for denial of the relief sought in Roland's Petition, and for the court to "grant such other and further relief to [Appellants] as this Court deems just and proper." D156, p. 10. That is an ample basis for an award of costs. "Under a prayer for general relief the court may grant any relief consistent with the pleadings and evidence." Homan v. Employers Reinsurance Corp., 136 S.W.2d 289, 301 (Mo. 1939). Section 514.060 does not condition a court's authority to award costs based on whether or not costs have been specifically requested.

Roland (and *amicus* American Civil Liberties Union) argues that § 514.060 does not permit shifting of costs to Roland because the statute does not apply "in those cases in which a different provision is made by law." *See* Respondent/Cross-Appellant's Brief, p. 48. Roland argues that the Sunshine Law has its own cost-shifting provisions. However, by Roland's own admission, the Sunshine Law is silent on whether the prevailing party can apply to the clerk to tax costs against the non-prevailing party in instances not addressed in § 610.027. Section 610.027 of the Sunshine Law contains two specific instances in which costs are taxed against the governmental body: (1) a finding of a knowing or purposeful violation under subsections .3 and .4; and (2) when the governmental body brings suit to determine whether records are subject to a request pursuant to subsection .6. It is otherwise silent on taxation of costs. Therefore, a different provision *is not made by law*, and the general rule set forth in § 514.060 is applicable.

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.'" Hinton v. Dir. of Revenue, 21 S.W.3d 109, 112 (Mo. App. W.D. 2000) (internal citations omitted). *See also* Richardson v. State Highway & Transp. Comm'n., 863 S.W.2d 876, 882 (Mo. banc 1993) ("Waivers of sovereign immunity are, however, strictly construed. This accords with the general prohibition of assessing costs against the state. *When the General Assembly waives immunity regarding costs, it does so explicitly*….") (internal citations omitted). (Emphasis added.) Appellants are state entities/officials.[8] Therefore, costs cannot be shifted to Appellants by implication. The General Assembly provided only a few specific instances in which costs are shifted under the Sunshine Law. Outside of these situations, the general rule in § 514.060 applies, and the trial court's assessment of the costs incurred in the second-phase of this lawsuit against Roland was proper and should be affirmed.

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.

[8] All of the Individual Appellants were sued in their official capacities only, so under the law it is as though Roland sued only the Election Board.

Respectfully submitted,

/s/ James C. Hetlage

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

The undersigned counsel hereby certifies that on August 5, 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 8,773, 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