SC97781

IN THE SUPREME COURT OF MISSOURI

ST. LOUIS CITY BOARD OF ELECTION COMMISSIONERS, ET AL.,

Defendants-Appellants,

v.

DAVID ROLAND

Plaintiff-Respondent/Cross-Appellant.

APPEAL FROM THE TWENTY-SECOND CIRCUIT COURT
The Honorable Julian Bush and Jason Sengheiser, Circuit Judges
Case No. 1622-CC09861

SUBSTITUTE BRIEF OF RESPONDENT/CROSS-APPELLANT

David E. Roland #60548
14779 Audrain Road 815
Mexico, MO 65265
Phone: (314) 604-6621
libertyandjustice@gmail.com

Attorney for Respondent/Cross-Appellant

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Procedural Posture

This case involves the application of Missouri's Sunshine Law to the St. Louis City Board of Election Commissioners.[1] After the Board refused to investigate potential violations of absentee ballot laws, Roland asked the Board to produce (among other public records) copies of certain absentee ballot applications and absentee ballot envelopes ("the Contested Records") so that he could conduct his own investigation. The Board refused to produce the Contested Records. Roland filed this lawsuit to force the Board to comply with the Sunshine Law. In an expedited hearing, the Board's attorney dictated the Board's answer, admitting all the facts Roland alleged in his Petition, save only that the Defendants knowingly violated the law. Both parties made oral motions for judgment on the pleadings. On August 23, 2016, Circuit Judge Julian Bush issued a partial judgment in favor of Roland holding that the Board had violated the Sunshine Law because neither § 115.289, RSMo.,[2] nor § 115.493 authorized the Board to withhold the Contested Records from Roland. The Board produced the Contested Records.

This matter later proceeded to trial for the purpose of determining whether the Board's violations of the Sunshine Law were knowing or purposeful. On October 16, 2017, Circuit Judge Jason Sengheiser issued a final judgment holding that they were not. In a docket

[1] For the sake of convenience, Roland will refer to the Board of Election Commissioners, its Directors, and its custodian of records, each of whom he sued in their official capacities, collectively as "the Board."

[2] All statutory references in this brief shall be to the most recent edition of the Missouri Revised Statutes unless otherwise noted.

entry accompanying the final judgment, the trial court ordered Roland to pay the Board's costs. On October 19, 2017, the Board submitted a Bill of Costs in the amount of $1,084.50, which was taxed against Roland. Roland timely appealed the trial court's October 16, 2017 order to pay the Board's costs and one week later the Board cross-appealed the trial court's August 23, 2016 partial judgment in favor of Roland.

On January 16, 2018, the Court of Appeals consolidated the parties' appeals, instructing the Board to assume the position of the primary appellant and to file the first brief in accordance with Rule 84.04(i). This order put Roland, the plaintiff below, in the position of Respondent/Cross-Appellant for the purposes of this consolidated matter. On February 5, 2019, the Court of Appeals issued an opinion affirming in part and reversing in part; three weeks later it issued a corrected opinion that did not substantially modify its earlier opinion. On March 12, 2019, Roland filed a motion to rehear, modify, or transfer; the Court of Appeals denied the motion. On March 27, 2019, Roland filed an application for transfer to this Court; the Court sustained this motion on June 4, 2019. This Court has jurisdiction over this matter pursuant to Article V, § 10 of the Missouri Constitution, which authorizes this Court to accept transfer of cases after the Court of Appeals issues an opinion where the case involves a question of general interest or importance.

Mootness

The question of whether citizens may inspect absentee ballot applications and empty absentee ballot envelopes is of great public interest, is likely to recur, and is likely to elude appellate review in future live controversies; this case warrants an exception to the mootness doctrine. *See In re Pyre*, 169 S.W.3d 116, 120 (Mo. App. E.D. 2005).

STATEMENT OF FACTS

In early July 2016, several candidates for elective office in St. Louis City approached Roland and asked him to look into potential misuse of the absentee ballot system in elections conducted by the Board. Transcript ("Tr."), p. 159; D173, p. 4. Upon investigation, Roland became concerned that certain election results in St. Louis City were being skewed by violations of the state's laws regarding absentee voting. Tr., p. 159; D173, p. 4. On behalf of his clients, Roland explained these concerns to the members of the Board by sending each of the Commissioners (Burger, Maloney, Phillips, and Schwartz)[3] letters detailing his findings and asking the Board to take action to prevent absentee voter fraud in the August 2, 2016 primary election. Tr. 159-60; D138; D139; D140; D141; D173, p. 4. On July 15, 2016, attorney David Sweeney sent Roland a letter on behalf of the Board that gave Roland the impression that the Board had no intention of investigating the concerns expressed in Roland's letters. Tr., p. 160; D142.

Roland's clients asked him to conduct his own investigation into the possible violations of absentee ballot laws. Tr., pp. 160-61; D173, pp. 4-5. On July 22, 2016, Roland sent to the Board a Sunshine Law request seeking, among other documents, copies of absentee ballot applications and absentee ballot envelopes submitted to the Board in recent elections. Tr., p. 161; D143; D173, p. 5. On July 22, 2016, Roland submitted to Jobe a written public records request ("the Request") pursuant to Missouri's Sunshine Law. D173, p. 5.

[3] Each of these Board members has since been replaced; their successors have automatically been substituted as parties pursuant to Rule 52.13(d).

On July 25, 2016, Jobe sent Roland an email confirming that she had received Roland's Sunshine Law request and had "given the request to Gary Stoff for approval." D173, p. 5. On the afternoon of July 26, 2016, attorney David Sweeney called Roland and said that Sweeney planned to advise the Board to deny part of Roland's Sunshine Law request on the basis that, in Sweeney's opinion, § 115.289, RSMo., exempted some of the records Roland had requested from the scope of the Sunshine Law. D137, p. 5; D156, p. 3. On the evening of July 26, 2016, Roland sent two emails to the Board and Sweeney, advising them that § 115.289 could not justify withholding the Contested Records. D137, p. 5-6; D145; D156, p. 3-4; D161. Roland's second July 26, 2016 email pointed out that "[n]othing in section 115.289 states that absentee ballot applications are records that may be deemed 'closed[,]'" and the final paragraph of that email reminded its recipients of the options the Sunshine Law affords to public governmental bodies in doubt regarding their legal obligations. D161; D173, p. 6-7.

On July 27, 2016, Sweeney sent Roland a letter officially responding to the Request. D147; D173, p. 8. In response to paragraph 4 of the Request, which involved applications for absentee ballots, Sweeney's response stated, "Section 610.021(4) 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. In response to paragraph 5 of the Request, which involved absentee ballot envelopes, Sweeney's response stated, "Section 610.021(4) 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. In response to paragraph 6 of the Request, which involved applications for absentee ballots, Sweeney's response stated, "Section 610.021(4) permits a public governmental body to close records which are protected from disclosure by law. Section 115.493 protects the information being requested. However, the list of applications for absentee ballots including the name, voting address, and mailing address, if different, of each applicant will be provided to you, as a person with written authorization from a candidate, on July 29, 2016, after 8:00 a.m." D147, p. 2.

Later on July 27, 2016, Roland sent an email addressed to Sweeney, Burger, Maloney, Phillips, Schwartz, Stoff, and Jobe, which included an attachment. D148; D149; D173, p. 8. The attachment was a copy of § 115.493, RSMo., with certain text highlighted in yellow and other text highlighted in green. D149. Roland's July 27 email explained why the Contested Records did not belong among the types of records that § 115.493 treated as confidential. D148.

On July 28, 2016, Sweeney sent Roland a letter purporting to amend the formal response the Board had provided to Roland on July 27, 2016. D150, p. 1; D173, p. 9. Sweeney's July 28, 2016 letter purported to amend the Board's response to paragraph 4 of the Request so that it would now state, ""Section 610.021(4) permits a public governmental body to close records which are protected from disclosure by law. Section 115.289 protects the information being requested." D150, p. 1. Sweeney's July 28, 2016 letter purported to amend the Board's response to paragraph 6 of the Request so that it would now state, "Section 610.021(4) permits a public governmental body to close records which are protected from disclosure by law. Section 115.289 protects the information being

requested. However, the list of applications for absentee ballots including the name, voting address, and mailing address, if different, of each applicant will be provided to you, as a person with written authorization from a candidate, on July 29, 2016, after 8:00 a.m."[4] D150, p. 1-2. Roland filed his Petition in this lawsuit against the Defendants on July 29, 2016. D137; D173, p. 9.

Early the next week, Bruce Franks, Jr., one of Roland's clients who was a candidate in the August 2, 2016 primary election, lost his bid to be the Democrat Party's nominee for the 78th House District by 90 votes. *Franks v. Hubbard*, 498 S.W.3d 862, 865 (Mo. App. E.D. 2016). Although Franks received nearly 53% of the votes cast at the polls on election day, he lost the race because his opponent won 78.5% of the votes cast via absentee ballot. *Id.* On August 17, 2016, Roland filed an election contest on Franks' behalf, alleging that his opponent's vote total included a large number of unlawful absentee ballots. *Id.*

On August 22, 2016, Roland and the Board agreed to expedited consideration of Roland's Sunshine Law challenge. D136, p. 10. At a hearing before Judge Julian Bush, the Defendants dictated an Answer to Roland's Petition. D136, p. 10. Both parties made oral motions for judgment on the pleadings, which were heard and submitted. D136, p. 10; D173, p. 9. On August 23, 2016, Judge Bush issued a Memorandum Opinion that granted Roland partial judgment on the pleadings. D136, 10; D153; D173, p. 9. After initially stating that they would allow Roland to begin reviewing the Contested Documents on

[4] Although the record does not include the list that the Board produced, it revealed that 4,750 different voters applied for absentee ballots for the August 2, 2016 primary election.

Wednesday, August 24, the Board allowed Roland to begin reviewing the documents on Thursday, August 25. D154; D173, p. 10.

The trial in *Franks v. Hubbard* began on Wednesday, August 31, 2017; Roland used the Contested Records to demonstrate "numerous violations of the absentee voter statutes." *Id.* at 871. On September 7, 2016, just days after Judge Rex Burlison's ruled in favor of Franks and ordered a special primary election, Governor Nixon removed Burger and Schwartz from the Board, noting Judge Burlison's finding that the legal violations were "solely the responsibility of the City of St. Louis Board of Election Commissioners." Tr. at 142; "Gov. Nixon Shakes Up St. Louis Elections Board" *St. Louis Post-Dispatch*, Sept. 7, 2016, available online at http://www.stltoday.com/news/local/govt-and-politics/gov-nixon-shakes-up-st-louis-elections-board/article_da435339-06ca-5c3c-9ec8-8def62052891.html.

The Board filed an Amended Answer on December 19, 2016.; this Amended Answer was not the pleading based upon which Judge Bush granted Roland's motion for judgment on the pleadings. D156. The Board did not ask the trial court to reconsider Judge Bush's partial judgment on the pleadings, either in light of its Amended Answer or in light of facts adduced at trial. D156. The Amended Answer did not include any request for an award of costs, nor did it cite any authority under which the trial court could grant the Board an award of costs against Roland. D156.

On June 13, 2017, Circuit Judge Jason Sengheiser conducted a one-day trial for the purpose of determining whether the Board's violations of the Sunshine Law were knowing or purposeful. D136, p. 15; D173, p. 1. The Board filed a trial brief prior to the beginning

of the trial; that brief did not request an award of costs, nor did it cite any authority under which the trial court could grant the Board an award of costs against Roland. D166. Six weeks after the trial, the Board filed a supplemental memorandum opposing Roland's request for attorney fees pursuant to § 610.027, even if the trial court should conclude that the Board's violation of the Sunshine Law was knowing or purposeful. D170. In the conclusion to this supplemental memorandum, for the very first time the Board asked the trial court to "assess any and all costs to [Roland];" it did not cite any authority under which the trial court might grant this request. D170, p. 5.

On October 16, 2017, Judge Sengheiser entered a judgment concluding that Board's violations of the Sunshine Law were not knowing or purposeful. D173, p. 22. The judgment itself said nothing about either side paying the other's costs, nor did it identify any statutory basis for awarding costs to either party. D173. The docket entry associated with the final judgment included the sentence "Costs to the Plaintiff." D136, p. 16. Two days later, on October 19, 2017, the Board submitted a Bill of Costs in the amount of $1,084.50, which the trial court taxed against Roland. D136, p. 16; D174. Roland timely filed his notice of appeal on November 15, 2017. D136, p. 16; D176. One week later the Board timely filed its cross-appeal. D136, p. 16; D178

CROSS-APPELLANT'S POINT RELIED ON

I. The Trial Court Erroneously Applied the Law in Requiring Roland to Pay the Board's Court Costs Because the Trial Court Lacked Authority to Impose Such a Requirement In That § 610.027 Makes Provision for Whether an Award of Costs is Authorized in a Sunshine Law Case and § 610.027 Does Not Authorize an Award of Costs Against a Citizen Plaintiff, Particularly Where the Plaintiff has Proven a Violation of the Sunshine Law.

§ 610.027, RSMo.

§ 514.060, RSMo.

Mo. Sup. Ct. Rule 77.01

State ex rel. Merrell v. Carter, 518 S.W.3d 798, 800 (Mo. banc 2017)

State ex rel. Nixon v. Patriot Tobacco Co., 220 S.W.3d 889

(Mo. App. E.D. 2007)

ARGUMENT

I. Transparency of Public Records is the Express Policy of This State; Any Exceptions to This Policy Must be Strictly Construed. (Responding to Appellant's First and Second Points Relied On)

Citizen access to public records is not a new or novel policy for this State. Missouri's public policy in favor of open records and the right of public access is both "well-established" and "mandated legislatively in numerous contexts." *Transit Casualty Co. ex rel. Pulitzer Publishing Co. v. Transit Casualty Co. ex rel. Intervening Employees*, 43 S.W.3d 293 (Mo. banc 2001). Even before the legislature passed the Sunshine Law in 1973, it had firmly established citizens' firm right to inspect public records:

> "Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all times be open for personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen. Any official who violates the provisions of this section shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or by both the fine and confinement." § 109.180, RSMo.

The Sunshine Law, however, represented a more comprehensive legislative commitment to advancing the policy of government transparency. Since the adoption of that set of statutes, whenever a Missouri court is presented with a case in which a public governmental body has denied a citizen's request to inspect public records its analysis should begin and end with the Sunshine Law's simple, utterly unambiguous words:

- A "public record" is "any record, whether written or electronically stored, retained by or of any public governmental body[.]" § 610.010(6), RSMo.

- "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." § 610.011.1, RSMo. (emphasis added)
- "Except as otherwise provided by law, …all public records of public governmental bodies shall be open to the public for inspection and copying as set forth in sections 610.023 to 610.026[.]" § 610.011.2, RSMo.
- "All… public records shall be open to the public for inspection and duplication." § 610.015, RSMo.
- "Public records shall be presumed to be open unless otherwise exempt pursuant to the provisions of this chapter." § 610.022.5, RSMo.
- "Each public governmental body shall make available for inspection and copying by the public of that body's public records." § 610.023, RSMo.
- "If a public record contains material which is not exempt from disclosure as well as material which is exempt from disclosure, the public governmental body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." § 610.024.1, RSMo.
- "Once a party seeking judicial enforcement of sections 610.010 to 610.026 demonstrates to the court that [a public governmental body] has held a closed… record… the burden of persuasion shall be on the body and its members to

demonstrate compliance with the requirements of sections 610.010 to 610.026." § 610.027.2, RSMo.

There are some circumstances in which certain privacy interests might take precedence over the State's commitment to openness and transparency, but as Missouri courts have repeatedly recognized, it is for the ***legislature***, not the judiciary, to decide where those lines should be drawn. *State ex rel. Goodman v. St. Louis Board of Police Comm'rs*, 181 S.W.3d 156, 159 (Mo. App. E.D. 2005). And, in light of the legislature's direct command that the Sunshine Law's terms should be liberally construed to promote the public policy of transparency and any exceptions to that policy should be strictly construed, the courts' responsibility in an open records case is to look for ways that a statute's words could be interpreted to promote transparency, and only to find an exception to the Sunshine Law where the plain terms of a statute remove any uncertainty as to the legislature's intent.[5]

Courts assessing a potential exception to the Sunshine Law should adhere to the following venerable principles of statutory construction: When strictly construing a statute, a court may not presume anything that is not expressed. *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 381 (Mo. banc 2014). Courts must interpret statutes in such a way that, if possible, every word, clause, sentence, and provision is given effect; they must not presume that the legislature used superfluous terms. *Saint Charles County v. Director of*

[5] To reject a presumption in favor of transparency would not only render the phrase "and their exceptions strictly construed" a nullity, it would also contradict the express requirement to "liberally construe" §§ 610.010 to 610.200 to promote the public policy that records of public governmental bodies should be open to the public.

Revenue, 407 S.W.3d 576 (Mo. banc 2013). Courts may not add words to a statute. *Peters v. Wady Industries, Inc.*, 489 S.W.3d 784 (Mo. banc 2016). Provisions not plainly written in the law, or necessarily implied from what is written, should not be added under the guise of construction. *C.D.J. v. Mo. Dept. of Social Servs.*, 507 S.W.3d 605, 612 (Mo. App. E.D. 2016).

Transparency of Voter Information Been the Rule in Missouri for at Least Forty Years

For at least the past four decades, Missouri's election laws have made clear that, with a few clearly-described exceptions, the information that voters provide to election authorities is open to inspection by members of the public.

The General Assembly passed the initial version of Missouri's Sunshine Law in 1973, four years before the state passed its Comprehensive Election Act of 1977, which first established the provisions the Board has cited in support of its arguments. Chapter 115, RSMo., Supp. 1977. Section 1 of that first version of the Sunshine Law provided a very broad definition of "public governmental body" and defined "public record" as "any record retained by or of any public governmental body." 610.010, RSMo., Supp. 1973. Section 2 stated that "all public meetings shall be open to the public and public votes and public records shall be open to the public for inspection and duplication." § 610.015, RSMo., Supp. 1973.

When the legislature adopted the Election Act, then, it was not writing on a blank slate. The legislature was fully aware that to the extent it required election authorities to create or retain public records, those public records would only be excepted from the general rule

of transparency if the legislature made that exception abundantly clear. It was in that context that the legislature required election authorities to preserve in their offices "all applications and affidavits required by this chapter." § 115.173, RSMo., Supp. 1978. That initial version of the Missouri Comprehensive Election Act also expressly required election authorities to arrange voters' registration cards into permanent binders that would be maintained at the election authorities' offices, requiring that "[a]ll registration records shall be open to inspection by the public at all reasonable times."[6] § 115.163, RSMo., Supp. 1978. Thus, all the information that a voter provided to an election authority on their voter registration cards—and at that time it include one's name, home address, birthdate, telephone number (optional), township or ward, precinct, social security number (optional), place of birth, mother's maiden name (optional), last place registered, and occupation (optional)—would be available for inspection by any person who cared to go to the election authority's offices at a reasonable time. *Id*.

This same policy of transparency of election records exists today, at both the state and federal levels. Section 115.157 directly commands election authorities to make available for public inspection voters' names, addresses, townships, wards, precincts, and legislative districts, adding that "[a]ny election authority who fails to comply with the requirements of this section shall be subject to the provisions of chapter 610." § 115.157.5. The current

[6] Due to the fact that the election authorities' registers were not permitted to leave their offices except under very limited circumstances, citizens wishing to inspect these records would need to do so in person at the election authority's office. This is precisely the form of access Roland requested in this case. D143, p. 2.

version of § 115.163 requires election authorities to maintain a "precinct register" and states that "all registration records shall be open to inspection by the public at all reasonable times." Furthermore, federal law requires election authorities to disclose "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."[7] 52 U.S.C. § 20507(i). Section 115.158 establishes that the "Missouri Voter Registration System," is the "official voter registration list for the conduct of all elections in Missouri," the maintenance of which serves to ensure the accuracy and currency of the list of eligible voters. As such, as a matter of federal law, the information maintained as part of the Missouri Voter Registration System must be disclosed to the public—including individual voter registration applications and the information thereon. *Project Vote/Voting for America, Inc. v. Long*, 682 F.3d 331, 335-36 (4th Cir. 2012).

All of this goes to show that for at least the past forty years the general policy in Missouri has been that almost any information a voter provided to an election authority would be open for inspection by any member of the public who cared to go down to the election authority's office and look. It is also extremely telling to note, however, that the legislature has carved out certain exceptions to this general policy. For instance, §

[7] The Election Board misconstrued Roland's argument regarding the National Voter Registration Act. Roland does not contend that the NVRA compels a ruling in his favor—to have even a chance of obtaining such a ruling Roland would have had to request records under the authority of the NVRA and then, if denied, include violation of the NVRA as a claim. Roland merely invokes the NVRA to demonstrate that there is no basis at all for any presumption that the information a voter provides to an election authority is confidential, other than, of course, the votes they record on their ballots.

115.926.1 provides a perfect example of what it looks like when the legislature decides to create an exception to the Sunshine Law's disclosure requirements:

> 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***. The address shall be used only for official communication with the voter about the voting process, including transmitting military-overseas ballots and election materials if the voter has requested electronic transmission, and verifying the voter's mailing address and physical location. The request for an electronic-mail address shall describe the purposes for which the electronic-mail address may be used and include a statement that any other use or disclosure of the electronic-mail address is prohibited. § 115.926.1, RSMo.; A3.

This is what a statute looks like when the legislature decides that certain information is to be excepted from the Sunshine Law's disclosure requirements. It identifies a specific type of information, then states that it "shall not be made available to the public" and that it is "exempt from disclosure under the Missouri Sunshine Law contained in chapter 610." There is no need for speculation or reading between any lines, straining to discern what this provision could possibly mean. 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 rather than seeking out reasons that might justify limiting citizens' access to those records.

II. Section 115.289 Only Makes Absentee Ballot Applications Confidential Prior to 8:00 a.m. on the Friday Before the Relevant Election, and Then Only in the State's Largest Municipalities. (Responding to Appellant's First Point Relied On)

Judge Bush's Memorandum Opinion and Partial Judgment cuts right to the heart of the issue regarding § 115.289: "It is not possible, construing section 115.289 strictly, to construe the phrase 'prior to 8:00 a.m. on the Friday before the election' to mean 'prior to 8:00 a.m. on the Friday before the election or after 8:00 a.m. on the Friday before the election.'" D153, p. 3. This conclusion was correct and this Court should affirm it.

The History of § 115.289

The legislature adopted the first version of § 115.289 as part of the Comprehensive Election Act of 1977. At that time it read as follows:

> "As applications for absentee ballots are received, the election authority shall list the name, voting address and mailing address, if different, of each applicant. ***A copy of the list shall be posted in a conspicuous place, accessible to the public, at the entrance to the office of the election authority. Any member of the public may copy the posted list***, and the election authority may make copies of the posted list available for a reasonable fee determined by the election authority." § 115.289, RSMo., Supp. 1977 (emphasis added).

That first version of the statute made no mention whatsoever of confidentiality, either for the applications themselves or for the lists the election authorities were required to create. Quite to the contrary, the statute unambiguously required the list to be put ***squarely in public view*** and members of the public were expressly permitted to copy it.

The legislature amended § 115.289 in 1982, adopting the following language:

> 1. As applications for absentee ballots are received, the election authority shall list the name, voting address and mailing address, if different, of each applicant. Any person authorized under subsection 2 of this section may copy the list, and the election authority may make copies of the list available to the such persons for a reasonable fee determined by the election authority.

> 2. 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 a duly authorized representative of a campaign committee as defined in section 130.011, RSMo., or any person with written authorization from a candidate, or any person that has applied for an absentee ballot. § 115.289, RSMo., Supp. 1982.

This version of the statute reverses the earlier policy that the lists of absentee voters would be posted publicly, creating instead an explicit policy that these lists would only be available to a limited set of people. The requirement to keep these lists confidential applied statewide and there is no time limit imposed on that confidentiality. This version of the statute does again refer to absentee ballot applications as something separate from the lists, but the statute only makes the ***lists*** confidential—there is no suggestion that the applications must be kept confidential.

Just one year later, the General Assembly amended § 115.289 again, this time more dramatically. With the exception of a few inconsequential details, this version of the statute is the mirror image of the current version of the statute. This new revision had four subsections. The first two subsections, which were carried over from the original version of the statute described the scheme that applied generally throughout the state, while subsections .3 and .4 established the new scheme that would apply in the state's four largest municipalities (St. Louis City, St. Louis County, Kansas City, and Jackson County). § 115.289, RSMo., Supp. 1983. As before, the text of subsections .1 and .2—the ones that applied to the significant majority of the state and its citizens—contained no suggestion

whatsoever that absentee ballot applications were confidential or that election officials might treat them as "closed" records. §§ 115.289.1 and 2, RSMo., Supp. 1983. Subsection .3, on the other hand, specified that absentee ballot applications in St. Louis City, St. Louis County, Kansas City, and Jackson County would be kept confidential "[p]rior to 8:00 a.m. on the Friday before an election." The statute did not go on to say that these applications would continue to be confidential *after* 8:00 a.m. on the Friday before the relevant election. § 115.289.3, RSMo., Supp. 1983. In sum, the plain text of this statute, as it has existed from 1983 up to the present, establishes a general rule so far as the state and most of its citizens are concerned, absentee ballot applications themselves are not confidential, ever. The rule the statute imposes for election authorities in St. Louis City, St. Louis County, Kansas City, and Jackson County, however, is that absentee ballot applications are to be treated as confidential "[p]rior to 8:00 a.m. on the Friday before an election," but not after.

Interpreting § 115.289

The history and the language of this statute shows that there is something about the *lists* in particular that the legislature wanted to keep confidential. In the original 1977 version, the lists were to be posted publicly for all to see. Shortly thereafter, however, the legislature decided not only that the lists should be kept inside the election authority offices, but that they should not generally be available to the public. Despite this suggestion of confidentiality, it does not seem that anyone truly interested in viewing the list likely would have had much difficulty doing so because the legislature still authorized not only politicians and political campaigns to view these lists, but also "any person that has applied

for an absentee ballot." This seems a curiously low bar to clear for anyone really motivated to see the list.

The situation became even more complicated in 1983 when the legislature set up entirely different rules for the largest municipalities. Although it might stand to reason that every election authority in the state should provide the same permanent, qualified confidentiality for these absentee voter lists, that is not what the legislature required. Instead, the legislature determined that the absentee voter lists in the large urban areas should be ***totally*** confidential prior to 8:00 a.m. on the Friday before the relevant election, and then they would be qualifiedly confidential (the same as the rest of the state) after 8:00 a.m. on the Friday before the relevant election. The text of these provisions offer no clues as to ***why*** the legislature decided to make these distinctions—but it is absolutely clear that the legislature thought it useful to apply varying standards of absentee voter list confidentiality throughout the state and at different times..

Another distinction the legislature added to § 115.289 in 1983 regarded the applications for absentee ballots as well as the information contained on those absentee ballot applications. As previously noted, the original version of this statute specifically made reference to "applications for absentee ballots," so the legislature was familiar with the term, knew how to use it, and distinguished the applications themselves from the "lists" that it required election authorities to create. The original version of the statute does not in any way suggest that the applications were to be kept confidential. In 1983, however, the legislature specified for the first time that the applications themselves and the information contained thereon should be kept confidential. But ***only*** in the major urban areas. And ***only***

prior to 8:00 a.m. on the Friday before the relevant election. Again, the legislature's language here is not in any way ambiguous. The history of this statute shows that the legislature made a definite choice to distinguish between the absentee ballot applications, the information contained thereon, and the absentee voter lists. The legislature also made an unambiguous choice that ***only*** the election authorities in the four major urban areas were required to keep the applications and the information thereon strictly confidential, and that the strict confidentiality would extend ***only*** to 8:00 a.m on the Friday before the relevant election.

Any interpretation the Board (or this Court) wishes to make regarding § 115.289 must take account of the statute's history, as well as several different textual facts drawn from that history: (1) The original 1977 version of this statue actually ***required*** election authorities to post these absentee voter lists publicly, and there was no suggestion that either the absentee ballot applications themselves or the absentee voter lists were something to be kept confidential; (2) When in 1982 the legislature decided to change that policy and make the ***lists*** confidential, it did not also choose to make the applications confidential; (3) When in 1983 the legislature created the separate set of rules to govern the major urban areas, it required election authorities in those areas to give the absentee voter lists ***total*** confidentiality prior to 8:00 a.m. on the Friday before the relevant election, but then after 8:00 a.m. on the Friday before the relevant election the lists got only the same qualified confidentiality afforded to absentee voter lists throughout the rest of the state; (4) When the legislature created a new set of rules to govern the major urban areas, it specifically chose to address the applications and the information thereon as units separate

from the absentee voter lists; (5) The legislature chose to make the applications and the information thereon highly confidential, but ***only*** before 8:00 a.m. on the Friday before the relevant election—the legislature easily could have said that the applications should be kept confidential at all times or it could have treated them the same as the lists… but it did ***not*** do that; and (6) All of these policy decisions were taking place in the context of laws—both the Sunshine Law and the Election Code—that expressly allowed any member of the public to walk into an election authority's office and inspect almost all of the information a voter had provided to that election authority.

The legislature's policy choices, as represented by the various stages of this statute's development do seem unusual. Roland suggests that there may be some common sense behind those choices. For example, on a practical level it is fairly easy for an election authority to produce and a requestor to review a concise, neatly-printed, well-ordered list of data that comes preassembled in a stack of orderly pages. It is significantly more difficult for an election authority to produce and a requestor to review the same basic data from those neat pages, but now jumbled-up and scattered across hundreds or thousands of separate documents, each with its own form of handwriting.[8] 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.

[8] Perhaps this is something of which the court can take judicial notice.

As § 115.926.1 demonstrates, the legislature knows precisely how to craft an exemption from the Sunshine Law if that is what the legislature intends to do. The parties and this Court may lack the information and context necessary to grasp why the legislature made the policy choices it did in crafting § 115.289 over the years, but the language itself is unambiguous, identifying specific types of records and informing citizens what degree of confidentiality (if any) will apply to those records at specific times and in specific places. Absentee ballot applications are exempt from public disclosure in Missouri's four largest municipalities, prior to 8:00 a.m. on the Friday before the relevant election. Nothing in the statute can reasonably be read to arrive at any other conclusion. This interpretation is consistent with Judge Bush's August 23, 2016 Partial Judgment in Roland's favor, and therefore this Court should affirm that Partial Judgment.

III. No Missouri Statute Excepts Absentee Ballot Envelopes from the Sunshine Law's Disclosure Requirements (Responding to Appellant's Second Point Relied On)

As an initial matter, it is important to note that the Board has now completely abandoned the position it had maintained since its first rejection of Roland's open records request: that absentee ballot envelopes are "processed ballot materials in write-in form" not to be opened or inspected pursuant to § 115.493. Taken by itself, the Board's decision to abandon this argument is laudable because, as Judge Bush accurately noted, "[t]he phrase 'processed ballot materials in write-in form' is awkward at best and gobbledegook at worse, and it is certainly not self-evident that absentee ballot envelopes are such things." D153, p. 2. But the Board's wholesale abandonment of its longstanding argument does present two

significant issues that this Court must consider because, although a *respondent* is entitled on appeal to advance any argument in support of the trial court's judgment, an appellant does not have that same flexibility. *Garland v. Ruhl*, 455 S.W.3d 442, 450 n7 (Mo. banc 2015); *see also Rouner v. Wise*, 446 S.W.3d 242, 249 n5 (Mo. banc 2014); *Coldwell Banker Residential Real Estate Servs., Inc. v. Missouri Real Estate Comm'n*, 712 S.W.2d 666, 668 n1 (Mo. banc 1986).

Section 610.023.4 Does not Permit Public Governmental Bodies to Adopt *Post Hoc* Justifications for Denying Citizens' Access to Public Records

The first issue raised by the Board's abrupt shift in its argument has to do with the Sunshine Law. Section 610.023.4 requires a public governmental body that is denying a citizen's request for public records to provide the citizen with a "written statement of the grounds for such denial" and that statement must "cite the specific provision of law under which access is denied[.]" Part of the function of § 610.023.4 is to inform the citizen of the position the public governmental body will take in the event that the citizen decides to pursue a lawsuit for the purpose of obtaining a ruling as to the openness of the records the public governmental body has withheld. This allows the citizen to be fully informed before they commit themselves to spending the time, money, and emotional energy that accompanies this sort of litigation. If, after a citizen has initiated a lawsuit pursuant to § 610.027, the public governmental body could simply introduce new, previously undisclosed statutory justifications for having denied the citizen's request for public records, § 610.023.4 would be deprived of any substantial purpose because a citizen would still have no certainty that the reason they were initially given for the denial was the "real"

reason, or whether after a lawsuit has been filed the governmental body will simply shift its tactics and introduce *post hoc* justifications for withholding the records.

If public governmental bodies such as the Board are allowed to "move the goalposts" by changing their arguments after they get sued, citizens who wish to vindicate the state's explicit policy of transparency would not only face additional uncertainty in gauging the wisdom of going to court to ensure access to the records they requested, they could also find themselves facing additional legal expenses as the result of having to confront surprise justifications lobbed up by the defendant. Furthermore, it might be that if the public governmental body had fully informed the citizen of the statutes it intended to invoke to justify withholding the records, the citizen might have decided not to pursue the legal challenge in the first place. Consequently, this Court should interpret § 610.023.4 as acting in concert with the rest of the Sunshine Law to ensure that citizens will be fully informed, prior to initiating legal action regarding a records request that has been denied, as to the legal bases on which the public governmental body will rely to defend that denial. The Court should hold that where, as here, a citizen has demanded and received a § 610.023.4 statement of the statutory grounds on which a public governmental body bases its denial of a public records request, the public governmental body must be limited in any ensuing litigation to the rationale it provided the citizen in that § 610.023.4 statement.

The Board Has Fundamentally Altered the Basis of the Claim it Presented to the Court of Appeals

The second issue presented by the Board's abandonment of its argument that absentee ballot envelopes are "processed ballot materials in write-in form" is that it has substantially

altered the basis of the second Point Relied On it presented to the Court of Appeals. In its appellate brief the Board's second Point Relied On expressly argued that the trial court had erred "in that § 115.493, RSMo., provides that ***these envelopes*** are confidential processed ballot materials[.]" App. Br., p. 23. In its Substitute Brief, however, the Board's second Point Relied On argues that the trial court erred "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[.]" Thus, the Board is no longer contending (as it has through the entire course of this litigation) that absentee ballot envelopes themselves are closed records, but rather that they must be exempt from disclosure because the absentee ballots themselves are closed records.[9] Roland will address below why this "vicarious closure" contention is incorrect on the merits, but this Court may consider whether the Board has failed to preserve this issue for review.

Where this Court accepts transfer of a case after the Court of Appeals has issued an opinion, Rule 83.08(b) forbids an appellant to "alter the basis of any claim that was raised in the court of appeals brief."[10] In *Barkley v. McKeever Enterprises, Inc.*, 456 S.W.3d 829 (Mo. banc 2015), an appellant had argued (unsuccessfully) at the trial court and at the Court of Appeals that the trial court had erred by giving a particular jury instruction because, as a matter of law, the respondent was claiming an affirmative defense that, according to the

[9] Roland did not seek, nor did the trial court's judgment grant, any opportunity to inspect voted ballots of any sort.

[10] Respondents are nonetheless permitted to advance any argument in defense of the judgment. *Garland v. Ruhl*, 455 S.W.3d at 450 n7.

appellant, did not exist. *Id*. at 836. After the case was transferred to this Court, the appellant modified her first Point Relied On to include an alternative argument that the trial court had erred because the instruction complained of had improperly articulated the respondent's affirmative defense. *Id*. at 838-39. Because the appellant was attempting to assert an argument that the trial court had not addressed and that had not been presented to the Court of Appeals, this Court refused to address that argument. *Id*. at 839-40.

Prior to the filing of its Substitute Brief, the Board had always argued that it was justified in denying Roland's request to inspect absentee ballot envelopes because, it contended, ***the envelopes*** were not open public records. D153, p. 2; D166, pp. 3, 8, 11; D178, p. 4; App. Br., pp. 23-28. In its Substitute Brief, however, the Board argues that citizens may not inspect absentee ballot envelopes because ***the absentee ballots*** are not open public records. App. Subst. Br. at 31. The Board did not present to the trial court or to the Court of Appeals the question of whether the Sunshine Law requires it to withhold open public records from a citizen on the basis that the open records are stored in the same container as closed public records. Thus, this Court might consider whether, in light of Rule 83.08(b) and this Court's decision in *Barkley*, the Board has preserved this question for the Court's review.

The Facts of This Case Demonstrate Why Citizens Must Be Permitted to Inspect Absentee Ballot Envelopes

James Madison famously noted in Federalist 51:

> "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over

> men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

The Sunshine Law exists because, despite the brilliance of the checks and balances built into our political system, citizens of the Show-Me State came to realize that sometimes the only way to "oblige government to control itself" is to ensure that citizens have a hard-and-fast right to see for themselves what their government officials are doing with the power the people have entrusted to them. The people as a whole will only truly be equipped to hold their government officials accountable to the extent that the people are empowered to observe public meetings, inspect public records, and share what they find with their fellow citizens.

The Board's Substitute Brief fleetingly and begrudgingly admits that Roland used his inspection of the documents in this case to "uncover apparent improprieties that led to the overturning of a state legislative primary election." App. Subst. Br., p. 24. That does not even begin to tell the story. Roland had to request these documents in the first place because he had identified reason to believe that absentee ballot fraud had for years been skewing the results of the very elections the Board was supposed to be safeguarding.[11] The Board refused to investigate potential absentee ballot fraud that had apparently been taking place

[11] Due to the extraordinarily short time available for the election contest Roland and Franks had to make the strategic decision to focus their evidence solely on the 238 votes illegally counted due to the Board's numerous violations of the absentee ballot laws because they were the easiest to prove. The St. Louis Post-Dispatch relied on evidence and witnesses Roland and Franks had been gathering for weeks to publish a bombshell story about some of the issues that first prompted their concern. *See* Stephen Deere and Doug Moore, "P-D Investigation reveals multiple problems with absentee voting," *St. Louis Post-Dispatch*, August 31, 2016. *Available online at*: https://tinyurl.com/y6a335p5

under its own nose. When Roland finally was permitted to review these documents and share the results of his research in the *Franks v. Hubbard* election contest, the evidence showed that the ***Board itself*** had committed several "abuses of the election law" so great that the validity of the contested election was doubtful. *Franks*, 498 S.W.3d at 869. The Court of Appeals held that the Board had committed "numerous violations of the absentee ballot statutes, including:

- Allowing voters to submit absentee ballots without subscribing and swearing an affidavit before casting their ballots (§ 115.291.1);
- Accepting and counting absentee ballots that had not been placed in an absentee ballot envelope (§ 115.291.1 and .2);[12]
- Accepting and counting the ballots from envelopes bearing affidavits that had not been notarized as required by § 115.291.1;
- Accepting and counting the ballots from envelopes on which the voter had failed to write their address as required by § 115.283.1;
- Accepting and counting the ballots from voters who received assistance in filling out their ballots, but their assistant did not complete the statement made under penalty of perjury as required by § 115.283.5;

[12] As Judge Joan Burger, who was the Chair of the Board until Governor Nixon removed her shortly after the trial in *Franks*, testified at that trial, allowing voters to cast absentee ballots without keeping them in envelopes meant that candidates had no opportunity to challenge any of those ballots that might have been illegally cast. *Id.* at 870.

Thus, in an election that was decided by a margin of only 90 votes, the Board accepted and counted at least 238 absentee ballots that were not lawfully cast. *Id*. at 871.

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 relatively quick, definitive proof that the August 2, 2016 primary election result was of doubtful validity, requiring a special election. If the trial court had not—correctly—required the Board to let Roland inspect the absentee ballot envelopes, the Board's violations might never have been discovered. The people of the 78th House District and the 5th Ward might have continued to endure elected officials of dubious legitimacy. This case, which is inextricably connected with *Franks v. Hubbard*, is a textbook example of the power of government transparency to empower the citizens to hold their government officials accountable.

The Board has not Identified any Statute or Combination of Statutes That Prohibit a Member of the Public From Inspecting Empty Absentee Ballot Envelopes

The Board's new argument in its Second Point Relied On is that §§ 115.295, 115.299, and 115.493 collectively create an exception that excepts empty absentee ballot envelopes from the Sunshine Law's disclosure requirements. They do not.

The Board insists that § 115.295 supports its arguments, but the only statement in that statute of any possible relevance is: "All 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."[13] § 115.295.3. Protecting the integrity and secrecy of voted absentee ballots is of utmost importance, so *of course* the absentee ballot envelopes should not be opened prior to the lawful time for removing and counting those ballots—Roland has never suggested otherwise. But specifying that ballot envelopes shall be kept "together in a safe place" and shall not be opened prior to the time specified in § 115.299 does not in any way imply that the public is prohibited from inspecting these public records after the election has taken place and the voted ballots have been removed from them.

To the extent that the Board is seeking a ruling as to 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. Indeed, Roland's initial records request pointedly did not ask to inspect the absentee ballot envelopes for the August 2, 2016 primary election because at the time of his request they still contained voted ballots. *See* D137, ¶¶ 19, 45; D143, ¶¶ 5-6; D153, p. 1. It was only *after* the August 2, 2016 primary election that Roland made a verbal and written request to review the now-empty absentee ballot envelopes associated with that election. D154, ¶ 5. Thus, the only question these facts present is whether absentee ballot envelopes are closed records *after* the voted ballots have been removed from them. *See City of Springfield v. Events Pub. Co.*, 951 S.W.2d 366,

[13] Section 115.299 prescribes the only process through which one may lawfully open the envelopes before it is time to remove and count the absentee ballots.

370-71 (Mo. App. S. D. 1997) (courts must not go beyond the justiciable controversy presented by the facts of the case). Section 115.295 has no bearing on this question.

The Board correctly notes that § 115.493 severely limits the circumstances under which anyone may open or inspect "voted ballots, ballot cards, processed ballot materials in electronic form, and write-in forms." But, as Roland has emphasized from the very beginning of his dispute with the Board, that statute does *not* impose those same restrictions on "applications, statements, certificates, affidavits and computer programs relating to each election" from the Sunshine Law's disclosure requirements. D149. Absentee ballot envelopes are affidavits. *Franks v. Hubbard*, 498 S.W.3d 862, 869 (Mo. App. E.D. 2016) ("[T]he statement on a ballot envelope is an affidavit, made under penalty of perjury, and required to be notarized[.]"). Nothing in the wording of § 115.493 or any other statute suggests that these envelopes and the affidavits printed on them are "closed" for the purposes of the Sunshine Law or that the public is prohibited from inspecting them, particularly once they no longer contain voted ballots.[14] It is also important to note that although § 115.493 specifies that "voted ballots, ballot cards, processed ballot materials in electronic form and write-in forms," are not to be opened or inspected, the facts of this case

[14] Once an envelope is opened and the voted ballot removed from it and placed in a ballot box, there is no way of connecting the voted ballot back to the envelope in which it was delivered to the election authority so there is no particular reason that the envelopes should be exempt from inspection. *See* § 115.299.4. As long as election authority personnel are the ones retrieving the envelopes from their container and overseeing the citizen's inspection of the envelopes, there is no significant risk of anyone tampering with the voted ballots that remain in the container.

demonstrate that it is entirely possible to open a container that happens to hold some of these restricted materials without opening or inspecting (or allowing a member of the public to open or inspect) the restricted materials themselves.[15] As will be discussed further below, because one can open a container that houses both open public records and closed public records without opening or inspecting the closed records, there is no reason to interpret § 115.493 as prohibiting citizen inspection of empty absentee ballot envelopes. The election authority merely needs to avoid opening or inspecting the voted ballots themselves.

The crux of the Board's argument—which was not presented either to the trial court or to the Court of Appeals—is that *even though the absentee ballot envelopes are not themselves closed records*, they are exempt from disclosure under the Sunshine Law because they are *stored with* voted ballots, which *are* closed records. *See, e.g.*, App. Subst. Br., p. 34. The Board does not cite any precedent to support its position and Roland has been unable to locate any. The relevant statutes themselves refute the idea that there is any special significance to keeping voted ballots in a sealed container, and they also cast doubt on the notion that having open public records in close proximity to closed records somehow prevents disclosure of the open records.

Relying on witness testimony that was not available to the trial court when it issued the partial judgment from which the Board appeals, the Board makes much of the fact that after

[15] After Judge Bush entered the partial judgment in Roland's favor the Board produced for Roland's inspection more than one thousand absentee ballot envelopes and zero voted ballots.

the ballots have been counted § 115.299 requires the ballots and the ballot envelopes to be stored in the same sealed container. App. Subst. Br., p. 31-33. The Board wants the Court to conclude that sealed containers (and anything within them) are necessarily meant to remain closed, but a broader review of Chapter 115 forecloses this conclusion. First, there is an obvious reason for the legislature to require these records (the voted ballots and the absentee ballot envelopes) to be stored together in a sealed container—in the event of a legal proceeding a quick way to determine if an unauthorized person has tampered with the ballot box would be to see if the number of envelopes matches the number of ballots in the container.[16] Placing seals on the container does not in any way suggest that the container must not be opened; it merely ensures that any unauthorized opening of the container will be apparent. *See, e.g.*, § 115.430.5(2) (explaining that when a provisional ballot—in a sealed envelope *and* a sealed ballot box—is delivered to the election authority they must be removed, sorted, photocopied, and then placed in another sealed container until time for tabulation); 115.465 (describing two methods for sealing containers containing voted ballots for transportation between a polling place and the election authority's office); §

[16] Because it was not an issue raised before the trial court there is nothing in the record to explain why the version of § 115.299 in force in 2016 required ballots and envelopes to be "placed on a string." In other states, however, ballot envelopes have holes punched in them so that election officials can visually discern if an envelope still has a ballot in it, and running a string (or zip tie) through the hole provides both physical confirmation that the ballot has been removed and an easy method for keeping the envelopes bundled for storage. *See* "Good Question: Why are there holes in election materials" by Matt Gephart, *available online at*: https://kutv.com/news/get-gephardt/good-question-why-are-there-holes-in-election-materials. Although it is not in the record, none of the several hundred ballot envelopes Roland reviewed appeared to have any holes in them through which a string or zip tie could have run.

115.469 (requiring ballot cards, defective ballots, and write-in forms to be placed together in a container that is "sealed in such a manner that if the container is opened the seal will be broken beyond repair" before the container is opened again at the counting location).

The Sunshine Law itself anticipates that there might be circumstances in which open public records might be adjacent to (or even contain) information that is not subject to disclosure. Section 610.024 requires public governmental bodies, where possible, to separate information and records that are exempt from disclosure from information and records that are not exempt, and to make the non-exempt material available for examination and copying. This should not be difficult to do when it comes to voted absentee ballots, which are exempt from disclosure, and empty absentee ballot envelopes (and the affidavits printed thereon), which are not exempt from disclosure. Election authorities could easily comply with § 115.299 by putting voted absentee ballots in their own sealed envelope or container, then putting that sealed envelope or container into a larger sealed container that also contains the absentee ballot envelopes—this would make absolutely sure that citizens retain their ability to inspect open public records without in any way "opening or inspecting" those records that § 115.493 requires to be kept closed. Another possible solution is suggested by § 115.430.5(2), which requires officials to photocopy provisional ballot envelopes before they are placed in a separate sealed container prior to tabulation. There is no law preventing an election authority from creating and maintaining an electronic copy of the absentee ballot envelopes before they are sealed in a container with voted absentee ballots; the election authority could then allow members of the public to inspect these electronic copies in lieu of the originals. Although the Board has not identified

any statute at all suggesting that a voter's reasons for requesting or casting an absentee ballot is excepted from the scope of the Sunshine Law, should the legislature ever create such an exception the Board could potentially redact the excepted information from an electronic copy of the empty absentee ballot envelope, then make the redacted copy available for public inspection. The long and the short of it is, reading § 610.024 in conjunction with the rest of the Sunshine Low requires the Board to look for ways to *increase* citizen access to public records rather than constantly looking for reasons that citizen access to public records might be limited.

Because the Board has not properly preserved its Second Point Relied On for review and, in the alternative, has not identified any statute or combination of statutes that prohibit a member of the public from inspecting empty absentee ballot envelopes, this Court must affirm the trial court's judgment.

IV. The Trial Court Erroneously Applied the Law in Requiring Roland to Pay the Board's Court Costs Because the Trial Court Lacked Authority to Impose Such a Requirement In That § 610.027 Makes Provision for Whether an Award of Costs is Authorized in a Sunshine Law Case and § 610.027 Does Not Authorize an Award of Costs Against a Citizen Plaintiff, Particularly Where the Plaintiff has Proven a Violation of the Sunshine Law.

Error Preserved for Appellate Review

This cross-appeal is limited to the question of whether, as a matter of law, a trial court may order a citizen who filed a non-frivolous Sunshine Law challenge to pay the court costs of the public governmental body they sued.[17] Roland won a judgment from the trial

[17] Before the Court of Appeals the Board misconstrued Roland's argument, suggesting that he was alleging an error in the amount of the costs taxed and that, therefore, a motion to

court stating that the Board violated the Sunshine Law, and yet the trial court nonetheless determined that it had the authority to award costs and ordered the clerk of court to tax the Board's costs against Roland. Roland filed a timely notice of appeal clearly identifying the error of law he was asking the appellate court to review; because this was a court-tried case this was sufficient to preserve the issue for appellate review. Rule 73.01(d)

In the alternative, Rule 84.13(c) gives this Court the authority to apply "plain error" review when warranted by the circumstances of a given case. *See McGee ex rel. McGee v. City of Pine Lawn*, 405 S.W.3d 582 (Mo. App. E.D. 2013). The Court of Appeals will review for plain error matters affecting substantial rights where the record shows that a "manifest injustice or a miscarriage of justice" would result if the matter is left uncorrected. *In re Marriage of Lawry*, 883 S.W.2d 84, 89 (Mo. App. S.D. 1994) (reversing trial court order regarding maintenance order although matter not properly preserved for appellate review). Where an appellate court applies plain error review, it asks whether there are substantial grounds for believing that the trial court committed an error that is "evident, obvious and clear, which resulted in manifest injustice or a miscarriage of justice." *Wagner v. Mortgage Information Services, Inc.*, 261 S.W.3d 625, 632-33 (Mo. App. W.D. 2008). "[T]here is a manifest injustice in burdening the successful party to a proceeding with the costs of the same[.]" *Ex parte Nelson*, 162 S.W. 167 (Mo. banc 1913).

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retax costs was a prerequisite to raising the issue on appeal. This is incorrect. A motion to retax costs addresses whether the specific expenses that have been taxed are accurate or appropriate; such a motion does not permit a challenge to the trial court's authority to award costs in the first place.

Standard of Review

When the Court of Appeals reviews a court-tried case it will affirm the judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously applies the law. *R.L. Polk & Co. v. Missouri Dept. of Revenue*, 309 S.W.3d 881, 884 (Mo. App. W.D. 2010). An appellate court applies *de novo* review to questions of law in court-tried cases, reviewing the trial court's determination independently, without deference to the trial court's conclusions. *Pearson v. Koster*, 367 S.W.3d 36, 43-44 (Mo. banc 2012). A claim that a trial court's judgment erroneously applies the law involves review of the trial court's construction and application of the law. *Doe v. St. Louis Community College*, 526 S.W.3d 329, 335 (Mo. App. E.D. 2017). Interpretation of a statute is a question of law that an appellate court reviews *de novo*. *R.L. Polk & Co.* at 884.

Argument

Missouri courts have no inherent authority to award costs; any award of costs must be made pursuant to an express grant of statutory authority. *State ex rel. Merrell v. Carter*, 518 S.W.3d 798, 800 (Mo. banc 2017). "Statutes allowing the taxation of costs are strictly construed." *Id.*

The Board correctly noted in its initial brief that the trial court's judgment did not make an express award of costs. App. Subst. Br., p. 14. Instead, the trial court filed a docket entry that accompanied the judgment which included the phrase "Costs to the Plaintiff." D136, p. 16. The fact that the trial court did not include its award of costs as part of the judgment

is irrelevant; a docket entry indicating that the clerk of court either should or should not tax costs to one party or another constitutes an order as to the taxation of costs. *See Hathaway v. Halley*, 499 S.W.3d 782, 784 (Mo. App. E.D. 2016). Neither the circuit judge nor the clerk of court identified any statutory authority for taxing costs against Roland.[18]

Roland brought this case to enforce the provisions of the Sunshine Law, which clearly and definitively establishes government transparency as the policy of this state. § 610.011. The Sunshine Law includes a provision, § 610.027, that sets up a distinctive framework that courts must follow when considering a Sunshine Law case. Section 610.027.1 replaces the normal rules regarding standing, broadly authorizing almost anyone to pursue judicial enforcement of the Sunshine Law's provisions. Section 610.027.2 explains that once a plaintiff shows that a defendant is a public governmental body and has denied access to a meeting, record, or vote, the defendant must persuade the court that it has complied with the Sunshine Law. Subsections .3, .4. and .5 describe the potential consequences if a defendant is shown to have violated the Sunshine Law's requirements—including the possibility that the public governmental body will have to pay a civil penalty and/or the plaintiff's costs and attorney fees. Section 610.027.6 explains the options available to a public governmental body that is in doubt about its obligations under the Sunshine Law, including seeking formal opinions from either the Attorney General or the entity's own

[18] The Board's statement in its Substitute Brief that the taxation of costs in this case was made pursuant to "§§ 492.590 and 514.060, RSMo," is utterly without foundation. Neither Judge Sengheiser nor the court clerk identified any provision giving the trial court authority to require Roland to pay the Board's costs.

attorney or initiating a lawsuit to establish what the Sunshine Law requires—although, importantly, a public government body that initiates such a lawsuit is obligated to pay all of the defendant citizen's litigation expenses. *See Hemeyer v. KRCG-TV*, 6 S.W.3d 880 (Mo. banc 1999). None of these provisions gives any indication that in the context of a non-frivolous Sunshine Law case a court may order a non-governmental party to pay a government party's costs or attorney fees.[19] To the contrary, every aspect of § 610.027 suggests that the legislature intended (1) to encourage residents to pursue non-frivolous actions to enforce the Sunshine Law, and (2) to discourage public governmental bodies from denying citizen access to public meetings, records, and votes.

These aspects of § 610.027 dovetail perfectly with the overarching purpose of the Sunshine Law, as expressed in § 610.011. The General Assembly designed § 610.027 primarily to encourage citizens to hold public governmental bodies accountable when they violate the Sunshine Law, and secondarily to discourage public governmental bodies from violating the law in the first place. Most citizens lack the emotional and financial capacity to take on the stress and expense of litigation purely to gain access to public records or a public meeting, so the legislature created the possibility that if the citizen proved a knowing or purposeful violation there was a mechanism through which they could recoup their legal expenses.[20] On the other hand, the awareness that not only public governmental bodies but

[19] This Court is not presented with the question of whether a court may award costs and/or attorney fees against a party who brings a frivolous Sunshine Law claim; Roland expresses no opinion on the matter.

[20] A citizen litigant that proves a knowing or purposeful violation of the Sunshine Law also has the potential to recover civil penalties from the offending public governmental body.

individual *members* of public governmental bodies might be required to pay a citizen's legal expenses was designed to provide significant incentive for citizens to pursue their rights and for these government actors to err on the side of caution when it comes to fulfilling their responsibilities under the Sunshine Law.

Neither Section 514.060 nor Rule 77.01 Authorize the Trial Court to Require Roland to pay the Board's Costs

Missouri law authorizes courts to award costs to "the party prevailing… ***except in those cases in which a different provision is made by law***." § 514.060, A3; Rule 77.01. Section 610.027 represents the legislature making a different provision by law to govern the courts' authority to award costs and attorney fees in the context of Sunshine Law claims, only permitting a court to award costs and attorney fees ***against*** a public governmental body, not in one's favor.

But even if § 610.027 did not preempt § 514.060 and Rule 77.01 when it comes to awarding costs in the context of Sunshine Law-related claims, those general provisions only permit the court to award costs to "the party prevailing" in an action. A prevailing party is the party prevailing on the main issue in dispute, even if that party does not obtain all the relief requested. *State ex rel. Nixon v. Patriot Tobacco Co.*, 220 S.W.3d 889, 891 (Mo. App. E.D. 2007); *see also Brooke Drywall of Columbia, Inc. v. Building Const. Enterprises, Inc.*, 361 S.W.3d 22, 27 (Mo. App. W.D. 2011) ("A party need only obtain 'some relief' from the court in order to be deemed 'the prevailing party.'"). A plaintiff certainly prevails in a lawsuit when the plaintiff obtains "the substance of what he sought." *Collector of Revenue v. Wiley*, 529 S.W.3d 42 (Mo. App. E.D. 2017).

In this case, Roland's primary goal—"the substance of what he sought"—was to establish that the Contested Records were open public records and that the Board had violated the Sunshine Law by withholding the Contested Records from Roland, and also to gain access to the Contested Records so he could prove violations of Missouri's absentee ballot laws in support of his client's election contest. He succeeded in this primary goal, making him the prevailing party in this litigation even if he did not persuade the trial court that the Board's Sunshine Law violations were knowing or purposeful. Thus, even if § 514.060 or Rule 77.01 applied in this case, these provisions would not have authorized requiring Roland, the prevailing party, to pay the costs of the public governmental body that he proved to have violated the Sunshine Law.

Few Citizens Would Risk Pursuing Sunshine Law Claims if Courts can Force Successful Plaintiffs to Pay the Government Defendants' Costs

The trial court's decision to force Roland to pay the Board's court costs is utterly alien to the design of § 610.027, and devastating to the ideal of government transparency. Even in clear-cut cases of Sunshine Law violations, courts have raised the bar for proving "knowing" and "purposeful" violations so high that only the most extreme cases seem to offer any reasonable hope that the citizen might recover their legal fees. Litigation is terribly expensive and very few citizens have the wherewithal to devote thousands of dollars and years' worth of emotional strain just for the privilege of reviewing some public records or attending certain public meetings. Even before the trial court ordered Roland to pay the Board's costs, going to court to enforce the Sunshine Law would be an economic

drain that few could justify. If the trial court's order is not reversed, would-be plaintiffs will now have to account for the possibility that even if they prove that the government violated the law, they may still be forced to pay the government's costs – and the only (seemingly?) sure-fire way to avoid paying the government's costs is to forgo any claim that the alleged violation was knowing or purposeful. Of course, if a challenger forgoes those claims, they lose any possibility at all of recovering their own costs and attorney fees.

If Missourians are unwilling or unable to make use of the judicial enforcement mechanism the Sunshine Law has provided them, public governmental bodies have little incentive to prioritize understanding and complying with the Sunshine Law's requirements.[21] This may be the reason that, although the basic framework of the Sunshine Law has been in place for more than 45 years, a study the State Auditor conducted in 2016 found that only about 30% of Missouri public governmental bodies fully complied with her office's requests for simple public records. *See* Galloway, Nicole, "Sunshine Law Review, Report No. 2016-124," November 2016, *available at* https://www.auditor.mo.gov/content/auditor-galloway-finds-only-30-compliance-government-transparency-law.

Before the trial court ordered Roland to pay the Board's costs, Missourians court trust that if they were going to take on a Sunshine Law case they could at least anticipate and to a significant extent limit how much it would cost them. If this Court allows the trial court's

[21] Indeed, the courts' current interpretation of what it means to commit a "knowing" or "purposeful" violation of the Sunshine Law creates a powerful *disincentive* for government officials to understand the law's requirements. Ignorance really is bliss.

order to stand, however, potential plaintiffs must face the possibility that even if they *win*, the judge might order them to pay thousands of dollars for the benefit of the very entity that violated their rights in the first place. If even success carries the possibility of such a loss, *why would any citizen ever take that risk*?

The trial court's order erroneously applied the law. The order cannot be squared with the framework that § 610.027 establishes relative to costs and fees in the context of a Sunshine Law claim. It is contrary to § 514.060 and Rule 77.01, which only allow the prevailing party to recover their costs against the other party. And from the perspective of public policy, the implications of this order are widespread and devastating to the public's policy of promoting transparent, accountable government. This Court must reverse the trial court's order requiring Roland to pay the Board's costs because §§ 610.027.3 and .4 do not authorize a court to order a citizen to pay the government's costs where the citizen has exercised their right to bring a non-frivolous action to enforce the Sunshine Law.

V. The Board's Second Point Relied On Does Not Warrant Plain Error Review. (Responding to the Board's Second Point Relied On)

The Board proposes that the Court should invoke its authority under Rule 84.13 to find "plain error" in the trial court's judgment even though the Board did not preserve the arguments it made in its Second Point Relied On. Plain error review is not warranted.

As an initial matter, the Board is incorrect in suggesting that "the Court's decision [in this case] will likely be the final word on the privacy of absentee ballot envelopes." Because the Sunshine Law precludes the Board from arguing a statutory basis for closure that it did

not present in response to Roland's § 610.023.4 demand, the Board has not preserved anything to review and there is no basis for the Court to issue a ruling as to the propriety of closing absentee ballot envelopes. As far as this case is concerned, that means the trial court's judgment in regard to absentee ballot envelopes will stand affirmed, but because the Court of Appeals opinion was vacated this case will have produced no precedent on that point that is binding on any other parties. 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 those records—Roland is confident that there is at least one attorney fully acquainted with the Sunshine Law who stands ready and willing to defend such a suit.

The Board's request for plain error review fails on the merits because the only possible "injustice" the Board has "suffered" as a consequence of Judge Bush's judgment is the very public exposure of the fact that, far from ensuring fair and lawful elections, the Board itself was perpetrating election fraud on the citizens of St. Louis. *See Franks*, 498 S.W.3d at 868-69. But even though certain members of the Board may have found this exposure (and the subsequent dismissal of several of those members) to be distasteful, it was a significant benefit for the Board as an institution and for the people of St. Louis. It is difficult to imagine how the Board's current members could seriously *complain* about the fact that, their previous multiple violations of the law having been exposed, the Board is now much better informed about what the law requires of them and, thus, they are better able to serve the voters they previously had been failing.

To the extent that the Board suggests that it is uncertain how to reconcile what state law requires with the way it has previously done things, this brief has offered some suggestions. Furthermore, Roland is willing to help the Board improve its service to the people of St. Louis by coming up with additional solutions that will fix any of the Board's remaining policies that leave it in violation of state law. If, as it seems, the Board is dissatisfied of confused as to what the law actually requires, that is an issue it should present to the legislature. However unwieldly, inconvenient, or confusing the Board may find the legislature's policy choices to be, it is not the place of the judiciary to ignore or rewrite those policies, but rather to enforce them. Given the overwhelming clarity with which the legislature has established this state's policy in favor of citizen access to public records, this court should find that the trial court did not commit any errors of which the Board has accused it, but rather that the partial judgment correctly declared the law in regard to §§ 115.289 and 115.493.

CONCLUSION

For the above reasons, Roland asks this Court (1) to affirm the trial court's holding that § 115.289 could not justify the Board's decision to withhold from Roland the absentee ballot applications he requested; (2) to affirm the trial court's holding that § 115.493 could not justify the Board's decision to withhold from Roland the absentee ballot envelopes he requested; (3) to hold that the Sunshine Law does not authorize a trial court to order a citizen plaintiff who has pursued a non-frivolous case to bear the government's costs, especially when the citizen plaintiff proved that the government violated the Sunshine Law;

and (4) to reverse the trial court's order authorizing the taxation of the Board's costs against Roland.

Respectfully Submitted,

David E. Roland #60548
14779 Audrain Road 815
Mexico, MO 65265
(314) 604-6621
(314) 720-0989 (fax)
libertyandjustice@gmail.com

Attorney for Plaintiff/Cross-Appellant

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on July 16, 2019, I electronically filed the foregoing with the Clerk of the Missouri Supreme Court by using the Electronic Filing System, and that a copy will be served by the Electronic Filing System upon those parties indicated by the Electronic Filing System. Pursuant to Missouri Supreme Court Rule 55.03(a), I have signed the original of this Certificate and the foregoing brief.

I also hereby certify that this brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b). This brief was prepared in Microsoft Word 365 and contains 13,460 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (fewer than the 31,000 word limit in the rules). The font is Times New Roman, double-spacing, 13-point type.

Respectfully submitted,

David E. Roland #60548
14779 Audrain Road 815
Mexico, MO 65265
(314) 604-6621
(314) 720-0989 (fax)
libertyandjustice@gmail.com

Attorney for Plaintiff/Cross-Appellant