No. SC99098

In the
Supreme Court of Missouri

CITY OF MARYLAND HEIGHTS, et al.
Respondents,

v.

STATE OF MISSOURI,
Appellant.

Appeal from the Circuit Court of Cole County
The Honorable Cotton Walker

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

The Missouri Constitution vests this Court with "exclusive appellate jurisdiction in all cases involving the validity of a … statute … of this state." MO. CONST. art. V § 3. This case involves the validity of a statute, § 115.646, RSMo. Specifically, it is about whether the statute violates the Free Speech Clause of the First Amendment of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. On April 24, 2021, the Circuit Court entered judgment in Plaintiffs' favor, finding that § 115.646 was unconstitutional under those two constitutional provisions. *See* D43 p.13; App. 13. Missouri timely filed its notice of appeal on May 6, 2021. D44 pp. 1–3. This appeal therefore involves the validity of a statute of the State, and so falls within the Court's exclusive appellate jurisdiction. MO. CONST. art. V, § 3.

INTRODUCTION

This case presents two questions of law. The first is whether the U.S. Constitution's protection of free speech means the State of Missouri cannot prohibit local officials from using public money to fund messages supporting or opposing ballot measures. Missouri can. When public officials use public funds to convey messages, they are speaking on behalf of the government they represent. In short, they are engaging in government speech. And such speech does not receive First Amendment protection. Thus, § 115.646, RSMo, because it regulates only government speech, does not offend the U.S. Constitution.

But even if § 115.646 regulated private speech, the law passes strict scrutiny. It is narrowly tailored to advance Missouri's compelling interest in ensuring fairness, and its appearance, in the electoral process, and in respecting First Amendment rights. Allowing political subdivisions to use public funds to electioneer subverts the democratic process. By employing the vast resources of government to push for a particular electoral result, public officials could drown out opposing voices. At the very least, using those resources in that fashion looks unfair to those on the other side of the issue and thus threatens to undermine the democratic process. It also violates the First Amendment, which bars compelling individuals to subsidize the speech of others. Section 115.646—by restricting use of public funds, not speech, and

by permitting officials to use public funds to educate the public instead of electioneer—is narrowly drawn to advance those interests.

The second issue is whether § 115.646 is unconstitutionally vague. Notably, this is a facial challenge, which § 115.646 fails only if it is impermissibly vague in all of its applications. It is not. Section 115.646 says that "[n]o contribution or expenditure of public funds shall be made directly by any officer, employee or agent of any political subdivision to advocate, support, or oppose any ballot measure or candidate for public office." Those are common terms with common meanings that people commonly use and understand. The statute thus has a clear, core application, as the Circuit Court conceded. That is enough to show that the law is not facially void for vagueness.

STATEMENT OF FACTS

I. The lawsuit and summary judgment motion

The operative complaint is the First Amended Petition, which Respondents, a group of officials (the "Officials"), along with the political subdivisions where they work (the "Subdivisions") filed on December 31, 2019. D2 pp. 1–2 ¶¶ 1–6. The four count petition attacked § 115.646, RSMo, which then provided (emphasis added):

> *No contribution or expenditure of public funds shall be made directly by any officer, employee or agent of any political subdivision to advocate, support, or oppose any ballot measure* or candidate for public office. This section shall not be construed to prohibit any public official of a political subdivision from making

> public appearances or from issuing press releases concerning any such ballot measure.[1]

Respondents sought, in Count I, a declaration about the law's meaning insofar as it applied to ballot measures. D2 pp. 11–12 ¶ 21. Count II alleged that § 115.646's restriction on using public funds to advocate, support, or oppose a ballot measure is a facially unconstitutional, content-based restriction on the private speech of public officials that violates the First Amendment of the U.S. Constitution. D2 pp. 12–13 ¶¶ 22–26. Count III alleged that the bar on advocating, supporting, or opposing a ballot measure is unconstitutionally vague on its face and thus violates the due process guarantee of the Fourteenth Amendment to the U.S. Constitution. D2 pp. 13–14 ¶¶ 27–29. Count IV alleged that § 115.646 is unconstitutionally overbroad as it relates to ballot measures. D2 pp. 14–16 ¶¶ 30–32.[2]

Missouri answered, *see* D3 pp. 1–8, and the parties eventually sought summary judgment. Respondents filed a motion for summary judgment on Counts II, III, and IV. *See* D31 pp. 1–2.[3] Missouri did not contest Respondents'

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[1] The General Assembly amended § 115.646 in H.B. 271. *See* H.B. 271, § A, 101st Gen. Assemb., Reg. Sess. (Mo. 2021). The changes take effect August 28, 2021.

[2] Respondents did not challenge § 115.646 as it applies to candidates for election.

[3] As the Circuit Court noted, this meant the summary judgment motion was relevant only to the Officials, not the Subdivisions. D43 p. 1 n.1; App. 1 n.1.

facts. *See* D37 pp. 1–7 (Missouri's responses to Respondents' statement of uncontroverted material facts); D43 p. 3; App. 3 (noting that fact). The Officials claimed that their official duties and § 115.646 conflicted, *see* D2 p. 5 ¶ 16, in that their officials duties require them "to (i) assess the benefits and detriments of policy outcomes that are determined by ballot measure elections and (ii) communicate those assessments to the city's constituents prior to those elections, using public resources." D37 p. 3 (citing affidavits from the Officials). As almost all the Officials said: They believe they have a "responsibility to … [u]se [subdivision] resources to communicate to all [the subdivision's] constituents the benefits and detriments to the city of any ballot measure to be determined by the [subdivision's] voters." D4 p. 4 ¶ 13(c); *see also* D5 p. 4 ¶ 13(c); D6 p. 5 ¶ 12(c); D33 p. 6 ¶ 12(c); *cf.* D7 p. 4 ¶ 11(a)–(c) (similar). They also said they had used public resources to engage in such communication in the past. *See* D37 pp. 3–4; *see also* D43 p. 2; App. 2.

The Officials also claimed that they did not understand the full scope of § 115.646. *See* D37 pp. 4–6. Specifically, the Officials claimed they could not determine:

- Whether a political subdivision—as opposed to its employees or officials—could authorize the use of funds to advocate, support, or oppose a ballot measure under the statute;

- Whether the law prohibited voting to authorize funds for advocating, supporting, or opposing a ballot measure;
- Whether it was permissible to advocate, support, or oppose a ballot measure using non-monetary resources;
- Whether subdivision officials could work with private parties to advocate, support, or oppose a ballot initiative without violating the statute;
- Whether it was lawful to advocate, support, or oppose a proposed ballot measure that was going through the initiative process;
- Whether bringing a legal challenge to a ballot measure was consistent with § 115.646;
- Whether "the content of any particular message conveyed by using public resources for the purpose of informing constituents of the benefits or detriments of a proposed ballot measure" might fall within the statute; and
- The scope of the safe harbor provisions.

See D4 pp. 6–8 ¶¶ 18–19; D5 pp. 6–8, ¶¶ 18–19; D6 pp. 6–8, ¶¶ 16–17; D33 pp. 7–9, ¶¶ 16–17; *see also* D7 pp. 5–7, ¶¶ 15–16 (similar, but for a city administrator).

Respondents also attached a Missouri Attorney General Opinion letter interpreting and applying § 115.646, *see* D12 pp. 1–4, and cases from the Missouri Ethics Commission ("MEC") applying § 115.646, *see* D13–D29.

II. The Circuit Court's decision

On April 24, 2021, the Circuit Court granted judgment to Respondents on Count II and Count III. The court noted that the Officials "contend … that [§ 115.646], on its face, violates their 1st Amendment right to speak on ballot measures and their 14th Amendment right to be free from the penal enforcement of a vague law." D43 p. 3; App. 3. The Circuit Court started with Count II and concluded § 115.646 "plainly targets speech based on content" because determining whether an official "is supporting or opposing a particular ballot measure" turns on the content of an official's (shorthand for "any officer, employee, or agent of any political subdivision" in § 115.646—a shorthand this brief will use) speech. D43 p. 4–5; App. 4–5.

The Circuit Court then rejected Missouri's argument that § 115.646 regulates only government speech, saying the statute "does not address the right or ability of Missouri's political subdivisions to promote their unique points of view" or "prohibit local governments from using public funds for electoral advocacy." D43 p. 7; App. 7. "Instead, Section 115.646 restricts the scope of what a political subdivision's officials, employees, and agents may say about a pending ballot proposition." D43 p. 7, App. 7. That is so, per the

Circuit Court, because the law "encompasses the speech of" any subdivision official "regardless of" their viewpoint on a ballot measure "so long as [the official is] using the government's money" to make the speech. D43 p. 7; App. 7. "For example, a city council may call for an election on a tax increase and support its passage, but a mayor having a column in a monthly newsletter may nonetheless declare his or her opposition to the tax proposal." D43 p. 7; App. 7. In that case, the Circuit Court said, "only the council's expressed viewpoint qualifies as 'government speech.'" D43 p. 7; App. 7.

The upshot, per the Circuit Court, was that the statute applied to more than just those "who promote the government's viewpoint." D43 p. 7; App. 7. And so it did not apply to government speech. *See* D43 pp. 7–8; App. 7–8.

Because § 115.646 did not regulate government speech, the Circuit Court concluded it was subject to strict scrutiny, *see* D43 p. 5; App. 5, and that it failed the test, *see* D43 p. 8; App. 8. The Circuit Court rejected Missouri's claim that fairness, or its appearance, in the electoral process was a compelling interest. D43 pp. 8–9; App. 8–9. It said that that interest had "been disabused by the government speech cases." D43 p. 9; App. 9. It also said that other statutory procedures and protections, as well the acuity of Missouri's voters, made the claimed interest less than compelling. D43 p. 9; App. 9.

The Circuit Court then said that the law was not "narrowly drawn to achieve the State's professed fairness interest." D43 p. 9; App. 9 (quotations

omitted). It reached that conclusion because the General Assembly could have written the statute to apply only to political subdivisions, which the Circuit Court said would have served the same interest as writing it more broadly to encompass officials. *See* D43 p. 9–10; App. 10.

As to Count III, the Circuit Court concluded that § 115.646 was void for vagueness because:

- The law did not define "ballot measure" thus making it "unclear when the statutory prohibition against advocacy begins." D43 p. 10; App. 10.
- The "term 'public funds'" was "undefined and ambiguous;" specifically, it was unclear whether the term included just money or something more. D43 p. 11; App. 11.
- The statute did not describe "contribution or expenditure … made directly" with sufficient clarity. D43 p. 11; App. 11 (alteration in original).
- The terms "advocating, supporting, or opposing any ballot measure are also indefinite" according to the Circuit Court. D43 p. 12; App. 12 (alterations and quotations omitted). Specifically, the Circuit Court faulted the context-specific analysis that must occur to determine whether a communication advocated, supported, or opposed a ballot measure. *See* D43 p. 12; App. 12 (saying the law

> provides "no guidelines or standards [as to what those terms mean], and they can only be applied—and in effect, defined retroactively—by relying on the contextual facts"). "In some cases the answer will be plain as to whether speech is informationally neutral or constitutes advocacy, support, or opposition," the Circuit Court admitted, "but answers in most cases will be more elusive … ." D43 p. 12; App. 12.

Given its analysis, the Circuit Court concluded that § 115.646, insofar as it applied to ballot measures,[4] is "unconstitutional and void." D43 p. 13; App. 13. It therefore granted the Officials judgment on Count II and Count III and dismissed Count I (and, thus, the sole count in which the Subdivisions have an interest) and Count IV as moot. D43 p. 13; App. 13. Missouri timely appealed. *See* D44 pp. 1–3.

III. The General Assembly amends § 115.646, RSMo

On June 15, 2021, the Governor signed H.B. 271, which amended § 115.646 effective August 28, 2021. *See* H.B. 271, § A, 101st Gen. Assemb., Reg. Sess. (Mo. 2021). As amended, the law now says (alterations bolded):

> No contribution or expenditure of public funds shall be made directly by any officer, employee or agent of any political

[4] While the Circuit Court declared § 115.646 "unconstitutional and void," D43 p. 13; App. 13, it said its order and judgment did not address the constitutionality of the law "as it pertains to candidates for office," *see* D43 p. 3 n.4; App. 3 n.4.

> subdivision, **including school districts and charter schools**, to advocate, support, or oppose **the passage or defeat of** any ballot measure or **the nomination or election of any** candidate for public office**, or to direct any public funds to, or pay any debts or obligations of, any committee supporting or opposing such ballot measures or candidates.** This section shall not be construed to prohibit any public official of a political subdivision**, including school districts and charter schools,** from making public appearances or from issuing press releases concerning any such ballot measure. **Any purposeful violation of this section shall be punished as a class four election offense.**

Those changes are minor, so they do not moot the case; the Officials' claimed issues with the statute remain. *See D.C.M. v. Pemiscot Cty. Juvenile Office*, 578 S.W.3d 776, 780 (Mo. banc 2019). They do, however, affect the analysis. So when this brief refers to § 115.646 as amended, and as effective on August 28, it will refer to the law as "§ 115.646 (2021)."

POINTS RELIED ON

I. The Circuit Court erred in granting judgment to the Officials on Count II, because § 115.646, RSMo, regulates government speech, in that the statute limits the ability of public officials to use public funds to produce speech that people would ascribe to the political subdivision.

- *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015)
- *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009)
- *State v. Johnson*, 524 S.W.3d 505 (Mo. banc 2017)
- *Fraternal Order of Police v. Montgomery County*, 132 A.3d 311 (Md. 2016)
- Section 115.646, RSMo

II. The Circuit Court erred in granting judgment to the Officials on Count II, because § 115.646, RSMo, passes strict scrutiny, in that it advances Missouri's compelling interest in ensuring that elections are fair, and appear fair, and in avoiding First Amendment issues that would arise by compelling taxpayers to pay for speech with which they disagree, and the law is narrowly tailored to achieve those interests.

- *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018)
- *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)
- *Stanson v. Mott*, 551 P.2d 1 (Cal. 1976)
- Section 115.646, RSMo

III. The Circuit Court erred in granting judgment to the Officials on Count III, because § 115.646 is not unconstitutionally vague, in that vagueness does not permeate the statute, as is necessary to succeed on a facial vagueness challenge, since there is a core of conduct to which the statute clearly applies.

- *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)
- *Trustees of Indiana University v. Curry*, 918 F.3d 537 (7th Cir. 2019)
- *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955 (Mo. banc 1999)
- *State v. Faruqi*, 344 S.W.3d 193 (Mo. banc 2011)
- Section 115.646, RSMo

ARGUMENT

I. The Circuit Court erred in granting judgment to the Officials on Count II, because § 115.646, RSMo, regulates government speech, in that the statute limits the ability of public officials to use public funds to produce speech that people would ascribe to the political subdivision.

It is axiomatic that government speech—as opposed to private speech—does not receive First Amendment protection. Because § 115.646 regulates government speech, it is valid. The law prohibits public officials from using public funds to make public statements taking sides on a public issue (*i.e.*, ballot measures). That is quintessential government speech, and so the First Amendment does not prohibit Missouri from regulating it as it did in § 115.646.

Standard of Review: This Court reviews the grant of summary judgment de novo, applying the same criteria as the circuit court. *Green v. Fotoohighiam*, 606 S.W.3d 113, 115–16 (Mo. banc 2020). Summary judgment decisions are "based on the pleadings, record submitted, and the law." *Id.* (quoting *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 452–53 (Mo. banc 2011). The record and all reasonable inferences from it are viewed in the light most favorable to the non-moving party; summary judgment is proper only if the movant shows there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Id.*

Furthermore, where, as here, the constitutionality of a duly enacted statute is at issue, the "statute is presumed to be constitutional and will not be

invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *Bd. of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 368–69 (Mo. banc 2001) (quoting *Linton v. Mo. Veterinary Med. Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999) (quoting another source)). This is a question of law reviewed de novo. *See, e.g., State v. Young*, 362 S.W.3d 386, 390 (Mo. banc 2012). "The burden to prove a statute unconstitutional is upon the party bringing the challenge." *Bd. of Educ. of City of St. Louis*, 47 S.W.3d at 369. Because this is a facial challenge, that burden requires the Officials to demonstrate "no set of circumstances exists under which the statute may be constitutionally applied." *State v. Johnson*, 524 S.W.3d 505, 511 (Mo. banc 2017) (quoting *State v. Jeffrey*, 400 S.W.3d 303, 308 (Mo. banc 2013)).[5]

Preservation: The State preserved this issue for appellate review. *See* D36, pp. 5–6, 9–11.

A. Section 115.646 applies only to government speech because it restricts public officials from using public funds to

[5] There is an exception for First Amendment challenges based on a statute's overbreadth. *See, e.g., Jeffrey*, 400 S.W.3d at 308. But there are no overbreadth issues before the Court; the Circuit Court dismissed the Officials' overbreadth claim. D43 p. 13; App. 13.

promote or to oppose ballot measures, which is paradigmatic government speech.

The government speech doctrine recognizes "the principle that when the State is the speaker, it may make content-based choices." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). To put it another way, while "[t]he Free Speech Clause restricts government regulation of speech; it does not restrict government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

But that does not mean government speech is free from regulation. To the contrary, what the government can say—especially, as relevant here, what political subdivisions of a state can say—"may be limited by law, regulation, or practice." *Summum*, 555 U.S. at 467; *see also*, *e.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015) ("Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech."); *Fraternal Order of Police v. Montgomery County*, 132 A.3d 311, 323 (Md. 2016) ("[I]n *the absence of clear and specific prohibitions under State or Federal law*, [the government speech doctrine] provides an affirmative basis for government entities to inform the public of their views . . . ."); *cf. Mo. Bankers Ass'n, Inc. v. St. Louis County*, 448 S.W.3d 267, 271 (Mo. banc 2014) (noting that a local subdivision's police power "may not invade the province of

general legislation involving the public policy of the state as a whole") (quotations omitted).

Section 115.646 is such a regulation. The law prohibits only a "contribution or expenditure of *public* funds" "made directly by any *officer, employee, or agent of any political subdivision*." Plainly put, § 115.646 applies when *public* officials use *public* funds to take sides on a *public* issue—a ballot measure. That is quintessential government speech. *See Delano Farms Co. v. Cal. Table Grape Comm'n*, 417 P.3d 699, 720 (Cal. 2018) ("In some instances—*such as standard communications by 'a governor, a mayor, or a state tax commission'*—speech may be recognized as that of the government without extended analysis.") (emphasis added) (quoting *Keller v. State Bar of Cal.*, 496 U.S. 1, 11 (1990)); *Fraternal Order*, 132 A.3d at 325 (noting that "[a]t least two Federal Courts of Appeals and several U.S. District Courts have applied [the government speech doctrine] to sustain activities by local governments in support of ballot measures") (discussing, *inter alia*, *Kidwell v. City of Union*, 462 F.3d 620 (6th Cir. 2006) and *Page v. Lexington County School District One*, 531 F.3d 275 (4th Cir. 2008)); *see also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005) (concluding that a program funded with "targeted assessments" where "the government sets the overall message to be communicated and approves every word that is disseminated" is government speech, even if a private party helped develop the messages). And, consistent

with that conclusion, it is speech subject to regulation—as it is in numerous states with laws similar to § 115.646,[6] and as is consistent with those courts that have concluded that allowing political subdivisions, including through their officials, to use public funds for electioneering is improper absent explicit legal authorization.[7]

Indeed, the Officials basically admit that the speech they make, and which they say is subject to § 115.646, is government speech. They believe "their *public offices*" require them to "*communicate*" their assessments about ballot measures "to the city's constituents … *using public resources*." D37 p. 3 (emphases added). The Officials therefore understand that they are communicating messages to their constituents on behalf of the political

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[6] *See*, *e.g.*, ARIZ. REV. STAT. ANN. § 9-500.14; CAL. GOV'T CODE § 54964; COLO. REV. STAT. § 1-45-117(1)(a)(I); CONN. GEN. STAT. ANN. § 9-369b(a)(1)(C)(4); WASH. REV. CODE ANN. § 42.17A.555; *see also*, *e.g.*, *Cook v. Baca*, 95 F. Supp. 2d 1215, 1227 & n.18 (D.N.M. 2000) (gathering cases where a court has "struck down the government's use of public funds to support an election issue" on statutory grounds); *Fraternal Order*, 132 A.3d at 329 (collecting examples from other states, though noting Maryland lacks such a law).

[7] *See*, *e.g.*, *Smith v. Dorsey*, 599 So. 2d 529, 540 (Miss. 1992) ("In Mississippi, a school district is without explicit *or* implicit statutory authority to expend taxpayer funds in a promotional effort for the passage of a bond referendum."); *Stanson v. Mott*, 551 P.2d 1, 3 (Cal. 1976) ("As we explain, past decisions in both California and our sister states establish that, at least in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign."); *Citizens to Protect Pub. Funds v. Bd. of Educ. of Parsippany-Troy Hills Twp.*, 98 A.2d 673, 677 (N.J. 1953) (expending funds to advocate for one side of an issue "is not lawful in the absence of express authority from the Legislature").

subdivision they represent—*i.e.*, they are speaking for the government. That is admirable and commendable government service. It is also government speech, and so receives no First Amendment protection from § 115.646.

Furthermore, the Circuit Court agreed with that framework. It nevertheless concluded that "[s]ection 115.646 does not regulate 'government speech'" because the law "is not limited to the speech of those individuals who promote the government's viewpoint; rather it encompasses the speech of [officials] regardless of that viewpoint, so long as [the speech] is spoken using the government's money." D43 p. 7; App. 7. It gave as an example "a city council [which] call[s] for an election on a tax increase and support[s] its passage, but a mayor having a column in a monthly newsletter may nonetheless declare his or her opposition to the tax proposal. Both types of speech may violate the statute, but only the council's [is] government speech." D43 p. 7; App. 7; *see also* D43 p. 8; App. 8 (discussing why the law would be constitutional if it referenced only political subdivisions as opposed to their employees). There are three problems with the Circuit Court's logic.

First, it admits that there *are* instances in which § 115.646 would apply to government speech—namely, where the viewpoint of the official and political subdivision coincide (assuming a use of government funds). *See* D43 p. 7; App. 7 ("The statute is not limited to the speech of those individuals who promote the government's viewpoint," thus implying that the speech of

individuals who promote the government's view is government speech). In those instances, § 115.646 could constitutionally operate, as the Circuit Court all but admitted. *See* D43 p. 7; App. 7. Thus, the law is not unconstitutional in all of its applications, and the Officials' facial challenge fails. *See*, *e.g.*, *Johnson*, 524 S.W.3d at 511.

Second, one of the premises of the Circuit Court's analysis is that there is a distinction between "individual government actors"—the officers, employees, or agents to whom the statute refers—and the government itself. *See* D43 pp. 7–8; App. 7–8. That is wrong, at least in the mine run of cases; "[a] governmental entity, like any corporate body, can act only through its officers and employees." *Coyne v. Edwards*, 395 S.W.3d 509, 515 (Mo. banc 2013). So, as many government speech cases recognize, governments must speak through their officials and employees.[8] The two are, for constitutional

[8] *See also*, *e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) ("The Free Speech Clause does not require government to maintain viewpoint neutrality when *its officers and employees speak* about the venture.") (emphasis added); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) ("Where the University speaks … in its own name through its regents or officers" it is engaging in government speech); *Delano Farms Co.*, 417 P.3d at 720 ("In some instances—such as standard communications by '*a governor, a mayor, or a state tax commission*'—speech may be recognized as that of the government without extended analysis.") (emphasis added) (quoting *Keller*, 496 U.S. at 11); *Fraternal Order*, 132 A.3d at 327 (taking as its premise that "a State or local government, *through its agencies or officials*, can use public funds or public employees to engage in government speech") (emphasis added).

purposes, the same and so the speech of the public official is the speech of the political subdivision.

But even if that were not the case—in other words, if that speech were private speech—§ 115.646 is still constitutional. Key here is that § 115.646 does not limit or compel a public official's private speech. Rather, it prohibits officials from using public funds for certain categories of speech.

So if (as the Officials claim), their speech is private speech, their constitutional claim is that the First Amendment gives them a right to public subsidization of their private speech advocating, supporting, or opposing ballot measures. That is plainly wrong. It is well settled that there is no constitutional right to government subsidization of private speech. *See*, *e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("The Government can … fund a program to encourage certain activities it believes to be in the public interest, without … funding an alternative program which seeks to deal with the problem … . In so doing, the Government has not discriminated on the basis of viewpoint … ."); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe on that right."); *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998).

Third, the Circuit Court's analysis is contrary to U.S. Supreme Court precedent. The Circuit Court viewed § 115.646's application to a city council and a mayor with contradictory viewpoints as problematic because only one person's speech could "qualif[y] as 'government speech.'" D43 p. 7; App. 7. The premise of that reasoning is that government speech must be coherent and uniform, in the sense that it must promote a single, government-endorsed message. *See* D43 p. 7; App. 7 ("The state is not limited to the speech of those individuals who promote the government's viewpoint; rather it encompasses the speech of the targeted individuals regardless of that viewpoint … so long as it is spoken using the government's money.").

But the Supreme Court has never said that unity or coherence of messaging is an indispensable requirement for government speech. Indeed, such a requirement is inconsistent with government speech precedent. The U.S. Supreme Court concluded that a government "accepting a privately donated monument and placing it on city property … engages in expressive conduct." *Summum*, 555 U.S. at 476. In doing so, the Court rejected the argument that for the acceptance to be government speech, the government had to "publicly embrace[] 'the message' that the monument conveys." *Id.* at 473. That was because monuments can convey more than "one 'message'"—a monument can include messages from the government which accepted it, the donor (or donors) who paid for it, or the creator who made it. *See id.* at 474,

476. Those messages "may not coincide" and could even change over time and with shifting context. *See id.* at 474–77. Despite all that—despite the lack of any one, coherent message; despite the fact that "a government entity does not necessarily endorse the specific meaning" of some of those messages, *see id.* at 476–77—the government who accepts a donated monument engages in government speech. *See id.* at 476.

And in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the U.S. Supreme Court concluded that privately-created specialty license plates were government speech even though there were 350 different plate designs displaying numerous messages (like "Rather Be Golfing") that no one would associate with the State of Texas. *See* 576 U.S. at 221–22 (Alito, J., dissenting). At no point did the Supreme Court consider whether those messages were coherent or uniform; they likely were not. *See id.* app. at 236 (Alito, J., dissenting) (providing examples of the plates). Rather, relying on *Summum*, the Court determined that the specialty plates carried messages from Texas by considering (1) whether governments historically used license plates to communicate messages; (2) whether the public closely identifies license plate designs with the State; and (3) the control the State had over the plates. *See id.* at 210–13; *see also Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (summarizing the *Walker* analysis). It concluded that "the historical context, observers' reasonable interpretation of the messages conveyed by Texas specialty plates,

and the effective control that the State exerts over the design selection process" meant that the specialty license plate messages were government speech, despite their communicative diversity. *Walker*, 576 U.S. at 216.

Applying that framework here establishes that § 115.646 applies to government speech. The law prohibits public officials from using public funds to make electioneering statements. It is hard to think of a more typical method of government communication than via public official funded with public money. Indeed, the Officials all testified it was their official duty to communicate to the public, and to use public funds to do so. *See*, *e.g.*, D37 p. 3 (noting, in the statement of undisputed facts, that the Officials had to "communicate [assessments of ballot measures] to [their] constituents … using public resources"). And obviously, "observers' reasonable interpretation" of the statements public officials make using public money is that those statements are the government's. *Walker*, 576 U.S. at 216. Finally, political subdivisions retain control over their funds and officials who speak for them. Indeed, even a rogue official's statements may be government speech, if a political subdivision failed to declaim them. *See O'Brien v. Village of Lincolnshire*, 955 F.3d 616, 627–28 (7th Cir. 2020) (refusing to denounce potential "rogue" speech, but instead endorsing it, meant the speech was still government speech); *cf. Johanns*, 544 U.S. at 561 (exercising "final approval authority" over the finished communication is evidence that speech is government speech);

Page, 531 F.3d at 284 (disclaiming "the contents of any linked website, [made] it clear that only that which was stated on its own website should be taken as the School District's speech").

To be sure, the incoherence of a public entity's putative messages may be a factor when evaluating whether speech is government speech. *Compare Matal*, 137 S. Ct. at 1758, 1760 (concluding the vast number of trademarks, many with contradictory messages, suggested that trademarks are not government speech), *with Walker*, 576 U.S. at 217 ("Texas's desire to communicate numerous messages"—potentially "many more" than the "messages" at play in *Summum*—"does not mean that the messages conveyed are not Texas's own."). But it alone does not render a public official's communication private speech. Indeed, such a conclusion is incompatible with the horizontal separation of power. The different branches of government must (and routinely do) publicly debate issues. Those statements, though contradictory, are still government speech, albeit the speech of a particular branch of the government. If it were otherwise, then people could use the First Amendment to attack speech from one branch with which they disagreed, stultifying public debate. Preventing that is the *raison d'etre* of the government speech doctrine. *See Summum*, 555 U.S. at 468 ("[I]t is not easy to imagine how government could function if it lacked this freedom. 'If every citizen were to have a right to insist that no one paid by public funds express

a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.'") (quoting *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990)).

The Circuit Court's hypothetical of the city council and the city mayor taking opposing positions on a ballot measure illustrates the point. *See* D43 p. 7; App. 7. A reasonable observer would believe both are engaging in government speech, because the observer would understand that both were engaged in an intra-governmental debate and represented their respective branches of government.

And so it is clear that § 115.646 applies to government speech—namely, public officials using public funds to advocate or to oppose certain public policies embodied in ballot measures. The First Amendment therefore does not apply, and the Circuit Court erred in concluding otherwise.

II. The Circuit Court erred in granting judgment to the Officials on Count II, because § 115.646, RSMo, passes strict scrutiny, in that it advances Missouri's compelling interest in ensuring that elections are fair, and appear fair, and in avoiding First Amendment issues that would arise by compelling taxpayers to pay for speech with which they disagree, and the law is narrowly tailored to achieve those interests.

Even if § 115.646 regulates private speech instead of government speech and is thus a content-based restriction on speech subject to strict scrutiny, *see Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), it is still constitutional. The

law advances Missouri's compelling interests in the fairness of elections and respect of constitutional rights and is narrowly tailored to do so.

Standard of Review: A grant of summary judgment receives de novo review "based on the pleadings, record submitted, and the law." *Green*, 606 S.W.3d at 115–16 (quoting another source). The record, and all reasonable inferences from it, is viewed in the light most favorable to the non-moving party; summary judgment is appropriate if there is no genuine issue of material fact and the movant succeeds as a matter of law. *Id.*

Since the constitutionality of a duly enacted statute is at issue, the "statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *Bd. of Educ. of City of St. Louis*, 47 S.W.3d at 368–69 (Mo. banc 2001) (quoting another source)). This is a question of law subject to de novo review. *Young*, 362 S.W.3d at 390. The Officials must establish § 115.646's constitutional invalidity, *see Board of Education of City of St. Louis*, 47 S.W.3d at 369, by showing that "no set of circumstances exists under which the statute may be constitutionally applied," *see Johnson*, 524 S.W.3d at 511 (quoting another source).

Preservation: The State preserved this issue for appellate review. *See* D36, pp. 6–9, 11–13.

A. Section 115.646 advances Missouri's compelling interest in ensuring fairness in elections and avoiding the constitutional issues that would arise from compelling taxpayers to subsidize speech with which they disagreed.

Section 115.646 serves two compelling interests. Either is sufficient to uphold the law.

First, the law serves the State's compelling interests in "[p]reserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" and "the individual citizen's confidence in government … ." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 789–90 (1978) (quotations and citations omitted) (collecting cases).

Section 115.646 serves those interests, not because it regulates speech *qua* speech, but because it prohibits officials from contributing or expending public funds to advocate for or against a particular ballot measure. "The spectacle of state agencies campaigning for or against propositions or proposed constitutional amendments to be voted on by the public, albeit perhaps well-motivated, can only demean the democratic process." *Stern v. Kramarsky*, 375 N.Y.S.2d 235, 239 (N.Y. Sup. Ct. 1975). If the "government, with its relatively vast financial resources … undertakes a campaign to favor or oppose a measure placed on the ballot, then by so doing government undercuts the very fabric which the constitution weaves to prevent government from stifling the

voice of the people. An election which takes place in the shadow of omniscient government is a mockery—an exercise in futility—and therefor a sham." *Palm Beach County v. Hudspeth*, 540 So. 2d 147, 154 (Fla. Ct. App. 1989); *see Mountain States Legal Found. v. Denver Sch. Dist. No. 1*, 459 F. Supp. 357, 360 (D. Colo. 1978) (making a similar point).

That interest has justified laws limiting the ability of political subdivisions to use public funds to champion a particular position (as opposed to limiting the speech of the subdivisions' officials). *See*, *e.g.*, *Anderson v. City of Boston*, 380 N.E.2d 628, 638 (Mass. 1978) ("The Commonwealth has a substantial, compelling interest in assuring the fairness of elections and the appearance of fairness in the electoral process. It may protect that interest by excluding its political subdivisions from partisan involvement in election questions … ."); *see also Fraternal Order*, 132 A.3d at 329 (supporting or opposing "a politically-tainted ballot measure expressing disputed principles of social policy that would neither hamper nor enhance the operations or programs of the county government … is not a proper function of government"). Section 115.646 is of a piece with those laws.

That governments may speak freely under the government speech doctrine does not undermine the State's fairness interest, contra the Circuit Court. *See* D43 pp. 8–9, App. 8–9. All the government speech doctrine means is that there are no First Amendment restrictions on the government taking a

particular position; it says nothing about Missouri's interest in limiting the electoral unfairness, or the appearance thereof, that could arise if the government funded its officials' decision to take sides in an election. Indeed, similar concerns animate laws prohibiting government employees from actively participating in political management or campaigns. *See U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 564–66 (1973). There are no First Amendment issues with such laws. *See id.* at 556, 567. There are thus none with § 115.646.

Nor does the fact that there are, as the Circuit Court noted, other checks in place that may limit the negative consequences of government-funded electioneering. *See* D43 p. 9, App. 9. To start, the existence of those checks is a question of tailoring, not a question of whether the law advances a compelling interest. Those checks also do not fully address the governmental interest at stake—the "danger feared by our country's founders … in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office; the selective use of public funds in election campaigns … raises the *specter* of just such an *improper distortion* of the democratic electoral process." *Stanson v. Mott*, 551 P.2d 1, 9 (Cal. 1976) (internal citations omitted) (emphases added). The checks the Circuit Court identified do not address the specter of a distorted election *process*; they focus instead on the validity of the final result despite any process fouls. *See* D43

pp. 9, App. 9. But in a democracy, process is just as important as the result; a government that advocates for or against a particular ballot measure "can undermine its legitimacy as a champion of the people's will and thereby subvert one of the principles underlying democratic society." *Kidwell v. City of Union*, 462 F.3d 620, 625 (6th Cir. 2006). Thus, "Missouri's broad interests in preserving the integrity of the election *process* are significant, compelling, and important." *Geier v. Mo. Ethics Comm'n*, 474 S.W.3d 560, 566 (Mo. banc 2015) (emphasis added) (alteration omitted) (quoting *Weinschenk v. State*, 203 S.W.3d 201, 217 (Mo. banc 2006)).

Second, § 115.646 advances Missouri's interest in preventing unconstitutional abridgments of the freedom of speech of taxpayers by compelling them to subsidize messages they do not support. "The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint." *Citizens to Protect Pub. Funds v. Bd. of Educ. of Parsippany-Troy Hills Twp.*, 98 A.2d 673, 677 (N.J. 1953).

That "just cause for complaint" springs from the U.S. Constitution. Strict scrutiny applies only if the speech at issue is *private* speech. If the Officials are right that their speech advocating, supporting, or opposing a ballot measure is not government speech (and they are not), then it must be

private speech. And if it is, § 115.646 thus prohibits public officials from using taxpayer dollars to subsidize their private speech. In other words, it prohibits an action which would "seriously impinge[] on First Amendment rights" of taxpayers. *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018); *see also Putter v. Montpelier Pub. Sch. Sys.*, 697 A.2d 354, 358 (Vt. 1997) ("[P]laintiff's assertion that the federal Constitution prohibits governmental entities from spending public funds to promote partisan positions in election campaigns finds support in a number of judicial authorities") (collecting cases); *Carter v. City of Las Cruces*, 915 P.2d 336, 339 (N.M. Ct. App. 1996) ("[W]e do observe that Plaintiff's claims under the United States Constitution are not without support.") (collecting cases). Protecting such core First Amendment values is a compelling state interest. *See Widmar v. Vincent*, 454 U.S. 263, 271 (1981) ("We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling.").

That point underlines the constitutionality of § 115.646. Either the law regulates government speech, and so does not offend the First Amendment (as Missouri contends above), or it prohibits government from subsidizing private speech (as is the necessary implication from the Officials' thesis), and so advances core First Amendment values. In either case, § 115.646 is constitutional.

B. Section 115.646 is narrowly tailored to promote those interests.

"[S]trict scrutiny is generally satisfied only if the law at issue is 'narrowly tailored to achieve a compelling interest.'" *Dotson v. Kander*, 464 S.W.3d 190, 197 (Mo. banc 2015) (quoting *Miller v. Johnson*, 515 U.S. 900, 920 (1995)). Section 115.646 meets that requirement for two reasons.

First, the law only prohibits the use of public funds for certain speech, as opposed to regulating speech itself. It therefore advances the interests described above—ensuring fairness in the electoral process and avoiding compelled-speech issues—without proscribing or prescribing what public officials may say when they are not using public funds.

Second, § 115.646 does not prohibit public officials from distributing information material; that is, material which does not advocate, support, or oppose. *See*, *e.g.*, *State ex rel. Wright v. Campbell*, 938 S.W.2d 640, 646 (Mo. App. 1997) (Crandall, J., concurring). The law thus exempts a large swatch of speech that does not implicate the interests it seeks to advance, and shows that § 115.646 is narrowly tailored.

The Circuit Court's complaint that the law is not narrowly tailored because it does not target the political subdivision, it only targets its officials, *see* D43 pp. 9–10, App. 9–10, is irrelevant. As discussed above, political subdivisions must act through their officials. So a law limiting the speech to

which those officials could apply public funds is no different than a law limiting the political subdivision. *See Coyne*, 395 S.W.3d at 515.

The Circuit Court also said that the law was not narrowly tailored because it was unconstitutionally vague. *See* D43 p. 10, App. 10. Not so, as the analysis below shows.

III. The Circuit Court erred in granting judgment to the Officials on Count III, because § 115.646 is not unconstitutionally vague, in that vagueness does not permeate the statute, as is necessary to succeed on a facial vagueness challenge, since there is a core of conduct to which the statute clearly applies.

To succeed on a claim that a statute is facially void for vagueness, the complainant must show that vagueness so permeates the statute that there is no core of conduct to which the law clearly applies. That is not the case for § 115.646; the statute plainly applies to a core set of conduct—as even the Circuit Court said. As a result, the Officials' facial challenge fails and the Circuit Court erred in concluding otherwise.

Standard of Review: A grant of summary judgment receives de novo review "based on the pleadings, record submitted, and the law." *Green*, 606 S.W.3d at 115–16 (quoting another source). The record, and all reasonable inferences from it, are viewed in the light most favorable to the non-moving party; summary judgment is appropriate if there is no genuine issue of material fact and the movant succeeds as a matter of law. *Id.*

Since the constitutionality of a duly enacted statute is at issue, the "statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *Bd. of Educ. of City of St. Louis*, 47 S.W.3d at 368–69 (Mo. banc 2001) (quoting another source)). This is a question of law subject to de novo review. *Young*, 362 S.W.3d at 390. The Officials must establish § 115.646's constitutional invalidity, *see Board of Education of City of St. Louis*, 47 S.W.3d at 369, by showing that "no set of circumstances exists under which the statute may be constitutionally applied," *see Johnson*, 524 S.W.3d at 511 (quoting another source).

Preservation: The State preserved this issue for appellate review. *See* D36, pp. 13–23.

A. There is a clear core of conduct to which § 115.646 applies, and thus the statute is not too vague to be constitutional.

A law is unconstitutionally vague when it fails to "convey[] to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999). That can happen in two, related ways—one is where a "statute is so unclear that 'men of common intelligence must necessarily guess at its meaning,'" the other is where it fails to provide "guidance … to those who must

apply the statute" and therefore results in "arbitrary and discriminatory application." *State v. Young*, 695 S.W.2d 882, 884 (Mo. banc 1985) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)); *see also FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "Due process does not, however, require perfection." *State v. Faruqi*, 344 S.W.3d 193, 200 (Mo. banc 2011). "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Thus, "neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague." *Cocktail Fortune, Inc.*, 994 S.W.2d at 957. "The constitutional due process demand is met if the words used bear a meaning commonly understood by persons of ordinary intelligence." *State v. Allen*, 905 S.W.2d 874, 877 (Mo. banc 1995).

That makes facial vagueness challenges difficult. "[T]he complainant must demonstrate that *the law is impermissibly vague in all of its applications*." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) (emphasis added). That requires showing that "vagueness permeates the text of [the] law." *Faruqi*, 344 S.W.3d at 200–01 (quoting *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality opinion)). As a result, and as numerous cases establish, facial vagueness challenges fail so long as there is "a core of understandable meaning." *Trustees of Ind. Univ. v. Curry*,

918 F.3d 537, 540 (7th Cir. 2019).[9] "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960)); *see also Cocktail Fortune, Inc.*, 994 S.W.2d at 958 ("[T]he hypothetical approach is not the appropriate standard for reviewing whether a regulation is void for vagueness.").

Yet speculation about hypotheticals is all the Circuit Court relied on in concluding that § 115.646 is facially void for vagueness. Each term the Circuit Court considered vague has a clear, core meaning.

Take "ballot measure." The Circuit Court said that the term could apply to more than just the language appearing on the ballot. *See* D43 pp. 10–11,

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[9] *See also*, *e.g.*, *Fox Television Stations, Inc.*, 567 U.S. at 253 ("[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved."); *Smith v. Goguen*, 415 U.S. 566, 578 (1974) (concluding that where a law "has no core" it lacks "any ascertainable standard for inclusion and exclusion" and so offends due process); *United States v. Harriss*, 347 U.S. 612, 618 (1954) ("[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise."); *Nash v. United States*, 229 U.S. 373, 377 (1912) ("[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."); *Faruqi*, 344 S.W.3d at 201 n.2 (discussing the analysis in *Young*, 695 S.W.2d at 886); *Turner v. Mo. Dep't of Conservation*, 349 S.W.3d 434, 443–44 (Mo. App. 2011) (relying on this Court's precedent to conclude that a declaratory judgment action seeking to declare a regulation facially void for vagueness was inappropriate).

App. 10–11. Whatever the merits of that view, it is a concession that the statute applies where a public official uses public funds to advocate, support, or oppose the proposal "actually appearing on a ballot." D43 p. 10; App. 10. And the fact that § 130.011(2) defines "ballot measure"—albeit more broadly than just what appears on the ballot—further highlights that the phrase has a clear core. That is enough to defeat the Officials' vagueness challenge.

So, too, with the phrases "public funds" and "contribution or expenditure … made directly." The Circuit Court posed some questions about the precise scope of those phrases (for example, whether use of subdivision resources counts as "public funds" or what count as making direct contributions or expenditures). *See* D43 p. 11; App. 11. It is doubtful that those claimed ambiguities are real. After all, "public funds" means, at the very least, public money. *See*, *e.g.*, *Fund*, AMERICAN HERITAGE DICTIONARY (3d ed. 1996) (defining "fund" as meaning, *inter alia*, "[a]vailable money; ready cash"). Furthermore, as the Circuit Court discussed at some length, there are statutory definitions of "contribution" and "expenditure" ("money or anything of value") as well as Missouri Ethics Commission decisions that set clear bounds to those phrases that comport with their ordinary meaning. *See* D43 p. 11; App. 11 (quoting § 130.011(12), (16)). Those establish a core meaning. And while what "directly" means may, at times, raise questions of interpretation, the term is common, and has dictionary definitions that fits the

statutory purpose of § 115.646. *See*, *e.g.*, *Directly*, WEBSTER'S THIRD NEW INT'L DICTIONARY (2002) ("without any intervening agency or instrumentality or determining influence : without any intermediate step").

So those terms have—at a minimum—a meaning that applies in most, if not all cases. *See*, *e.g.*, *Cocktail Fortune, Inc.*, 994 S.W.2d at 958 and *State v. Schleiermacher*, 924 S.W.2d 269, 275 (Mo. banc 1996) (looking to dictionary definitions and context to determine the meaning of statutory terms, and concluding they are not void for vagueness); *see also Kolender v. Lawson*, 461 U.S. 352, 355 (1983) (looking to "any limiting construction that a[n] … enforcement agency has proffered" in determining whether a statute was vague) (quoting *Vill. of Hoffman Estates*, 455 U.S. at 494). They are thus not facially void for vagueness.

The Circuit Court also said that "advocate, support, or oppose" was ambiguous because application of the terms rely "on the contextual facts" of a communication. D43 p. 12; App. 12. But those are words "people use and understand in normal life," so it is "hard to see what can be wrong with them" given that "[e]ven a protean word such as 'reasonable' has enough of a core to allow its use in situations where rights to speak are at issue." *Curry*, 918 F.3d at 540 (citing *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 324 (2002)). It blinks reality to believe that any person—much less public officials, who routinely engage in advocacy—would not know if they were advocating, supporting, or

opposing a ballot measure. *See State ex rel. Nixon v. Telco Directory Publ'g*, 863 S.W.2d 596, 600 (Mo. banc 1993) (noting, because of the common law roots of the word "deception," that its meaning in the Missouri Merchandising Practice Act was not "lost on reasonably intelligent business persons").

Courts recognize that fact. They routinely uphold the constitutionality of statutes whose application requires contextual analysis. In *Grayned*, for example, the U.S. Supreme Court upheld an anti-noise statute that required determining an action's "impact on the normal activities of the school" in ascertaining whether there was a violation. 408 U.S. at 112. The U.S. Supreme Court also determined that statutory definitions that "use words of degree"—that is, words that turn on the presence or extent of specific facts, like "*specific* skill" and "*general* knowledge"—in describing prohibited conduct provide constitutionally sufficient notice. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 21–23 (2010) (emphases added). And in *Village of Hoffman Estates*, the U.S. Supreme Court concluded that a law barring selling items "designed … for use with illegal" drugs without a license was constitutional even though it required considering the "objective features" of items. 455 U.S. at 501. That is, the statue required looking at the "features designed by the manufacturer" to see if the item was "principally used with illegal drugs." *Id.* And this Court, in *State v. Helgoth*, 691 S.W.2d 281 (Mo. banc 1985), upheld a law that prohibited "photographing nude children with the specific purpose

that the depictions thereby created be used for sexual stimulation or gratification" against a vagueness challenge even though "[t]he standard employed is a subjective one." *See id.* at 283–84.

Section 115.646 is no different. The words "advocate, support, or oppose" are sufficient guides to public officials who are subject to the law and those enforcing the law because there is a core, objective element to them. As the Attorney General noted in his letter interpreting the statute, whether a communication is advocating, supporting, or opposing a measure considers "such factors as the style, tenor and timing of the publication." D12 p. 2 (quoting *Stanson*, 551 P.2d at 12). Those are objective factors that are readily understandable. *See id.* (discussing the dictionary definition of "advocate"); *see also Wright*, 938 S.W.2d at 644 ("[W]hether the city is violating [§ 115.646] must be determined by reference to the communications themselves."). Those standards are sufficient to withstand facial vagueness challenges, as at least two state Supreme Courts have said. *Vargas v. City of Salinas*, 205 P.3d 207, 227–28 (Cal. 2009) (requiring analysis of "the style, tenor, and timing of a communication to determine whether, from an objective standpoint" the communication is electioneering "does not render" the law "impermissibly vague") (quotation omitted); *Sweetman v. State Elections Enf't Comm'n*, 732 A.2d 144, 161–63 (Conn. 1999) (noting, *inter alia*, that the standard "contains classic objective language" that preclude arbitrary enforcement).

Moreover, whatever theoretical notions of vagueness that exist with regards to the scope of "advocate, support, or oppose," there is, as *Vargas* and *Sweetman* note, a core of conduct to which § 115.646 clearly applies: express advocacy. *Sweetman*, 732 A.2d at 161 ("[P]laintiffs themselves have supplied an application with respect to which the statute is not vague; they concede that the commission may punish 'express advocacy' without running afoul of the constitution."); *see Vargas*, 205 P.3d at 227 ("[T]he *Stanson* decision explicitly identified a number of materials and activities that unquestionably constitute campaign activities (without any need to consider their 'style, tenor and timing')—for example, the use of public funds to purchase bumper stickers, posters, advertising 'floats,' or television and radio 'spots' ... ."). As the Circuit Court admitted, "[i]n some cases the answer will be plain as to whether speech is informationally neutral or constitutes advocacy, support, or opposition … ." D43 p. 12; App. 12.[10] That is enough to reverse the Circuit Court and uphold the law against the Officials' facial challenge.

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[10] The Circuit Court also said that "answers in most cases will be more elusive," D43 p. 12; App. 12—an empirical claim with no basis in the summary judgment record. Regardless, the statement conflates First Amendment overbreadth challenges and Fourteenth Amendment due process void-for-vagueness challenges. *See Humanitarian Law Project*, 561 U.S. at 20 ("[O]ur precedents make clear that a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression."); *State v. Jeffrey*, 400 S.W.3d 303, 308 (Mo. banc 2013) ("This Court has adopted the overbreadth doctrine and also limits its application to the First Amendment context.").

And even if it were not, H.B. 271's addition of a scienter requirement fixes any remaining vagueness issues with § 115.646.[11] *See* D43 p. 12; App. 12 (faulting the unamended statue for lack of such a requirement). As of August 28, only "purposeful violation[s]" of the law will carry criminal penalties. § 115.646 (2021). "[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Vill. of Hoffman Estates*, 455 U.S. at 499; *see also Hill*, 530 U.S. at 732; *State v. Shaw*, 847 S.W.2d 768, 776 (Mo. banc 1993) (concluding a statute's scienter requirement cured any vagueness issue).[12] It is no different here.

* * *

The point is not to establish the meaning of § 115.646 for all time and all circumstances. The point is that there is clear core of conduct that the

[11] This is not to say that violations that occurred before H.B. 271's passage are not crimes.

[12] The Officials also claimed that the statutory safe harbor—that the law does not "prohibit any public official of a political subdivision from making public appearances or from issuing press releases concerning any such ballot measure," § 115.646—is vague. *See* D37 pp. 4–5. The Circuit Court did not address this claim, but there is no reason to believe that the safe harbor lacks a core meaning. *See Gerrard v. Bd. of Election Comm'rs*, 913 S.W.2d 88, 90 (Mo. App. 1995) ("Section 115.646 permits these officials to make public appearances and issue press releases."). Regardless, any claimed ambiguity of the safe harbor cannot change the fact that § 115.646's prohibitory language applies to a clear core of activities.

statutory phrase a "contribution or expenditure of public funds shall be made directly by any officer, employee, or agent of any political subdivision" covers. And "a core of meaning is enough to reject a vagueness challenge, leaving to future adjudication the inevitable questions at the statutory margin." *Curry*, 918 F.3d at 541.

CONCLUSION

For those reasons, Missouri respectfully asks this Court to reverse the judgment of the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2021, Appellants' Brief and Appendix were filed electronically through Case.net and, therefore, served on all counsel of record.

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Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that on August 26, 2021, pursuant to Rule 84.06(c), Appellants' Brief complies with the limitations contained in Rule 84.06(b), was prepared using Microsoft Word in 13-point Century Schoolbook font, contains 11,666 words, as determined by Microsoft Word, and was electronically served on all counsel of record through Case.net.

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