**IN THE SUPREME COURT OF THE STATE OF MISSOURI**

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**Case No. SC100132**

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**ANNA FITZ-JAMES et al.,**
**Respondents,**
**v.**
**ANDREW BAILEY, in his official capacity as Attorney General for the State of Missouri,**
**Appellant.**

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# *AMICI CURIAE* BRIEF OF MAYOR QUINTON LUCAS OF CITY OF KANSAS CITY, MISSOURI AND PUBLIC RIGHTS PROJECT

## IN SUPPORT OF RESPONDENT

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## STATEMENT OF INTEREST

Mayor Quinton Lucas is Mayor of Kansas City, Missouri. He represents over 500,000 Missouri citizens whose ability to exercise their constitutional rights are imperiled. As a public official, he also has ministerial duties statutorily imposed upon him, and performs those duties as commanded. He submits this brief to champion the rights of his constituents and provide a local-government perspective on the importance of officials executing their ministerial duties and facilitating the will of the people.

Public Rights Project ("PRP") is a not-for-profit civil rights advocacy organization committed to equitable enforcement of law. PRP catalyzes greater rights protection alongside our network of nearly 200 state, local, and tribal government partners. PRP provides technical assistance, training, and legal support to drive public administration that improves the daily lives of historically underserved groups and marginalized people, and promotes voting rights and other democratic norms.

The Kansas City Mayor and PRP are deeply concerned about the accelerating trend of state officials blocking ballot initiatives where voters wish to restore or advance individual rights. These actions undermine democratic processes and the rule of law, and often usurp the powers of other duly elected officials. The Attorney General's failure to fulfill his ministerial duties is a prime example.

The Kansas City Mayor and PRP thus submit this brief in support of Petitioner's request for mandamus relief because the Attorney General's unlawful actions and inaction

deprive Missourians of their constitutional prerogative and interfere with and erode our democracy.[1]

## ARGUMENT

The Circuit Court correctly concluded that by indefinitely delaying the production of a ballot title, Attorney General Bailey failed to execute his ministerial duties. The Attorney General has stymied the democratic process by unlawfully compressing the time for Missourians to collect the required number of signatures to qualify for the initiatives' appearance on the 2024 ballot. By June 20th, the Attorney General had deprived the ballot initiative process of fifty days "which cannot be recovered." Slip Op. at 20. By the time this Court hears this case on July 18th, the Attorney General's continued intransigence will have taken away twenty-eight more days. To guard against exactly the kinds of harms to democracy the Attorney General threatens here, this Court and others around the country have routinely identified duties like the Attorney General's as ministerial—providing public officials no discretion or power to interfere with valid voter efforts—and issued mandamus when the officials refuse to discharge those ministerial duties.

### I. The Circuit Court Correctly Recognized the Attorney General's Duty as Ministerial and Properly Granted Mandamus to Compel Performance.

Government functions only when public officials faithfully execute their ministerial duties as defined by law. Because the Attorney General's duties in the ballot initiative

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *Amici* or *Amici*'s counsel made a monetary contribution to the preparation or submission of this brief.

process are ministerial, the Circuit Court properly issued a writ of mandamus to address Attorney General Bailey's refusal to perform them.

"The principle at the heart of [the writ of mandamus] is that *public officers* are required to perform *ministerial duties* without any request or demand, and the entire public has the right to that performance." *Curtis v. Missouri Democratic Party*, 548 S.W.3d 909, 915 (Mo. banc 2018) (cleaned up) (alteration and emphasis in the original). A ministerial duty is one that must be executed "upon a given set of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to [the public official's] judgment or opinion concerning the propriety or impropriety of the act to be performed." *State ex rel. Alsup v. Kanatzar*, 588 S.W.3d 187, 191 (Mo. banc 2019) (alteration in original) (quoting *State ex rel. Forgrave v. Hill*, 198 S.W. 844, 846 (Mo. banc 1917)).

Missouri's ballot-initiative statutes impose clear mandatory duties on the Attorney General: "The attorney general ***shall***, within ten days of receipt of the fiscal note and the fiscal note summary, approve the legal content and form of the fiscal note summary prepared by the state auditor and ***shall*** forward notice of such approval to the state auditor." RSMo. § 116.175.4 (emphasis added). As the Circuit Court noted, "the word 'shall' generally prescribes a mandatory duty." Slip Op. at 23 (quoting *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009)). In prescribing the Attorney General a duty to approve and forward the fiscal note summary, "the statute makes clear what he 'shall' do." *Id*.

The duty remains ministerial even though the statute allows some judgment to evaluate the summary's "legal content and form." While some judgment may be required "in a limited sense" in executing ministerial duties, a public officer must still act "by

direction of legal authority upon a given state of facts, independent of what he may think of the propriety or impropriety of doing the act in the particular case." *State ex rel. Jones v. Cook*, 73 S.W. 489, 493 (Mo. banc 1903). In Missouri and elsewhere, courts have regularly found acts to be ministerial even when they require some application of the officer's expertise and judgment:

- The Kansas City, Missouri City Council must approve subdivision plans that meet zoning requirements and must reject those that do not, even though the council is vested "with discretion and judgment . . . to determine whether a plan meets the zoning or subdivision requirement." *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157, 164–65 (Mo. banc 2006).

- Public officials must erect warning signs on public roadways, even though where and when to erect signs requires fact-gathering, analysis, and some discretion. *Cope v. Scott*, 45 F.3d 445, 451–52 (D.C. Cir. 1995).

- A medical examiner must correct and re-submit an autopsy record when he learns the original was erroneous, even though the method of correction may require exercising some judgment. *Lauer v. City of New York*, 733 N.E.2d 184, 187 (2000).

- Public school teachers must report bullying according to known rules or codes of conduct, even though there is discretion "with respect to the means or method to be employed in performing this duty." *Patton v. Bickford*, 529 S.W.3d 717, 727-28 (Ky. 2016) ("To be sure, there is a degree of discretion associated with the Teachers' duties here. But this discretion does not in and of itself transform an otherwise ministerial duty to a discretionary one.")

- Public officials must approve land developments that meet established standards, even though that requires determining whether standards are met. *Knutson v. State ex rel. Seberger*, 157 N.E.2d 469, 471 (1959).

The Attorney General here had even less discretion than in these ministerial-duty cases where more complex application of law to facts was required. This Court has held that public official have no authorization to "analyze or evaluate the correctness of the returned fiscal impact submissions," and should not "wade into the policy debates

surrounding initiative petitions." *Brown v. Carnahan*, 370 S.W.3d 637, 649, 650 (Mo. banc 2012). Instead, the fiscal note must "state the consequences of the initiative without bias, prejudice, deception, or favoritism." *Id.* at 654. If it does, the Attorney General "shall forward" it. RSMo. § 116.175.4.

Here, the summaries' "legal content and form" complied with statutory requirements. They stated estimated costs and savings to state and local governments, they contained fewer than fifty words, they summarized the fiscal note, and they did not contain biased, prejudicial, deceptive, or argumentative language.[2] Slip Op. at 24. The Attorney General had no more to do here than review for that statutory compliance, approve the summaries, and forward his approval. Permitting him to delay the initiative process based on prejudiced statistical analyses that artificially inflate the initiatives' estimated cost would set a dangerous precedent and sanction a biased and unlawful power grab.[3]

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[2] They read: "State governmental entities estimate no costs or savings, but unknown impact. Local government entities estimate costs of at least $51,000 annually in reduced tax revenues. Opponents estimate a potentially significant loss to state revenue."

[3] General Bailey's speculations about the petitions' costs are irrelevant. They are also wrong. Studies indicate that abortion *bans* are costly, and an initiative restoring reproductive rights would likely lead to an expected overall *reduction* in costs to Missouri state and local governments. *See, e.g., The High Cost of House Bill 126 on the Economic Health of St. Louis*, The Office of the Treasurer of St. Louis City & NARAL Pro-Choice Missouri Foundation 6-8 (Mar. 2021) (finding that the potential public and private sector impacts from the loss of reproductive rights could approach tens of millions of dollars in a single Missouri city), https://prochoicemissouri.org/research/.

Other studies demonstrate the far-ranging economic consequences of denying women abortions—consequences likely to result in additional strain on government resources. *See, e.g.*, Diana Greene Foster et al., *Socioeconomic outcomes of women who receive and women who are denied wanted abortions*, American Journal of Public Health, 108(3):407-413 (March 2018) (concluding that laws restricting abortion may result in

The Attorney General's high office provides no cover for his failure to execute his ministerial duties. Even a "high officer" who maintains discretion in some areas, may have "duties assigned him by law, in the execution of which he is independent of all control, but that of the laws." *Marbury v. Madison*, 5 U.S. 137, 149–50 (1803) (declaring the ministerial duties of the U.S. Secretary of State). The Attorney General is "not above the law." *Id.*

## II. Failing to Perform Ballot-Initiative-Related Ministerial Duties Strips Missouri Citizens of their Sovereignty.

The initiative process exists because "[t]he people, from whom all constitutional authority is derived, have reserved the 'power to propose and enact or reject laws and amendments to the Constitution.'" *Missourians to Protect the Initiative Process v. Blunt*,

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worsened economic outcomes for women; specifically, study participants forced to give birth were more likely to (1) live in poverty 6 months after abortion denial; (2) receive public assistance; (3) be unemployed; and (4) be unable to cover basic living expenses like food, housing and transportation); Sarah Miller et al., *The Economic consequences of being denied an abortion*, The National Bureau of Economic Research, NBER Working Paper Series Paper No. 26662 (January 2020) (finding that women denied an abortion experience (1) a large, multi-year increase in financial distress; (2) lower credit scores; (3) higher debt; and (4) more numerous negative public financial records, such as bankruptcies and evictions); Foster, Biggs, and Raifman., *Comparison of health, development, maternal bonding, and poverty among children born after denial of abortion vs after pregnancies subsequent to an abortion*, JAMA Pediatrics, 172(11):1053-1060 (September 2018) (finding that children born as a result of abortion denial are more likely to live below the federal poverty level than children born from a subsequent pregnancy to women who received the abortion).

Missouri spends even more money navigating its current abortion ban than many of the states in these studies. *See* Kacen Bayless, *Missouri banned abortion. Why is it spending millions to promote alternatives to procedure?*, Kansas City Star (July 7, 2023), https://www.kansascity.com/article277059568.html. The Auditor's fiscal note summary estimating only costs and no savings is, if anything, a generous concession to the Attorney General's position.

799 S.W.2d 824, 827 (Mo. banc 1990) (quoting Mo. Const. art. 3, § 49). This grants the initiative process a special place in Missouri's constitutional structure. *Brown*, 370 S.W.3d at 644 ("Nothing in our constitution so closely models participatory democracy in its pure form." (quoting *Missourians to Protect*, 799 S.W.2d at 827)). When the people determine to act through initiative, "there is no power that can say them nay." *State ex rel. Drain v. Becker*, 240 S.W. 229, 230 (Mo. banc 1922).

Because the constitutional right to initiative is not self-executing, Missouri law, like that of other states, prescribes specific ministerial tasks for executive officers. But if executive officers jam the gears by shirking their ministerial duties, they "thwart the will of the people." *State ex rel. Stokes v. Roach*, 190 S.W. 277, 278 (Mo. banc 1916). Courts become the last line of defense.

This Court consistently demonstrates special solicitude for the initiative and referendum. When a litigant asks the Court "to prevent the initiative process from taking place," this Court views the request with "restraint, trepidation, and a healthy suspicion." *Missourians to Protect*, 799 S.W.2d at 827. When, as here, a litigant asks the Court to *facilitate* the initiative process, it "liberally construe[s]" the initiative and referendum procedures to "avail the voters with every opportunity to exercise these rights." *United Lab. Comm. of Mo. v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. banc 1978).

Permitting relator an opportunity to exercise her right to initiative requires mandamus. Without the writ, this Court's zealous protection of the initiative right will flounder in the face of the Attorney General's dilatory refusal to facilitate it. His delay tactic will "have the practical effect of foreclosing meaningful exercise of the power of

referendum." *Am. CL. Union of Missouri v. Ashcroft*, 577 S.W.3d 881, 890 (Mo. App. W.D. 2019). Affirming the Circuit Court here would "simply enable the people in their sovereign capacity, and as the source of all power, to express their will at the polls" *Roach*, 190 S.W. at 277. *See also State ex rel. Thomas v. Neeley*, 128 S.W.3d 920, 924 (Mo. App. S.D. 2004) (upholding a writ of mandamus directing a city clerk to certify the names of candidates where the candidates met their statutory obligations because the clerk had no "discretion to decide whose names are placed on the ballot.").

Courts throughout the country similarly protect the initiative—including with mandamus—against officials' refusing to comply with statutory requirements to facilitate it. The Michigan Supreme Court, for example, recently issued mandamus directing an election board to place a petition on the ballot. *Reprod. Freedom for All v. Bd. of State Canvassers*, 978 N.W.2d 854, 855 (Mich. 2022). It found the board's duty "limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures," and rejected the board's attempt to expand the word "form" beyond its traditional understanding. *Id.* Concurring, the Chief Justice opined that board "acts in a ministerial capacity and lacks discretionary authority to adjudicate legal disputes." *Id.* at 855 n.1 (McCormack, C.J., concurring) (citing *Stand Up for Democracy v Secretary of State*, 822 N.W.2d 159 (Mich. 2012)). Other state courts have acted similarly. *See Planning & Conservation League, Inc. v. Lungren*, 38 Cal. App. 4th 497, 501 (3d Dist. 1995) (upholding a writ of mandate to the state's attorney general in the initiative process); *In re State Question No. 805, Initiative Petition*, 473 P.3d 466, 467 (Ok. 2020) (issuing a writ of mandamus directing the Secretary of State to accept signed petitions for an initiative);

*Hutcheson v. Gonzales*, 71 P.2d 140, 151–52 (N.M. 1937) (issuing a writ of mandamus to Secretary of State on a referendum concerning proposed constitutional amendments); *Windsor v. Polk Cnty.*, 87 N.W. 704, 705 (Iowa 1901) ("Since the statute gives the requisite number of voters the right to demand the submission of the question to the decision of the electors of the county, any one or more of the petitioners are entitled to a writ [of mandamus], if necessary to compel the entry of the order by the board[.]"); *State ex rel. Marcolin v. Smith*, 138 N.E. 881, 881 (Ohio 1922) (issuing a writ of mandamus directing the Secretary of State to approve a petition).

The Attorney General's disregard for his lawful duties is depriving Missouri's citizens of a "constitutional right [] integral to Missouri's democratic system of government." *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 492 (Mo. banc 2022). To reach the ballot, the petition will need signatures from eight percent of voters in two-thirds of congressional districts. Mo. Const. art. 3, § 50. Each day General Bailey delays his duty, the time for signature collection shrinks, the cost balloons, and the likelihood plummets that Ms. Fitz-James will be able to present her fellow voters with a proposal she deems important. *See No Bans on Choice*, 638 S.W.3d at 492; *United Lab. Comm. Of Mo.*, 572 S.W.2d at 454. Each day wasted offends the "fundamental expression of the power held by the people" and impedes a sovereign constitutional prerogative. *No Bans on Choice*, 638 S.W.3d at 492.

Every branch of government helps facilitate the initiative. The legislature cannot impede it. *See No Bans on Choice*, 638 S.W.3d at 492 ("The legislature must not be permitted to use procedural formalities to interfere with or impede this constitutional

right."). The executive must facilitate it. *See* RSMo. § 116.175. The courts zealously guard it. *See Missourians to Protect*, 799 S.W.2d at 827. Affirming the circuit court opinion's would do just that; commanding the Attorney General to execute his duties so he does not "thwart the will of the people." *Roach*, 190 S.W. at 278.

## CONCLUSION

This Court should affirm the Circuit Court's opinion granting the writ of mandamus that requires the Attorney General to promptly approve the legal content and form of the fiscal note summaries and forward notice of the approval.

Dated: July 13, 2023

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that pursuant to Mo. S. Ct. Rule 84.06(c), this brief (1) contains the information required by Mo. S. Ct. Rule 55.03; (2) complies with the limitations in Mo. S. Ct. Rule 84.06(b); and (3) contains ____ words, exclusive of the sections exempted by Mo. S. Ct. Rule 84.06(b), determined using the word count program in Microsoft Word.

/s/ Tara M. Kelly
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## CERTIFICATE OF CONSENT

I hereby certify that all parties have consented to the filing of this brief.

/s/ Tara M. Kelly
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically with the Court's electronic filing system on July 13, 2023. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

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