IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. MISSOURI COALITION FOR THE ENVIRONMENT, et al.,	)	
Appellants,	)	
vs.	)	No. SC95546
JOINT COMMITTEE ON ADMINISTRATIVE RULES, et al.,	)	
Respondents.	)	

On Appeal from the Circuit Court of Cole County
Nineteenth Judicial Circuit, Division IV,
The Hon. Patricia S. Joyce, presiding,
No. 14AC-CC00133

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

The Joint Committee on Administrative Rules ("JCAR"), a standing committee of the General Assembly, disapproved portions of an administrative rule promulgated by the Public Service Commission ("PSC" or "Commission"). The Secretary of State published the Commission's final order of rulemaking in the Missouri Register and the Code of State Regulations, but without the portions disapproved by JCAR.

The legislature's authority to veto administrative rules is in issue on this appeal. The Court is asked to decide whether all or parts of §§ 536.019, 536.021, 536.028 and 536.073, RSMo, violate the separation of powers between the three branches of government founded on Article II, § 1 of the Missouri Constitution.

The Supreme Court has exclusive appellate jurisdiction because the validity of statutes of this state is involved. Missouri Constitution, Article V, § 3.

STATEMENT OF FACTS

This case revisits the decision in *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules,* 948 S.W.2d 125 (Mo. banc 1997)("*MCE v. JCAR"* or *"JCAR* I"), which ordered the Secretary of State to publish a rule promulgated by the Department of Natural Resources which had not been submitted to the Joint Committee on Administrative Rules ("JCAR"). The Court held that statutory provisions for (1) suspending promulgation of an agency's final orders of rulemaking pending JCAR review, (2) preventing promulgation and enforcement of agency rules JCAR disapproved, and (3) permitting JCAR to suspend and withdraw rules already promulgated by an agency were unconstitutional. "The proper process for legislative curtailment of agency rulemaking, then, is confined to that outlined in article III for bill passage and presentment." 948 S.W.2d at 134.

In its 1997 session the General Assembly moved promptly to shore up its authority to veto administrative rules by passing HB 850, which added two new sections to Chapter 536, RSMo, and amended another relating to JCAR. The Governor cooperated in this effort by issuing Executive Order 97-97 ("EO 97-97") on June 27, 1997, which acknowledged passage of HB 850 and said "the Executive Branch wishes to grant sufficient time to allow the Legislative Branch to review proposed final orders of rulemaking." EO 97-97 directed most executive agencies to submit their rules to JCAR and abide by legislative vetoes (L.F. II, 275–6; A28).

The Court has yet to decide whether these changes in the law cured the violations of the separation of powers found by the Court in the first *MCE v. JCAR* case.

The Renewable Energy Standard

At the general election of November 4, 2008, the Missouri electorate passed the Renewable Energy Standard ("RES"), a ballot initiative denominated Proposition C (L.F. III, 516). It is now codified as §§ 393.1020–393.1035, RSMo. The RES requires "electrical corporations" as defined by § 386.020, RSMo, to achieve increasing percentages of their sales with electricity from renewable energy sources such as wind and sun: two percent of sales in the years 2011–2013; five percent from 2014–2017; ten percent from 2018–2020; and fifteen percent in each calendar year beginning in 2021. The RES reads, in relevant part,

a. "'Renewable energy credit' or 'REC', a tradeable certificate of proof that one megawatt-hour of electricity has been generated from renewable energy sources," § 393.1025(4), RSMo;

b. "The portfolio requirement shall apply to all power sold to Missouri consumers whether such power is self-generated or purchased from another source in or outside of this state. A utility may also comply with the standard in whole or in part by purchasing RECs." § 393.1030.1, RSMo (A22);

c. "The [public service] commission …shall make whatever rules are necessary to enforce the renewable energy standard." § 393.1030.2 (A23).

On January 8, 2010, the PSC filed with JCAR and the Secretary of State a "Proposed Rule" for the RES (L.F. II, 277–325). The proposed rule included paragraphs 4 CSR 240-20.100(2)(A) and (2)(B)2, which read (L.F. II, 291):

> (A) Electric energy or RECs associated with electric energy are eligible to be counted towards the RES requirements only if the generation facility for the renewable energy resource is either located in Missouri or, if located outside of Missouri, the renewable energy resource is sold to Missouri electric energy retail customers. For renewable energy resources generated at facilities located outside Missouri, an electric utility shall provide proof that the electric energy was sold to Missouri customers.
>
> (B) The amount of renewable energy resources or RECs associated with renewable energy resources that can be counted towards meeting the RES requirements are as follows:
>
> …2. If the facility generating the renewable energy resources is located outside Missouri, the allowed amount is the amount of megawatt-hours generated by the applicable generating facility that is sold to Missouri customers. For the purposes of subsections (A) and (B) of this section, Missouri electric energy retail customers shall include retail customers of regulated Missouri utilities as well as customers of Missouri municipal utilities and Missouri rural electric cooperatives.

RECs—renewable energy credits—are the currency of the RES. Utilities demonstrate compliance with the statute by registering and retiring a sufficient number of RECs representing renewable energy generated or purchased. 4 CSR 240-20.100(3)(F, J) (L.F. III, 367–8; A31). As a general matter, RECs may be sold together with the renewable electricity they represent ("bundled")(L.F. II, 338) or they may be "unbundled" and sold separately from the electricity (L.F. II, 339–40), in which case the certificates are no

longer tethered to generators at any location. The effect of paragraphs (2)(A) and (2)(B)2 was that any RECs used by utilities to comply with the RES must represent electricity "sold to Missouri consumers," in the words of the RES. § 393.1030.1, RSMo (A22). The matter of where renewable electricity comes from is often called "geographic sourcing" (*e.g.* L.F. III, 399–400).

On June 2, 2010, the PSC filed with JCAR its "Order of Rulemaking," which included paragraphs (2)(A) and (2)(B)2 and which the PSC adopted by a 3–2 vote (L.F. III, 395, 428), two commissioners dissenting (L.F. III, 449, 452). In its response to comments the PSC interpreted § 393.1030.1 (A22) to mean that the ability of utilities to comply with the standard by purchasing RECs was subject to the requirement that the energy represented by those RECs must be delivered to Missouri (L.F. II, 340–1; III, 402–3). "Missouri voters…wanted cleaner energy delivered to their homes and they wanted the economic advantages renewable energy generation will bring to the state." (L.F. III, 403)

The Legislative Veto

On June 24, 2010, JCAR convened a hearing on the RES rule in the State Capitol. On July 1, JCAR voted to disapprove paragraphs (2)(A)and (2)(B)2 of the rule (L.F. III, 498). Senator Luann Ridgway, chairwoman of JCAR, wrote a letter to Secretary of State Robin Carnahan informing her of the vote and saying, "The Committee considers those portions which were disapproved to be held in abeyance at this time and asks that you not publish those portions of the rule" (L.F. II, 272–3).

Also on July 1, 2010, the PSC voted to file a "Revised Order of Rulemaking"

(L.F. II, 332). The Rule Transmittal did not list either paragraph (2)(A) or (2)(B)2 among the portions deleted from the proposed rule (L.F. II, 330). In its "explanation of revised order of rulemaking," the PSC noted that JCAR's hearing was ongoing (L.F. III, 364).

On July 6, 2010, the PSC transmitted to the Secretary of State its Revised Order of Rulemaking, including paragraphs (2)(A) and (2)(B)2 (L.F. II, 330–3). In a letter to Secretary Carnahan, Steven C. Reed, Secretary of the PSC, wrote:

> This rule includes the portions disapproved by JCAR but, in accordance with section 536.073.8, the Commission is not filing those sections for publication. Rather, the Commission expects that the disapproved portions of the rule will be held in abeyance by JCAR and continue to work through the process set forth in Chapter 536 for the General Assembly to act.

He concluded that the Commission "requests that sections (2)(A) and (2)(B)2 be reserved for later use in the event the Commission decides to amend the rule" (L.F. II, 332).

On August 16, 2010, the revised final rule was published in the Missouri Register as an "Order of Rulemaking," 35 Mo.Reg. 1183. The sections marked (2)(A) and (2)(B)2 read "*Reserved,*" 35 Mo.Reg. at 1196 (A30–31), with a note referring to JCAR's disapproval. 35 Mo.Reg. at 1202 (A32). The rule, without the disapproved paragraphs, appeared in the Code of State Regulations as 4 CSR 240-20.100 with an effective date of September 30, 2010.

On February 1, 2011, the Missouri Senate and House of Representatives both passed Senate Concurrent Resolution 1, by which they purported to "permanently disapprove and suspend the final order of rulemaking for the proposed amendment to 4

CSR 240-20.100(2)(A) and 4 CSR240-20.100(2)(B)2…."(L.F. III, 496, 498–9). The Governor allowed SCR 1 to take effect without either signing or vetoing it (L.F. III, 497; 36 Mo. Reg. 1008–11; 4 CSR 240-20.100, p. 62; A32).

Before the full legislature acted, the PSC, on Jan. 26, 2011, issued an "Order Withdrawing Geographic Sourcing Provisions (2)(A) and (2)(B)2 of 4 CSR 240-20.100 Pursuant to the Actions of JCAR" (L.F. III, 473–4, 495).

The regulated utilities have availed themselves of this opportunity by purchasing unbundled solar RECs (SRECs) from third-party brokers or aggregators using the Western Renewable Energy Generation Information System (WREGIS)(L.F. I, 117, 160, 169, 171; II, 188–9, 217–8, 242–3). Some of the utilities' RES Compliance Reports filed with the PSC are redacted, but to the extent the origin of these purchased SRECs can be determined, they are all from California. For the 2011 report of Ameren Missouri, see (L.F. I, 123–36); for Kansas City Power & Light ("KCP&L"), (L.F. I, 153, 160); for KCP&L-Greater Missouri Operations ("GMO"), (L.F. I, 163, 169, 171–5). For the 2012 reports, see Ameren (L.F. II, 180, 188–9); KCP&L (L.F. II, 211, 217–8, 224, 231–5); GMO (L.F. II, 236, 242–3, 245–7, 254–71).

The course of this litigation

The Commission's revised rule was under review until the Court of Appeals entered its opinion on November 12, 2012, upholding it. *State ex rel. Missouri Energy Development Ass'n v. PSC,* 386 S.W.3d 165 (Mo.App. W.D. 2012). Several parties in that case attempted to challenge the deleted geographic sourcing provisions as being contrary to the statute, but the court held that the issue was moot since they had never

gone into effect. 386 S.W.3d at 175–6.

Appellants then commenced this case in St. Louis County Circuit Court before venue was transferred to Cole County (L.F. I, 1, 14). Plaintiff Missouri Coalition for the Environment ("MCE") is a not-for-profit corporation that promotes renewable energy as an alternative to fossil fuels (L.F. I, 71–2). Missouri Solar Applications LLC installs solar photovoltaic systems and alleged that it was being denied business opportunities because allowing the utilities to buy RECs from anywhere in the country had lowered their value in Missouri, making solar a less attractive prospect to customers by lengthening the time they could pay off their systems' costs by selling the RECs generated by their systems (L.F. I, 73–4). Thomas J. Sager is a resident of Rolla, a member of MCE and a Missouri taxpayer (L.F. I, 75–6). Public money has been expended by JCAR over the years (L.F. I, 94–111). These facts are admitted by the respondents (L.F. I, 82–4; III, 458–62, 475–9).

Respondents are JCAR and its members, the Secretary of State as the official responsible for publishing administrative rules, the PSC as the agency charged with enforcing the RES, and the Governor because of Executive Order 97-97 (L.F. I, 17–18, 30–1).

Three motions for summary judgment were filed, one by plaintiffs (L.F. I, 58), one by the PSC (L.F. III, 484), and a "cross-motion for summary judgment" by JCAR and the Governor (L.F. I, 5). The case was decided on uncontroverted facts (L.F. III, 458, 467, 475, 486, 504). On May 20, 2015, the Circuit Court entered judgment denying plaintiffs' motion and granting the PSC's motion (L.F. III, 515, 521).

On initial appeal, in Case No. SC95100, this Court dismissed for want of a final

judgment (L.F. III, 522). On remand the PSC filed a motion to dismiss the case as moot on the ground that the PSC had, in the interim, filed an amended rule (L.F. III, 523). This revised rule, which became effective on November 30, 2015 (4 CSR 240, Chapter 20, p. 62; A32) still omits the contested paragraphs and replaces them with "Reserved*" (4 CSR 240, Chapter 20, pp. 42–3; A30–1). The revised rule is accompanied by the same note as in the earlier version, explaining again the actions taken by JCAR and the legislature in 2010 and 2011 (*id*. at p. 62; A32). The trial court granted the PSC's motion on January 11, 2016 (L.F. III, 530–1). Notice of appeal was filed on February 11 (L.F. III, 532).

POINTS RELIED ON

I

The trial court erred in dismissing the petition because the legislative veto exercised by JCAR and the full legislature violated the separation of powers in Article II, Section 1 of the Missouri Constitution, and the secretary of state therefore had a ministerial duty to publish both the original and revised rules with the two vetoed paragraphs, in that all or parts of sections 536.019, 536.021, 526.028 and 536.073, RSMo, and EO 97-97, authorize JCAR and the General Assembly to (1) suspend administrative rules, (2) prevent publication and enforcement of rules of which they disapprove, and (3) repeal rules by concurrent resolution rather than by passage of a bill through the procedures of Article III of the Constitution. The legislative veto also encroaches upon the judicial power to pronounce upon the validity of rules.

Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. banc 1997)

State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 69 (Mo. banc 1982)

Legislative Research Commission v. Brown, 664 S.W.2d 907 (Ky. 1984)

Missouri Constitution, Article II, § 1

Missouri Constitution, Article IV, § 8

II

The trial court erred in dismissing Count I of the petition because the Joint Committee on Administrative Rules had no authority to review and disapprove of any part of the Renewable Energy Standard rule in that JCAR's authority is limited by § 536.024.1, RSMo, to acting "When the general assembly authorizes any state agency to adopt administrative rules or regulations," but the delegation of rulemaking authority for the Renewable Energy Standard was granted by ballot initiative and not by the general assembly.

Section 536.024, RSMo

Terminal Railroad Ass'n v. City of Brentwood, 360 Mo. 777, 230 S.W.2d 768 (1950)

Fort Zumwalt School District v. Dickherber, 576 S.W.2d 532 (Mo. banc 1979)

III

The trial court erred in dismissing the petition because the case is not moot in that (a) the revised PSC rule perpetuates the error in the original rule by again omitting the contested paragraphs; (b) the Commission had no authority to determine, and did not determine, the propriety of JCAR's action, which was consequently not reviewed by the Court of Appeals; and (c) the Commission's attempt to withdraw the geographic sourcing provisions came after the rule had been promulgated and therefore required a separate order of rulemaking.

Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. banc 1997)

State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 69 (Mo. banc 1982)

Champlin Petroleum v. Brashears, 592 S.W.2d 545 (Mo.App. W.D. 1979)

Section 536.021, RSMo

ARGUMENT

I

The trial court erred in dismissing the petition because the legislative veto exercised by JCAR and the full legislature violated the separation of powers in Article II, Section 1 of the Missouri Constitution, and the secretary of state therefore had a ministerial duty to publish both the original and revised rules with the two vetoed paragraphs, in that all or parts of sections 536.019, 536.021, 526.028 and 536.073, RSMo, and EO 97-97, authorize JCAR and the General Assembly to (1) suspend administrative rules, (2) prevent publication and enforcement of rules of which they disapprove, and (3) repeal rules by concurrent resolution rather than by passage of a bill through the procedures of Article III of the Constitution. The legislative veto also encroaches upon the judicial power to pronounce upon the validity of rules.

In *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules,* 948 S.W.2d 125 (Mo. banc 1997), the Court ordered the Secretary of State to publish a rule filed by the Department of Natural Resources which had not been submitted to JCAR. The legislature makes the laws; the executive branch executes them. Mo. Const., Art. II, § 1; 948 S.W.2d at 133:

> Section 260.225 violates this principle by 1) suspending publication and, therefore, promulgation of the DNR's final orders of rulemaking for up to twenty days while the JCAR reviews such rules; 2) preventing promulgation and enforcement of DNR rules the JCAR disapproves; and 3)

permitting the JCAR to suspend and withdraw rules already promulgated by the DNR.

Id. at 134. The legislature may repeal rules only by following the procedure for bill passage in Art. III. *Id.* Although the statutes in issue here are not the same as the one in *JCAR* I, they have the same unconstitutional effects of allowing JCAR to suspend rulemakings and disapprove of rules, and the full legislature to veto them by resolution.

Standard of Review

Appellate courts review a grant of dismissal de novo. *Huch v. Charter Communications,* 290 S.W.3d 721, 724 (Mo. banc 2009). Mootness is a legal issue reviewed de novo. *T.C.T. v. Shafinia,* 351 S.W.3d 34, 36 (Mo.App. W.D. 2011). A case is moot when the judgment sought would have no practical effect on any then-existing controversy. *State ex rel. Reed v. Reardon,* 41 S.W.3d 470, 473 (Mo. banc 2001).

Statutory interpretation is likewise an issue of law on which no deference is owed to the trial court. *Bolt v. Giordano,* 310 S.W.3d 237, 242 (Mo. banc 2010). The Court presumes a statute to be valid unless it clearly contradicts a constitutional provision. *JCAR,* 948 S.W.2d at 132.

The result here in *JCAR* II is foretold in *JCAR* I. The trial court's judgment of dismissal, based on the PSC's amendment of the RES rule, maintains that a revised rule automatically moots a case brought under the predecessor rule (L.F. III, 530–1). As discussed more fully in Point III, this is not true when the amended rule perpetuates the issue in the original. *JCAR,* 948 S.W.2d at 135. This Court can render effectual relief because the geographic sourcing paragraphs are still missing from the revised rule and

can be restored by an order of the Court.

Suspension of a rule is by itself a constitutional violation.

The Court in *JCAR* I said: "The legislature may not unilaterally control execution of rulemaking authority after its delegation of rulemaking power, regardless of whether it does so by suspension, revocation, or prior approval of administrative rules." 948 S.W.2d 125, 134.

Thus JCAR cannot lawfully suspend a rule, and this is true regardless of any subsequent legislative veto or failure to veto. In this case the disapproved portions of the RES rule were not published by the Secretary of State and were held in abeyance until the full legislature rejected them by passing Senate Concurrent Resolution (SCR) 1 on February 1, 2011 (L.F. III, 495–9); 36 Mo. Reg. 1008–11 (A32). While the 1997 amendments to chapter 536 together with EO 97-97 put new veto machinery into place, they repeat the defects of the old.

Section 536.021.1 provides that "no proposed order of rulemaking, final order of rulemaking or portion thereof shall take effect, or be published by the secretary of state, so long as the general assembly shall disapprove such by concurrent resolution pursuant to article IV, section 8 within thirty legislative days occurring during the same regular session of the general assembly" (A4). This allows for suspension of a rule for up to 30 days of the legislative session, and veto without passage of a bill.

Section 536.021.5 gives an agency 90 days to file a final order of rulemaking but adds: "Such ninety days shall be tolled for the time period any rule is held under abeyance pursuant to an executive order" (A6–7). This refers to EO 97-97, which

requires agencies to "hold in abeyance for thirty (30) legislative days" any final rule that "has been disapproved" by JCAR (A28, ¶ 3), and creates the possibility of a suspension, caused by JCAR, beyond the 90 days.

Section 536.073.4 still provides that:

> No rule or portion of a rule promulgated under the authority of this chapter shall become effective until it has been approved by the joint committee on administrative rules in accordance with the procedures provided herein, and the delegation of the legislative authority to enact law by the adoption of such rules is dependent upon the power of the joint committee on administrative rules to review and **suspend rules pending ratification by the senate and the house of representatives** as provided herein. [Emphasis added.]

This expressly allows for suspension of a rule and veto (A19).

Section 536.073.7: "The committee may, by majority vote of the members, suspend the order of rulemaking or portion thereof" on various grounds (A20).

Section 536.073.8 further provides: "If the committee disapproves any rule or portion thereof, the filing agency shall not file such disapproved portion of any rule with the secretary of state and the secretary of state shall not publish in the Missouri Register any final order of rulemaking containing the disapproved portion." This negation of the secretary of state's usual duty to publish a rule under § 536.021 is a unilateral veto by JCAR subject to ratification by the full legislature. § 536.073.9 (A20–21).

In summary, whenever JCAR disapproves a rule, the rule cannot be published or take effect if the senate and the house ratify the disapproval by concurrent resolution. The

senate and the house have "thirty legislative days" after the disapproval in which to act. The mere disapproval by JCAR has the effect of suspending the rule for a period of up to thirty legislative days, which can be many months when the legislature is not in session. JCAR disapproved a rule of the Department of Health and Senior Services after a hearing on May 12, 2015; the full legislature did not ratify JCAR's action until February 11, 2016 (SCR 46; 2016 Senate Journal, p. 295).

These suspensions of the executive rulemaking process are unconstitutional under *JCAR* 1.

Legislative veto by concurrent resolution is unconstitutional.

A suspended rule or portion of a rule may still take effect, but not "so long as the general assembly shall disapprove such by concurrent resolution pursuant to article IV, section 8 within thirty legislative days occurring during the same regular session of the general assembly." Section 536.021.1, RSMo (A4); to the same effect is § 536.073.9 (A20–1).

Section 536.073.10 allows the general assembly to suspend or revoke rules after "adoption…either by bill or, pursuant to section 8, article IV of the constitution, by concurrent resolution upon recommendation of the joint committee on administrative rules" (A21).

EO 97-97 orders agencies to "give force and effect to concurrent resolutions" provided they have been presented to the governor and subjected to the constitutional process for veto and veto override (A28, ¶ 4).

In *Missouri Coalition for Environment v. Joint Committee on Administrative*

Rules, 948 S.W.2d 125 (Mo. banc 1997), the Court held that revocation of a rule must be a legislative action. "As such, it is subject to the constitutional mandates for bill passage" of Article III, § 21 and the presentment (to the governor) requirement of Art. III, § 31. 948 S.W.2d at 134.

In the wake of the Court's decision, the general assembly amended the laws to allow for override of an agency rule by concurrent resolution. Apparently, the legislature believed that a concurrent resolution would function as a bill. However, the Court had not overlooked this. The statute at issue in *JCAR* I, § 260.225.10, RSMo 1994, allowed a rule to be suspended or revoked by bill **or** concurrent resolution, 948 S.W.2d at 130, fn. 13; but the opinion only allows the use of a bill.

This is explained by Article IV, § 8 of the Constitution, which says that a concurrent resolution "shall be proceeded upon in the same manner as in the case of a bill; provided, that no resolution shall have the effect to repeal, extend, or amend any law." The deletion of parts of an agency rule amends a law and therefore cannot be done by concurrent resolution. "Properly promulgated rules have the 'force and effect of law.'" 948 S.W.2d at 134 (citation omitted). "The proper process for legislative curtailment of agency rulemaking, then, is confined to that outlined in Article III for bill passage and presentment." *Id.*

EO 97-97 violates the separation of powers.

EO 97-97 requires that agencies: "3. Shall hold in abeyance by thirty (30) legislative days a final order of rulemaking…that has been disapproved by [JCAR]" and "4. Shall give force and effect to concurrent resolutions disapproving an administrative

rule" if the resolution is signed by the governor or approved over his veto (A28). The executive thus consented to legislative suspension and veto of administrative rules.

Executive orders are of three kinds: (1) formal, ceremonial and political; (2) communications to subordinate officials concerning executive branch duties; and (3) orders that implement or supplement the state's constitution or statutes. Only the last type is legally enforceable, and only if the order is supported by some constitutional or statutory provision. *Kinder v. Holden,* 92 S.W.3d 793, 806 (Mo.App. W.D. 2002).

EO 97-97 is in this third category. The statutory authority it cites is HB 850 (A28). The Governor was cooperating with the Legislature on the legislative veto. This made him a party to the violation of the separation of powers.

Since an executive order has no more legal authority than a statute or constitutional provision can give it, EO 97-97 falls because its statutory basis is unconstitutional.

The legislative veto violates the separation of legislative from judicial powers.

Judicial review of administrative rules is established by Art. V, § 18 of the Constitution: "All final decisions, findings, rules and orders on [sic] any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law…" Section 536.050.1 says: "The power of the courts of this state to render declaratory judgments shall extend to declaratory judgments respecting the validity of rules…"

JCAR's authority to suspend rules is constrained by § 536.073.7 to disapproval

"only for one or more of the following grounds: (1) An absence of statutory authority for the proposed rule; (2) An emergency relating to public health, safety or welfare; (3) The proposed rule is in conflict with state law; (4) A substantial change in circumstance since enactment of the law upon which the proposed rule is based; (5) The proposed rule is arbitrary and capricious" (A20). This trespasses on the jurisdiction of the courts.

"Courts alone have the power to make final determinations of questions of law," including "whether the agency action is unsupported by competent and substantial evidence upon the whole record, is unconstitutional, or in excess of statutory authority, or otherwise unauthorized by law, or upon unlawful procedure, or arbitrary, capricious or unreasonable, or involves an abuse of discretion." *Lederer v. Dep't of Social Services,* 825 S.W.2d 858, 863 (Mo.App. W.D. 1992). "The declaration of the validity or invalidity of statutes and administrative rules thus is purely a judicial function." *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75 (Mo. banc 1982).

JCAR usurped the authority of the judiciary to review rules when it disapproved the PSC's interpretation of § 393.1030.1 as requiring all RECs to stem from "power sold to Missouri consumers" (A22).

Mandamus lies.

In *MCE v. JCAR,* the Court ordered the Secretary of State to publish a rule that had not been submitted to JCAR because the statute requiring such submission was unconstitutional. 948 S.W.2d at 136. The Court resolved in Appellants' favor the issue "whether the secretary of state refused to publish the final order of rulemaking in reliance upon unconstitutional provisions…" *Id.* It was the secretary's ministerial duty to publish

the rule, disregarding the unconstitutional role of JCAR. The difference is that in this case the rule *had* been submitted to JCAR which had exercised its assumed role of invalidating parts of the rule. The case for mandamus is equally compelling.

The PSC secretary's cover letter to the secretary of state accompanying the final rule said, "This rule includes the portions disapproved by JCAR but…the Commission is not filing those sections for publication" (L.F. II, 332). The PSC essentially left it to the secretary to decide whether or not to publish the disapproved paragraphs, but there really was no decision to be made. It was the secretary of state's ministerial duty to publish them.

Mandamus must therefore issue requiring the Secretary to publish the PSC's rule as it was transmitted, including the disapproved paragraphs (2)(A) and (2)(B)2, without giving effect to the PSC secretary's contradictory instructions that those paragraphs were being filed but not being filed.

The "poison pill"

There is one final impediment to relief, one that was informally referred to in the court below as the poison pill. Section 536.028.10 starts with a non-severability clause and concludes:

> If any of the powers vested with the general assembly or the joint committee on administrative rules to review, to hold in abeyance the rule pending action by the general assembly, to delay the effective date or to disapprove and annul a rule or portion of a rule contained in an order of rulemaking, are held unconstitutional or invalid, the purported grant of rulemaking authority and any rule so proposed and

> contained in the order of rulemaking shall be revoked and shall be null, void and unenforceable. (A14)

This sentence threatens to wipe out swathes of the Code of State Regulations and prevent the executive branch from doing its duty of executing the laws. The legislature also put the poison pill directly into the RES in its 2013 amendment to § 393.1030 (A27).

The poison pill is a ransom note portending fatal consequences to the hostage body of administrative law should this Court exercise its constitutional authority to declare any part of the JCAR statutes invalid.

The Missouri legislature is not the first to employ this tactic. In 1982 the Kentucky legislature arrogated certain powers to its Legislative Research Commission (LRC) including a legislative veto over administrative rules similar to ours. *Legislative Research Commission v. Brown,* 664 S.W.2d 907, 917–8 (Ky. 1984). The Supreme Court held that this violated the separation of powers. 664 S.W.2d at 918–9.

The Court also had to consider the effect of a non-severability clause that "in essence, provides that if the LRC or its subcommittee cannot constitutionally veto proposed regulations, then the executive department cannot issue any more regulations." *Id.* at 919. The Court struck down this statute as a further violation of the separation of powers because it "restricted the power of the Governor to carry out his duties." *Id.* at 920.

When a new statute is unconstitutional, its repealing clause is also unconstitutional, and the old law remains in force. *State ex rel. SSM Health Care v. Neill,* 78 S.W.3d 140, 143 (Mo. banc 2002). The poison pill is ineffectual at repealing

prior grants of rulemaking authority.

The poison pill is not yet in effect, but it is a live issue, a ticking bomb that must be disarmed in deciding this case. Its effectiveness will be triggered by "Declaration by a court with jurisdiction that section 536.024 or any portion of executive order 97-97 is unconstitutional or invalid for any reason." § 536.028.13(4) (A14). But that will be of no consequence because the poison pill is itself unconstitutional.

II

The trial court erred in dismissing Count I of the petition because the Joint Committee on Administrative Rules had no authority to review and disapprove of any part of the Renewable Energy Standard rule in that JCAR's authority is limited by § 536.024.1, RSMo, to acting "When the general assembly authorizes any state agency to adopt administrative rules or regulations," but the delegation of rulemaking authority for the Renewable Energy Standard was granted by ballot initiative and not by the general assembly.

Count I of the petition, "Lack of Statutory Authority," sets up as a matter of statutory interpretation the argument that JCAR's statutory authority "does not extend to grants of rulemaking authority in a law passed through the initiative process" (L.F. I, 26) based on § 536.024, which gives JCAR power to review proposed and final orders of rulemaking:

> 1. When the **general assembly** authorizes any state agency to adopt administrative rules or regulations, the granting of such rulemaking authority and the validity of such rules and regulations is contingent upon the agency complying with the provisions of this section in promulgating such rules after June 3, 1994. [Emphasis added; A10.]

In its first judgment the trial court granted summary judgment for the reason that there was no case law to support this contention and that the legislature had substituted itself for the people as the grantor of rulemaking authority when it amended the RES in

2013 (L.F. III, 517). The subsequent judgment of dismissal on remand ruled that the case was moot because the original rule had been revised. As discussed more fully under Point III, the case is not moot because the two paragraphs disapproved by JCAR are still omitted from the amended rule. *MCE v. JCAR,* 948 S.W.2d at 135.

Standard of review

Appellate courts review a grant of dismissal de novo. *Huch v. Charter Communications,* 290 S.W.3d 721, 724 (Mo. banc 2009). Mootness is a legal issue reviewed de novo. *T.C.T. v. Shafinia,* 351 S.W.3d 34, 36 (Mo.App. W.D. 2011). Statutory interpretation is likewise an issue of law on which no deference is owed to the trial court. *Bolt v. Giordano,* 310 S.W.3d 237, 242 (Mo. banc 2010).

Argument

In the era of JCAR it is legislative practice to include boilerplate language in every bill that delegates rulemaking authority:

> Any rule or portion of a rule, as that term is defined in section 536.010, that is created under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of chapter 536 and, if applicable, section 536.028. This section and chapter 536 are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536 to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2009, shall be invalid and void.

This quotation happens to be from the Missouri Energy Efficiency Investment Act, § 393.1075.11, RSMo. Another example is the 2013 amendment to the Renewable Energy Standard itself, § 393.1030.6 (A27). As the trial court noted, Proposition C, the original RES, contained no such language (L.F. 361). The delegation of rulemaking authority to the PSC in § 393.1030.2 (2008) was not made by the general assembly but by the people through their independent legislative power under Article III, § 49 of the Constitution. It made no reference to JCAR (A23).

The limitation of § 536.024.1 to delegations of rulemaking authority by "the general assembly" evinces a legislative intent to police its own grants of authority. Whether ballot initiatives were excluded by design or inadvertently, they were excluded.

Not every statute pertaining to JCAR repeats the limitation in § 536.024.1, but they show a consistent intent to incorporate it. The procedure for rulemaking is spelled out in § 536.021, which says: "The secretary of state shall not publish any proposed rulemaking or final order of rulemaking that has not fully complied with the provisions of section 536.024 or an executive order [*i.e.* EO 97-97], whichever appropriately applies." § 536.021.1 (A4). Thus § 536.021 incorporates the limitation in § 536.024. EO 97-97 refers to HB 850 (A28) and thus to the whole package of amendments to Chapter 536, including § 536.024.1 with the "general assembly" language (A10–11).

HB 850 included § 536.028.1: "Notwithstanding provisions of this chapter to the contrary, the delegation of authority to any state agency to propose to the general assembly rules as provided under this section is contingent upon the agency complying with the provisions of this chapter…" (A11). Proposition C did not delegate any authority

to propose rules to the general assembly.

To the same effect is § 536.073.4: "No rule or portion of a rule promulgated under the authority of this chapter shall become effective until it has been approved by the joint committee on administrative rules…" (A19). "No rule" does not mean any rule, but one promulgated "under the authority of this chapter," including § 536.024. The delegation of "legislative authority" clearly refers to delegation by the general assembly.

The primacy of § 536.024 is confirmed by the contingent effective date clauses in § 536.019.2 and § 536.028.13, which would come into effect only upon the occurrence of one of four events including: "(4) Declaration by a court with jurisdiction that section 536.024 or any portion of executive order number 97-97 is unconstitutional or invalid for any reason" (A3, A15).

Section 536.024 is the keystone of the JCAR edifice. In *JCAR* I the Court said, "Section 536.024 is a new statute that provides a comprehensive scheme for all rulemaking authority granted to the executive department." 948 S.W.2d at 135.

HB 850 did not amend § 536.037, which now reads in relevant part: "3. The committee shall review all rules promulgated by any state agency after January 1, 1976, except rules promulgated by the labor and industrial labor relations commission" (A17). But § 536.024.1 applies to rules promulgated "after June 3, 1994" (A10). The "general assembly" clause in § 536.024.1 qualifies and, for purposes of rules promulgated after June 3, 1994, supersedes § 536.037.

Since the JCAR statutes deal with the same subject, they can be read in pari materia and harmonized, giving effect to every clause and provision. *Fort Zumwalt*

School District v. Dickherber, 576 S.W.2d 532, 536–7 (Mo. banc 1979). The legislature is presumed to act intentionally when it includes language in one section and omits it from another, related section; and the specific prevails over the general. *Terminal Railroad Ass'n v. City of Brentwood,* 360 Mo. 777, 230 S.W.2d 768, 769–70 (1950); *State v. Bass,* 81 S.W.3d 595, 604 (Mo.App. W.D. 2002). The specific "general assembly" clause of § 536.024.1 would have no meaning if it did not apply to the other JCAR statutes. It therefore prevails over broader language in those other sections.

The legislative policy behind JCAR is for the joint committee to review only those rules that are authorized by the general assembly. This limitation in § 536.024 would be nullified if that power were to be extended to rules promulgated under an initiative law.

Finally, the first judgment of the court below did not explain how the legislature's amendment to the RES § 393.1030.6 (A27) in 2013 could have traveled back in time and made the general assembly, rather than the people, the original delegator of rulemaking authority. The rule promulgated in 2010 had the sole authority of Proposition C and was not subject to review by JCAR, and this delegation of rulemaking power by the initiative is still in the amended statute at § 393.1030.2 (A23).

III

The trial court erred in dismissing the petition because the case is not moot in that (a) the revised PSC rule perpetuates the error in the original rule by again omitting the contested paragraphs; (b) the Commission had no authority to determine, and did not determine, the propriety of JCAR's action, which was consequently not reviewed by the Court of Appeals; and (c) the Commission's attempt to withdraw the geographic sourcing provisions came after the rule had been promulgated and therefore required a separate order of rulemaking.

The trial court dismissed the case for mootness on the theory that the PSC's revision of the rule altogether superseded the original rule (L.F. III, 530–1; A1–2). But the amended rule did not remove the merits of this case from contention because the two paragraphs disapproved by JCAR are still omitted.

Standard of Review

Appellate courts review a grant of dismissal de novo. *Huch v. Charter Communications,* 290 S.W.3d 721, 724 (Mo. banc 2009). Mootness is a legal issue reviewed de novo. *T.C.T. v. Shafinia,* 351 S.W.3d 34, 36 (Mo.App. W.D. 2011).

Mootness implicates the justiciability of a case. A case is moot when the judgment sought would have no practical effect on any then-existing controversy, as when an event occurs that makes the court's decision unnecessary or makes the granting of effectual relief impossible. *State ex rel. Reed v. Reardon,* 41 S.W.3d 470, 473 (Mo. banc 2001).

The PSC's revised rule does not moot the case because it perpetuates the error in the original rule.

This Court does decide, on full review of a case, issues of mootness based on claims that a new rule or statute has cured any constitutional errors. *MCE v. JCAR, supra; Humane Society v. State,* 405 S.W.3d 532, 535–7 (Mo. banc 2013).

Furthermore, the Court has jurisdiction if constitutional claims were necessarily but implicitly decided by the judgment of the trial court. *Bankers Union Life Insurance Co. v. Floy Hanks & Mistwood,* 654 S.W.2d 888, 889 (Mo. banc 1983).

What the Court said in *JCAR* I applies almost word for word:

> Although a subsequent statutory amendment may moot a case when an amendment removes the question at issue…a case is not mooted when the controversy continues regardless of the amendment. Here, essentially the same constitutional infirmity infects both the earlier and later versions of the statute.

948 S.W.2d at 135.

The two contested paragraphs are still excluded from the rule with the same designation, *"Reserved."* 4 CSR 240-20.100(2), pp. 42–3 (October 31, 2015)(A30–1). The reason for this appears in the final order of rulemaking published in the Missouri Register. There the PSC, in its response to comments on the new rule, states:

> COMMENT #3: When the Commission originally promulgated this rule, the legislature passed a resolution that blocked the geographic sourcing provisions of subsection (2)(A) and paragraph (2)(B)2. The rule as published in the *Code* shows those numbers as "reserved". The proposed amendment would remove the

> "reserved" designation and renumber the surrounding subsections. Renew Missouri points out that **the legislature's blocking of the geographic sourcing provisions is still subject to ongoing litigation** and asks that the "reserved" designation remain in the rule. Staff replied that the "reserved" designation is unnecessary as the rules can be renumbered if any future changes to the rule result from that litigation.
>
> RESPONSE AND EXPLANATION OF CHANGE: The commission agrees with the comment and will leave the "reserved" designation in place. [Emphasis added.]

40 Mo.Reg. at 1499 (October 15, 2015). The new rule was therefore not enacted independently of JCAR's disapproval of the same paragraphs of the original rule. On the contrary, it perpetuates the constitutional issue before the Court. The PSC acknowledged the pendency of this case and preserved space in the new rule for reinstatement of those paragraphs if this Court should so order.

This case has never been about the PSC's rule, despite Respondents' continuous efforts to make it appear so. It is about JCAR's action in gutting that rule. The petition and Appellants' jurisdictional statement say that all or parts of sections 536.019, 536.021, 536.028 and 536.073, RSMo, violate the separation of powers decreed by the Constitution of Missouri, Article II, Section 1, a result compelled by *JCAR* I (L.F. I, 29–30). The PSC cannot legally defy JCAR, nor can it pronounce upon the validity of statutes because it is not a court. *Evans v. Empire District Electric,* 346 S.W.3d 313, 318 (Mo.App. W.D. 2011); *Gaines v. Gibbs*, 709 S.W.2d 541, 543 (Mo.App. SD 1986). The

revised rule could not and did not moot the case.

The constitutional issues before the Court are not moot because the trial court necessarily and implicitly decided the constitutional issue. *General Motors v. Fair Employment Practices Division,* 574 S.W.2d 394, 397 (Mo. banc 1978). By basing judgment on the revised rule, the trial court assumed that rule was valid, which in turn assumed that JCAR's action in striking the contested paragraphs was valid. Even though the trial court did not expressly rule on the constitutional question, "a ruling in favor of constitutionality of the statute is necessarily implicit in the court's order sustaining [the] motion to dismiss ..." *Champlin Petroleum v. Brashears,* 592 S.W.2d 545, 547 (Mo.App. W.D. 1979).

JCAR's action was not subject to writ of review.

Two additional mootness issues still inhere in the case. In the trial court's first judgment it found the case precluded by the Court of Appeals' finding that the geographic sourcing issue was moot (L.F. III, 518–9). The other issue is the Court of Appeals' treatment of the PSC's order attempting to withdraw the rule after it had been published.

The rule was indeed reviewed and affirmed in *Missouri Energy Development Ass'n v. PSC,* 386 S.W.3d 165 (Mo.App. W.D. 2012)("*MEDA*"), but that case did not—nor could it have—adjudicated the legality of JCAR's actions.

Multiple parties appealed from the Commission's rulemaking. Four of them put forth an argument that the disapproved and deleted geographic sourcing paragraphs were unlawful, unreasonable, arbitrary and capricious. The issue had nothing to do with JCAR;

the appellants were challenging the PSC's interpretation of the statute as meaning that all RECs must represent energy delivered to Missouri (L.F. II, 340–1). *MEDA,* 386 S.W.3d at 175. The Court of Appeals held that there was no controversy since the paragraphs had not been published and were "not enforceable against electric utilities." The appellants were seeking an advisory opinion. *Id.* at 176.

The exclusive avenue for review of a PSC order, including an order of rulemaking, is by writ of review under § 386.510, RSMo. *State ex rel. Atmos Energy Corp.,* 103 S.W.3d 753, 757–9 (Mo. banc 2003). The PSC has primary jurisdiction over the regulation of electric utilities under chapters 386 and 393, RSMo, and can interpret and attempt to harmonize those statutes that fall within its administrative charge and technical expertise. *Evans v. Empire District Electric,* 346 S.W.3d 313, 317–8 (Mo.App. W.D. 2011). The PSC did construe the RES statute in Appellants' favor, but JCAR's action removed that interpretation from the field of judicial review. The only way to restore it would have been for the PSC to override JCAR. This it could not do without striking down, or ignoring, the JCAR statutes.

The PSC is a creature of statute possessing only those powers over utilities conferred on it by the legislature. "It may not perform the judicial function. It has no power to determine damages, award pecuniary relief, declare or enforce any principle of law or equity." *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz,* 596 S.W.2d 466, 468 (Mo. App. E.D. 1980). It may not grant declaratory judgment. It may not declare a statute invalid. *Evans,* 346 S.W.3d at 319.

"Agency adjudicative power extends only to the ascertainment of facts and the

application of existing law thereto in order to resolve issues within the given area of agency expertise…The declaration of the validity or invalidity of statutes and administrative rules thus is purely a judicial function." *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75 (Mo. banc 1982).

When JCAR disapproved parts of its rule, the Commission could only obey. The PSC did not review, and could not have reviewed, JCAR's action, and consequently the issue was not presented to the Court of Appeals.

The PSC did not succeed in withdrawing the disputed paragraphs.

The Court of Appeals in *MEDA* found that the PSC had withdrawn the geographic sourcing paragraphs: "The PSC's withdrawal of the provisions, the propriety of which is not contested in this case, rendered moot the points challenging them." 386 S.W.3d at 176. The Court thus acknowledged that the propriety of the Commission's order of withdrawal had not been briefed or argued.

On January 26, 2011, four months after the RES rule had gone into effect on September 30, 2010, the Commission entered an order withdrawing the geographic sourcing paragraphs "pursuant to the actions of JCAR" (L.F. III, 473–4). This order had no effect for at least two reasons.

First, the PSC had lost jurisdiction over the rulemaking while the writ of review was pending. *Missouri Cable Telecommunications Ass'n v. PSC*, 929 S.W.2d 768, 772 (Mo. App. W.D. 1996). Petitions for writs of review had been filed on August 4, 5 and 9, 2010 (L.F. III, 504, 510–11, ¶¶ 38–42).

Second, the Commission failed to follow mandated procedure for withdrawing a

rule. Section 536.021.5 only gave the PSC 90 days from the date of the hearing to withdraw the rule (A6). The PSC held its hearing on the rule on April 6, 2010 (Uncontroverted Facts, L.F. III, 462, 480, ¶ 15). After July 6 (which the Court of Appeals found was 90 days as computed under Rule 44.01(a); 386 S.W.3d at 176) the PSC could only withdraw the rule by starting over with a new order of rulemaking. *Missouri Coalition for Environment v. Joint Committee on Administrative Rules,* 948 S.W.2d at 135–6.

In *JCAR* I the Department of Natural Resources tried to do the same thing—withdraw a final order of rulemaking it had submitted to the Secretary of State nearly two years earlier. This Court held that "when the secretary of state improperly refused to publish the DNR's final order of rulemaking…the rule was, for purposes of this litigation, promulgated." 948 S.W.2d at 135. It was then too late to withdraw it without going through a fresh rulemaking. 948 S.W.2d at 136.

The result must be the same here even though only a portion of the rule was affected. "No rule shall hereafter be…amended" without filing proposed and final orders of rulemaking with the secretary of state, § 536.021.1 (A4); and "any rule, amendment or rescission thereof, shall be null, void and unenforceable unless made in accordance with the provisions of this section." § 536.021.7 (A7). The PSC did not follow this procedure.

Conclusion

To itemize the redundant assertions of legislative authority to veto administrative rules, Appellants count five provisions for suspension of rules (§§ 536.021.1, 536.021.5, 536.073.4, 536.073.7–.8, RSMo; and EO 97-97) and three more for legislative override by concurrent resolution (§§ 536.021.1, 536.073.9–.10, RSMo; and EO 979-97). More examples would be added if §§ 536.019 and 536.028 were to take effect, including the retroactive veto of existing rules by revoking legislative delegations of rulemaking authority, preventing the executive branch from doing its job of executing the laws.

WHEREFORE Appellants pray the Court to reverse the judgment of the trial court and:

Declare that Sections 536.019, the last four sentences of 536.021.1, the last two sentences of 536.021.5, all of 536.028, and 536.073.4–.5 and .7–.10, RSMo, and Executive Order 97-97 are unconstitutional;

Declare that pursuant to § 536.024, RSMo, the authority of the legislature to veto administrative rules does not apply to rules made under delegations of rulemaking power by ballot initiative;

Issue its order in mandamus to the Secretary of State to publish 4 CSR 240-20.100, paragraphs (2)(A) and (2)(B)2 as promulgated by the PSC.

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CERTIFICATION

This brief complies with the limitations of Rule 84.06(b), containing 9,474 words and 889 lines all-inclusive.

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Certificate of Service

Counsel for Appellant has made service of this brief and the appendix on all other counsel of record by way of electronic filing on this 10th day of May, 2016.

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