SC96885

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex rel.* ATTORNEY GENERAL JOSHUA D. HAWLEY, THE BOARD OF TRUSTEES OF THE MISSOURI PETROLEUM STORAGE TANK INSURANCE FUND,

Appellant,

v.

PILOT TRAVEL CENTERS LLC,

Respondent.

Appeal from the Circuit Court of Cole County, Missouri
19th Judicial Circuit, Division 1
The Honorable Jon E. Beetem
Case Nos. 15AC-CC00458, 15AC-CC00458-01

SUBSTITUTE BRIEF OF RESPONDENT PILOT TRAVEL CENTERS LLC

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JURISDICTIONAL STATEMENT

Appellant's jurisdictional statement is incorrect because this appeal is not timely and does not fall within this Court's exclusive jurisdiction. *See* Appellant's Brief at 10 (citing MO. CONST. art V, § 3). Rather, on March 6, 2018, after an opinion by the Court of Appeals, Western District, this Court granted Respondent Pilot Travel Centers LLC's ("Pilot") application for transfer. As such, this Court would—but for the untimeliness of the appeal—have jurisdiction pursuant to Rule 83.04 and Mo. Const. art. V, § 10.

As set forth in Section I, *infra*, this appeal is *not* timely because Appellant did not file its notice of appeal within 10 days of the circuit court's June 22, 2016 judgment becoming final. *See* Rule 81.04(a). This Court therefore lacks jurisdiction, must dismiss the appeal, and leave the judgment below in full force and effect. *See, e.g., Spicer v. Spicer*, 336 S.W.3d 466, 471 (Mo. 2011) (no jurisdiction over untimely appeal); *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1, 20 (Mo. 1972) (judgment not appealed from "will not be disturbed"); *Williams v. City of Hayti*, 184 S.W. 470, 471 (Mo. 1916) (judgment not appealed from "stands in full force and effect").

RESPONSE TO APPELLANT'S STATEMENT OF FACTS

Pilot is dissatisfied with the accuracy and completeness of Appellant's statement of facts, and therefore responds as follows. *See* Rule 84.04(f).

A. Correctly Identifying the Single Appellant

The Substitute Brief ("Brief") identifies two "Appellants," each claiming to have an independent right to sue Pilot. They are: (1) the Board of Trustees (the "Board") for the Missouri Petroleum Storage Tank Insurance Fund (the "Fund"); and (2) the Attorney

General. *See* Brief at 20-21. The operative petition, however, was filed by a a *single* Plaintiff-Appellant: the Board, which is a statutorily created manager of the statutorily created Fund, and is, at best, represented by the Attorney General.

In the circuit court, all three iterations of the petition identified a single "Plaintiff," which first was the Fund, later the Board, and was sometimes described as the "State of Missouri." *See* SLF:2-11, 22-38; LF:27-29, 31-44, 56-65, 77. In the first two petitions, the Fund (not the Board) claimed it sustained damages because Pilot breached a contract with the Fund. SLF:2, 4-5, 9 (¶¶13-16, 28-30); LF:56, 59-60, 64-65 (¶¶15-18, 30-32)). The first two petitions also claimed that Pilot's alleged breach caused the Fund to lose "its" right to pursue a separate civil action. SLF:9 (¶¶28-29); LF:64 (¶¶30-31).

The third and operative petition is different. *See* LF:31-44 (Second Amended Petition for Breach of Contract, Unjust Enrichment, and Damages) (the "Petition"). It continues to identify a single "Plaintiff" and to claim that "the Fund suffered damages." *See* LF:31, 44; LF:42 (¶31). But in a departure from its predecessors, the Petition asserts that Pilot breached a contract with the *Board*—not the Fund—or was unjustly enriched. *See* LF:34-35, 43 (¶¶11, 13-14, 32-36).[1] Further, the Petition pleads that Pilot's alleged breach impaired *the Board's*—not the Fund's—ability to recover damages in a separate civil action. LF:42-43 (¶¶30, 35).

Consistent with the single-Plaintiff Petition, the Notice of Appeal identified a single "Appellant." LF:361. But in the Court of Appeals, the single Appellant morphed

[1] In the circuit court, the Board referred to itself as the "Trustees."

into a trinity of the Board, the Fund, and the Attorney General—each claiming to have an independent right to sue. *See* Opening Brief in the Court of Appeals at 12-13 ("the Attorney General has the independent power and authority to bring this suit …, whether or not the Board or the Fund have standing to bring suit or enter into contracts in their own right"). Now, in this Court, there are two "Appellants": the Attorney General, who, based on the order of arguments, is claiming the primary right to sue Pilot, followed by the Board, which allegedly "also has independent authority to sue." *See* Brief at 20-21.

Ultimately, the evolving labels are immaterial because it is the pleaded facts in the Petition that define this purported action. *See State ex rel. Anderson v. Consol. Sch. Dist.*, 417 S.W.2d 657, 659 (Mo. 1967) ("the character of a cause of action is determined from the facts stated in the petition and not by the prayer or name given the action by the pleader"); *W. A. Ross Const. Co. v. Chiles*, 130 S.W.2d 524, 528 (Mo. 1939) ("The case is whatever the pleadings and the facts make it, regardless of what name plaintiff gave it"). The pleaded facts identify a lone Plaintiff, the Board, which sued Pilot to recoup monies paid from the Fund. The Attorney General is, at best, the Board's counsel.

B. Summary of the Board's Allegations

Pilot owns and operates a travel center in Higginsville, Missouri, which it acquired from Williams TravelCenters, Inc. ("Williams"). LF:32, 34 (¶¶4, 11). Pilot started participating in the Fund for the Higginsville travel center in 2003, paying statutorily prescribed fees and renewing its participation every year. LF:34-35 (¶¶10-12); *see also* LF:53; RSMo § 319.131.3(3). Contrary to the Board's assertions, there is no allegation that the Board "agreed to admit Williams [into the Fund] only if Williams entered into a

Participation Agreement 'in return for coverage.'" *Compare* Brief at 11-12 *with* LF:34-35 (¶¶9-14). Nor does the Board plead that Pilot assumed or consented to the terms of the "Agreement." Rather, the Board merely pleads that Williams "entered into" the "Agreement," which was "thereafter assigned" (by an unidentified someone) to Pilot. LF:34 (¶11); LF:53).

On June 21, 2007, Pilot discovered at its Higginsville travel a petroleum release which testing determined was caused by defective "Geoflex" piping. LF:36 (¶¶15-18, 20). Pilot began cleaning up the release, and the Board provided reimbursement from the Fund as required by statute. LF:36-37, 41 (¶¶19, 21-22, 28(e)); *see also* RSMo § 319.131.4. In August 2007, two months after the release, the Board's private counsel allegedly advised Pilot that the Board had acquired Pilot's rights to sue the maker of "Geoflex" and invited Pilot's "participation" in a lawsuit. LF:37-38 (¶¶23, 26(a)).

Contrary to the Board's assertion that it "repeatedly contacted" Pilot during a five-year period (Brief at 13), the pleaded facts are that Pilot heard nothing more about the would-be action until February 2012, when the Board's counsel advised a Pilot employee that the statute of limitations was about to expire. LF:38 (¶26(a)-(b)). Days before that expiration, the Board's private counsel exercised the Board's alleged rights by filing a lawsuit against more than 100 defendants in the Circuit Court of Lafayette County. LF:37 (¶24).[2]

[2] *See Pilot Corp., et al. v. Environ Products, Inc., et al.*, Case No. 12LF-CV00661 (hereafter the "Lafayette County Lawsuit").

Shortly before filing the Lafayette County Lawsuit, the Board's counsel sought "contact" with Pilot. LF:38 (¶26(c)). After filing the action, the Board's counsel and agents of the Fund asked for "assistance, cooperation, and contact," "reached out" and "telephoned" Pilot, and otherwise sought Pilot's "attention." LF:38-39 (¶¶26(e)-(k)). But other than asking Pilot to sign a "Standstill Agreement" (LF:39, ¶26(f)), the Petition does not identify the form of cooperation or assistance allegedly requested or needed from Pilot. Further, the Board's claim that Pilot "ignored these communications every time" (Brief at 13) conflicts with pleaded facts that Pilot's environmental manager "responded" to the Board and offered to "discuss the matter with [Pilot's] general counsel[.]" LF:38 (¶26(b)).

In addition, the Board does not plead why it needed cooperation to maintain an action that it already had filed in the name of Pilot and a separate entity (Pilot Corporation)[3] without the assent of either entity. *See* LF:38-40 (¶¶26(a)-(k)). Although the Board contends it was "subrogated" to Pilot's interests, the purported Participation Agreement allegedly transferred to the Board the right to bring an action against the parties responsible for the Higginsville release. Specifically, the purported Participation Agreement states that if Pilot "has rights to recover all or part of any payment we [the

[3] Pilot Corporation and Pilot Travel Centers LLC are separate and distinct entities. The decision to name Pilot Corporation as a party is a mystery because that entity neither owned nor operated the Higginsville travel center (*see* LF:32, (¶4)) and was not named in the Participation Agreement or the Certificates of Endorsement. (*See* LF:53-55).

Board] have made under this policy, *those rights are transferred to us* [the Board]." LF:35 (¶14); LF:51 (¶6) (emphasis and bracketed text added).

At any rate, the Board has omitted from its Petition that the Board's private counsel (LF:39, ¶23) was not seeking cooperation in the recovery of a "payment … made under this policy" (LF:51 (¶6)). Instead, he repeatedly propositioned Pilot about hiring him to pursue Pilot's separate, *uninsured* losses, including alleged losses in Ocala, Florida. Ultimately, the Board's counsel dismissed the Lafayette County Lawsuit and did not re-file it. *See* LF:40-41. As a result of Pilot's alleged failure to "cooperate," the Board pleads it "disclaim[ed]" Pilot's participation in the Fund and "withdr[ew]" Pilot's right to obtain reimbursement. LF:41 (¶28(c), (e)).

The Board then filed the action below, asserting that the right to file the Lafayette County Lawsuit belonged solely to the Board. *See* LF:37 (¶23) ("the [Board] retained [an attorney] to protect its subrogation rights"). The Board alleged that Pilot's refusal to "assist, cooperate, or help the Fund's efforts impaired the Trustees' [Board's] ability to recover any damages [in the Lafayette County Lawsuit.]" LF:42 (¶30). Specifically, the Board claimed that Pilot breached the purported "Participation Agreement" between Pilot and the Board (LF:34-35 (¶¶11-14)). The Board also claimed the "Fund suffered damages" consisting of the reimbursement the Fund paid to Pilot, along with the Fund's litigation expenses and costs associated with the Fund's third-party administrator. LF:42 ((¶31). The Petition also asserts an alternative claim for unjust enrichment that likewise alleges damage only to the Fund. *See* LF:43 (¶¶35-36). In short, the Board filed a suit seeking to recover damages allegedly sustained by the Fund.

Contrary to the claims made in the Brief, the Attorney General is not a party to this appeal or the action below. The entirety of the allegations about the Attorney General is found in a *single paragraph* in the Petition. LF:31-32 (¶1). Other than identifying Missouri's former Attorney General, that paragraph constitutes a legal conclusion, and thus fails to plead any claim. *See, e.g.*, *Hemphill ex rel. Burns v. Hemphill*, 316 S.W.2d 582, 586 (Mo. 1958) (a court disregards legal conclusions in considering the sufficiency of a petition); *Aufenkamp v. Grabill*, 112 S.W.3d 455, 460 (Mo. App. W.D. 2003) (reversing for lack of standing because plaintiffs did not plead facts establishing they were real parties in interest). Accordingly, the Attorney General has no separate or independent cause of action.

Finally, Appellant's Statement of Facts makes other assertions that are nowhere to be found in the Petition. For example, there are no pleaded facts that the Fund "promotes the stability of the fuel industry" or that Pilot annually acknowledged a "contractual agreement" with the Board. Brief at 11-12. Similarly, and despite several assertions in the Brief, the Petition contains no pleaded facts (or even conclusions) about rights or damages belonging to the State of Missouri, nor are than any pleaded facts about harm to the environment or the public. *See generally* LF:31-43.

C. Facts Regarding Untimeliness of Appeal

Pilot responded to the Petition with two motions to dismiss: one for lack of standing, and the other for failure to state a claim. LF:23, 81, 99. Following briefing and argument, the circuit court entered its June 22, 2016, Judgment disposing of all claims. LF:24; SLF:12 (A1). Thirty days later, the single "Plaintiff" filed a single motion entitled

"Plaintiff's Motion to Amend the Judgment, Pursuant to Supreme Court Rule 78.04." LF:25, 150.

On October 11, 2016—81 days after the Motion to Amend was filed—the circuit court conducted a telephone hearing during which it expressed its intent to maintain its prior rulings dismissing the case, and also requested proposed judgments from the parties. *See* LF:25. The circuit court then entered a docket entry saying: "Judgment set aside. Revised judgment due 10/25/16. Cmts by State 10 days later." LF:25, 360. On October 25, 2016, Pilot submitted a proposed amended judgment as requested by the circuit court. LF:2. On October 28, the Board's counsel submitted a "redline" of Pilot's proposed amended judgment. LF:2; SLF:22-38. Consistent with the circuit court's intent to maintain its prior rulings, the "redline" contained no substantive changes to Pilot's proposed judgment. SLF:22-38.

On January 24, 2017—181 days after the Board filed its motion to amend—the circuit court entered its Amended Judgment of Dismissal. LF:2, 4. It states that the circuit court: "grants the State's Motion to Amend Judgment Pursuant to Supreme Court Rule 78.04, in part, by setting aside its June 22, 2016 Judgment of Dismissal and amending it to address the *ConocoPhillips* and *City of Harrisonville* decisions," while clarifying that the circuit court "denies the remainder of the Motion to Amend, and maintains its prior decision dismissing this action." LF:19. The "Plaintiff" filed its only Notice of Appeal on March 3, 2017. LF:2, 361.

SUMMARY OF ARGUMENT

The Court should dismiss this appeal because it is untimely. *See* Section I, *infra*. But even if this appeal were timely, the Court should affirm the judgment below because the Board is bound by its enabling statutes, which, as summarized in Section II, grant *zero* authority to file lawsuits or enter contracts like the purported "Participation Agreement."

In addition, a legislative creation cannot sue unless such a power is "specifically authorized" by statute. *See generally* Section III, *infra*. Missouri courts have also held the specific authority to sue cannot be implied from general statements in an enabling statute. *See* Section III, B, *infra*. Further, the Legislature has repeatedly and specifically authorized its creations to bring lawsuits by making them "bodies corporate" or by granting them the power "to sue." Comparable powers are nowhere to be found in the Board's enabling authority. Section III, C, *infra*.

The Board also asks this Court to confer broad remedial authority onto the Board, ostensibly so that it can address its unpleaded concerns about the environment and public health. Authority to address those concerns already exists, but the Legislature elected to vest that authority in the Missouri Department of Natural Resources ("MDNR")—not the Board. Section III, D, *infra*. Faced with overwhelming authority defeating its arguments, the Board relies on this Court's *dicta* in *ConocoPhillips*, claiming that this Court "held" that the Board has the power to sue. That decision contains no such holding, and the uninformed *dictum* about the Board's authority to sue is the result of statutes and cases not being brought to this Court's attention. Section III, E, *infra*.

The Board's arguments about its authority to enter into a "subrogation" agreement likewise fail because the Legislature granted the Board no authority to enter contracts with Fund participants. Section IV, A, *infra*. Even if the Board had such powers, the purported "Participation Agreement" is, by its own terms, only valid to the extent it complies with statutory authority. *See* LF:47. This Court has held that an agency cannot use a contract to expand its authority or impose conditions not authorized by statute. Section IV, C, *infra*.

For similar reasons, the Court should reject the Board's alternative claim for "unjust" enrichment, because a legislative creation has no inherent equitable powers or rights—instead, such creations only enjoy the powers granted by statute. Section V, *infra*. Nonetheless, there is nothing improper about Pilot receiving reimbursement it was statutorily entitled to receive. Nor is there anything unjust about Pilot declining to "cooperate" with an action that was beyond the Board's statutory authority.

Finally, the Court should reject the Attorney General's effort to cloak the Board (or himself) with standing. *See* Section VI, *infra*. The Attorney General claims an independent right to sue by relying on vague notions of common law authority to represent "interests of the state." However, the Fund—the "account" of money allegedly damaged by Pilot's alleged actions—is not an interest of the state. Section VI, C, *infra*. Monies in the Fund are not state funds, and the Board merely manages those nonstate funds for the benefit of Fund participants. Moreover, there is no allegation in the Petition about any harm to the State of Missouri or the public. *See generally* LF:31-43. Accordingly, there is no claim by the State. Instead, the Attorney General is attempting

to bestow upon a state agency powers that were not granted by the Legislature, which would violate the separation of powers set out in the Missouri Constitution.

STANDARD OF REVIEW

Pilot agrees with the Board that an appellate court reviews *de novo* a trial court's decision to dismiss a petition for failure to state a claim, but the remainder of the Board's statement about the standard of review is incomplete and inaccurate. *See* Brief at 22.

Although a court generally cannot consider matters outside the pleadings in ruling on a motion to dismiss, it can consider the exhibits attached to a petition because "[a]n exhibit to a pleading is a part thereof for all purposes." Rule 55.12; *see also Smith v. Humane Soc'y of United States*, 519 S.W.3d 789, 797-98 (Mo. 2017) ("Exhibits attached to the petition are reviewed as part of the petition."). Further, dismissals for lack of standing may also be based on "any other noncontested facts accepted as true by the parties." *Carozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 572 (Mo. App. W.D. 2017).

Finally, the Board, as the party seeking relief, bears the burden of establishing standing. *Id.* at 572 (citing *Manzara v. State*, 343 S.W.3d 656, 659 (Mo. 2011)). In reviewing a dismissal for lack of standing, this Court "must affirm the dismissal if it can be sustained on any ground which is supported by the motion to dismiss, regardless of whether the circuit court relied on that ground." *Id.*

ARGUMENT PART ONE: UNTIMELY APPEAL

The Court should dismiss this appeal and leave the Judgment below in full force and effect because the Board did not timely appeal.

I. This Court Lacks Jurisdiction Because the Board did not Timely Appeal from the Circuit Court's Final Judgment (Responding to Point I)

The circuit court entered judgment on June 22, 2016. SLF:12. Thirty days later, the Board filed its "Motion to Amend the Judgment, Pursuant to Supreme Court Rule 78.04." LF:150. A timely motion to amend is an authorized after-trial motion that can postpone the finality of a judgment for up to 90 days, at which point "all motions not ruled shall be deemed overruled" and the judgment becomes final. Rule 81.05(a)(2) (A10); *see also Developers Sur. & Indem. Co. v. Woods of Somerset, LLC*, 455 S.W.3d 487, 491 (Mo. App. W.D. 2015). Here, the Board did not appeal from the June 22, 2016 judgment, and only appeals from a purported amended judgment entered some six months later.

The Board argues the circuit court retained plenary authority over the June 22 judgment for a full 90 days and exercised that authority on the 81st day by stating that the judgment was "set aside", leaving nothing for the Board to appeal until months later. This argument is contrary to controlling law.

Missouri law recognizes two distinct time periods during which a circuit court has authority over a judgment: (1) the 30-day period in Rule 75.01, which begins following entry of judgment; and (2) the 90-day period in Rule 81.05, which postpones the finality of the judgment for a maximum of 90 days, but only if a party files an authorized, after-trial motion during the 30-day period. *See* Rule 81.05(a)(1).

This Court has unequivocally held that a circuit court's powers during the 30- and 90-day periods are *not* "the same" because: "[o]nce the thirty day period in Rule 75.01

expires, a trial court's authority to grant relief is *constrained by and limited to* the grounds raised in a timely filed, authorized after-trial motion." *Massman Constr. Co. v. Highway & Transp. Comm'n*, 914 S.W.2d 801, 802-03 (Mo. 1996) (emphasis added); *see also Stein v. McDonald*, 394 S.W.2d 297, 300 (Mo. 1965); *Loveless v. Locke Distrib. Co.*, 313 S.W.2d 24, 27 (Mo. 1958). In ruling on an after-trial motion, the circuit court "must grant relief based on grounds raised in a timely filed authorized after-trial motion." *Seitz v. Seitz*, 107 S.W.3d 478, 488 (Mo. App. S.D. 2003); *see also In re Smythe*, 254 S.W.3d 895, 898 (Mo. App. S.D. 2008) (Rule 81.05 grants the trial court subject matter jurisdiction for ninety days . . . for a limited purpose. In other words, the court has jurisdiction to enter an order but not the authority to enter an order inconsistent with the requests of the parties.").[4]

[4] The circuit court thus had authority to amend the judgment to account for issues in the Board's Motion to Amend, but that authority was "constrained by and limited to the grounds" stated in the motion. *Massman,* 914 S.W.2d at 802-03. The Board's motion provided no authority (or reason) to set the entire Judgment "aside" or to "vacate" it, as it left intact several of the independently sufficient grounds for dismissal, such as the circuit court's ruling that that there was "no authority permitting [the Board] to enter into a contract with fund participants," (SLF:18-19), and that the Board "had no authority to acquire from Pilot the right" to bring the Lafayette County Lawsuit. (SLF:19-20). Neither of these equally dispositive grounds for dismissal were challenged anywhere in the Board's Motion to Amend. (*See* LF:150-154).

All three districts of the court of appeals have likewise held that a circuit court's powers in the 30- and 90-day periods are *not* the same, and that power in the 90-day period is *limited to the relief sought* in an after-trial motion. *See, e.g.*, *In re Marriage of Noles*, 343 S.W.3d 2, 6 (Mo. App. S.D. 2011); *State ex rel. Mo. Parks Ass'n v. Dep't of Natural Res.*, 316 S.W.3d 375, 382-84 (Mo. App. W.D. 2010); *Antonacci v. Antonacci*, 892 S.W.2d 365, 368 (Mo. App. E.D. 1995). This Court has explained that while Rule 75.01 gives trial courts broad control over judgments for a limited 30-day period, "[t]he provisions of Rule 81.05 are, however, expressly limited to parties." *Spicer*, 336 S.W.3d at 470 (citing Rule 81.05 and *State ex rel. Wolfner v. Dalton*, 955 S.W.2d 928, 930 (Mo. 1997)).

In re Marriage of Noles, 343 S.W.3d 2, and *Ferguson v. Curators of Lincoln University*, 498 S.W.3d 481 (Mo. App. W.D. 2016), illustrate how the critical distinction between a circuit court's authority during those 30- and 90-day periods operates in determining when and how a motion to amend has been "ruled" for purposes of Rule 81.05. During the 90-day period, there are only *three* methods by which a motion to amend can be "ruled" for purposes of Rule 81.05: "(1) the motion is explicitly denied; (2) the trial court takes no action on it [and thus the motion is deemed denied by rule]; or (3) an amended judgment is actually executed and filed." *Ferguson*, 498 S.W.3d at 495 (quoting *In re Marriage of Noles*, 343 S.W.3d at 9). The inchoate granting of a motion to amend is equivalent to circuit-court inaction, meaning the motion is deemed denied no later than 90 days after it is filed. *Id*. Thus, only the third method in *Ferguson* and

Noles—executing and entering an amended judgment within the 90-day period—operates to grant a motion to amend and prevent a judgment from becoming final. *Id.*

In *Ferguson*, a circuit court had "purported to rule" on a motion to amend by "sustaining" it, but the Western District—applying the reasoning of the Southern District in *Noles*—found that this attempt to "sustain" the motion "did not effectively 'rule' on the motion for purposes of Rule 81.05[.]" 498 S.W.3d at 495-96. (citing *Noles*, 343 S.W.3d at 9). In *Noles*, the trial court had purported to grant a new trial in addition to requesting that counsel furnish a proposed amended judgment, stating: "Motion for New Trial reconsidered and granted …. Amended judgment to be filed by counsel for Respondent." 343 S.W.3d at 4-5. Despite the docket entry's opening language about granting a "new trial," the court in *Noles* held that this "docket entry *simply provided notice that the trial court intended to amend the judgment at some future date*." 343 S.W.3d at 8 (emphasis added).

Applying *Ferguson* and *Noles* to this case, the Board's Motion to Amend was deemed denied when the circuit court did not enter an amended judgment within the 90-day period. The docket entry in this case was just like the one in *Noles*, saying "Judgment set aside. Revised judgment due 10/25/16. Cmts by state ten days later." LF:25, 360. Just as in *Noles*, this docket entry merely showed the trial court intended to amend the judgment at some future date; and just as in *Noles*, this "interlocutory order [wa]s insufficient to 'rule on' [the] motion to amend the judgment." 343 S.W.3d at 9. The Board's Motion to Amend, although timely filed, "extended the trial court's authority to modify its judgment (within the bounds of the matters raised in [the Board's]

motion) . . . but no further." *Noles*, 343 S.W.3d at 7 (parenthetical text in original). Thus, the purported amended judgment entered after the expiration of ninety days "was a nullity and must be vacated" because the original judgment became "final, valid, and enforceable" upon the expiration of the ninety days. *Id.* at 9.

The Board argues that the circuit court could "vacate" its judgment during the 90-day period by claiming (incorrectly) that a circuit court's powers over a judgment during the 30- and 90-day periods are "the same." To support this errant conclusion, the Board relies on *Steiferman v. K-Mart Corp.*, 746 S.W.2d 145, 147 (Mo. App. W.D. 1988), a case involving a court's power to "set aside" a default judgment. *Cf.* Rule 74.05(d) (motion to set aside default is not an authorized after-trial motion); *Brungard v. Risky's Inc.*, 240 S.W.3d 685, 687 (Mo. 2007) ("pursuant to Rule 74.05(d), a motion to set aside the default judgment is treated as an independent action"). *Steiferman* asserts (without citation to authority) that "[d]uring this 90-day period, the court retains the *same power* under Rule 75.01 and may vacate, reopen, correct, amend or modify the judgment." *Id.* (emphasis added). In its opinion (nullified by operation of transfer to this Court), the Western District also cited *Klaus v. Shelby*, 4 S.W.3d 635, 637 (Mo. App. E.D. 1999), which repeats the aberrant *Steiferman* rule.[5]

[5] Only two other opinions—*Puisis v. Puisis*, 90 S.W.3d 169, 172 (Mo. App. E.D. 2002) and *Barr v. Sanders*, 206 S.W.3d 393, 395 (Mo. App. W.D. 2006)—have followed the *Steiferman* rule, and both did so without mention of this Court's controlling opinions.

In its Brief here, the Board fails to mention—and makes no attempt to distinguish—this Court's decisions in *Massman*, *Spicer*, *Stein*, *Loveless*, or any of the many Court of Appeals decisions (*e.g.*, *In re Marriage of Noles*, *In re Smythe*, and *Antonacci*, among others) that correctly distinguish a trial court's control of judgments during the 30-day period under Rule 75.01 from its "constrained and limited" authority to grant parties' motions in the 90-day period under Rule 81.05. *Massman*, 914 S.W.2d at 802. Instead, the Board cites *Steiferman* as though it were controlling.[6] But *Steiferman* is directly contrary to the law declared by this Court and should be expressly overruled to avoid further opportunity for misdirection or confusion.

In further disregard of settled and controlling law, the Board cites *Scott v. Smith*, 34 S.W. 864, 86 (Mo. 1886), which held more than a century ago that a trial court could vacate a judgment "in its discretion" during the "term" in which the judgment was rendered. Brief at 24. The Board also invokes *State ex rel. Brainerd v. Adams*, which noted a trial court's ability to correct errors "at any time during the term." 84 Mo. 310, 316 (1884).

Missouri, however, abolished terms of court in 1943. *See Wooten v. Friedberg*, 198 S.W.2d 1, 5 (Mo. 1946). Since then, a court's power over its judgment has been "embodied in statutes and supreme court rules that authorize[] the trial court to retain

[6] The Board's presentation of *Steiferman* as though it were good law is puzzling since the Board elsewhere declares that "a lower-court opinion that is inconsistent with one of this Court's decisions is impliedly overruled." Brief at 39.

jurisdiction over its judgment for a limited period." *Pirtle v. Cook*, 956 S.W.2d 235, 240 (Mo. 1997). These rules "have the force and effect of law" and "supersede all statutes and existing court rules inconsistent therewith." *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. 1995) (quoting Mo. Const. art. V, § 5 and Rule 41.01).

As this Court has explained, whatever powers previously existed during a "term" at common law have been specifically limited to the 30-day window of Rule 75.01:

> Rule 75.01 represents the modern embodiment of this common law power and contains the rules that govern its exercise. Because a court's power to change its judgment threatens the finality of the judgment and, consequently, slows the litigation process, the period in which the trial court can make such a change **is limited to only thirty days**.

Pirtle, 956 S.W.2d at 240 (emphasis added) (citing *Kattering v. Franz*, 231 S.W.2d 148, 149 (1950)).

Three final observations further demonstrate the pervasively erroneous nature of the Board's position on finality of judgment and appellate jurisdiction.

First, the Board's position would effectively eliminate the prohibition on extending the 90-day period for ruling on after-trial motions. This Court has held that a trial court "ha[s] no authority to extend the 90-day limit for ruling" after-trial motions. *In re Estate of Shaw*, 256 S.W.3d 72, 76 (Mo. 2008). If the Board's position were to prevail this would no longer be true; if the filing of an after-trial motion suffices to extend the trial court's plenary control of judgments, then *any* post-trial motion would not only serve extend the trial court's control from thirty to ninety days, it would give trial courts the

option of forestalling finality indefinitely through docket entries like the one at issue here. Allowing that to happen "would be to create again the same conditions which [Rule 75.01] sought to remedy." *Kattering*, 231 S.W.2d at 149.

Second, even though the circuit court had orally rejected the Board's arguments, the Board claims it had "nothing to appeal until the Court issued its January 24, 2017 order." Brief at 22. But the rules of this Court belie that contention. Rule 81.05(b) expressly permits the premature filing of a notice of appeal. *See also Coffer v. Wasson-Hunt*, 281 S.W.3d 308, 311 (Mo. 2009) ("The board's premature notice of appeal became effective . . . when the judgment became final."). And even after missing its window for filing a timely notice of appeal, the Board might also have sought "a special order, pursuant to section 512.060 … and Rule 81.07(a), permitting a late filing of the notice of appeal within six months from the date the judgment appealed from bec[a]me[] final." *Spicer*, 336 S.W.3d at 471. Because the Board failed to do either of these things, "[t]his Court is without jurisdiction and must dismiss the appeal." *Id*. at 472.

Finally, even though Pilot was not aggrieved by the Court's judgment of June 22, the Board argues (for the first time and without any citation to authority) that Pilot had a duty to challenge the purported "vacatur." *See* Brief at 25; *see also J.A.R. v. D.G.R.*, 426 S.W.3d 624, 629 (Mo. 2014) ("A party may not raise claims for the first time in this Court and 'shall not alter the basis of any claim that was raised in the brief filed in the court of appeals.'") (quoting Rule 83.08(b)). But there was nothing for Pilot to appeal because: (1) the Board's motion to amend was not granted, and was deemed denied by rule; (2) the circuit court lost jurisdiction after the motion to amend was denied; and (3)

the June 22, 2016 Judgment was final and only appealable *by the Board*. Pilot had no right or need to appeal because it was not aggrieved by the circuit court's final judgment. *See* RSMo § 512.020 (party "aggrieved" by a judgment may appeal); *Shelter Mut. Ins. Co. v. Briggs*, 793 S.W.2d 862, 863 (Mo. 1990) (A party is aggrieved "when the judgment operates prejudicially and directly on his personal or property rights or interests and such effect is immediate and not merely a possible remote consequence.").

For the reasons stated above, this Court should dimiss the appeal.

ARGUMENT PART TWO: MERITS OF THE APPEAL

The merits of this appeal are framed by Missouri law on the scope of authority for legislative creations like the Board and the Fund it manages. As demonstrated below, the Board and Fund only have certain, statutorily defined powers—none of which grants them the power to sue or to enter contracts other than those set forth by statute.

II. Properly Defining the Powers of the Board and the Fund

Federal law requires tank owners, like Pilot, to prove they have certain financial resources to pay for a cleanup in the event of a tank release. *See generally* RSMo § 319.114; see also LF:33 (¶8). Tank owners meet these requirements with, for example, private insurance, self-insurance, a cash trust fund, or letters or credit. See id. The Legislature determined that tank owners should have another method to meet federal requirements, resulting in the creation of the Fund along with a Board to oversee it.[7]

[7] The statutory authority for the Board and Fund is found in sections 319.100 to 319.139, which govern petroleum storage tanks generally. Pilot has provided the Court

However, the Fund expires at the end of the year 2020 (RSMo § 319.129.16), and the Legislature has periodically required reports about whether affordable private insurance renders the Fund unnecessary (§ 319.131.2). As such, the Board is not tasked with "managing an insurance organization" (Brief at 45)—rather, it merely oversees a Fund that was designed to be a temporary alternative to private insurance. To more fully understand what powers the Fund and Board have, it is first necessary to review the statutes that created them.

A. The Fund

The Fund is a "special trust fund" containing money from surcharges on certain petroleum products (§ 319.132) (A41) and fees paid by tank owners who participate in the Fund (§ 319.133) (A43). Importantly, and contrary to the Board's arguments, the General Assembly expressly separated the Fund from the interests of the State of Missouri. See RSMo § 319.129.1 (A32) ("Moneys in such special trust fund shall not be deemed to be state funds."); § 319.131.4 (A38) ("The liability of the [Fund] is not the liability of the state of Missouri.").

Further, money in the Fund never becomes the state's money because it is not transferred to the "general revenue at the end of each biennium." RSMo § 319.129.1 (A32). Likewise, interest on money in the Fund remains in the fund, so both principal and interest are nonstate money. RSMo § 319.129.3 (A32). And when the Fund expires

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with a copy of these statutes in its Appendix as A11-53. The primary enabling statutes for the Board and Fund are §§ 319.129 to 319.133 (A32-44).

in the year 2020, the "sole purpose" of any remaining money is for completing the payment of claims for participants and third parties. RSMo § 319.129.16 (A34).

Finally, money in the Fund may only be used for specific, statutorily defined purposes. *See City of Harrisonville*, 495 S.W.3d at 751 ("[P]ursuant to its enabling statutes, the Fund is to be used for payment of its participants' cleanup costs and third-parties' claims involving property damage or bodily injury."); *see also* RSMo § 319.123 (A27) ("All moneys in the fund shall be used solely for expenses related to the administration of sections 319.100 to 319.137."); § 319.132.4(4) (A41) ("Moneys generated by this surcharge shall not be used for any purposes other than those outlined in sections 319.129 through 319.133 and section 319.138.").

Accordingly, money in the Fund may only be used to pay for, primarily, reimbursing cleanup costs and defending Fund participants from third-party claims. RSMo §§ 319.131.4-6 (A38), 319.138 (A51); see also LF:117 (concession by the Board that the "principal purpose of the Fund is to provide reimbursement for the cleanup of spilled petroleum to participants"). Money in the Fund may also be used to pay for staffing costs (RSMo § 319.129.9) (A33); professionals to help the Board "carry out the fiduciary management of the fund" (e.g., accountants) (§ 319.129.10) (A33); legal fees to defend Fund participants (id.); and costs relating to reinsuring or auditing the Fund (§ 319.129.15, 17) (A34).

B. The Board

The Board is separate from the Fund. It is tasked with the "general administration of the *fund*," has "responsibility for the proper operation of the *fund*" and makes

"decisions relating to payments from the *fund*[.]" RSMo § 319.129.4 (A32) (emphasis added). Moreover, the Board "prescribe[s] all rules and regulations as they relate to fiduciary management of the *fund*." RSMo § 319.129.13 (A33) (emphasis added). The Board's power is therefore limited to the "*fund*"—which is defined as "the petroleum storage tank insurance fund established pursuant to section 319.129." RSMo § 319.100(5) (A11). With two exceptions (to require site assessments for new Fund applicants or adopt a tank operator training program), the Board has no power to manage or regulate Fund *participants* or the public in general.

A comprehensive review of the enabling statutes reveals the Board, in administering and operating the Fund, only has the power to:

- Audit the Fund and assess its "financial soundness." RSMo §§ 319.129.10 (A33), 319.129.17 (A34), 319.132.3 (A41).
- Reinsure all or a portion of the Fund's liability. RSMo § 319.129.15 (A34).
- Establish a committee to recommend legal changes to the General Assembly to assure efficient operation of the Fund, and report whether private insurance is an affordable alternative to the Fund. RSMo § 319.131.2 (A37).
- Set, within statutorily defined limits, the amount of fees and surcharges paid into the Fund, and suspend the collection of money based on the Fund's balance. RSMo §§ 319.132.1, 319.132.4, 319.132.5 (A41-42); 319.133.1, 319.133.4 (A43). The Board may also decide whether a

surcharge was paid in error, and may allow some tank owners to pay Fund participation fees in installments. RSMo §§ 319.132.2 (A41), 319.133.4 (A43).

- Pay money from the Fund for the cleanup of contamination caused by tank releases. RSMo § 319.131.4 (A38), 319.138.1 (A51).
- Disapprove certain reimbursements as delineated by statute. *See* RSMo §§ 319.131.5 (A38) and 319.131.9(2) (A39) (the Board cannot reimburse for costs exceeding statutory limits, "excessive" engineering costs, or for certain types of damages, like punitive damages and pain and suffering).
- Make payments from the Fund for property and bodily injury claims made by third parties, and pay counsel to defend those claims using money in the Fund. RSMo § 319.129.10 (A33), 319.131.5-6 (A38).
- Appoint an executive director for the Fund, hire employees, and enter contracts with state agencies for staffing purposes, and also use Fund money to pay for staffing costs. RSMo §§ 319.129.8, 319.129.9 (A33), 319.132.4(4) (A41-42).
- Finally, the Board has two auxiliary powers. It may create (or eliminate) a tank operator training program. *See* RSMo §§ 319.130.1, 319.130.3, 319.130.4 (A35-36). It may also require new Fund applicants to conduct a site assessment before participating in the Fund. RSMo § 319.133.6 (A43).

C. Legal Standards for Defining the Powers of the Board and Fund

To completely define the powers of the Board and Fund, this Court must construe the statutory language summarized above. The rules of statutory construction for legislative creations are well-defined under Missouri law. As this Court held in *Wright v. Bd. of Educ.*, 246 S.W. 43, 45 (Mo. 1922):

> The power delegated [to a state agency] by the Legislature is purely derivative. Under a well-recognized canon of construction, such powers, however remedial in their purpose, can only be exercised as are clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication, regard always being had for the object to be attained.

Id. Consistent with the quotation above, this Court has more recently held that legislative creations "possess only those powers expressly conferred or necessarily implied by statute." *Bodenhausen v. Missouri Bd. of Registration for Healing Arts*, 900 S.W.2d 621, 622 (Mo. 1995).

In this appeal, the Board has taken great liberties with the meaning of "implied" powers. But there is no "implied" authority unless it "*necessarily* follows" from the express language of the enabling statutes. *See C.D.J. v. Missouri Dep't of Soc. Servs.*, 507 S.W.3d 605, 612 (Mo. App. E.D. 2016) (emphasis added). Indeed, implied powers exist only "as necessary to carry out the *powers specifically granted*" by statute. *State ex rel. Util. Consumers Council, Inc. v. Missouri Pub. Serv. Com.*, 585 S.W.2d 41, 49 (Mo. 1979) (emphasis added); *see also Missouri Pub. Serv. Comm'n v. Oneok, Inc.*, 318

S.W.3d 134, 138 (Mo. App. W.D. 2009) (implied powers must be "clear," "necessary" and "proper" to carry out "specifically granted powers").

In addition, this Court has held that "[t]he scope of power and duties for public agencies is *narrowly limited* to those *essential* to accomplish the *principal purpose* for which the agency was created." *Bd. of Educ. v. State*, 47 S.W.3d 366, 370 (Mo. 2001) (emphasis added). Similarly, an agency "cannot infer a power from a statute simply because that power would facilitate the accomplishment of an end deemed beneficial." *Wells v. Dunn*, 104 S.W.3d 792, 796 (Mo. App. W.D. 2003). Missouri courts have likewise held that the decision on what powers to assign a state agency entails "policy reserved for our legislature." *Oneok*, 318 S.W.3d at 138; *see also Dishon v. Rice*, 871 S.W.2d 126, 128 (Mo. App. E.D. 1994) ("[I]t is for the legislature to establish the means to achieve [an agency's] statutory purpose.").

Finally, this Court has plainly held that these rules apply to the Board and Fund. *See City of Harrisonville v. McCall Serv. Stations*, 495 S.W.3d 738, 751 (Mo. 2016) ("Creatures of statute like the Fund can operate only in accordance with their enabling statutes."). This Court has also held that the Fund is "merely an account within the state treasury" and for it to pay claims or take similar actions, "some person or entity must be authorized to do these things *using* the Fund." *Id.* at 752 (emphasis in original); *see also id.* at 742 ("the Fund is merely an account and *only* its Board of Trustees is responsible for the administration and operation of the Fund") (emphasis added).

D. Summary of the Board's and Fund's Powers

Two key rules of statutory construction control the scope of the Board's powers: (1) it has powers that are expressly conferred by statute; (2) it has implied powers, but only those that are *necessary* to carry out its express powers. The Court applies these rules so that the Board's powers are narrowly limited to those essential to accomplish the Board's principal purpose. It is also the Legislature's role to define the Board's powers, and any doubt about a power should be resolved against the finding of that power.

As outlined above, the Board's express powers are to manage payments into the Fund, oversee payments from the Fund, monitor the balance of the Fund, and hire staff or outside employees to support these functions. For example, the Board engages in "general administration of the fund" (RSMo § 319.129.4) (A32-33) by appointing a director and hiring staff. It carries out its "responsibility for the proper operation of the fund" (*id.*) by auditing the Fund, reinsuring the Fund's liability, recommending policy changes to the General Assembly, or adjusting (or suspending) the amount of fees paid into the Fund. The Board also makes "decisions relating to payments from the fund" by reimbursing Fund participants for *all* cleanup costs, except for those delineated by statute. *Id.*; *see also* RSMo §§ 319.131.5 (A38), 319.131.9(2) (A39).

The Board also has implied powers, but only if they are necessary to carry out its express powers. For example, whether the Board has the implied power to sue is in no way necessary for it to hire support staff to monitor the balance of the Fund. Nor is the power to sue necessary for the Board to set, within statutory parameters, the amount of fees paid into the Fund. The Board's desired powers to sue or for subrogation rights also

have no bearing on the Board's ability to determine whether part of a reimbursement request contains costs excluded by statute. Again, any implied power must exist only to support the very purposes of the Board and Fund, which are to benefit tank owners by reimbursing their costs and defending them from claims.

Finally, and contrary to the plain statutory language discussed above, the Board claims its purpose is "managing an insurance organization." Brief at 46. It then uses this imagined purpose to grant itself expansive implied powers. For example, the Board argues that because the private insurance industry makes "ubiquitous use of subrogation," the enabling statutes somehow bestow the Board with implied powers to enter subrogation agreements and to compel Fund participants to transfer their legal rights to the Board. Brief at 37. A mere subrogation interest alone, however, would be ineffective, so the Board next implies that is also has the power to "enforce those agreements" in a civil lawsuit. *Id.* The Board also recognizes the weakness in is argument, so it claims that if the Board has no authority to sue, then the Attorney General should be able to sue on its behalf. Brief at 35. As further demonstrated in the sections that follow, Missouri law topples this teetering tower of implied authority.

III. The Circuit Court Correctly Dismissed the Action for Want of Standing Because No Statute Authorizes the Board or the Fund to Sue (Responding to Point III)

The circuit court correctly dismissed the Board's lawsuit because the enabling statutes do not authorize the Board to file lawsuits.

A. The Necessity of Standing

"Standing is a necessary component of a justiciable case that must be shown to be present prior to adjudication on the merits." *Schweich v. Nixon,* 408 S.W.3d 769, 774 (Mo. 2013). "[Standing] asks whether the persons seeking relief have the right to do so." *Columbia Sussex Corp. v. Missouri Gaming Comm'n*, 197 S.W.3d 137, 140 (Mo. App. W.D. 2006) (quoting *Farmer v. Kinder*, 89 S.W.3d 447 (Mo. 2002)) (bracketed language in original). "Where, as here, a question is raised about a party's standing, courts have a duty to determine the question of their jurisdiction before reaching substantive issues, for if a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented." *Id.*

Legislatively created entities and state officials are bound by these fundamental rules of standing. *See, e.g.*, *Farmer*, 89 S.W.3d at 453 (state treasurer has the authority to receive, invest, and distribute funds, but no authority to file a lawsuit seeking to *receive* funds);[8] *Schweich v. Nixon,* 408 S.W.3d 769, 777 (Mo. 2013) (state auditor had no

[8] The Board's Brief generally references a list of 80 funds established by the Legislature (Brief at 33), many of which are managed by the state treasurer. For example, the state treasurer has authority to "approve disbursements" from the Puppy Protection Trust Fund (RSMo § 143.1014.2) and may also "administer" the Elderly Home-Delivered Meals Trust Fund (RSMo § 143.1002.3). Such statutory authority does not, however, expressly or implicitly authorize the treasurer to bring lawsuits in an

standing to bring a declaratory judgment action challenging governor's authority to withhold certain funds). Finally, as stated by one commentator: "It cannot be assumed that any administrative official has standing to institute any kind of proceeding to carry out agency duties, especially if there is evidence of legislative intent to limit the remedies available to the agency." *See* 20A MO. PRAC., ADMINISTRATIVE PRACTICE & PROCEDURE § 13:3 (4th ed. 2006).

B. General Delegations of Authority Do Not Grant a Power to Sue.

Missouri courts hold that a legislatively created entity must have *specific statutory authority* to maintain a lawsuit. *Oneok, Inc.*, 318 S.W.3d at 138; *see also In re Exhumation of Body of D.M.*, 808 S.W.2d 37 (Mo. App. S.D. 1991); *Brooks v. Pool-Leffler*, 636 S.W.2d 113 (Mo. App. E.D. 1982). Without such authority, an agency's lawsuit must be dismissed for want of standing. *Id.*

For example, in *Oneok*, the Public Service Commission—a legislative creation—filed a lawsuit against several natural gas suppliers alleging they had conspired to inflate the cost of gas, resulting in overcharges to local distributors. 318 S.W.3d at 136. The trial court dismissed for lack of standing because "there was no statute authorizing the Commission to bring the action," and the court of appeals *affirmed*. *Id.*

First, *Oneok* held that the Commission had no standing because there was no statute "specifically authorizing" it to assert a private cause of action for damages. *Id*. at

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attempt raise money for these funds. *See Farmer*, 89 S.W.3d at 453 (state treasurer is a mere *custodian* of funds and cannot file a lawsuit seeking to *receive* funds).

138. Likewise, the Board here identifies no statute that specifically authorizes it to sue, and there is none.

Second, the Commission argued that its lawsuit was necessary to redress a public harm—*e.g.*, to "ensure that Missouri's natural gas market is free from price manipulation and other unlawful conduct." *Oneok*, 318 S.W.3d at 137. But *Oneok* rejected that argument because the Commission's petition contained no allegation of any harm to ratepayers. *Id.* at 138. Similarly, the Board here repeatedly claims its lawsuit is necessary to prevent public harm (*see*, *e.g.*, Brief at 20, 26, 32-33, 35), but its Petition pleads damage only to the Fund—not the public or the environment. *See* LF:42 (¶31).

Third, the Commission argued in *Oneok* that it had *implicit* authority to file a lawsuit because its enabling statute expressly granted it "*all powers necessary or proper* to enable it to carry out fully and effectually all the purposes of this chapter." *See id.* at 137 (citing RSMo § 386.040) (emphasis added). The Board repackages that argument by relying on section 319.129.4 (A32), which tasks the Board with "general administration of the fund and the responsibility for the proper operation of the fund[.]" However, *Oneok* specifically held that general statutory powers are insufficient to authorize the filing of a lawsuit:

> [T]he "powers necessary or proper" clause in section 386.040 enables the Commission to carry out the functions *specifically delegated* to it by the legislature. It is not a license to engage in any conceivable activity for the protection of ratepayers. No matter how noble the cause, we must administer the law as it is, not as the Commission wishes it to be.

Oneok, 318 S.W.3d. at 138 (emphasis added).[9]

Fourth, the holding in *Oneok* echoes the holdings in *D.M.*, 808 S.W.2d at 37-38 and *Brooks*, 636 S.W.2d at 117-18, that general statements of authority do not specifically authorize an agency to sue. For example, in *Brooks*, the Commission on Human Rights had the power "to receive, investigate, *initiate*, and pass upon complaints alleging discrimination in employment." *Brooks*, 636 S.W.2d at 117 (quoting RSMo § 296.030(7)) (emphasis in original). However, the court of appeals held that the power to "initiate" discrimination complaints granted no standing to "file" a discrimination action. *Id*. at 117-18. Instead, the Legislature had authorized only the attorney general to "file" discrimination actions on the Commission's behalf. *Id.* at 18 ("the legislature entrusted [the attorney general] with the duty and authority to protect the governmental interest by conferring upon him standing to prosecute discrimination complaints.").

Moreover, in *D.M.*, the Department of Social Services sought a court order to exhume and autopsy the body of an allegedly abused child. In support of its alleged power to bring the action, the Department relied on its authority to "investigate reports of child abuse." *Id*. at 38. The court of appeals affirmed dismissal for lack of standing,

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[9] *Cf. Montana Petroleum Tank Release Comp. Bd. v. Crumleys, Inc.*, 174 P.3d 948, 955 (Mont. 2008) (holding that a Montana board for a comparable storage tank fund had the *implied* authority to enter a subrogation agreement with a fund participant and to bring suit to enforce that agreement because its enabling statute specifically authorized the board to "undertake legal action").

holding that the authority to investigate did not authorize the filing of the suit to exhume a deceased child.

> The legislature has not given the department authority to authorize an autopsy. The department, therefore, does not have authority to apply for an order of exhumation for that purpose. For those reasons the department lacks legal standing to seek a court order for exhumation and autopsy.

Id. at 40.

In short, this Court should apply *Oneok*, *Brooks* and *D.M.* to affirm the dismissal below because the Board has no specific authority to sue, and because general statutory terms relating to "administration," "operation" and "payments decisions" for the Fund do not specifically empower the Board to file lawsuits.

C. The Legislature Knows How to Specifically Authorize Its Creations to Sue, but Withheld Such Authority from the Board.

A thorough review of Missouri law reveals that the Legislature has consistently and *specifically* authorized its creations to sue by granting them the powers of a "body corporate," by empowering them "to sue," or, more narrowly, by authorizing them to maintain certain types of actions. The Legislature granted the Board no such powers. Instead, the Board implies such powers by claiming it has all the powers of a school district or private insurance company. *See* Brief at 43-44. But those arguments are meritless.

1. The Board is not a body corporate and has no power to sue.

First, and most broadly, when the Legislature gives an agency the powers of a "body corporate" it also grants the power to sue. Indeed, the term "body corporate" has special meaning under Missouri law, and when the legislature uses that term in defining an agency, it intends for the agency to act as a corporation with "the power to contract and to sue and be sued." *Boyd v. Kan. City Area Transp. Auth.*, 610 S.W.2d 414, 416 (Mo. App. W.D. 1980) (noting that the "term 'body corporate' appears in the constitution and statutes of this state some ninety times.").

Here, the Board relies heavily on this Court's opinion in *State ex rel. Sch. Dist. v. Jones*, 653 S.W.2d 178, 184-85 (Mo. 1983), which held that a school district had the *implied* authority to sue, despite having no express statutory authority "to sue." *See* Brief at 18, 44-46. The Board's reliance on *Jones* is severely misplaced because school districts are "bodies corporate." *Jones*, 653 S.W.2d at 185. In fact, unlike the Board (a "manager" of a mere "fund"), Missouri has repeatedly recognized that school districts have powers similar to private corporations. *See id.*; *see also Feeler v. Reorganized Sch. Dist.*, 290 S.W.2d 102, 104 (Mo. 1956) ("a school district is a body corporate with power to own and sell real estate"); *State v. Lawrence*, 77 S.W. 497, 507 (Mo. 1903) (every school district is a body corporate with the power to sue and be sued); *Sch. Dist. v. Pace*, 87 S.W. 580, 582 (Mo. App. E.D. 1905) (schools are "bodies corporate, possessing the usual powers of corporations for public purposes"). The Board's enabling authority here comes nowhere close to stating that the Board is a "body corporate," which renders its school district analogy meritless.

2. The Board has no express authority "to sue."

The Legislature also specifically authorizes its creations to commence legal actions by expressly granting them the power "to sue." Consistent with the creation of school districts as "bodies corporate," Missouri statutes have authorized school-related entities "to sue." *See, e.g.*, RSMo § 162.571 (City of St. Louis Board of Education); § 162.875 (special school district); § 169.420 (public school retirement systems); § 174.040(1) (board of regents for universities); § 178.716.2 (vocational school district); and § 178.770.2 (community college districts).

Beyond school districts, the Legislature has expressly granted certain funds, boards, and commissions the power "to sue." For example, each of the following legislative creations has the express power "to sue": the Prosecuting Attorneys and Circuit Attorneys' Retirement Fund (RSMo § 56.800); police retirement boards (§ 86.1060); the Missouri Development Finance Board (§ 100.270(1)); the Children's Division of the Department of Social Services (§ 207.020); fire protection districts (§ 321.220); the Board of Private Investigator and Private Fire Investigator Examiners (§ 324.1102.1); the Missouri Dental Board (§ 332.021); and the Air Conservation Commission (§ 643.085.2). Thus, unlike many other boards created by the Legislature, there is no statute granting the Board here the power "to sue."

3. The Board has no authority to maintain any type of action.

The Legislature has also created certain entities that have neither the powers of a "body corporate" nor the express authority "to sue," but which nonetheless may bring legal actions for certain purposes. For example, the State Board of Chiropractic

Examiners is not a body corporate and does not have the right "to sue" generally, but it may file an action asking a court to enjoin a person from providing chiropractic care without a license. RSMo § 331.085. Likewise, the Board of Geologist Registration has the power to request a circuit court to enforce the Board's subpoenas, and may also ask the attorney general to file an action to enjoin the work of unregistered geologists. RSMo § 256.480. Again, the Board here has no such powers.

4. The Board has less power than other "insurance" funds

Recognizing it has no specific authority to sue, the Board argues it has implied authority to sue on the grounds that it should have "the same power and authorities that similarly situated private organizations have[.]" Brief at 43. The Board's comparison is meritless because the Legislature has vested other boards with some of the powers held by similarly situated private companies, but did not grant those powers to the Board.

For example, the Legislature created the Missouri Public Entity Risk Management Fund ("MOPERM") and the Missouri Mesothelioma Risk Management Fund ("MMRMF"). Participation in either of these funds "has the same *effect* as [the] purchase of *insurance*." RSMo § 287.233.4 (emphasis added); § 537.705.1 (identical language). The Board's statues here contain no such language. Further, the boards for MOPERM and MMRMF have the authority to sue because they both act as a "body corporate." *See* RSMo §§ 287.223, 537.700. Thus, the Legislature vested MOPERM and MMRMF with some of the powers commonly held by private insurance companies, but it very plainly did not grant those same powers to the Board.

In short, the Board is not a school district, does not have the powers of a private insurance company, is not a "body corporate," and has no power "to sue" generally or for any particular purpose.[10] It therefore had no standing to maintain the action below.

5. The Board's policy arguments belong in the Legislature.

The comprehensive review of Missouri law above might tempt the Board to argue that the legislature engaged in an oversight by withholding from the Board powers enjoyed by numerous other agencies, boards and funds. But such an argument would belong in a different Jefferson City building. *See Dworkin v. Caledonian Ins. Co.*, 226 S.W. 846, 851 (Mo. 1920) ("The court may feel sure the Legislature meant to include something which by oversight was omitted, yet cannot supply it."); *State v. Thomas*, 637 S.W.2d 81, 83 (Mo. App. W.D. 1982) ("[W]e cannot supply by fiat a supposed oversight of the legislature."). Instead, the consistent legislative commands

[10] The Board, without identifying it as such, relies on the *dissenting* opinion in *State ex rel. Barker v. Chi. & A. R. Co.*, 178 S.W. 129, 146 (1915), to argue that: "Having the power to make contracts or suffer wrongs, [the Board] has the inherent right to bring a suit to enforce the one or redress the other." Brief at 43 (brackets supplied by the Board its in Brief). The Board misstates Missouri law because the dissenting was merely opining that the *State of Missouri*—not the Board—is "a public corporation" and "endowed with all the rights to sue in equity or at law which are possessed by other corporations or by natural persons." The Board, however, is merely a legislative creature bound by its statutory powers—it is not *the state* nor a corporation.

outlined above compel the conclusion that the legislature did not intend to grant the Board the power to sue. *See Mueller v. Missouri Hazardous Waste Mgmt. Comm'n*, 904 S.W.2d 552, 558 (Mo. App. S.D. 1995) ("Where a legislative body has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power.").

In sum, the Legislature has granted many of its creations the power to sue, but has plainly withheld such authority from the Board. The circuit court's dismissal was undoubtedly correct because the Board has no authority to sue, and no power may be implied from the general language in its enabling statutes.

D. This Court Should Not Create New Remedies for the Board Because Sufficient Other Remedies Already Exist

Dissatisfied with its statutory authority, the Board argues that it deserves the right to pursue legal remedies against Fund participants by relying on an *unpleaded* parade of horribles. *See* Brief at 32-33, 45 (*e.g.*, petroleum "price shock" due to environmental spills, "unrectified" environmental spills, delayed "remediation of environmental emergencies," double recoveries by Fund participants, and a "risk of insolvency" for the Fund). The Board also argues that interpreting its enabling statutes to deny it the desired right to sue is "absurd" because it would "dismantle" the Board's ability to maintain the integrity of the Fund, render the Board "wholly defenseless to recoup lost funds," and "leave it without recourse." Brief at 48. These concerns are likewise nowhere to be found in the Petition.

Further, the Board misleads the Court about its statutory purpose by misusing a statement from *Rees Oil Co. v. Dir. of Revenue*, 992 S.W.2d 354, 356 (Mo. App. W.D. 1999). Specifically, the Board argues: "The Fund … serves the critical purpose of 'limit[ing] environmental and public health hazards from leaking underground storage tanks containing regulated substances.'" Brief at 33 (quoting *Rees*, 992 S.W.2d at 356). But here is what the court in *Rees* actually said:

> In an effort to limit environmental and public health hazards from leaking underground storage tanks containing regulated substances, *the Environmental Protection Agency and the State of Missouri established rules and regulations* holding owners and operators of such tanks financially responsible for leaks.

Rees, 992 S.W.2d at 356 (emphasis added).

The difference between the Board's argument about the Fund's purported "critical purpose" and the actual statement in *Rees* is significant because, by statute, the Board cannot police tank owners. As demonstrated in Section II, B, *supra*, the power of the Board, with only a few exceptions, is strictly limited to managing the "fund"—it has no power to manage fund *participants*, the environment or public in general. *See, e.g.*, RSMo § 319.129.13 (A33) ("In no case shall the board have oversight regarding environmental cleanup standards for petroleum storage tanks."). Rather, these powers belong to a different agency—MDNR. *See, e.g.*, RSMo § 319.109 (A20) ("The department [MDNR] shall establish requirements for the reporting of any releases and corrective action taken in response to a release from an underground storage tank[.]").

Notably, the Brief ignores this Court's decision in *State ex rel. Thomason v. Roth*, 372 S.W.2d 94 (Mo. 1963), which instructs that an agency enjoys only the remedies provided by statute. In *Roth* this Court affirmed the dismissal of an action for injunctive relief filed by the Commissioner of Agriculture to enforce the Unfair Milk Sales Practices Act. By statute the Commissioner's "exclusive" remedy was to bring injunction proceedings *only after* receiving a written complaint from an injured person. *Id.* at 97. Absent a complaint, no "cause of action, right, or method of procedure now provided by law" permitted the Commissioner to "maintain this suit for an injunction[.]" *Id.* at 98. Simply put, when the Legislature prescribes the remedies for a state agency, the agency must use those remedies and cannot concoct its own. *See id.*

The Legislature has adopted remedies relating to storage tanks by authorizing MDNR (*not* the Board) to: (1) "take any and all necessary action" to abate an immediate threat from a tank to the public health, safety, or the environment (§ 319.125.4) (A28); (2) recover costs incurred in taking any such action (*id.*); and (3) enforce violations relating to the regulation of storage tanks (§ 319.127.2) (A30). And the only time the Attorney General has statutory authority to bring an action for violation of a storage tank regulation is when so requested by *MDNR*. *See* RSMo § 319.127.2 (A30).

If the Board is truly concerned that its lack of statutory authority is putting the Fund or public health at risk, it may (as *authorized* by the legislature) form a committee to recommend statutory changes to the Board's authority, or it can procure reinsurance. RSMo §§ 319.129.15 (A34), 319.131.2 (A37). A member of the Board could also ask MDNR to investigate violations by a tank owner; depending on the results of MDNR's

investigation, MDNR could decide to revoke the right to operate a storage tank or participate in the Fund. See RSMo §§ 319.120 (A26), 319.125.1(1)-(2) (A28), 319.125.5 (A28). Thus, the enabling statutes provide remedies to address alleged environmental or public health concerns that are connected to storage tanks, but those powers simply do not belong to the Board.

Finally, MDNR did not bring this action, and the Board has not pleaded a basis (if any) for MDNR to pursue the remedies available to it. Instead, the Board has abused its powers by attempting to coerce Pilot's cooperation with the Lafayette County Action. When Pilot did not acquiesce, the Board by fiat declared its own remedy—it punished Pilot by refusing to provide any additional reimbursement from the Fund. LF:41 (¶28 (c), (e)) (pleading that the Board "disclaim[ed] and "withdr[ew]" Pilot's right to reimbursement from the Fund).[11] But the only instance in which the legislature has authorized the removal of a tank owner from the Fund is if *MDNR*—after an administrative appeal *and other due process*—denies a tank owner's request to register its tank with the department. RSMo § 319.125 (A28). Thus, the Board is not only attempting to assert authority it does not have, but claims to have powers broader than those expressly granted to MDNR. In short, the Board has no remedial powers, and

[11] And, of course, the Board fashioned another remedy by suing Pilot and attempting to recoup monies paid from the Fund, even though no statute grants the Board any such remedies.

argues to the Court that it deserves them. But, in reality, the Board asks this Court to grant it powers and remedies the Legislature never intended the Board to have.

E. Improper Reliance on this Court's Uninformed *Dicta* in *ConocoPhillips*.

In an attempt to avoid an entire body of case and statutory law, the Board cites *State ex rel. Koster v. ConocoPhillips Co.*, 493 S.W.3d 397 (Mo. 2016), asserting that this Court has "expressly held" that the Board has the right to sue. Brief at 36. But the *ConocoPhillips* decision contains no such holding and never discussed the body of law outlined above, because it was not brought to this Court's attention.

The appellant in *ConocoPhillips* was an individual (Wagoner) who had been denied intervention as of right to challenge the settlement of an action brought by the Attorney General on behalf of the Board against two oil companies. The burden was on Wagoner to satisfy the three-element test for intervention. 493 S.W.3d at 403. This Court succinctly stated its holding as follows: "Because Wagoner's motion to intervene failed to address—let alone establish—these elements, the trial court did not err in overruling Wagoner's motion." *Id*. at 403. Thus, *ConocoPhillips* turned on a complete failure of proof by the intervenor as to all three required elements.

This Court has recently held that "[j]udicial decisions must be construed with reference to the facts and issues of the particular case, and … the authority of the decision as a precedent is limited to those points of law which are raised by the record, considered by the court, and necessary to the decision." *State ex rel. Tivol Plaza, Inc. v. Missouri Comm'n on Human Rights*, 527 S.W.3d 837, 845 (Mo. 2017) (quoting *Byrne & Jones*

Enter., Inc. v. Monroe City R-1 Sch. Dist., 493 S.W.3d 847, 855 (Mo. 2016)) (ellipses in original). As explained below, *ConocoPhillips* has no precedential value on the Board's authority to file suit because that point of law was not raised by the record in *ConocoPhillips*, not considered by this Court in its opinion, and not necessary to the decision. Any one of these shortcomings would negate such precedential value, but *ConocoPhillips* lacks all three.

First, the record in *ConocoPhillips* raised no issue on the authority of a legislatively created entity. Pilot provided the circuit court with copies of the appellate briefs this Court received in *ConocoPhillips* (LF:180-314), and they confirm that the key decisions and statutory provisions that the circuit court relied on in reaching its Judgment here were neither raised nor discussed by the parties in *ConocoPhillips*. For example, neither the parties in *ConocoPhillips* nor this Court appear to have considered case law holding that a legislatively created entity must have *specific statutory authority* to maintain a lawsuit. *See*, Section III, A-D *supra*. Nor did either party in *ConocoPhillips* discuss the limiting language in the Board's enabling statutes or the law defining the scope of an agency's authority.

These omissions in the record are telling because those key arguments and authorities had already been presented to the circuit court in this case *before* substitute briefs were filed in *ConocoPhillips*. Specifically, the Board filed a substitute brief with this Court in *ConocoPhillips* on March 25, 2016, and this Court heard argument on April 13, 2016. *See* LF:180-226. But this was *after* Pilot responded (on February 3, 2016) to the Petition by renewing an earlier (and substantively similar) motion to dismiss

for lack of standing, and *after* the Board responded to that motion on March 4, 2016. LF:81-98, 109-133. Thus, when the Board filed its brief and later presented oral argument to this Court in *ConocoPhillips*, the Board had for months been fully aware of controlling precedent in Missouri that negated the Board's ability to bring lawsuits. If these decisions had been germane to the holding and arguments in *ConocoPhillips*, the Board and the Attorney General presumably would have cited them (especially after Wagoner failed to do so). It is therefore clear that the Board's standing to sue was *not* the dispositive issue in *ConocoPhillips.*

Second, since the parties in *ConocoPhillips* framed no issue of Board standing, it can scarcely be said that this Court considered that issue. The Board seizes upon a statement made by this Court in discussing Wagoner's failure to establish the *first* element for intervention, namely "that *Wagoner has a legally protectable interest* in the subject matter of the Board's suit against Phillips." *Id*. at 404 (emphasis added). Wagoner argued that "he might be a claimant against the Fund at some hypothetical point in the future" and that "the Board might not recover as much from Phillips as he could" if allowed to intervene. *Id*. at 404. This Court brushed aside this contention as follows:

> The Court need not address whether this is the sort of interest that would give rise to a right to intervene under Rule 52.12(a) because Wagoner fails to demonstrate that—as a potential future claimant against the Fund—he has a right to sue third parties he thinks have recovered from the Fund improperly. The Board certainly has the right to sue to recover moneys owed to the Fund, *see* § 319.129.4, but nothing in the statutes creating the

> Fund and authorizing the Board to administer it gives such a right to Wagoner simply because he might someday be a claimant against the Fund. *See Johnson v. Kraft Gen. Foods, Inc.*, 885 S.W.2d 334, 336 (Mo. banc 1994) ("[W]hen the legislature has established other means of enforcement, we will not recognize a private civil action unless such appears by clear implication to have been the legislative intent.") (quotations omitted). *Cf. Int'l Ass'n of Fire Fighters, Local 2665 v. City of Clayton*, 320 F.3d 849, 851 (8th Cir. 2003) ("As a general rule, a beneficiary may not bring an action at law on behalf of a trust against a third party . . . . The right to bring such an action belongs to the trustee.") (quotations and citations omitted). Accordingly, *Wagoner fails to show the first element required for intervention*.

Id. at 404 (emphasis added).

Thus, this Court held that Wagoner was required to establish that *he* (not the Board) had a legally protectable interest, and he failed to do so. *Id*. The comment the Board mischaracterizes as a "holding" was only the first clause of a compound sentence; the second clause tells the rest of the story and frames the context as *Wagoner's right to intervene* rather than the Board's authority to sue: "*but nothing in the statutes* creating the Fund and authorizing the Board to administer it *gives such a right to Wagoner* simply because he might someday be a claimant against the Fund." *Id*. (emphasis added). That ruling was dispositive and made any discussion about the authority or interests of any

other person or entity *dicta*, immaterial and unnecessary for the decision.[12] The Board advocates a broad reading of *ConocoPhillips*, but even if the Court's language there "was intended to address circumstances beyond the facts of [that case], it is *dicta*." *Byrne & Jones*, 493 S.W.3d at 855 (rejecting assertion that prior judicial statements on standing in one context established rule as to standing in a different context).

Finally, this Court's comment regarding the Board's purported authority to sue cannot be regarded as necessary to the actual holding of the case, namely that Wagoner failed to establish each and every element required for intervention. 493 S.W.3d at 403. His failure to establish the first element was no more essential to the holding than his failure to establish the second element, or the third one. *See id.* at 403 (holding that Wagoner failed to establish any of these elements).

Ultimately, the Board's own brief belies its contention that this Court has already "expressly held" that the Board has standing to sue. If the *ConocoPhillips* decision had so held, then the Board would not have chosen to advance the Attorney General's alleged standing as its primary standing argument before this Court. Nor if the Board's standing and authority had already been thoroughly considered and analyzed by this Court in

[12] This Court's "*see*" citation to *Johnson* and parenthetical quotation about recognizing a "private civil action" did not declare the Board's alleged authority to sue. The Board can claim otherwise only by mixing and matching highly excerpted phrases from *Johnson* and *ConocoPhillips* with the Board's own wishful phrasing that "This Court held . . . because the legislature gave . . . ." Brief at 38.

ConocoPhillips would there be any reason for the Board to devote nine pages of its Brief to arguing that topic. *See* Brief at 40-49. As demonstrated above, resolution of the question of Board standing presented in this case depends on a full analysis of statutory provisions in light of settled precedent on the authority of a legislatively created entity, and for the reasons described above, the Board has no authority or standing to sue.

IV. The Circuit Court Correctly Dismissed Because the Board Lacks Authority to Enter Contracts with Fund Participants (Responding to Point III)

The "Participation Agreement" allegedly operates as a contract between Pilot and the Board. However, for the reasons stated below, that contract is void and unenforceable. The circuit court's Judgment is therefore correct because the Board has no standing to sue for rights and damages arising from a contract it had no authority to enter. *See Verni v. Cleveland Chiropractic Coll.*, 212 S.W.3d 150, 153 (Mo. 2007) ("Only parties to a contract and any third-party beneficiaries of a contract have standing to enforce that contract.").

A. Board Cannot Enter Contracts Beyond Those Authorized by Statute

The Board had no authority to enter the Participation Agreement because the enabling statutes allow the Board to enter contracts for only the following purposes:

(1) To contract with other agencies for staffing (*e.g.*, hiring employees from the MDNR to provide staffing resources). *See* RSMo § 319.129.9 (A33).

(2) To hire professionals to "carry out the fiduciary management of the fund" (*e.g.*, persons experienced in insurance underwriting, accounting, the

servicing of claims and rate making) and hire "legal counsel to *defend* third-party claims." RSMo § 319.129.10 (A33) (emphasis added).

(3) To "commission" periodic independent financial audits of the Fund. RSMo § 319.129.17 (A34).

(4) To hire third parties to conduct a training program for storage tank operators. RSMo § 319.130.3 (A36).

(5) To purchase reinsurance for the Fund from an insurer who sells environmental liability insurance in Missouri. RSMo § 319.129.15 (A34)

The above items constitute the full extent of the Board's contracting authority, and this Court has held that the Board may not use a contract to expand its authority or rights. *See Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940) ("If the authority conferred could be enlarged by its own holdings of waiver, estoppel, or even by contract, the Commission could itself add to its own powers and create rights and duties beyond what the Legislature provided or intended.") (collecting cases).

Lacking express authority, the Board argues that it has the *implied* authority to enter contracts with Fund participants based on its general statutory authority relating to "administration," "operation" and "payments decisions" for the Fund. That interpretation is misplaced, because there is no need for the Legislature to spell out the instances in which the Board can contract if it intended for the Board's general powers to also grant the power to contract. *See Wright*, 246 S.W. at 45 ("Under a well-recognized canon of construction, [a state agency's] powers, however remedial in their purpose, can only be exercised as are clearly comprehended within the words of the statute or that may be

derived therefrom by necessary implication, regard always being had for the object to be attained."); *Harrison v. MFA Mut. Ins. Co*, 607 S.W.2d 137, 146 (Mo. 1980) (in interpreting statutes "the express mention of one thing implies the exclusion of another"). For example, the Legislature has expressly mentioned the Board's right to enter contracts for staffing the Fund or *defending* Fund participants, but made no reference whatsoever to any power by the Board to contract with Fund participants.

B. The Legislature Did Not Specifically Authorize the Board to Acquire Pilot's Private Legal Rights.

In its Brief, the Board uses the term "subrogation" (or some form of it) approximately 80 times to describe the Participation Agreement or its effect. The Board, however, has overlooked the "distinct difference between the assignment of a claim and subrogation to a claim." *Holt v. Myers*, 494 S.W.2d 430, 437 (Mo. App. E.D. 1973) (explaining that assignments contractually transfer a party's legal rights, while subrogation rights arise under equitable principles). Here, the "Participation Agreement" purports to create an assignment. In a subsection titled "TRANSFER OF RECOVERY RIGHTS TO US," it states that it if a Fund participant "has rights to recover all or part of any payment we [the Board] have made under this policy, *those rights are transferred to us* [the Board]." LF:35 (¶14); LF:51 (¶6) (emphasis added).

The distinction between an assignment and subrogation is significant because, under Missouri law, an agency must have specific authority to acquire legal rights. Specifically, in *Oneok*, the Commission filed suit against natural gas suppliers after acquiring the right to sue from the local distributors allegedly harmed by inflated prices.

The court of appeals held the Commission could not acquire a private right of action because there was no statute "specifically authorizing the Commission to receive the [local distributors'] assignments[.]" *Oneok*, 318 S.W.3d. at 138. The court of appeals also rejected the argument that the assignments were valid under Missouri common law that generally allowed the assignment of claims. *Id.* at 139.

Here, the Board pleads it contractually acquired Pilot's rights to sue the maker of the defective "Geoflex" piping. LF:35 (¶14). But like *Oneok*, there is no statutory authority specifically enabling the Board to acquire private rights of action. In an attempt to grant itself authority, the Board relies on comparisons to the private insurance industry, which generally uses contracts to acquire the legal rights of its insureds. *See, e.g.*, Brief at 41. However, the court of appeals held in *Oneok* that general legal principles cannot "govern the assignment and assertion of causes of action where the assignee and petitioner is an entity created and governed by a statutory scheme which does not give it the power to engage in such actions." *Oneok*, 318 S.W.3d. at 139.

Finally, statutory analysis reveals, once again, that the Board has less power than other legislative creations. For example, both the MOPERM and MMRMF insurance funds are managed by boards that are specifically authorized to acquire legal rights. RSMo § 537.705 ("The board shall have power … to purchase, acquire, hold, invest, lend, lease, sell, assign, transfer, and dispose of all property, rights, and securities, and enter into written contracts, all as may be necessary or proper to carry out the purposes of section 537.700 or 537.755."); *see also* § 287.233.28 (granting virtually identical powers

to "acquire" rights and enter contracts). Again, no comparable authority exists for the Board here.

C. The Board Has Impermissibly Used the "Participation Agreement" to Impose Terms and Conditions Not Authorized by Statute

The Board also relies on the Participation Agreement, which the Board claims is an insurance policy (Brief at 44, 47)[13] that purportedly requires Fund participants to "transfer" their legal rights to the Board and then cooperate in its legal actions. The Participation Agreement is void because the Board has impermissibly used an alleged contract to grants itself powers beyond those authorized by statute.

First, the Legislature has defined the instances in which the Board can disapprove certain payment requests. RSMo §§ 319.131.5 (A38), 319.131.9(2) (A39). Absent one of these exceptions, the Board's enabling statute otherwise *requires* the Board to use the Fund to defend participants and pay *all* cleanup costs. *See* RSMo §§ 319.131.4 (A38) ("shall assume all costs"); 319.131.5 (A38) ("shall provide coverage"); *see also Wolf v.*

[13] Describing the "Agreement" as an insurance "policy" is a fiction because the Board, unlike other Missouri boards, has no authority to define the "coverages" available to Fund participants. *Cf.* RSMo §§ 287.223.22; 537.730.2 (authorizing the MOPERM and MMRMF boards to determine the "coverages to be offered"). Indeed, the Board concedes that "the enabling statutes never give the Board the authority to 'contract' for insurance polices[.]" Brief at 47.

Midwest Nephrology Consultants, PC., 487 S.W.3d 78, 83 (Mo. App. W.D. 2016) (in statutes the "word 'may' is permissive only, and the word 'shall' is mandatory.").

The Legislature has also specified the conditions that Fund participants must satisfy in order to receive reimbursement. Specifically, a participant must: (1) register its tanks (RSMo §§ 319.131 (A37), 319.120 (A26)); (2) comply with record-keeping, reporting, and tank-operation regulations adopted by the MDNR (§§ 319.107-319.111 (A19-21); (3) allow MDNR to access tank records and inspect tanks (§ 319.117 (A24)); pay certain fees into the Fund (§ 319.123 (A27); 319.129.2 (A32); 319.133.2 (A43)); (4) certify that tanks meet certain standards (§ 319.131.3(1) (A37); (5) submit proof of a tank's integrity (*id.*); and (8) install protection, prevention, or detection equipment on a tank (§ 319.136.1) (A46).

Thus, the statutory provisions above define what the Board must pay (and not pay) in reimbursing a Fund participant. The statutes also prescribe what actions a Fund participant must take (or not take) to participate in the Fund. Yet, the Board has used its purported "Participation Agreement" to concoct additional obligations. As explained by this Court in *Soars*, 142 S.W.2d at 871, state agencies cannot use contracts to expand their authority. Likewise, this Court has held that an agency may not use a contract as a substitute for rulemaking. *See NME Hospitals, Inc. v. Dept. of Social Services*, 850 S.W.2d 71 (Mo. 1993) (adopting the uniformly held rule that "state agencies may not evade rulemaking by contract"). The Board's "contract" violates both rules.

First, neither the enabling statutes (RSMo §§ 319.100 to 319.139) (A11-53) nor the Board's administrative rules (10 C.S.R. §§ 100-1.010 to 100-6.010) contain any

mention of a "transfer" of Pilot's "rights" to the Board. Instead, the alleged obligation to "transfer" its rights arises only by a contract that, as discussed above, the Board has no authority to enter. *See also Miller v. Missouri Dep't of Transp.*, 32 S.W.3d 170, 174 (Mo. App. W.D. 2000) ("A contract is void where the public agency fails to follow proper procedures and exceeds its statutory authority.").

Second, the only obligation to "cooperate" with or "assist" the Board—other than the terms of the "Participation Agreement"—arises via an administrative rule that applies to "Third Party Claims" filed *against* tank owners. *See* 10 C.S.R. § 100-5.030. Indeed, the express stated purpose of the rule in section 100-5.030 is to "describe[] the procedures to be followed in the event there is *a third-party claim against a tank owner or operator* who is insured by the fund, and summarizes what third-party coverage is provided by the fund." *Id.* (emphasis added).

To the extent Board's rule in section 100.5.030 could be viewed as prescribing a duty to "cooperate" in actions filed *by the Board* against third parties (rather than in actions filed *by third parties* against Fund participants), it is void and enforceable because it conflicts with and exceeds the Board's statutory authority. *State ex rel. Missouri Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 598-99 (Mo. 2012) (regulations "may be promulgated only to the extent of and within the delegated authority of the agency's

enabling statute");[14] *Gasconade Cty. Counseling Servs., Inc. v. Missouri Dep't of Health*, 314 S.W.3d 368, 377 (Mo. App. E.D. 2010) (holding that an administrative rule prohibiting contracts between the board for a mental health fund and for-profit entities was a nullity because such a restriction was not authorized by statute). In short, the Board's has impermissibly attempted to use a contract to impose conditions on Fund participants that are not authorized by statute or regulation.

Finally, and yet again, a comparison between the Board's powers and other legislative creations reveals that the Board has less power than the boards for other funds. For example, the Legislature requires MOPERM participants to "cooperate" with certain legal actions:

> All persons and entities protected by the fund *shall cooperate* with those persons responsible for conducting any investigation and preparing any defense under the provisions of sections 537.700 to 537.755, by assisting such persons in all respects, including the making of settlements, the securing and giving of evidence, and the attending and obtaining witnesses to attend hearings and trials.

RSMo § 537.745.2 (emphasis added). Such obligations are nowhere to be found in the Board's enabling statute here. Notably, the purported "Participation Agreement" states

[14] The rule in section 100-5.030 cites RSMo §§ 319.129 and 319.131 as the source of its authority, but those sections nowhere mention any duty to "cooperate" or "assist" the Board with legal actions.

on its face that it is only valid to the extent it complies with statutory authority. *See* LF:47 In short, the "Participation Agreement" is nothing more than an impermissible attempt by the Board to expand its powers via an alleged "contract."

D. Pilot Has Not Assumed or Otherwise Consented to the Invalid Participation Agreement

Finally, the Board appears to argue that Pilot is bound by the Participation Agreement because it allegedly "assumed" the duties in that "agreement," or tacitly consented to the terms by accepting payments from the Fund. Brief at 12. However, the Participation Agreement is void, and under Missouri law "[n]o performance on either side [of an *ultra vires* agreement] can give the unlawful contract any validity, or be the foundation of any right of action upon it." *St. Charles Cty. v. A Joint Bd. or Comm'n*, 184 S.W.3d 161, 166 (Mo. App. E.D. 2006); *see also Livingston Manor, Inc. v. Dep't of Soc. Servs., Div. of Family Servs.*, 809 S.W.2d 153, 156 (Mo. App. W.D. 1991) (an agency has only the authority granted by legislature and its power cannot be enlarged or conferred by consent or agreement).

V. The Circuit Court Correctly Dismissed the Alternative Count for Unjust Enrichment Because There Is Nothing "Unjust" About Pilot Receiving Statutorily Mandated Reimbursement or Declining to "Cooperate" with the Board's Unauthorized Actions (Responding to Point IV)

As an alternative to its breach of contract claim, the Board pleaded it was "unjust" for Pilot to receive reimbursement from the Fund, and then not "help the fund through its Trustees recoup the reimbursement." LF:43 (¶35). However, the circuit court properly

dismissed this count because the Board has no subrogation rights, and because Pilot's actions were not unjust as a matter of law. *See Graves v. Berkowitz*, 15 S.W.3d 59, 64 (Mo. App. W.D. 2000) (court may determine whether benefit was "unjust" as a matter of law).

First, the Board has attempted to sue Pilot based on equitable theories of unjust enrichment and subrogation. *See Tucker v. Holder*, 225 S.W.2d 123, 126 (Mo. 1949) (the right of subrogation, unlike a contractual transfer of rights, is a "device of equity to prevent unjust enrichment."); *Holt*, 494 S.W.2d at 437 ("in a case of subrogation, only an equitable right passes to the subrogee"). Further, legislative creations only enjoy the authority granted to them *by statute*, and otherwise have no equitable powers or rights. *Soars*, 142 S.W.2d at 871 (agency authority cannot be "enlarged by its own holdings of waiver, estoppel, or even by contract"); *State ex rel. Jenkins v. Brown*, 19 S.W.2d 484, 486 (Mo. 1929) (an administrative body "has no power to declare or enforce any principle of law or equity"). The Board's unjust enrichment claim fails because the Board's enabling statutes nowhere mention any equitable powers or subrogation rights.

Second, a review of Missouri's statutes confirms, once more, that the Legislature intended for the Board to have *less* power than other legislatively created funds. *See* RSMo § 100.287.2 (the Missouri Development Finance Board "shall become subrogated" to the rights of a lender receiving payment from the board); § 173.110.1 (the Department of Higher Education "shall be subrogated to all the rights to all the rights of the eligible lender" for payments made in connection with defaulted student loans); RSMo § 630.205.1 (granting the Department of Mental Health subrogation rights and authorizing

it to "take any and all action necessary to enforce" those rights"). Once again, the Board has no such powers.

Likewise, the Legislature knows how to grant subrogation rights to the State of Missouri, and how to authorize the attorney general to enforce those rights. *See* RSMo § 537.693 (vesting in the State of Missouri a subrogation right for payments made from the Tort Victim's Compensation Fund, and further authorizing the attorney general to enforce such rights); RSMo § 595.040.1 (granting similar subrogation and enforcement rights in connection with payments made from the Missouri Victims of Crime Compensation Fund). No comparable authority exists here for the Board or attorney general.

Third, even if the Board could pursue equitable remedies (which it cannot), its claim for unjust enrichment still fails because it cannot establish all elements of its claim. Unjust enrichment has three core elements: "the plaintiff must prove that (1) he conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances." *Howard v. Turnbull*, 316 S.W.3d 431, 436 (Mo. App. W.D. 2010). The "most significant" element is the third, "that the enrichment of the defendant be unjust." *Associate Eng'g. Co. v. Webbe,* 795 S.W.2d 606, 608 (Mo. App. E.D.1990).

Here, there was nothing improper or unjust about Pilot receiving reimbursement that it was entitled to receive by statute. For example, the Board concedes that Pilot was "not the cause of the spill" that resulted in the cleanup on Pilot's property. LF:43 (¶34). Pilot was also participating in the Fund at the time of the release and had paid the

applicable participation fee every year. LF:34-35 (¶¶11-12); *see also* LF:53; *Turner v. Wesslak*, 453 S.W.3d 855, 860 (Mo. App. S.D. 2014) ("Unjust enrichment can occur only when a person retains a benefit without paying its reasonable value."). And, as demonstrated above, Pilot was statutorily *entitled* to receive reimbursement from the Fund for its cleanup costs, and the Fund was statutorily *required* to pay those amounts. *See* RSMo § 319.131.4 (A38); *Howard*, 316 S.W.3d at 436 ("Even if a benefit is 'conferred' and 'appreciated,' if no injustice results from the defendant's retention of the benefit, then no cause of action for unjust enrichment will lie."); *see also Am. Standard Ins. Co. v. Bracht*, 103 S.W.3d 281, 293 (Mo. App. S.D. 2003) ("There can be no unjust enrichment if the parties receive what they intended to obtain.").

Absent statutory authority, the only possible—and the only pleaded—basis for asserting that Pilot had an obligation to "cooperate" with the Board is the "Participation Agreement." *See* LF:35 (¶13) (pleading that the Participation Agreement required Pilot to "cooperate"). The Court of Appeals in its now-vacated opinion correctly stated that the duty to "cooperate" arises "solely from the terms of the written Participation Agreement." Slip Op. at 12. The Board's arguments about "unjust enrichment" likewise assert that Pilot's duty to cooperate arises *solely* by contract. *See* Brief at 49 (Pilot "agreed to subrogate"); *id at* 52 (Pilot's "promise to subrogate") *id*. at 53 ("Pilot obtained the insurance benefits *only because it agreed to subrogate* 'in return' for insurance coverage.") (emphasis added). In short, the only "unjust" act identified by the Board is Pilot's alleged failure to comply with an invalid cooperation clause in an invalid

"contract." Pilot had no duty to assist the Board with the *ultra vires* Lafayette County Lawsuit, so there is nothing "unjust" about Pilot declining to cooperate in that action.

VI. The Circuit Court Correctly Dismissed for Want of Standing because the Attorney General Lacks Authority to Maintain the Action (Responding to Point II)

The Attorney General asserts that "[i]f the Board has no authority to sue, the Attorney General certainly does." Brief at 29. He incorrectly claims that he "has standing to sue here to protect the financial integrity of the State's program, stabilize the petroleum industry, and protect the environment and the public by ensuring resources are available for prompt cleanup of petroleum spills." Brief at 26. The Attorney General lacks standing for several reasons.

First, no basis for such standing was ever pleaded. Second, the Attorney General provides no specific statutory or common-law authority for the claims asserted below. Third, the claimed (and *pleaded*) harm to the Fund does not constitute a state interest, and the Attorney General can only sue to vindicate a valid state interest. Fourth, the Attorney General's various attempts to enlarge his authority to sue all fail, as he cannot support his claimed right to sue, cannot obtain standing by default, and cannot declare his own standing.

A. The Attorney General's Claimed Standing Was Never Pleaded.

The only type of harm alleged in the Petition was pecuniary, and the only entity alleged to suffer harm was "the Fund." The Petition contains no allegations that the alleged damages affected the state or somehow threatened the "fiscal integrity of the

Fund." Nor are there any allegations about the stability of the petroleum industry, impact on the environment, the cleanup of other spills, or the general welfare. LF:31-44.

The only paragraph of the Petition with *any* reference to the state or Attorney General is a conclusory statement that section 27.060 allows him to file suits that "are necessary to protect the rights and interests of the state." LF:31-32 ¶1. But it does not allege that the "rights and interests of the state" were implicated in the claims being asserted. There are certainly no references to any "goals" of the Fund, or interests of the Attorney General in "fostering the goals the Fund pursues." Brief at 26.

The Attorney General contends that "[t]he trial court did not dispute that the Attorney General has the power to bring this suit if it is in the public interest." Brief at 30. But this misrepresents the circuit court's decision: far from endorsing his right to sue, the circuit court noted the complete absence of pleaded allegations to support the Attorney General's standing and stated the Board had only "pleaded in its Petition and argued in its briefing that it brought this breach of contract lawsuit to vindicate the alleged rights of [the Board]. The lawsuit is, accordingly, not a lawsuit to protect the public interest, but is a lawsuit filed for the purpose of remedying [the Fund's] alleged damages." SLF:17.

This absence of pleaded facts is fatal to the Attorney General's claims of standing. Allegations to support standing *must* be pleaded. *See Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 53 (Mo. 1999) ("[T]his Court has held that the party asserting standing must allege 'such a personal stake in the outcome of the controversy' as to warrant invocation of this Court's jurisdiction and to justify exercise of the court's remedial

powers on the party's behalf."). Dismissal is appropriate where the plaintiff "did not allege sufficient facts to establish standing to bring the claim." *Mo. Mun. League v. State*, 489 S.W.3d 765, 769 (Mo. 2016).

B. The Attorney General Has No Express Statutory or Common-Law Authority to Sue for Recovery of Nonstate Funds.

The Attorney General concedes that the Tort Victim's Compensation Fund has a supporting statute that "creates a subrogation interest and provides the Attorney General authority to 'enforce' that provision," and that no such statute exists for the Fund at issue here. Brief at 29. But he asserts that this absence of any similar authorizing statute should not "imply that the Attorney General lacks authority" because the General Assembly must be specific when it "strips the Attorney General of its powers." *Id.* But that begs the question and wrongly assumes the existence of such powers.[15]

Nor does the Attorney General cite any specific common-law authority to assert the claims below. Despite puffery about his common-law powers being "substantial," "broad," "varied," and "numerous" (Brief at 22, 27, 28-30, 32, 35), he identifies not a

[15] The Attorney General tries to downplay the lack of specific statutory authority with a quote from Justice Kagan's dissent in *Yates v. United States*, 135 S. Ct. 1074 (2015), about the "belt-and-suspenders caution" employed in drafting a single statute. Brief at 29. But here there is neither a belt nor suspenders; pointing out that a legislature can enact *multiple* redundant provisions to confer statutory authority hardly supports an inference of that authority from the choice to enact *no* provision.

single one that authorizes filing suit for a Fund containing nonstate money, or to "enforce other subrogation interests not specifically enumerated by statutes." Brief at 29.

The Attorney General quotes (twice) the case of *Thatcher v. St. Louis*, 122 S.W.2d 915 (Mo. 1938) as saying that his common-law powers are "so varied and numerous that they have perhaps never been specifically enumerated." Brief at 28, 30. The Attorney General thereby implies that, given the size of the haystack, there simply must be a needle or two in it somewhere. This misplaced reliance on *Thatcher* is doubly ironic.[16]

First, in *Thatcher* the Attorney General was trying to *downplay* the scope of his common-law duties. His office had been awarded fees out of a fund for a public charity, and the receipt of those fees was challenged on appeal. *Id.* at 916. He sought to keep the fees despite the legal limits on his compensation, by arguing that "the Attorney General in charitable trust cases 'does not appear in the discharge of his official duties.'" *Id.* at 917. This Court soundly rejected that argument, reminding him that his "representation of the public to enforce charitable trusts, in their interests, is a duty directly pertaining to the Attorney General's office." *Id.* at 916.

[16] It is also slightly incorrect: the Attorney General twice selectively applies the language from *Thatcher* to his "powers" (Brief at 28, 30), but the full quoted sentence referred specifically to "duties" instead. *Id.* at 916 (quoting *State ex rel. Barrett v. Boeckeler Lumber Co.*, 302 Mo. 187, 206, 257 S.W. 453, 456 (1924)) (rejecting Attorney General's attempt to recover fees beyond his salary in an anti-trust suit).

The second irony in the *Thatcher* quotations is the suggestion that the Attorney General has authority absent specific authorization. The *Thatcher* Court considered prior cases and specifically noted the "absence of an allowance . . . of counsel fees out of the fund, to the Attorney General or his representatives," in any of those prior cases. *Id.* at 918 (quoting *Wemme v. First Church of Christ, Scientist*, 219 P. 618, 628 (Or. 1923)). This Court accordingly reversed, holding that "neither the Attorney General nor special attorneys employed to represent him are entitled to have fees allowed and paid out of the funds of a charitable trust." *Id.*; *see also State ex rel. McKittrick v. Mo. Pub. Serv. Comm'n*, 175 S.W.2d 857, 865 (Mo. 1943) ("[I]t is our opinion, and we hold, that the Attorney General had no right to intervene in the proceeding . . . . We are not cited to any case where it has ever been done before.").

Additionally, while the remark in *Thatcher* that the Attorney General's powers "have perhaps never been specifically enumerated" may have been true at the time, attorneys general have themselves undertaken to enumerate their powers several times in the eighty years since *Thatcher*. One is cited in the Board's brief: STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, authored and published by the National Association of Attorneys General (Emily Myers ed., 3d ed. 2013).[17] The Attorney General twice cites this volume as support for styling himself "the great officer of state" (Brief at 27, 35), but he identifies not a single provision in its 476 pages to support suits

[17] *See also* COMM. ON THE OFFICE OF ATT'Y GEN., NAT'L ASS'N OF ATTY'S GEN., COMMON LAW POWERS OF STATE ATTORNEYS GENERAL 39 (Jan. 1975).

like this one. Even though the book has an entire chapter titled "Environment," with an extensive taxonomy of statutory and common-law means for attorneys general to address environmental concerns, the Attorney General offers no basis for the "powers" allegedly exercised here. *Id.* at 121-43.

C. Board Interests are Not State Interests, and The Attorney General Cannot Sue Except to Vindicate A Valid State Interest.

The only pleaded interests are those of the Board (and the Fund it oversees). But these are not state interests, and the Attorney General has no right to sue except to vindicate legitimate state interests.

1. Board interests are not state interests.

The Attorney General conflates the interests of the Board with the interests of the State, claiming a right to sue because Pilot allegedly "caused the Fund to suffer more than $760,000 in damages, and the State has an interest in maintaining the fiscal health of its programs." Brief at 32. Even if the "fiscal health" of the Fund had been pleaded, the insinuation that the Fund's "fiscal health" might implicate state funds is unfounded. The General Assembly expressly divorced the state from any interest in the Fund. *See* RSMo § 319.129.1 (A32) (monies in the Fund "shall not be deemed to be state funds" and are excluded from "general revenue"); RSMo § 319.131.4 (A38) ("The liability of the [Fund] … is not the liability of the state…."); RSMo § 319.129.1 (A36) (Fund money excluded from "general revenue"); RSMo § 319.129.16 (A34) (Fund money remains nonstate money even after the expiration of the Fund).

Case law confirms this separation of state and Fund interests. "[T]he moneys in the special trust fund consisting of the fees are 'not ... deemed to be state funds.' They are 'nonstate funds.'" *River Fleets, Inc. v. Carter*, 990 S.W.2d 75, 77 (Mo. App. W.D. 1999) (ellipsis in original; internal citation omitted). And the Fund is not protected by sovereign immunity:

> If the fund's liability is not the liability of the state of Missouri, then, *ipso facto*, the State's immunity from liability does not apply. These statutory and constitutional provisions lead inexorably to the conclusion that the fees paid by Appellant are non state funds and are not protected by sovereign immunity.

Id. at 78; *accord Rees Oil Co. & Rees Petroleum Products, Inc. v. Dir. of Revenue*, 992 S.W.2d 354, 358 (Mo. App. W.D. 1999)).

Faced with unequivocal statutes and case law, the Attorney General argues that the state's lack of pecuniary interest is immaterial, and his duties to promote the "general welfare" suffice for standing. Brief at 31. But the Fund does not exist to benefit the "the general welfare." Instead, it exists to benefit a particular class: "Owners and operators of petroleum storage tanks are eligible for participation in the fund to partially meet the financial responsibility of cleanup." *Bullmaster v. Krueger*, 151 S.W.3d 380, 383 n.1 (Mo. App. W.D. 2004). Fund participation is limited: "Applicants shall not be eligible for fund benefits until they are accepted into the fund." RSMo § 319.131.8(1) (A43). And the Board has acknowledged this; as the Petition concedes, the purpose of the Fund is to make sure "owners and operators of underground petroleum storage tanks have financial

resources available" to meet their obligations under federal legislation. LF:33 (¶8). Even in opposing Pilot's motion to dismiss, the Board conceded that "[t]he principal purpose of the Fund is to provide reimbursement for the cleanup of spilled petroleum *to participants* in the event that their underground storage tanks leak." LF:117 (citing *Rees*, 992 S.W.2d at 354) (emphasis added).

More than twenty years ago this Court confirmed that the legislature created the Fund to benefit this limited class of participating tank owners and operators, rather than the general public. In *Reidy Terminal, Inc. v. Dir. of Revenue*, 898 S.W.2d 540, 542 (Mo. 1995), the plaintiff-owner of a tugboat-refueling operation had paid fees into the Fund, but was ineligible for compensation from the Fund because of a "glitch" in the statute. The Court found that the Fund surcharge in section 319.132.1 was a fee, rather than a tax, since the "proceeds of the surcharge are not paid into the state's general fund for the support of government and all public needs, but instead, are 'deposited to the credit of the [Fund].'" *Id.* at 542 (quoting RSMo § 319.132.1 (1994)). This Court found the plaintiff's surcharge unconstitutional since the plaintiff did not belong to the limited class of potential beneficiaries; for those ineligible to receive payment from the Fund, such as Reidy, "any charge would be unfair in light of the fact that benefits were nonexistent." *Id.*

The damages claimed here could only accrue to the direct benefit of the particular class of Fund participants—not to the Attorney General, the state, or the public. *See* RSMo § 319.129 (A36). The Petition seeks reimbursement of nonstate monies paid from the Fund, and thus any recovery would come in the form of nonstate monies being paid back into the Fund. There is no public damage or public interest.

2. The Attorney General Cannot Sue Except to Vindicate A Valid State Interest.

No statutory or common-law authority allows the Attorney General to litigate on behalf of private interests. The Attorney General repeatedly references RSMo § 27.060, but it only underscores the state-interest requirement by permitting him to institute civil suits that are "requisite or necessary to protect the *rights and interests of the state*," and for cases already instituted, to "appear and interplead, answer or defend, in any proceeding or tribunal in which the *state's interests* are involved." *Id.* (emphasis added).

Any common-law right to sue is similarly limited to suits on behalf of the state or the public as a whole. *See State ex rel. McKittrick v. Missouri Pub. Serv. Comm'n*, 175 S.W.2d 857, 861 (Mo. 1943).[18] In *McKittrick*, where a previous Attorney General relied on the common law and the predecessor statute to section 27.060, this Court recognized an important threshold question that "must be answered" is whether the state is "'interested' within the meaning of the statute." *Id.* at 861.

[18] This Court has declared that "there can be no doubt that the Constitution does not prohibit the General Assembly from limiting the common-law powers of the Attorney General." *McKittrick*, 175 S.W.2d at 861. The Attorney General's reliance on cases from other jurisdictions is misplaced, as states differ over legislative control of the office's common-law authority. For example, *Fergus v. Russel* (Brief at 27) states the Attorney General "cannot be deprived of . . . common law functions by the legislature."110 N.E. 130, 144 (Ill. 1915). But Missouri does *not* share this view.

More than a century of controlling precedent confirms this. For example, in *State ex rel. Barker v. Chicago & A.R. Co.*, 178 S.W. 129, 136 (Mo. 1915), the Attorney General sued a railroad for excessive transportation costs charged to the state, and also tried to sue on behalf of all the individuals who had also been overcharged. This Court found the Attorney General had no authority to represent the private individuals:

> The subject-matter of the recovery sought in this case is plain. Can the State sue for the shippers and passengers, who by chance may have claims against the defendant? . . . [H]as the State the capacity to sue in that way and for that purpose? Without hesitation we say not. The State may sue for herself . . . and the shippers and passengers may sue for themselves; but the State has no power to sue for all, as she has done in the present petition.

Id. at 136. This Court grounded its decision in the Attorney General's limited capacity to represent individuals only insofar as he represents the state as a whole:

> The Attorney General in civil matters represents the State in its private interests. To that extent only he represents the people. In their private controversies he no more represents the people than does any private citizen. It was never contemplated by the Missouri Constitution, or any statute passed thereunder, that the State should use its good offices to collect from one citizen or corporation a sum due from another citizen or corporation. Public funds are not appropriated for that purpose, and should not be used for that purpose. Private individuals in their controversies should pay the expenses of their own lawyers.

Id. at 138; *see also Clark Oil & Refining Corp. v. Ashcroft*, 639 S.W.2d 594 (Mo. 1982) (antitrust claim by Attorney General valid because it was not "merely a suit on behalf of individual citizens prosecuting their private damage claims against other private individuals"). Even the National Association of Attorneys General has recognized that, whatever powers the common law may provide, "[t]he Attorney General may not, however, seek a remedy for the redress of mere private grievances, unaccompanied by an injury to the public." COMM. ON THE OFFICE OF ATT'Y GEN., NAT'L ASS'N OF ATTY'S GEN., COMMON LAW POWERS OF STATE ATTORNEYS GENERAL 39 (Jan. 1975). The Attorney General lacks any power to sue except to vindicate a state interest on behalf of the state or the public as a whole. He has not done so here.

D. The Attorney General Improperly Seeks to Enlarge His Authority.

Because the alleged damage to the Fund is not itself a state interest, the Attorney General seeks to expand his authority in several ways: by enlarging the scope of cases where he is authorized to sue, by claiming a default right to sue if the Board cannot, and by attempting to usurp a judicial role and declare his own standing. Each of these attempts should be rejected.

1. Declaring that state interests are "implicated" does not confer authority to sue.

Point II of the Brief declares that "the Attorney General can sue when the State's interests are *implicated*," and the first of its two subpoints says that "[t]he Attorney General has authority to bring suits that *implicate* the interests of the State." Brief at 26

(emphasis added). But the Attorney General's cited authorities provide no support for his attempted arrogation of authority over cases merely "implicating" a state interest.

He invokes *Fogle v. State* for the proposition that the Attorney General is "generally authorized to seek enforcement of the General Assembly's statutory purposes." Brief at 28 (quoting *Fogle v. State*, 295 S.W.3d 504, 510 (Mo. App. W.D. 2009)). But *Fogle* involved an action "brought under the Sexually Violent Predator Act," which granted specific authority for the Attorney General to "file a petition" against suspected sexually violent predators. RSMo § 632.486. No such direct statutory authority exists here, and *Fogle* merely illustrates a direct claim for statutory violations, not claims for damages alleged to "implicate" supposed state interests.

The Attorney General cites *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 137 (Mo. 2000), for the proposition that his "authority to pursue the public interest reaches even farther." Brief at 28. *American Tobacco* was a case where "the State of Missouri filed suit against several manufacturers of tobacco products." *Id.* at 125. But it did not do so based on mere "implication" of a state interest; it was an action *by the State* "to recover damages *incurred by the State*." *Id.* at 137 (emphasis added).

State ex rel. Taylor v. Wade, 231 S.W.2d 179 (Mo. 1950), is cited for the Attorney General's alleged authority to sue whenever it "would pursue a public interest." Brief at 30. But in reality, *Wade* involved mandamus to compel public officials to "perform mandatory duties of the office imposed by the Legislature." *Id.* at 182. The Attorney General's edited quotation from *Wade* can provide illusory authority for an expanded right to sue only by omitting important qualifying language, shown here in bold: "The

Attorney General, both because of his statutory and common law powers, is a proper party to bring an action for the state **which involves such rights and seeks enforcement of such duties, and** which would prevent injury to the general welfare." *Id.* (emphasis added), *compare* Brief at 30. Far from establishing authority to sue whenever claims would advance some vague notion of public interest or general welfare, this Court in *Wade* found suit permissible only because a public right was directly involved and "the object [wa]s to enforce a public duty." *Id.* at 182. There are no such allegations here.

Another selectively edited quotation underlies the Attorney General's claim to standing based on his obligations to "promote . . . the general welfare." Brief at 31 (quoting *State ex rel. Delmar Jockey Club v. Zachritz*, 65 S.W. 999, 1000 (Mo. 1901)) (ellipsis by the Board). But *Delmar Jockey Club* does not support any generic promote-the-general-welfare standing. Rather, the omitted portion of the quotation refers to the ability to file suit "to promote **the interest of all, and to prevent the wrongdoing of one resulting in injury to** the general welfare." *Id.* at 1000 (quoting *In re Debs*, 158 U.S. 564, 577 (1895)) (emphasis added). Additionally, the *dicta*[19] from *Delmar Jockey Club* was considered and rejected by this Court as a basis for expanding the Attorney General's authority in *State ex rel. McKittrick v. Missouri Public Service Commission*, in which it

[19] In *Delmar Jockey Club* the challenge to the Attorney General's right to sue was asserted by way of a writ of prohibition, and this Court ultimately held that the question "could not furnish a basis for prohibition" because the issue needed to be "determined in the court where the case is pending." 65 S.W. at 1000.

was the "only Missouri case cited by the Attorney General." 175 S.W.2d 857, 864 (Mo. 1943).[20]

When accurately portrayed, these cases merely show the Attorney General often does have authority to enforce the legislative policies enacted in statutes by directly suing for statutory violations on the state's behalf. But there are no such allegations in the petition dismissed below. Allowing the Attorney General to maintain suit for alleged damages to a nonstate fund because of some perceived implication of a state interest would be an extraordinary and unprecedented enlargement of the Attorney General's powers. Indeed, seventy-five years ago, this Court declared that if the Attorney General's broad conception of his own powers were left unchecked, "he could always intervene in behalf of one or more citizens of every city, town, village and community in the State. This obviously would be officious intermeddling." *McKittrick*, 175 S.W.2d at 862.

[20] The Attorney General cites *Delmar Jockey Club* as authority for him to sue in the absence of a "pecuniary interest" of the state. Brief at 31. But as noted in an *en banc* decision a few years after *Delmar Jockey Club*: "It is obvious that the decision rests upon the fact that the State had a direct pecuniary interest, in addition to its general governmental control." *McKittrick*, 175 S.W.2d at 864 (quoting *State ex rel. Mo. P. R. Co. v. Williams*, 120 S.W. 740, 750 (1909)).

2. The lack of Board standing does not confer standing on the Attorney General.

The last-ditch argument for standing is that the Board's *lack* of authority to sue somehow provides the Attorney General with authority to sue. But this unsupported argument makes at least two unwarranted assumptions.

The first is that every perceived ill must have a judicial remedy. But many statutes—including the Board's enabling authority—envision resort to the political process rather than litigation. *See* RSMo § 319.131.2 (A41) (authorizing the Board to create a committee to monitor the Fund and suggest legislative changes to protect it). Our "system of government leaves many crucial decisions to the political processes. The assumption that if a given plaintiff has no standing to sue, no one would have standing, is not a reason to find standing." *State ex rel. Mo. Auto. Dealers Ass'n v. Mo. Dep't of Revenue*, WD80331, available at 2017 Mo. App. LEXIS 1260, at *16 (Mo. App. W.D. 2017) (transfer denied April 3, 2018) (quoting *Sommer v. St. Louis*, 631 S.W.2d 676, 680 (Mo. App. E.D. 1982)).

The second unfounded assumption—that a lack of Board authority to sue leaves only the Attorney General to act—ignores the statutory powers of other entities (such as the MDNR) to address concerns through established procedures as discussed above. *See, e.g.*, RSMo § 319.125 (A32) (authorizing MDNR to act against tank owners that violate the statute or threaten the environment).

The Attorney General's claim to be the plaintiff of last resort is unsupported. He cites *Dickey v. Volker*, 11 S.W.2d 278, 282 (Mo. 1928), for the proposition that he has

"inherent authority" to sue where no one else is available. Brief at 28-29. But *Dickey* involved a public charitable trust, and *Dickey* and other public-charitable-trust cases actually show why the Attorney General has *no* authority to sue here.

The common-law right to sue for the misuse or mismanagement of public charitable trusts involves the right of the Attorney General to *sue trustees* for their malfeasance. When he sues in a public-charitable-trust case, he is "representing the sovereign power and the general public," and thus can do so only where there are "charities of a character so public as to interest 'the entire public.'" *Dickey*, 11 S.W.2d at 281-82; s*ee also State ex rel. Champion v. Holden*, 953 S.W.2d 151, 153 (Mo. App. S.D. 1997) ("[W]here there are clearly designated beneficiaries of a trust, even when they are well recognized charities, they alone must seek to enforce those provisions benefiting them.").

In such suits the Attorney General sues to vindicate the rights of the public *against* trustees who are failing to properly administer the trust's funds. *See* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 205 (Emily Myers ed., 3d ed. 2013) (Attorney General's role in this context is to "prevent and remedy breaches of fiduciary duty by trustees of charitable trusts"). Here the Attorney General is claiming the opposite role, purporting to represent the "board of *trustees* of the petroleum storage tank insurance fund." RSMo § 319.100(2) (emphasis added). "The plain fact is, the attorney general is not and, in many instances, could not properly be the attorney for the trustee of a public charitable trust. *He is the*

attorney for the public, not the attorney for the trustee." *Murphey v. Dalton*, 314 S.W.2d 726, 731 (Mo. 1958) (emphasis in original).

3. The Attorney General cannot declare his own standing.

With no valid argument for this Court to recognize his standing, the Attorney General asks that the question be left to him. Before the Court of Appeals he asserted it was "error as a matter of law" for the circuit court "to dictate to the Attorney General what constitutes an interest of the State warranting the Attorney General's intervention under Section 27.060." Opening Brief in the Court of Appeals at 20. He now maintains the circuit court "should have deferred to the Attorney General about whether this suit factually falls within the public interest." Brief at 34. Any such "deference" would be misguided for three reasons.

First, the Petition pleads no facts supporting Attorney General standing, so there is nothing to which the circuit court "should have deferred." LF:31-44, SLF:17. The only arguments about the existence of a state interest came after—and outside—the Petition.

Second, the Attorney General offers no authority for deference to his "discretion" in determining whether he has a right to sue. Although the Attorney General may decide "where and how" to litigate within his sphere of authority (*State ex rel. Igoe v. Bradford*, 611 S.W.2d 343, 347 (Mo. App. W.D. 1980)), the question of whether a *right* to litigate even exists—particularly for the benefit of a Fund containing nonstate money—is an entirely different matter. The case the Attorney General cites for assuming "wide discretion" to determine the public interest, *Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 267 (5th Cir. 1976), did not involve a nonstate fund; the issue was whether Florida's

Attorney General was "properly in federal court on behalf of Florida" to "recover damages allegedly suffered *by the state* as a consumer." *Id.* at 267 n.3, 268 (emphasis added).

Third, the Attorney General's quest to declare the powers and purpose of the Board would entail a gross violation of the separation-of-powers doctrine. The Missouri Constitution prohibits members of one branch from exercising "any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted." MO. CONST. art. II, § 1. It is the function of the legislative branch—not the Attorney General—to define any agency's power and purpose. *Oneok*, 318 S.W.3d at 138 (the decision on what powers to assign a state agency is "policy reserved for our legislature."). The Attorney General cannot "amend the clear wording of statutes," because "[o]nly the legislative branch may do that." *State ex rel. Dep't of Soc. Servs., Family Support Div. v. K.L.D.*, 118 S.W.3d 283, 290 (Mo. App. W.D. 2003).[21]

Similarly, the separation-of-powers doctrine prevents executive-branch members—including the Attorney General—from usurping a core judicial function by declaring their own standing. *See State Tax Comm'n v. Admin. Hearing Comm'n*, 641

[21] Likewise, the judicial branch has no authority to rewrite a statute to grant an agency powers not authorized by the legislature. *See Dworkin*, 226 S.W. at 851 (court cannot supply statutory power, even if it believes such powers were omitted by oversight); *Thomas*, 637 S.W.2d at 83 (a court "cannot supply by fiat a supposed oversight of the legislature").

S.W.2d 69, 75 (Mo. 1982) ("[T]he attorney general, as a member of the executive branch, 'has no judicial power and may not declare the law'…."). "[S]tanding is a question of law." *Missouri State Med. Ass'n v. State*, 256 S.W.3d 85, 87 (Mo. 2008).

This Court has already confirmed the judicial responsibility to determine standing in past cases of overreaching by the Attorney General. *See McKittrick*, 175 S.W.2d at 865 ("For all the foregoing reasons *it is our opinion*, and *we hold*, that the Attorney General had no right to intervene in the proceeding, or to apply for a rehearing, writ of review and appeal."); *Barker*, 178 S.W. at 136 ("[H]as the State the capacity to sue in that way and for that purpose? Without hesitation *we* say not.") (emphases added). Deferring to the Attorney General to determine his or the Board's standing would openly invite the "officious intermeddling" warned of in *McKittrick*, since the Attorney General "could always intervene in behalf of one or more citizens of every city, town, village and community in the State" by the mere *ipse dixit* that he finds their claims to promote the general welfare or to be in the public interest. *McKittrick*, 175 S.W.2d at 862.

CONCLUSION

For the reasons stated above, Respondent Pilot Travel Centers LLC respectfully requests that the Court dismiss this appeal for lack of jurisdiction or, alternatively, affirm the judgment of the circuit court.

Dated: April 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned certifies that:

1. The brief includes the information required by Rule 55.03;
2. Counsel has signed the original of the foregoing and will maintain it in compliance with Rule 55.03;
3. According to the word count function of counsel's word processing software (Microsoft Word), the brief, excluding those portions as provided by Rule 84.06(b), contains: 23,059 words; and
4. On April 20, 2018, a copy of the foregoing Substitute Brief of Respondent, together with this Certificate of Service and Compliance and Respondent's Appendix, were served via the Court's electronic filing system on the counsel of record below who have registered with Missouri's electronic filing system:

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