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MISSOURI SUPREME COURT

Case No. SC97284

DARRELL COPE AND
THE MISSOURI DEMOCRATIC PARTY

Appellants,

vs.

MICHAEL L. PARSON AND
MIKE KEHOE,

Respondents.

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Cole County Circuit Court. The circuit court granted defendants' motion to dismiss and entered judgment July 11, 2018. [Appeal Doc. 10]. Appellants timely filed their notice of appeal July 16, 2018. [Appeal Doc. 11].

This appeal involves the title to state office, specifically, whether Governor Mike Parson had the power under *Missouri Constitution, Art. IV, Sec. 4* and *Section 105.030, RSMo* to appoint Mike Kehoe as Lieutenant Governor. *Missouri Constitution, Art. IV, Sec. 4* states: "The governor shall fill all vacancies in public offices unless otherwise provided by law …" *Section 105.030, RSMo* states: "Whenever any vacancy, caused in any manner or by any means whatsoever, occurs or exists in any state or county office originally filled by election of the people, other than in the offices of lieutenant governor, state senator or representative, sheriff, or recorder of deeds in the city of St. Louis, the vacancy shall be filled by appointment by the governor …"

The Missouri Supreme Court has exclusive appellate jurisdiction in this case. *Missouri Constitution, Art. V, Sec. 3*.

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STANDARD OF REVIEW

> The standard of review for a trial court's grant of a motion to dismiss is *de novo*. When this Court reviews the dismissal of a petition for failure to state a claim, the facts contained in the petition are treated as true and they are construed liberally in favor of the plaintiffs. If the petition sets forth any set of facts that, if proven, would entitle the plaintiffs to relief, then the petition states a claim. Plaintiffs' petition states a cause of action if its averments invoke principles of substantive law may entitle the plaintiff to relief.

Lynch v. Lynch, 260 S.W.3d 834, 836 (Mo. 2008) (internal citations and quotations omitted); *see also Lebeau v. Commissioners of Franklin County*, 422 S.W.3d 284, 288 (Mo. 2014) ("Standing is a question of law, which this Court reviews de novo").

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STATEMENT OF FACTS

Michael L. Parson was Lieutenant Governor until Friday, June 1, 2018, when he was sworn in as Governor following the resignation of former Governor Eric Greitens. [Appeal Doc. 2, pg. 2, paragraph 3]. When Parson was sworn in, the Office of Lieutenant Governor became vacant. [Appeal Doc. 2, pg. 2, paragraph 5]. Governor Parson attempted to fill that vacancy by purportedly appointing Mike Kehoe, a Republican, as Lieutenant Governor on June 18, 2018. [Appeal Doc. 2, pg. 2, paragraph 6]. Kehoe was purportedly sworn in as Lieutenant Governor that same day. [Appeal Doc. 2, pg. 2, paragraph 6].

Following Governor Parson's purported appointment of Kehoe as Lieutenant Governor, the Missouri Democratic Party (the "Party") and Darrell Cope, a Missouri citizen and taxpayer, filed a petition for injunctive and declaratory relief challenging Governor Parson's authority to appoint Kehoe Lieutenant Governor. [Appeal Doc. 2, generally].

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POINTS RELIED ON

I.

The circuit court erred in dismissing the petition on the ground that appellants' requested an advisory opinion because appellants sought a declaratory judgment about an actual, existing legal dispute, in that Governor Parson in fact purported to appoint Mike Kehoe Lieutenant Governor.

Missouri Health Care Association v. AG, 953 S.W.2d 617 (Mo. 1997)

*Mercy Hospitals East Communities v. Missouri Health Facilities Review Comm*ittee, 362 S.W.3d 415 (Mo. 2012)

Section 527.010, RSMo

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II.

The circuit court erred in dismissing Darrell Cope's claims for lack of standing to challenge Governor Parson's appointment of Mike Kehoe as Lieutenant Governor because Darrell Cope has taxpayer standing in that Darrell Cope is a Missouri citizen and taxpayer, the purported appointment of Kehoe as Lieutenant Governor requires the expenditure of revenue collected from taxpayers to fund the Office of the Lieutenant Governor, and no revenue collected from taxpayers would be expended for the Office of the Lieutenant Governor if the Office remained vacant.

Airport Tech Partners, LLC v. State, 462 S.W.3d 740 (Mo. 2015)

Lebeau v. Commissioners of Franklin County, 422 S.W.3d 284 (Mo. 2014)

Manzara v. State, 343 S.W.3d 656 (Mo. 2011)

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III.

The circuit court erred in dismissing the Missouri Democratic Party's claims for lack of standing to challenge Governor Parson's appointment of Mike Kehoe as Lieutenant Governor because the Party has direct standing to challenge the Governor's authority to appoint a Lieutenant Governor in that the purported appointment of Kehoe as Lieutenant Governor creates an electoral disadvantage for the Party by enabling Kehoe to run for Lieutenant Governor in 2020 as an incumbent.

Texas Democratic Party v. Benkiser, 459 F.3d 582 (5th Cir. 2006)

Rule 67.06

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IV.

The circuit court erred in dismissing the Missouri Democratic Party's claims for lack of standing standing to challenge Governor Parson's appointment of Mike Kehoe as Lieutenant Governor because the Party has associational standing to challenge the Governor's authority to appoint a Lieutenant Governor in that the purported appointment creates an electoral disadvantage for the Party members by decreasing the effectiveness of their future vote for a Democratic Lieutenant Governor candidate challenging Mike Kehoe, the incumbent, in 2020.

McLain v. Meier, 851 F.2d 1045 (8th Cir. 1988)

Missouri Bankers Association v.

Director of the Missouri Division of Credit Unions,

126 S.W.3d 360 (Mo. 2003)

Rockefeller v. Powers, 74 F.3d 1367 (2d Cir. 1995)

St. Louis Association of Realtors v. City of Ferguson, 354 S.W.3d 620 (Mo. 2011)

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<u>V.</u>

The circuit court erred in dismissing the petition on the grounds that Governor Parson was authorized to appoint Mike Kehoe Lieutenant Governor because Governor Parson lacked such authority in that under *Missouri Constitution Art. IV, Sec. 4*, the Missouri General Assembly has the power to limit the Governor's authority to fill vacancies, which it did when it enacted *Section 105.030, RSMo.*, and excluded Lieutenant Governor from those offices that a Governor can fill.

Becker Glove International, Inc. v. Dubinsky, 41 S.W.3d 885 (Mo. 2001)

Labor's Educational & Political Club-Independent v. Danforth,

561 S.W.2d 339 (Mo. 1977)

Marx v. General Revenue Corp. 568 U.S. 371 (2013)

*Young v. Boone Electric Coop*erative, 462 S.W.3d 783 (Mo. App. 2015)

Missouri Constitution Art. IV, Sec. 4

Section 105.030, RSMo

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ARGUMENT

I. The circuit court erred in dismissing the petition on the ground that appellants' requested an advisory opinion because appellants sought a declaratory judgment about an actual, existing legal dispute, in that Governor Parson in fact purported to appoint Mike Kehoe Lieutenant Governor.

The circuit court held that, "a private plaintiff lacks authority to initiate a *quo warranto* action." This statement, although accurate, is immaterial because appellants did not file a *quo warranto* action. Appellants filed a petition for injunctive and declaratory relief. [Appeal Doc. 2]. Concluding that injunctive relief was also unavailable, appellants at the hearing on the motion to dismiss only requested declaratory relief.

Because appellants only requested declaratory relief, the circuit court held: "Plaintiffs' last-minute proposal is plainly inappropriate, because it asks this Court to offer an advisory opinion on the authority of the Governor to fill a vacancy in the office of Lieutenant Governor. An opinion about the law with no binding effect on any party is a quintessential advisory opinion." [Appeal Doc. 10. pg. 3].

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The circuit court also stated that appellants stated that a declaration "would have no binding effect on Lieutenant Governor Kehoe," suggesting Kehoe was not a proper party. [Appeal Doc. 10, pg. 3].

Appellants named Kehoe as a defendant because, "In suits for declaratory judgment, indispensable parties must be included in the action; indispensable parties are those necessary parties whose interest will be affected by direct operation of the judgment rendered." *Midwest Freedom Coalition, LLC v. Koster*, 398 S.W.3d 23, 26 (Mo. App. 2013) (quotation marks and citation omitted). Kehoe is an indispensible party, required to be joined, because a circuit court declaration that his appointment as Lieutenant Governor was unauthorized would directly affect him.

Moreover,with regard to a declaratory judgment's binding effect, the circuit court should not presume that Kehoe would ignore its judgment and continue to claim title to the Office of Lieutenant Governor if the court declared his appointment invalid.

A petition for declaratory judgment is not objectionable as seeking an advisory opinion because it only seeks declaratory relief. The statute creating the declaratory judgment cause of action states that a declaration, standing alone, is enough to present a justiciable claim:

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> The circuit courts of this state, within their respective jurisdictions shall have power to declare rights, status, and other legal relations *whether or not further relief is or could be claimed*. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Section 527.010, RSMo, (emphasis added); *see also Pollard v. Swenson*, 411 S.W.2d 837, 842 (Mo. App. 1967) ("while the injunction or other decree may for some technical reason be withheld or denied, the declaration may yet be issued and, as a conclusive determination of the rights of the parties, serves all essential purposes. Execution is ancillary to adjudication, and can easily be obtained should the adjudication be defied").

Appellants are not seeking an advisory opinion because the declaration they seek concerns the lawfulness of an action already taken by Governor Parson and appellants have standing to challenge that action (discussed in Points Relied On 2, 3, and 4 below).

The prohibition on advisory opinions arises in the context of whether a justiciable controversy exists. "An opinion is advisory if there is no justiciable

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controversy, such as if the question affects the rights of persons who are not parties in the case, the issue is not essential to the determination of the case, or the decision is based on hypothetical facts." *State ex rel. Heart of America Council v. McKenzie*, 484 S.W.3d 320, 324 n3 (Mo. 2016).

"In the context of a declaratory judgment action, [a] justiciable controversy exists where the plaintiff has a legally protectible interest at stake, a substantial controversy exists between parties with genuinely adverse interests, and that controversy is ripe for judicial determination. In other words, justiciability requires that the plaintiff's claim is ripe and that the plaintiff has standing to bring the underlying claim." *Mercy Hospitals East Communities v. Missouri Health Facilities Review Comm*ittee, 362 S.W.3d 415, 417-418 (Mo. 2012) (internal citations and quotations omitted).

"A 'ripe controversy' is one of 'sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Ports Petroleum Company v. Nixon*, 37 S.W.3d 237, 241 (Mo. 2001) (citation omitted). "A ripe controversy exists if the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." *Missouri Health Care Association v. AG*, 953 S.W.2d 617, 621 (Mo. 1997).

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Here, the conflict presently exists because it concerns the lawfulness of an action that *was* taken by Governor Parson as opposed to one that might hypothetically be taken by him in the future. Because the Office of the Lieutenant Governor was vacant until Governor Parson purportedly appointed Kehoe, the facts are sufficiently developed for the court to resolve the conflict. Therefore, the "ripeness" requirement necessary to avoid an advisory opinion is satisfied.

Because appellants' claim is ripe, and because appellants have standing (discussed in Points Relied On 2, 3, and 4 below), a justiciable controversy exists. Therefore, the circuit court erred in dismissing the petition on the ground that appellants were seeking an advisory opinion.

II. The circuit court erred in dismissing Darrell Cope's claims for lack of standing to challenge Governor Parson's appointment of Mike Kehoe as Lieutenant Governor because Darrell Cope has taxpayer standing in that Darrell Cope is a Missouri citizen and taxpayer, the purported appointment of Kehoe as Lieutenant Governor requires the expenditure of revenue collected from taxpayers to fund the Office of the Lieutenant Governor, and no revenue collected from taxpayers would be expended for the Office of the Lieutenant Governor if the Office remained vacant.

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"A party must have standing to bring an action in a Missouri court." *Lebeau v. Commissioners of Franklin County*, 422 S.W.3d 284, 288 (Mo. 2014). "Standing, at its most basic level, simply means that the party or parties seeking relief must have some stake in the litigation." *Id.*

"The taxpayer's interest in the litigation ultimately derives from the need to ensure that government officials conform to the law." *Id.* This is because, "Public policy demands a system of checks and balances whereby taxpayers can hold public officials accountable for their acts. … Taxpayers must have some mechanism of enforcing the law." *Manzara v. State,* 343 S.W.3d 656, 659 (Mo. 2011) (citation omitted). "Taxpayer standing gives taxpayers the opportunity to challenge certain actions of government officials that the taxpayer alleges are unauthorized by law, and it permits challenges in areas where no one individual otherwise would be able to allege a violation of the law." *Lebeau,* 422 S.W.3d at 289.

"In the context of a declaratory judgment action, the plaintiff must have a legally protectable interest at stake in the outcome of the litigation." *Lebeau*, 422 S.W.3d at 288. "This Court has repeatedly held that taxpayers do, in fact, have a legally protectable interest in the proper use and expenditure of tax dollars." *Id.*

However, "the mere filing of a lawsuit does not confer taxpayer standing upon a plaintiff. Instead, a taxpayer must establish that one of three conditions

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exists: (1) a direct expenditure of funds generated through taxation; (2) an increased levy in taxes; or (3) a pecuniary loss attributable to the challenged transaction of a municipality." *Manzara*, 343 S.W.3d at 659.

Here, Cope alleges he "is an American and Missouri citizen and taxpayer," and that the appointment of Mike Kehoe "will require the expenditure of revenue collected by taxpayers to fund the Office of the Lieutenant Governor." [Appeal Doc. 2, paragraphs 1 and 8]. During the hearing on the motion to dismiss, appellants explained the relevance of this allegations: "Gov. Parson's appointment of Kehoe as Lieutenant Governor authorized tax dollars to be spent to fund the office of lieutenant governor, which would not otherwise be spent if the office remained vacant." [Appeal Doc. 8, pg. 3].

Cope's allegations, taken as true for purposes of a motion to dismiss, sufficiently established taxpayer standing through "a direct expenditure of funds generated through taxation." *Manzara*, 343 S.W.3d at 659.[1]

The circuit court, however, found that Cope did not sufficiently allege taxpayer standing because "his Petition does not pray for an order blocking the expenditure of taxpayer funds for this purpose." [Appeal Doc. 10, pg. 8].

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[1] When determining whether a plaintiff has sufficiently alleged standing, the Court "assumes that all of the plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom." *Lebeau*, 422 S.W.3d at 288.

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According to the circuit court: "Because Mr. Cope has not requested the only relief that a taxpayer could seek in this context, he lacks taxpayer standing to pursue this action." *Id. at 8-9.* Respondents similarly argued that Cope did not sufficiently allege standing because "the Petition does not seek any relief challenging any government expenditure." [Appeal Doc 3, pg. 15].

No Missouri case supports the circuit court's opinion that taxpayer standing is only available when the taxpayer requests "an order blocking the expenditure of taxpayer funds." Indeed, this Court's opinions on taxpayer standing show otherwise.

For example, in *Lebeau*, the plaintiffs filed a declaratory judgment action "seeking a declaration that the legislature enacted HB 1171 in violation of the Missouri Constitution." *Lebeau*, 422 S.W.3d at 287. The plaintiffs alleged that the challenged legislation authorized "the creation of a county municipal court in counties within a certain population range and that the addition of this section violated the original purpose and single subject provisions" of the Missouri Constitution. *Id.* at 290. Further, plaintiffs alleged that, "the commissioners of Franklin County established a county municipal court by commission order pursuant to" the challenged legislation. *Id.*

This Court held that the plaintiffs had taxpayer standing to challenge the law because, "the creation and operation of a municipal court will require the

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expenditure of funds generated through taxation," and that the challenged legislation, "authorized tax dollars to be spent to establish a municipal court." *Id.*

Absent from the *Lebeau* opinion was any reference to a request by the plaintiffs for "an order blocking the expenditure of taxpayer funds," or a requirement that such a request be made.

This supposed remedial limitation on taxpayer standing is also absent from *Airport Tech Partners, LLC v. State*, 462 S.W.3d 740 (Mo. 2015), the case relied upon by the circuit court and respondents to support their position.

The plaintiffs in *Airport Tech* brought a declaratory judgment action alleging that legislation violated the Missouri Constitution's uniformity clause. *Id.* at 741. The plaintiffs alleged they had taxpayer standing because the challenged legislation resulted in the value of certain county property "being assessed at $0" which "must have resulted in an increase in taxes on other county property so the county could meet its budget needs." *Id.*

This Court held that the plaintiffs failed to allege taxpayer standing because, "the provision of a different method of valuation of airport property for tax purposes does not constitute an expenditure of public funds. Rather … it at most means that funds will not become public funds in the first instance because they will not be paid in taxes." *Id.* at 745.

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The issue in *Airport Tech* was whether the plaintiffs alleged an *expenditure* of funds conferring upon them taxpayer standing to seek a declaratory judgment. The Court's holding, however, was not based on the plaintiff's request for a declaratory judgment as opposed to a request for an order blocking an expenditure of funds.

Here, unlike the plaintiffs in *Airport Tech*, Cope alleges *an expenditure of funds* generated through taxation. Neither the circuit court nor respondents challenged the sufficiency of this allegation. Both the circuit court and respondents recognized that Cope alleged a "direct expenditure of funds generated through taxation that occurs from the funding of Lieutenant Governor Kehoe's office." [Appeal Doc. 10, pg. 8; Appeal Doc. 9, pg. 10].

Because Cope alleged an *expenditure* of funds generated through taxation, he has taxpayer standing to request declaratory relief, and was not required to seek an order blocking such payments to create standing.

The circuit court erred in holding that Cope lacked standing and in dismissing Cope's claims.

III. The circuit court erred in dismissing the Missouri Democratic Party's claims for lack of standing to challenge Governor Parson's appointment of Mike Kehoe as Lieutenant Governor because the Party has direct standing to challenge the

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Governor's authority to appoint a Lieutenant Governor in that the purported appointment of Kehoe as Lieutenant Governor creates an electoral disadvantage for the Party by enabling Kehoe to run for Lieutenant Governor in 2020 as an incumbent.

The Party has direct standing to challenge Governor Parson's purported appointment of Kehoe as Lieutenant Governor because "Governor Parson's purported appointment of a Lieutenant Governor will create an electoral disadvantage for the Party and its members, Democratic voters in the State of Missouri." [Appeal Doc. 2, pg. 3, paragraph 10].

Courts universally recognize that political parties have standing to challenge government actions that may create an electoral disadvantage. This is because "a political party's interest in a candidate's success is not merely an ideological interest. Political victory accedes power to the winning party, enabling it to better direct the machinery of government toward the party's interests. While power may be less tangible than money, threatened loss of that power is still a concrete and particularized injury sufficient for standing purposes." *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586-587 (5th Cir. 2006) (internal citation omitted); *see also Smith v. Boyle*, 144 F.3d 1060, 1061-63 (7th Cir. 1998) (Illinois Republicans had standing to challenge state voting rules that disadvantaged Republican candidates); *Schulz v. Williams*, 44 F.3d 48, 53 (2d

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Cir. 1994) (Conservative Party official had standing to challenge opposing candidate's position on the ballot where the opponent "could siphon votes from the Conservative Party" candidate); *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981) (holding that "potential loss of an election" was an injury in fact sufficient to give Republican Party official standing); *Democratic Party of the United States v. National Conservative Political Action Commission*, 578 F. Supp. 797, 810 (E.D. Pa. 1983) (holding that Democratic Party had Article III standing because challenged action "reduces the likelihood of its nominee's victory"); *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 423 (E.D. Mich. 2004) (holding that party had standing to challenge voting rules that could "diminish [its] political power").

Here, the Party alleged that, "If Governor Parson is permitted to appoint a Lieutenant Governor, then Mike Kehoe will be in a position to run as an incumbent Lieutenant Governor in 2020"; "Incumbent elected officials have significant fundraising and name recognition advantages over challengers"; and "Incumbent elected officials have a material electoral advantage over their challengers in Missouri. For example, 100% of incumbent Missouri State Senators and 96.3% of incumbent Missouri State Representatives won re-election in 2014." [Appeal Doc. 2, pg. 3, paragraphs 11-13].

The circuit court was required to accept these allegations as true and liberally grant the Party all reasonable inferences therefrom. *Duggan v. Pulitzer Publishing Company*, 913 S.W.2d 807, 809-810 (Mo. App. 1995). Applying this standard, Mike Kehoe, through his purported appointment, has become an incumbent, which, statistically speaking, will greatly favor him winning the 2020 Republican primary and the 2020 general election for the position. Governor Parson's appointment of Kehoe as Lieutenant Governor, therefore, is a direct threat to the Party's political power, which is "a concrete and particularized injury sufficient for standing purposes." *Texas Democratic Party*, 459 F.3d at 587.

The circuit court, however, stated: "This allegation is conjectural, hypothetical, and speculative. It is entirely unknown and unknowable whether Lieutenant Governor Kehoe will decide to run for the office of Lieutenant Governor in 2020; whether he will prevail in the Republican primary if he does run …" [Appeal Doc. 10, pg. 7]. Thus, instead of accepting the Party's allegations as true *as the law requires*, the circuit court disregarded the Party's allegations and dismissed the petition with prejudice. In doing so, the circuit court erred. The circuit court's decision dismissing the Party's petition for lack of direct standing should be reversed.

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Finally, even if the Party had failed to allege sufficient facts to establish direct standing -- it did not -- the circuit court committed reversible error by not granting the Party leave to amend its petition to cure any deficiencies.

"On sustaining a motion to dismiss a claim … the court shall freely grant leave to amend." *Rule 67.06* "Ordinarily when a first pleading is ruled to be insufficient in a trial court, the party is afforded a reasonable time to file an amended pleading if desired." *Dietrich v. Pulitzer Publishing Company*, 422 S.W.2d 330, 334 (Mo. 1968).

The circuit court did not provide the Party with an opportunity to amend its petition. Had the circuit court done so, the Party could have alleged additional facts establishing Kehoe's intention to run for lieutenant governor in 2020 and the benefits that his incumbency would provide him in that effort. Because the circuit court dismissed the Party's petition with prejudice and did not grant the Party leave to amend its petition, the circuit court abused its discretion and should be reversed.

IV. The circuit court erred in dismissing the Missouri Democratic Party's claims for lack of standing standing to challenge Governor Parson's appointment of Mike Kehoe as Lieutenant Governor because the Party has associational standing to challenge the Governor's authority to appoint a Lieutenant

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Governor in that the purported appointment creates an electoral disadvantage for the Party members by decreasing the effectiveness of their future vote for a Democratic Lieutenant Governor candidate challenging Mike Kehoe, the incumbent, in 2020.

"An entity has associational standing if: 1) its members would otherwise have standing to bring suit in their own right; 2) the interests it seeks to protect are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Missouri Bankers Association v. Director of the Missouri Division of Credit Unions*, 126 S.W.3d 360, 363 (Mo. 2003).

"To satisfy the first prong …, an association claiming standing on behalf of its members, must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action that would make out a justiciable case had the members themselves brought suit." *St. Louis Association of Realtors v. City of Ferguson*, 354 S.W.3d 620, 623 (Mo. 2011) (internal quotation and citation omitted).

Here, the Party alleges its members will be hurt at the ballot box. "Governor Parson's purported appointment of a Lieutenant Governor will create an electoral disadvantage for the Party *and its members, Democratic voters in*

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the State of Missouri." *Petition, paragraph 10* (emphasis added). Courts frequently hold that electoral disadvantages can confer standing.

In *Rockefeller v. Powers*, 74 F.3d 1367, 1376 (2d Cir. 1995), the plaintiffs claimed that they had standing, "by virtue of their alleged lack of choice in the Republican presidential primary." The defendants contended that this allegation was insufficient for standing purposes because, "there is no guarantee that a change in the ballot access rule would widen their choices, particularly since the plaintiffs cannot identify candidates who have already been or definitely will be excluded" by the challenged law. *Id.* The court rejected this argument, holding that plaintiffs just needed to "establish that their ability to compete was impaired." *Id.*, *citing Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville,* 508 U.S. 656 (1993).

As this Court recognized in the ballot-access context, "candidacy restrictions do affect, to some degree, the First Amendment *associational* rights of voters, sometimes referred to as the voters' right to 'cast their votes effectively.'" *Peters v. Johns*, 489 S.W.3d 262, 272-273 (Mo. 2016) (citation omitted).

Finally, in *McLain v. Meier*, 851 F.2d 1045, 1048 (8th Cir. 1988), the Eighth Circuit held that a plaintiff had standing because the allegations in his petition, "if true, would cause him injury as a voter because the ballot access laws

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would restrict his ability to vote for the candidate of his choice or dilute the effect of his vote if his chosen candidate were not fairly presented to the voting public."

The Party, therefore, has satisfied the first prong of the associational standing test.

"In determining whether the germaneness prong is satisfied, the relevant question is whether the basis on which the individual association members were found to have standing … also is germane to the association's purpose." *St. Louis Association of Realtors*, 354 S.W.3d at 625. "A major goal of a political party is to elect a candidate who will further the party's values and fortunes in the political arena." *Dart v. Brown*, 717 F.2d 1491, 1499 (5th Cir. 1983). Thus, as alleged, the Party's members' interests in not being disadvantaged at the ballot box is directly related to one of the Party's major purposes. The Party, therefore, has satisfied the second prong of the associational standing test.

Lastly, associational standing requires that neither the claims asserted or the relief requested requires the participation of the association's members.

> Where an association seeks only a prospective remedy, it is presumed that the relief gained from the litigation will inure to the benefit of those members of the association actually injured. Accordingly, requests made by an association for prospective relief generally do not require the individual participation of the

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> organization's members. Conversely, where an association seeks a remedy such as money damages, the participation of its individual members is necessary to determine the particular damages to which each affected member is entitled.

St. Louis Association of Realtors, 354 S.W.3d at 625 (internal quotations and citations omitted).

Here, the Party seeks prospective relief in the form of a declaration that Governor Parson's purported appointment of Kehoe as Lieutenant Governor was unauthorized. The declaration, if granted, would mean that Kehoe would no longer be Lieutenant Governor moving forward. The Party's claim and relief requested, therefore, does not require direct participation by the Party's members. The Party, therefore, has satisfied the third prong of the associational standing test.

The circuit court, however, held that the Party did not adequately assert associational standing because:

> This argument suffers from three fatal problems. First, the Party has not identified any individual member who suffers from this alleged injury, and thus its pleading fails as a matter of law. *Summers v. Earth Island Institute*, 555 U.S. 488, 497-98 (2009). Second, courts have repeatedly rejected this exact theory of "voter" standing. *See,*

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> *e.g., Gottlieb v. Fed. Election Comm'n,* 143 F.3d 618, 622 (D.C. Cir. 1998); *24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 633 (4th Cir. 2016); *Hollander v. McCain*, 566 F. Supp. 2d 63, 68 (D.N.H. 2008); *Drake v. Obama*, 664 F.3d 774, 784 (9th Cir. 2011); *Berg v. Obama*, 586 F.3d 234, 239 (3d Cir. 2009). Third, this theory of voter standing suffers from the very same problems as the Party's theory of direct standing—it is based on hypothetical, speculative, and conjectural assumptions.

[Appeal Doc. 10, pg. 8].

First, Missouri courts do not require a plaintiff asserting associational standing to identify individual members who have been harmed. This Court adopted a test for associational standing in *Missouri Outdoor Advertising Association v. Missouri State Highways & Transportation Commission,* 826 S.W.2d 342 (Mo. 1992). That test remains the law in Missouri today. *See Missouri Bankers Association, supra.* Nowhere in that three-part test does it state that the affected individual members must be identified.

The only Missouri cases that require member identification for standing involve actions brought by unincorporated associations. In those situations, *Rule 52.10* requires that the petition name "certain members as representative parties." *See Lake Arrowhead Property Owners Association v. Bagwell*, 100

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S.W.3d 840, 843 (Mo. App. 2003) ("Although Rule 52.10 generally allows an unincorporated association to obtain 'entity treatment,' the Association's action in this case does not appear to comply with Rule 52.10. The Association sued solely as an unincorporated association without 'naming certain members as representative parties,' under Rule 52.10").

Here, the Party is not an "unincorporated association," *Rule 52.10* does not apply, and the test adopted by this Court does not require identification of individual members affected by the action at issue.

The Party also alleges it has associational standing because its members, who are Democratic voters, will be competitively disadvantaged in future elections. The circuit court viewed this as the Party alleging that it has associational standing because its members are voters.

The Party *is not* contending that its members have been injured by virtue of being voters. The Party *is* contending that Governor Parson's actions have reduced the *effectiveness* of its members' future votes. Because the circuit court misconstrued the Party's allegations, the cases cited by the circuit court are not relevant to the standing issue here.

When viewed as alleged by the Party, the Party has sufficiently alleged an injury to its members. As stated above, courts frequently find that voters have

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standing when when the effectiveness of their vote is threatened, *see Rockefeller, Peters,* and *McLain supra*.

Here, given the near statistical certainty that Kehoe will win reelection if he runs as an incumbent, the effectiveness of the votes to be case by Democratic Party voters have been severely impaired. Thus, just like the plaintiffs who had standing to challenge actions that diluted their votes or limited access to the ballot, the members of the Party, too, have standing with respect to the purported appointment of a member of a competing political party to this position.

Because the Party's members have standing, the Party has associational standing to protect its members interests.

V. The circuit court erred in dismissing the petition on the grounds that Governor Parson was authorized to appoint Mike Kehoe Lieutenant Governor because Governor Parson lacked such authority in that under *Missouri Constitution Art. IV, Sec. 4*, the Missouri General Assembly has the power to limit the Governor's authority to fill vacancies, which it did when it enacted *Section 105.030, RSMo.*, and excluded Lieutenant Governor from those offices that a Governor can fill.

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The ultimate issue in this case on the merits is whether Governor Parson was authorized to fill a vacancy in the Office of Lieutenant Governor, in this case by appointing Mike Kehoe. He was not so authorized.

Missouri Constitution Art. IV, Sec. 4 states: "The governor shall fill all vacancies in public offices unless otherwise provided by law ..." The circuit court held that, "the plain and ordinary meaning of 'otherwise provided by law' in Article IV, § 4 is 'unless the law furnishes or supplies a different manner of filling the vacancy.'" [Appeal Doc. 10, pg. 5]. The circuit court continued that, because "Missouri law does not 'furnish' or 'supply' a method of filling the vacancy in the office of Lieutenant Governor," Governor Parson was authorized to appoint Kehoe as Lieutenant Governor. *Id.*

The circuit court's interpretation of the phrase "otherwise provided," however, is too limited, and is inconsistent with prior opinions from this Court, the United States Supreme Court, and other state and federal courts. The method of interpretation used by the circuit court would be unworkable if applied to other Missouri statutes.

Becker Glove International, Inc. v. Dubinsky, 41 S.W.3d 885, 887-888 (Mo. 2001), concerned "whether the compulsory counterclaim rule found in Rule 55.32(a) applies to an action filed in an associate circuit division under chapter 517." *Id.* at 886. Rule 41.01(d) provides that, "Civil actions pending in the

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associate circuit division shall be governed by Rules 41 through 101 *except where otherwise provided by law*." Id. at 886 (emphasis in opinion). This Court held: "'Except where otherwise provided by law' includes section 517.031, one of the statutes in which there are procedural requirements different from those in the rules of civil procedure." *Id.* The only reference to counterclaims in *Section 517.031.2, RSMo.,* was that counterclaims must be in writing. *Id. Section 517.031.2, RSMo* did not state, however, that compulsory counterclaims would be waived if not asserted in a responsive pleading. *Id.*

Notwithstanding this omission, this Court held that, "there is no question that section 517.031 is a law whose provisions displace the otherwise required adherence to the rules of civil procedure." *Id.* at 888. This Court concluded that a law could "provide otherwise" by displacing "required adherence."

The *Dubinsky* decision highlights why the circuit court's interpretation of the phrase "unless otherwise provided" -- "unless the law furnishes or supplies a different manner" -- is incorrect. Section 517.031 did not furnish "another manner" of pleading a compulsory counterclaim. It *eliminated* the requirement altogether.

In *City of Jefferson v. Missouri Department of Natural Resources*, 863 S.W.2d 844, 849 (Mo. 1993), appellants contended that *Section 260.305*, which authorized counties within specific regions to form or join a waste management

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district, violated *Missouri Constitution Art. VI, Sec. 16*. That provision stated: "Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with the United States, for the planning, development, construction, acquisition, or operation of any public improvement or facility, or for a common service, **in the manner provided by law.**" *Id.* (emphasis in decision).

Appellants contended that the phrase "in the manner provided by law" in *Article VI, Section 16* "limits the legislature to the establishment of procedures by which political subdivisions may enter cooperative agreements." *Id.* If this interpretation was correct, the Court stated, the legislature would be prohibited "from restricting the entities with whom a political subdivision may choose to cooperate." *Id.* This Court concluded, therefore, that the interpretation was not correct, holding that, "the legislature has limited the kind of agreements into which political subdivisions may enter to dispose of solid wastes," and "[t]his legislative limitation does not offend the constitution." *Id.* at 850.

In *De May v. Liberty Goundry Company*, 37 S.W.2d 640 (Mo. 1931), the plaintiff challenged the constitutionality of Section 44 of the Workmen's Compensation Act, which prohibited circuit courts from hearing additional evidence on appeals from decisions of the Workmen's Compensation Commission.

According to the court:

> Article 6 of our Constitution vests the judicial power of the State, as to matters of law and equity, in certain named constitutional courts, superior, intermediate, and inferior, and ... confers upon the circuit court "exclusive original jurisdiction in all civil cases *not otherwise provided for*, and such concurrent jurisdiction with and appellate jurisdiction from *inferior tribunals* and justices of the peace *as is or may be provided by law*," and gives the circuit court a superintending control over "*all inferior tribunals* in each county in their respective circuits."

Id. at 653.

Notwithstanding this provision, the Court held that Section 44 of the Workmen's Compensation Act was valid. Specifically, the Court stated that, "we find in the Constitution no express, positive, or clear inhibition or restriction upon the legislative branch of our state government which in any wise limits or curtails the power and authority of the Legislature to prescribe the particular causes and proceedings in which an appeal may lie, or to impose such reasonable conditions and restrictions upon an appeal as it may see fit, or to provide what errors or matters, whether of fact or of law, are reviewable on appeal." *Id.*

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Thus, when the Constitution gave the circuit courts appellate jurisdiction over inferior tribunals "as is or may be provided by law," *this Court recognized that the general assembly could provide for the circuit courts' appellate jurisdiction by **eliminating** their appellate jurisdiction on worker's compensation cases.*

In *Oregon County R-IV School Dist. v. Le Mon*, 739 S.W.2d 553 (Mo. App. 1987), the Missouri Court of Appeals analyzed the phrase "otherwise provided" in the context of Missouri's Sunshine Law. The Court noted that *Section 610.015, RSMo* contains the phrase "except as otherwise provided by law," which means "except as otherwise provided by statute." *Id.* at 557. Accordingly, the Court held that "Section 610.015 requires, in effect, that public records be open to the public for inspection and duplication unless a statute, either § 610.025 or some other statute, prohibits their disclosure." *Id.*

The unworkable nature of the circuit court below's interpretation of the phrase "otherwise provided" is further highlighted by Missouri's Sunshine Law. *Section 610.011, RSMo* states, "Except as otherwise provided by law … all records of public governmental bodies shall be open to the public for inspection and copying." Using the circuit court's interpretation, this phrase would mean that, unless the law furnishes or supplies a different manner for the public to access

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records, all records of public governmental bodies shall be open to the public for inspection and copying.

Interpreting *Section 610.011* in this way would make no sense because it would mean that records could never be closed because "otherwise provided" would only modify *how* the records are accessed as open as opposed to *whether* they are open. Such an interpretation would be inconsistent with the decision of every court to have analyzed the Sunshine Law.

Numerous courts in other jurisdictions have held that a law can "provide otherwise" by restricting or eliminated a power granted elsewhere.

For example, the U.S. Supreme Court in *Marx v. General Revenue Corp.,* 568 U.S. 371 (2013), recently analyzed the phrase "otherwise provided" in relation to Federal Rule 54(d)(1), which states that, "Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." The Court held that "[a] statute 'provides otherwise' than Rule 54(d)(1) if it is 'contrary' to the Rule." *Id.* at 377.

> For instance, a statute providing that "plaintiffs shall not be liable for costs" is contrary to Rule 54(d)(1) because it precludes a court from awarding costs to prevailing defendants. See, *e.g.,* 7 U.S.C §18(d)(1) (2006 ed., Supp.) ("The petitioner shall not be liable for costs in the district court"). Similarly, a statute providing that plaintiffs may

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> recover costs only under certain conditions is contrary to Rule 54(d) because it precludes a court from awarding costs to prevailing plaintiffs when those conditions have not been satisfied. See, *e.g.*, 28 U.S.C § 1928 ("[N]o costs shall be included in such judgment, unless the proper disclaimer has been filed in the United States Patent and Trademark Office").

Id.

The following cases in various courts have reached similar conclusions.

Arizona Supreme Court:

> Section 14-6102(A), the UPC provision, begins with a critical phrase: "Except as otherwise provided by law." Thus, § 14-6102(A), which allows a decedent's creditors to look to non-probate transfers to satisfy their claims, only applies when there is no other "law" to the contrary. Section 20-1131(A) is precisely such a "law." It expressly provides that life insurance proceeds are not subject to creditors' claims. Therefore, life insurance proceeds are not among the non-probate transfers available to satisfy the claims of creditors under § 14-6102(A).

May v. Ellis, 92 P.3d 859, 861 (Ariz. 2004).

Eleventh Circuit:

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> The language of § 4205(b)(1) does not expressly mention either advancing or postponing the parole eligibility date. However, the authority expressly given the district court would in some cases advance and in other cases postpone that date. Moreover, the last phrase of § 4205(a) — "except to the extent otherwise provided by law" — makes it clear that the parole eligibility dates fixed in that section will operate in the absence of contrary provisions of other laws.

United States v. Berry, 839 F.2d 1487, 1488 (11th Cir. 1988).

Middle District of Louisiana:

> The phrase "except as otherwise specifically provided by law" obviously qualifies what is to be considered a "public record." The language used does not require that the "otherwise" law contain a specific exemption from the Public Records Law, per se. It merely provides that there must be a law which specifically provides "otherwise," i.e., to the contrary — that specifically precludes public access to a certain type of document or record. In other words the exempting law is not required to specifically make reference to the Public Records Law.

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Texaco, Inc. v. Louisiana Land & Exploration Co., 805 F. Supp. 385, 389 (M.D.La. 1992).

Based on the foregoing, the Missouri General Assembly was authorized by *Missouri Constitution Art. IV, Sec. 4* to pass a law that was contrary to the appointment authority initially given to the Governor, regardless of whether that law passed by the General Assembly displaced, limited, or was contrary to the Governor's authority, *or entirely precluded the Governor from acting*.

The General Assembly's power to limit the Governor's authority to make appointments is further confirmed by *Missouri Constitution, Art. VII, Sec. 7*, which states: "Except as provided in this constitution, the appointment of all officers shall be made as prescribed by law." This provision expressly authorizes the General Assembly to prescribe how and whether officers shall be appointed. For example, *Missouri Constitution Art. IV, Sec. 51* dictates specifically how the members of boards and commissions and the heads of departments and divisions are to be appointed, and *Missouri Constitution Art. IV, Sec. 37(a)* dictates how the director of the department of mental heal is to be appointed. Thus, except as specifically detailed in the Constitution, *Art. VII, Sec. 7* gives it to the General Assembly to prescribe the appointment of all offices.

The General Assembly exercised its authority to limit the Governor's power to appoint a Lieutenant Governor by enacting *Section 105.030, RSMo*, which

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states: "Whenever any vacancy, caused in any manner or by any means whatsoever, occurs or exists in any state or county office originally filled by election of the people, other than in the offices of lieutenant governor, state senator or representative, sheriff, or recorder of deeds in the city of St. Louis, the vacancy shall be filled by appointment by the governor …"

This Court held that, "This section of the statute *authorizes the Governor to fill any vacancy by appointment* that may occur in any state or county office ***except that of Lieutenant-Governor***, State Senator, Representative, sheriff or coroner …" *State ex rel. Major v. Amick*, 152 S.W.591, 595-596 (Mo. 1912) (emphasis added), citing *Section 5828, Revised Statutes 1909* ("Whenever any vacancy, caused in any manner or by any means whatever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of Lieutenant-Governor, State Senator, Representative, sheriff or coroner, such vacancy shall be filled by appointment by the Governor").

The plain and ordinary meaning of the word "except" is "with the exclusion or exception of." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 29 June 2018. Based on *State ex rel. Major*, the Governor is excluded from appointing a Lieutenant Governor under *Section 105.030, RSMo*.

The rules of statutory construction lead to the same conclusion. It is "a cardinal rule of statutory construction that [the courts] presume the Legislature

does not employ *superfluous or meaningless language*." *Young v. Boone Electric Coop*erative, 462 S.W.3d 783, 792 (Mo. App. 2015) (emphasis added); *see also Mantia v. Missouri Department of Transportation*, 529 S.W.3d 804, 809 (Mo. 2017) ("This Court presumes every word, sentence, or clause in a statute has effect, and the legislature did not insert superfluous language").

This Court must, therefore, presume that the phrase "other than the office[] of lieutenant governor" has meaning. The only way to give meaning to the phrase is to interpret it as a specific limitation on the Governor's appointment authority.

Respondents' briefs in the circuit court highlights this point. In their motion to dismiss, respondents contended that *Section 105.030, RSMo.,* is a "general provision for filling vacancies in elective offices by gubernatorial appointment," and that "[t]he statute merely exempts the office of Lieutenant Governor (as well as several other offices)." [Appeal Doc. 4, pg. 4]. In their reply in support of their motion to dismiss, respondents contended that the phrase "other than the office[] of lieutenant governor" simply "limits the scope of that particular statutory section to specify that [*Section 105.030, RSMo.*] makes no provision for the filling of vacancies in the office of Lieutenant Governor." [Appeal Doc. 5, pg. 6].

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If defendants are correct, then the statute exempting the Lieutenant Governor's office from appointment by the Governor has no effect because the failure to provide an alternative method of filling the office, rather than just saying, as the statute does, that the Governor will not fill the office, means that the default Constitutional provision kicks in, assigning the Governor the ability to fill it. *Section 105.030, RSMo* would, under respondents' interpretation, have the same impact with respect to filling the Lieutenant Governor's office with or without the words "lieutenant governor" in its text.

Interpreting *Section 105.030, RSMo* as denying the Governor the authority to appoint a Lieutenant Governor is consistent with this Court's decision in *Labor's Educational & Political Club-Independent v. Danforth*, 561 S.W.2d 339 (Mo. 1977), which invalidated the Missouri Campaign Finance and Disclosure Act.

In *Danforth*, the Missouri Attorney General argued in support of the Act "that because there is no authority to hold special elections for some public offices, these offices would be left vacant if voiding an election would be the government's only recourse for a violation of the Act." *Id.*

This Court did not find the possibility that some offices would be left vacant, stating: "Art. IV, sec. 4, Mo. Const., provides that the governor shall fill all vacancies in public offices unless otherwise provided by law. Few offices if any

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(other than the lieutenant governor) would remain vacant in Missouri." *Id.* at 25 (emphasis added). In other words, this Court has previously recognized that Missouri law keeps the Office of the Lieutenant Governor vacant once vacated.

The Constitution also contemplates that the Office of Lieutenant Governor is to remain vacant if vacated. It directs the order of succession to or the discharge of the executive authority of the Governor "if there be no lieutenant governor." See *Missouri Constitution, Art. IV, Sections 11(a), 11(b)*. In addition, *Missouri Constitution Article IV, Section 11(c)* directly states that, unlike other state officers who may act as Governor, the Lieutenant Governor's office will become vacant if he acts as Governor. "If any state officer other than the lieutenant governor is acting as governor, his regular elective office shall not be deemed vacant and all duties of that office shall be performed by his chief administrative assistant."

That our Constitution contemplates that the Office of Lieutenant Governor if vacated remains vacant until a new Lieutenant Governor is elected is reinforced by our State's history. The webpage maintained by the Office of Lieutenant Governor lists all of the Lieutenant Governors and their respective terms, *noting the multiple extended periods that the office was left vacant*:

- When Lt. Gov. Reeves resigned in July 1825, the office was vacant for more than two years until Lt. Gov. Dunklin was inaugurated in 1828.

- When Lt. Gov. Brown died in office in August 1855, the office was vacant for a year until Lt. Gov. Jackson was elected in August 1856. Lt. Gov. Jackson then served as Governor from February through October 1857, beginning when Gov. Polk resigned and ending when Gov. Stewart was inaugurated, at which time Brown resumed his duties as Lieutenant Governor.
- Lt. Gov. Gravelly died in office in April 1872. The office remained vacant until Lt. Gov. Johnson was elected in November 1872.
- Lt. Gov. Morehouse became Governor upon the death of Gov. Marmaduke in 1887. The office remained vacant for some two years until Lt. Gov. Claycomb was elected and inaugurated 1889.
- Lt. Gov. Lee resigned in 1903. The Senate President Pro Tempore assumed the duties of the office until Lt. Gov. McKinley was inaugurated in 1905.
- Lt. Gov. Harris died in office in December 1944. The office remained vacant until new-elected Lt. Gov. Davis took the oath of office in January 1945.
- Lt. Gov. Long was appointed to a vacant U.S. Senate seat in September 1960. The office of Lieutenant Governor remained vacant for over a year until Lt. Gov. Bush was elected in 1961.
- Lt. Gov. Wilson became Governor in October 2000 upon the death of Gov. Carnahan. After Joe Maxwell was elected Lieutenant Governor, he was

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appointed by Wilson to serve as such until he was inaugurated for his own term in January 2001.

See History of the Office of Lieutenant Governor, posted on the website of the Office of Missouri Lieutenant Governor, available at https://ltgov.mo.gov/history-office-lieutenant-governor/ (last accessed July 16, 2018).[2]

Finally, Missouri could have adopted a Constitution that displaced the Governor's vacancy appointment power only when the law provided an alternative mode or manner of filling a vacancy. We did not. This is evident when comparing Missouri's Constitution to those of other states that adopted constitutions that in fact handle vacancies in the way the respondents wish Missouri did.

Arizona Constitution Art. V, Sec. 8 states, "When any office shall, from any cause, become vacant, and no mode shall be provided by the Constitution or by law for filling such vacancy, the Governor shall have the power to fill such vacancy by appointment."

Arkansas Constitution Art. 6, Sec. 23 states, "When any office, from any cause, may become vacant, and no mode is provided by the Constitution and laws

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[2] Although many of these vacancies occurred under prior Missouri constitutions, the relevant constitutional provisions were not materially different than that at issue here.

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for filling such vacancy, the Governor shall have the power to fill the same by granting a commission, which shall expire when the person elected to fill said office, at the next general election, shall be duly qualified."

Iowa Constitution Art. IV, Sec. 10 states, "When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the general assembly, or at the next election by the people."

Mississippi Constitution Art. 4, Sec. 103 states, "In all cases, not otherwise provided for in this constitution, *the Legislature may determine the mode of filling all vacancies*." (emphasis added).

Nevada Constitution Art. 5, Sec. 8 states, "When any Office shall, from any cause become vacant and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a commission which shall expire at the next election and qualification of the person elected to such Office."

Utah Constitution Art. VII, Sec. 9 states, "When any State or district office shall become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have the power to fill the same by

granting a commission, which shall expire at the next election, and upon qualification of the person elected to such office."

Wyoming Constitution Art. 4, Sec. 7 states, "When any office from any cause becomes vacant, and no mode is provided by the constitution or law for filling such vacancy, the governor shall have the power to fill the same by appointment."

If Missouri wanted the Governor's vacancy appointment power to be limited only when the General Assembly provided *another mode of filling the vacancy*, we could have included in the Constitution a provision like those in the constitutions of Arizona, Arkansas, Iowa, Mississippi, Nevada, Utah, and Wyoming. We did not.

The "no other mode of filling" language used by these State's constitutions is quite distinct from the "unless otherwise provided by law" language used in Missouri. *Our language*, in strict contrast to that used by these other states, *keeps open the possibility that the law would otherwise provide that an office would be left vacant if vacated* if so provided by statute enacted by the General Assembly.

CONCLUSION

The judgment should be reversed and the case remanded with instructions to the circuit court to enter judgment declaring that Governor Parson was not

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authorized to appoint Mike Kehoe — or anyone else — as Lieutenant Governor, and that the office shall remain vacant until the next Lieutenant Governor is elected and sworn in.

Respectfully submitted,

JACOBSON PRESS P.C.

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CERTIFICATES

The undersigned attorney for appellants Missouri Democratic Party and Darrell Cope certifies as required by Rule 84.06(c) as follows:

- This brief complies with the limitations contained in Rule 84.06(b).
- The brief contains 9,330 based on the word count function in Google Documents, not including those portions of the brief permitted to be excluded under Rule 84.06(b).
- The electronic PDF version of this brief filed with the court has been scanned for viruses and was determined to be virus-free.
- Copies of this brief were served on all counsel of record through the court's electronic filing system on August 13, 2018.

/s/ Matt Vianello______________